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THE
ATLANTIC REPORTER,
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CONTAINING ALL THE REPORTED DECISIONS OF THE

Supreme Courts of MAINE, NEW HAMPSHIRE, VERMONT, RHODE ISLAND,
CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals,
Court of Chancery, and Supreme and Prerogative Courts
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THE
ATLANTIC REPORTER.

VOLUME 71.

RUHLAND v. WATERMAN, Town Clerk,
et al.

(Supreme Court of Rhode Island. Oct. 23,
1908. On Rehearing, Oct. 29, 1908.)

**1. INTOXICATING LIQUORS (§ 25*)—LOCAL OP-
TION—ELECTIONS—VOID STATUTORY PRO-
VISIONS.**

Gen. Laws 1896, c. 102, § 4, providing for submission at general elections in cities and towns of the question whether liquor licenses shall be granted, is void so far as it provides that no vote shall be taken on the question unless a number of electors equal in cities to 10 per cent. and in towns to 15 per cent. of the vote cast for general officers at the preceding election shall petition the clerk thereof; that upon such petition the clerk shall insert a proposition providing for taking such vote in the warrant calling for the town, ward, and district meetings; and that he shall file with the Secretary of State a certificate that the question is to be submitted, in that the provision is incapable of reasonable construction, and does not show any rule applicable to the whole state, either as to the basis of computation of the number of names required for a valid petition or as to how the clerk shall determine either the number required or the qualifications of the signers to such petitions.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 25.*]

**2. INTOXICATING LIQUORS (§ 25*)—LOCAL OP-
TION—STATUTE CONSTRUED.**

Gen. Laws 1896, c. 102, § 4, provides for submission at general elections in cities and towns of the question whether liquor licenses shall be granted; that, if a majority votes against licenses, none shall be granted for a year nor until a subsequent vote to grant them, etc. *Held*, that the section requires submission of the question at general elections, with general provisions as to the effect of a majority vote, and that it forms a complete statute, on elimination of the void provision respecting petitions for submission of the question; the question being properly placed upon the ballots as provided by the election law (Gen. Laws 1896, c. 11, § 22), as amended by Pub. Laws, 1904-05, p. 167, c. 1229, § 2, passed April 26, 1905.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 25.*]

On Rehearing.

**3. INTOXICATING LIQUORS (§ 25*)—LOCAL OP-
TION—ELECTIONS—NOTICE.**

The void provision of Gen. Laws 1896, c. 102, § 4, requiring city and town clerks, upon petition of electors, to insert a proposition for taking a vote on the question whether liquor licenses shall be granted in the warrant calling the town, ward, or district meetings, is not in-

severable from the remainder of the section, which requires the petition to be submitted at each general election, etc., on the theory that no provision remains for notifying the electors of the vote to be taken, since notice must be given under Gen. Laws 1896, c. 37, § 8, requiring notice to the electors of a town meeting prescribed by law to be given by the town clerk, etc., and since under chapter 28, § 8, the term "town clerk" includes city clerk, and since, regardless of a statute directing notice, the Legislature having directed a vote on the question at each general election, town and city clerks must give notice in their warrants.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 25.*]

Petition by Lewis Ruhland for certiorari to review action of Daniel D. Waterman in making a certificate to the Secretary of State. Writ granted. Motion for reargument denied.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Edward D. Bassett, John W. Hogan, Arthur P. Sumner, and Philip S. Knauer, for petitioner. William B. Greenough, Atty. Gen., for Secretary of State. Benjamin W. Grim, for respondent Waterman.

PER CURIAM. The petitioner, a licensed wholesale liquor dealer in the town of Cranston, prefers this petition for a writ of certiorari to review the action of the respondent Waterman, as town clerk of that town, in certifying, under section 4 of chapter 102 of the General Laws of 1896, to the other respondent Bennett, Secretary of State, that a sufficient number of qualified electors have petitioned for the insertion upon the ballot for the election to be held on November 3d next the following question: "Will this town grant licenses for the sale of intoxicating liquors"—the petitioner averring, also, that he "has a large property which would greatly deteriorate in value should an election result in prohibiting the sale of intoxicating liquors." The section in question reads as follows: "The electors of the several cities and towns who are qualified to vote in the election of all general officers, shall, at each election of general officers, cast their ballots for or against the granting of licenses for the sale of intox-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

licating liquors pursuant to this chapter: Provided, that no vote shall be taken on this question in any city or town unless a number of the qualified electors equal in cities to ten per centum, and in towns to fifteen per centum, of the vote cast for general officers at the election next preceding, shall petition the city or town clerk therefor at least twenty days prior to said election; and the city or town clerk shall upon such petition insert a proposition providing for taking such vote in the warrant calling the town, ward or district meetings, and shall at least fifteen days previous to the day of said election file with the secretary of state a certificate that the question, 'Will this town (or, city) grant licenses for the sale of intoxicating liquors,' is to be submitted to the vote of the people in such town or city. If a majority of the ballots so cast at any such election be against the granting of such licenses, no license under the provisions of this chapter shall be granted in such city or town during the twelve calendar months next after such election, nor until such city or town shall vote at some subsequent election of general officers to grant such licenses; but if the majority of the ballots cast at any such election shall be for the granting of such licenses, then licenses under the provisions of this chapter shall be granted in such city or town during the twelve calendar months after such election and until such city or town shall vote at some subsequent election of general officers not to grant licenses."

The court is of the opinion that so much of the statute above quoted contained in section 4, c. 102, Gen. Laws 1896, as follows: "Provided, that no vote shall be taken on this question in any city or town unless a number of the qualified electors equal in cities to ten per centum, and in towns to fifteen per centum, of the vote cast for general officers at the election next preceding, shall petition the city or town clerk therefor at least twenty days prior to said election; and the city or town clerk shall upon such petition insert a proposition providing for taking such vote in the warrant calling the town, ward or district meetings, and shall at least fifteen days previous to the day of said election file with the secretary of state a certificate that the question, 'Will this town (or, city) grant licenses for the sale of intoxicating liquors?' is to be submitted to the vote of the people in such town or city"—is incapable of any reasonable construction, and contains no language from which this court can deduce any rule applicable to the whole state, either as to the basis of computation of the number of names required to make a valid petition or as to the method by which the clerk of any town or city shall determine either the number required or the qualifications of the persons whose names are signed to such petitions.

We therefore hold that such proviso is void for uncertainty.

As to the remainder of section 4, c. 102, Gen. Laws 1896, above quoted, which is as follows:

"Sec. 4. The electors of the several cities and towns who are qualified to vote in the election of all general officers, shall, at each election of general officers, cast their ballots for or against the granting of licenses for the sale of intoxicating liquors pursuant to this chapter. * * * If a majority of the ballots so cast at any such election be against the granting of such licenses, no license under the provisions of this chapter shall be granted in such city or town during the twelve calendar months next after such election, nor until such city or town shall vote at some subsequent election of general officers to grant such licenses; but if the majority of the ballots cast at any such election shall be for the granting of such licenses, then licenses under the provisions of this chapter shall be granted in such city or town during the twelve calendar months next after such election and until such city or town shall vote at some subsequent election of general officers not to grant licenses"—we hold that the general purpose of the section is to require the electors of the several cities and towns to cast their ballots for or against the granting of licenses, etc., at each election of general officers, with general provisions as to the effect of the majority of the ballots cast on the future granting of licenses, that such remainder of section 4 forms in itself a clear, complete, and intelligible statute, entirely similar in its effect as to the whole state to chapter 87, §§ 3, 4, 5, Pub. St. 1882, as applied to Providence and Pawtucket for several years. The question, "Will this town (or, city) grant licenses for the sale of intoxicating liquors?" should be placed upon the ballots to be used in the several cities and towns of the state at the ensuing election of general officers in accordance with the provisions of section 22 of chapter 11 of the General Laws of 1896, as amended by section 2 of chapter 1229 of the Public Laws of 1904-05, passed April 26, 1905. The proviso of the statute under which the respondent Waterman, town clerk of the town of Cranston, has given his certificate to the respondent Bennett, Secretary of State, in this case, having been herein declared to be void, we hold that it conferred no jurisdiction upon the town clerk to make such certificate.

The writ of certiorari prayed for by the petitioner will therefore be granted.

On Rehearing.

The only new suggestion in the petitioner's motion for reargument is contained in the third ground, as follows: "Chapter 9, § 12, Gen. Laws 1896, prescribes notice of meetings by warrant of town and city clerks. The proviso in section 4, c. 102, Gen. Laws 1896, requires the city and town clerks to insert the proposition in their warrants for elective meetings. This is the only provision of

law to be found for inserting the proposition in the warrants. If the proviso is cut out of said section 4, then no provision of law remains for inserting this proposition in the warrants for elective meetings"—whereupon he argues: "The proviso is inseverable from the main section, for the reason that it carried within its terms the method of notifying the electors of the vote upon the question. Section 22, c. 11, Gen. Laws 1896, amended by section 2, c. 1229, p. 167, Pub. Laws 1904-05, provides for placing this question upon the ballots, but no positive law appears anywhere for notifying the electors of the vote to be taken except in this expunged proviso, where the clerk is directed to insert it in the warrant calling the meeting. Without such notice, how can the question legally come before the electors, and without the proviso, how can it legally be inserted in the warrant? If not legally notified, why should a portion of the electors responding to notice for other purposes decide the question? We submit that they cannot." The argument is not convincing. Gen. Laws R. I. 1896, c. 37, § 8, provides: "The notice to the electors to meet in a town meeting prescribed by law shall be given by the town clerk issuing his warrant, directed to the town sergeant or one of the constables of such town, requiring him to post, at least seven days before the day appointed for such meeting, written notifications in three or more public places in the town, of the time when and place where said meeting is to be holden and of the business required by law to be transacted therein." This provision has been in force in this state in substantially the same terms since the General Statutes of 1872 (see Chapter 32, § 8), beyond which we have not deemed it necessary to examine. Under our statute of construction, the words "town clerk" include city clerk. See Gen. Laws 1896, c. 26, § 8. Even if there was no statute directing that notice should be given, we do not think such omission would be fatal. The Legislature having directed a vote on the question to be taken "at each election of general officers," it becomes the duty of town and city clerks to give notice thereof in the warrants calling the meetings for that purpose.

The motion for reargument is denied.

GREEN v. LOCKWOOD, Town Clerk.
(Supreme Court of Rhode Island. Oct. 23, 1908.)

Petition by W. T. Green for mandamus to James T. Lockwood. Writ denied.

This is a petition praying for a writ of mandamus to compel respondent, town clerk of town of Warwick, to insert in the warrant to be issued calling town or district meetings a proposition providing for the taking of a vote upon the granting of licenses for the sale of intoxicating liquors in the form as provided by statute, "Will this town grant licenses for the sale of intoxicating liquors?" and to file the same

with the Secretary of State as required by the statute. The petitioner is a resident in and a duly qualified elector of the town of Warwick and a signer of the petition to the town clerk requesting the town clerk to insert a proposition in the warrant aforesaid calling town or district meetings, providing for taking a vote upon the question of granting licenses. Gen. Laws R. I. 1896, c. 102, § 4.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Littlefield & Barrows, for petitioner. Frederick A. Jones, for respondent.

PER CURIAM. In accordance with the rescript filed this day in *Ruhland v. Waterman*, 71 Atl. 1, the writ of mandamus in this case is denied.

VOIGT v. FULLERTON, City Clerk.

(Supreme Court of Rhode Island. Oct. 23, 1908.)

Petitions for certiorari by Ernest Voigt against Frank N. Fullerton, city clerk; by Jeremiah J. Sullivan against William E. Smyth, town clerk, and others; by John H. Branaghan against John W. Rowe, city clerk, and others; by John F. Donahue against William S. Preston, city clerk, and others; and by Frank Whitford against George B. Parker, town clerk, and others. Writs granted.

Argued before DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Frank F. Nolan, Comstock & Canning, and Patrick P. Curran, for petitioner Voigt. Edward D. Bassett, John W. Hogan, Arthur P. Sumner, and Philip S. Knauer, for other petitioners. William B. Greenough, Atty. Gen., for Secretary of State. Clark Burdick, for respondent Fullerton. Harmon S. Babcock, for respondent Smyth. Edward W. Blodgett and James L. Jenks, for respondents Rowe and others. Erwin J. France, for respondent Preston.

PER CURIAM. In accordance with the rescript filed this day in *Ruhland v. Waterman*, 71 Atl. 1, the writ of certiorari will be granted.

McELROY v. CLARKE, City Clerk, et al.
COUTU et al. v. CRAWFORD, City Clerk,
et al. WILLIAMS v. POTTER, Town
Clerk, et al.

(Supreme Court of Rhode Island. Oct. 24, 1908.)

Petitions for certiorari, by Joseph H. McElroy, against William E. Clarke, city clerk, and others; by Charles Coutu and others against C. Fred Crawford, city clerk, and others; and by Alfred H. Williams against Henry H. Potter, town clerk, and others. Writs granted.

Argued before BLODGETT, JOHNSON, DUBOIS, and PARKHURST, JJ.

Edward D. Bassett, John W. Hogan, Arthur P. Sumner, and Philip S. Knauer, for petitioners. William B. Greenough, Atty. Gen., for Secretary of State. Albert A. Baker and Henry C. Cram, for respondent Clarke. John N. Butman, for respondent Crawford. Willis B. Richardson, for respondent Potter.

PER CURIAM. After a careful examination of the authorities submitted to us in the briefs filed by the counsel for the petitioners, we are

confirmed in our opinion expressed in our report in the case of *Ruhland v. Waterman et al.*, 71 Atl. L. Writs of certiorari will issue accordingly.

VESTER v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Nov. 23, 1908.)

NEW TRIAL (§ 104*)—NEWLY DISCOVERED EVIDENCE.

Where affidavits of newly discovered evidence urged as a basis for a new trial contributed rather to the volume of testimony than to the weight of the evidence and the principal affiant gave no convincing reason for the change between her affidavit and her testimony, the showing was insufficient.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 218-220; Dec. Dig. § 104.*]

Action by Julia A. Vester against the Rhode Island Company. On defendant's application to file a motion for a new trial for newly discovered evidence. Denied. Application dismissed.

See, also, 69 Atl. 606.

William H. Sullivan and Waterman, Curran & Hunt (Lewis A. Waterman, of counsel), for plaintiff. Henry W. Hayes and Joseph C. Sweeney, for defendant.

PER CURIAM. The affidavits of newly discovered evidence, even when stripped of trivialities, impertinence, scandal, and hearsay, contribute rather to the volume of testimony than add to the weight of evidence. The affidavit of the principal affiant discloses a newly discovered state of mind towards the plaintiff completely at variance with her previous affidavit of the plaintiff's perfect health given more than a year before, and her later affidavit, attempting to explain her former affidavit favorable to the plaintiff, is more ingenious than convincing. Furthermore counter affidavits have been filed in behalf of the plaintiff. We do not think that any useful purpose will be served by protracting this litigation upon such testimony, or that justice requires a revision of the case upon this ground.

The defendant's petition to file a motion for a new trial in the superior court on the ground of newly discovered evidence is therefore denied and dismissed.

VESTER v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Nov. 23, 1908.)

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Julia A. Vester against the Rhode Island Company. Verdict for plaintiff, and defendant brings exceptions. Overruled.

See, also, 67 Atl. 444, 69 Atl. 606.

William H. Sullivan and Waterman, Curran & Hunt (Lewis A. Waterman, of counsel), for

plaintiff. Henry W. Hayes, and Joseph C. Sweeney, for defendant.

PER CURIAM. A thorough examination and consideration of the transcript of the testimony and charge of the court discloses no error upon the part of either judge or jury. The verdict is sustained by the evidence, and the damages assessed are substantial but not excessive. The charge of the court is admirable in its conciseness and clearness, while the requests to charge and for special findings that were disallowed were severally either unnecessary or inappropriate. The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

(222 Pa. 240)

HANHAUSER v. PENNSYLVANIA & N. E. R. CO.

(Supreme Court of Pennsylvania. Oct. 5, 1908.)

1. APPEAL AND ERROR (§ 373*)—BOND—TIME OF FILING.

After an appeal had been entered, and a writ of certiorari filed, within six months from the judgment and it appeared that no execution had been issued or distribution ordered when the appeal was perfected the fact that a bond was not entered until six months thereafter is not ground for quashing the appeal. *Held* that under Act May 19, 1897 (P. L. 67), regulating practice on appeal (sections 4 and 15), the bond had not been entered until after the six months was no ground for quashing the appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2001; Dec. Dig. § 373.*]

2. APPEAL AND ERROR (§ 657*)—CORRECTING RECORD—REMITTING TO LOWER COURT.

Where several grounds of demurrer to a petition to open a judgment have been assigned, and the court below sustains the demurrer without giving any reason therefor, the Supreme Court will remit the record to the court below to state its reasons.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2830-2832; Dec. Dig. § 657.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by George Hanhauser, administrator of James Clarke, deceased, against the Pennsylvania & New England Railroad Company. From an order discharging rule to open judgment, defendant appeals. Record remitted.

The appellee moved to quash the appeal for the following reasons: "(1) Because the discharge of the rule taken to open judgment was entered by the court below on July 3, 1907, and the certiorari from the Supreme Court was not brought into the prothonotary's office until December 18, 1907, and the appeal bond not filed until February 23, 1908. (2) Because, by the provisions of the act of May 19, 1897 (P. L. 67), entitled 'An act regulating the practice, bail, costs and fees on appeals to the Supreme Court and superior court,' it is provided, in section 15, as follows: 'Sec. 15. Appeals may be taken from any sentence, order, judgment or decree without security in any proceeding, where by law the same is or may be allowed, but in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such cases the appeal shall not operate as a supersedeas, except when a county, township or municipal corporation, or any one suing or defending in a representative capacity, is the appellant; or when the appeal is from a judgment entered in favor of the commonwealth upon an account settled by the Auditor General and State Treasurer, and a bond with approved security has already been given, as required by law, or in any other case where a bond with approved security has already been entered in the court from which the appeal is taken, conditioned as herein provided for such appeal; in which cases the appeal shall operate as a supersedeas without security, and except also, that in all other cases where a corporation, other than a county, township or municipal corporation, appeals on its own behalf, such appeal shall be quashed, unless bail is given to operate as a supersedeas as by this act required.' And by section 4 it is provided as follows: 'Sec. 4. No appeal shall be allowed in any case unless taken within six calendar months from the entry of the sentence, order, judgment or decree appealed from, nor shall an appeal supersede an execution issued or distribution ordered, unless taken and perfected, and bail entered in the manner herein prescribed within three weeks from such entry.' And the said corporation, appellant, has not entered bond within 21 days from the entry of the order, judgment, or decree of the court below, in accordance with the provisions of the act of Assembly so cited."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Alex. Simpson, Jr., Wm. Y. C. Anderson, and Wm. Jay Turner, for appellant. Chester N. Farr, Jr., William O. Mayne, and William A. Glasgow, Jr., for appellee.

BROWN, J. The judgment which the court below refused to open was against five terre tenants, to whose rights, franchises, property, and assets the appellant succeeded. The order discharging the rule to open the judgment was made July 8, 1907, and the certiorari sur this appeal was filed in the court below December 18, 1907, within six calendar months from the discharge of the rule. After six months had expired from the refusal to open the judgment, the appellant filed its bond on this appeal. We cannot tell from the printed docket entries when it was approved by the court below, and counsel do not agree as to the date. In the motion to quash it is given as February 28, 1908, while in the answer thereto counsel for appellant fix it as March 2, 1908. But without regard to the date of the filing and approval of the bond, it was given on an appeal taken within time and approved. No time is fixed, by the act of 1897, within which such a bond

must be given and approved to operate as a supersedeas, except that it must be given within three weeks of the entry of a judgment or decree to supersede "an execution issued or distribution ordered." The question on this motion to quash is not whether the approval of the bond superseded any process in the hands of the sheriff at the time it was approved, but whether it was given to operate as a supersedeas. It is on file for the protection of the appellee in the form prescribed by the statute, and it manifestly was approved, that it might operate as a supersedeas. The motion to quash is therefore overruled.

The petition of the appellant to have the judgment opened was in the nature of a bill in equity, and was an appeal to the chancery power of the court. *O'Hara v. Baum*, 82 Pa. 416; *Humphrey v. Tozler*, 154 Pa. 410, 26 Atl. 542; *Hall v. West Chester Publishing Company*, 180 Pa. 561, 37 Atl. 106; *Lawrence v. Smith*, 215 Pa. 534, 64 Atl. 776. The appellee demurred to it on eight grounds. Whether the court below considered them all good, or some good and others bad, we do not know. All that we have from it is "Demurrer to petition sustained. Rule to open judgment discharged." The demurrer was filed on January 23, 1907, and there was ample time for an intelligent disposition of it. To this we are entitled. We sit as a court of review of what has been done by a court below, and in equity proceedings our review and correction are not confined to the decree alone, but extend to the induction or reasoning of the chancellor. *Sproull's Appeal*, 71 Pa. 137. In this case several important questions were raised by the demurrer. It was the plain duty of the court below to pass upon them, or at least to state the ground or grounds upon which the demurrer was sustained, instead of sending the record to us for our consideration and disposition, in the first instance, of the questions raised by the pleadings. This court is created for no such purpose, and very few judges in the courts below seem to think otherwise. We return the record to the common pleas that there may be made part of it the reasons for dismissing appellant's petition. When so sent back to us, this appeal will be disposed of.

Record remitted.

(222 Pa. 244)

HANHAUSER v. PENNSYLVANIA & N. E. R. CO.

(Supreme Court of Pennsylvania. Oct. 5, 1908.)
JUDGMENT (§ 870*)—REVIVAL—SCIRE FACIAS
—AFFIDAVIT OF DEFENSE.

On a scire facias, under Act April 4, 1862 (P. L. 235), supplementing resolution of January 21, 1843 (P. L. 367), an affidavit of defense of a party, sought to be brought in as a terre tenant, averring that such party "has never held, and does not now hold, any property, real

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

or personal, which it derived either directly or indirectly from said defendant," is sufficient to prevent judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 870.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by George Hanhauser, administrator of James Clarke, deceased, against the Pennsylvania & New England Railroad Company. From an order making absolute rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Reversed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Alex. Simpson, Jr., Wm. Y. C. Anderson, and Wm. Jay Turner, for appellant. Chester N. Farr, Jr., William C. Mayne, and William A. Glasgow, Jr., for appellee.

BROWN, J. On March 22, 1887, James Clarke, deceased, recovered judgment in the court below against the Pennsylvania & New England Railroad Company for \$34,084. It is claimed by the appellee, his administrator, that this judgment comes within the protection of the resolution of January 21, 1843 (P. L. 367), and the provisions of the supplement thereto of April 4, 1862 (P. L. 235). There is some force in the position of appellant that, as the record fails to show that the judgment is within the protection of the resolution, it is not within the provisions of the supplement; but it is not necessary for us to now pass upon this question, for a single averment of the appellant, in its affidavit of defense, clearly stands in the way of appellee's right to a summary judgment against it as a terre tenant. After the Clarke judgment had been obtained, various writs of scire facias were issued on it, to bring in other railroad companies as terre tenants, and against them judgments were entered. On November 24, 1905, this scil. fa. was issued, with notice to the appellant as a terre tenant. In its affidavit of defense, deemed insufficient by the court below for no reason given, the laconic order, if intended for an opinion, being simply, "Rule absolute for judgment for want of a sufficient affidavit of defense," the first averment is: "Said Lehigh & New England Railroad Company has never held, and does not now hold any property, real or personal, which it derived, either directly or indirectly, from said defendant." A reason given in the supplemental affidavit of defense why judgment should not be entered is: "Because at the time of the issuance of said scire facias, or at any time before or since, the Lehigh & New England Railroad Company did not own or hold, or claim to own or hold, and had not in its possession, any real or personal estate that was ever owned or held by the Pennsylvania &

New England Company, the above-named defendant, or upon which the judgment recited in the said scire facias was a lien."

The resolution of 1843 provides: "It shall not be lawful for any company incorporated by the laws of this commonwealth, and empowered to construct, make and manage any railroad, canal or other public internal improvement, while the debts and liabilities, or any part thereof incurred by the said company to contractors, laborers and workmen employed in the construction or repair of said improvement remain unpaid, to execute a general or partial assignment, conveyance, mortgage or other transfer, of the real or personal estate of the said company, so as to defeat, postpone, endanger or delay their said creditors, without the written assent of the said creditors first had and obtained; and any such assignment, conveyance, mortgage or transfer shall be deemed fraudulent, null and void, as against any such contractors, laborers and workmen, creditors as aforesaid." The supplement of 1862 is: "Whenever any incorporated company, subject to the provisions of the above resolution, shall divest themselves of their real or personal estate, contrary to the provisions of the said resolution, it shall and may be lawful for any contractor, laborer or workman employed in the construction or repair of the improvements of said company, having obtained judgment against the said company, to issue a scire facias upon said judgment with notice to any person, or to any incorporated company claiming to hold or own said real or personal estate, to be served in the same manner as a summons upon the defendant, if it can be found in the county, and upon the person or persons, or incorporated company claiming to hold or own such real estate; and if the defendant cannot be found, then upon the return of one nihil and service as aforesaid, on the person or persons, or company claiming to hold or own as aforesaid, the case to proceed as in other cases of scire facias on judgment against terre tenants."

If this were a proceeding to continue the lien of an ordinary judgment against a purchaser from the defendant in it as terre tenant, a plea, such as this affidavit of defense must be regarded to be, would be good. *Colborn v. Trimpey*, 36 Pa. 463; *Colwell v. Easley*, 83 Pa. 31; *Hulett v. Mutual Life Insurance Co.*, 114 Pa. 142, 6 Atl. 554. In *Colwell v. Easley*, *Colwell*, the defendant below, had been summoned as a terre tenant. His plea was, "The judgment sought to be revived by scire facias is no lien on the lands of J. A. Colwell, and never was." In reversing the court below for striking this off, and in holding that the plea was good, we said, after reviewing the authorities: "We are warranted in saying that a plea, by one sum-

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moned as a terre tenant, that his land was not, and never had been, bound by the judgment, would be good. * * * From the reasoning thus borrowed from our books we are led to conclude: (1) That when one is brought into court who has had no connection with the debtor's title he should be discharged, either by nonsuit or a verdict in his favor, for he is not a terre tenant. He cannot be bound by the judgment, and he ought not to have been summoned. (2) If he has had connection with the debtor's title, though the lien of the judgment may not have attached at the time of his purchase by reason of its previous expiration, he may nevertheless be warned as a terre tenant, and may defend under the plea that the judgment is not, and never was, a lien upon his land. It follows that the court erred in striking out the second plea of the defendant."

But this is not the ordinary proceeding by *scire facias* against a terre tenant. The writ is issued under the act of 1862, which provides who, and who only, may be summoned by it, namely, any person or any incorporated company claiming to hold or own the real or personal estate which belonged to the original defendant, and when such person or incorporated company is summoned into court, "the case proceeds as in other cases of *scire facias* on judgment against terre tenants." Instead of claiming to hold or own any real estate that ever belonged to the Pennsylvania & New England Railroad Company, the averment is that the appellant "has never held, and does not now hold, any property, real or personal, which it derived, either directly or indirectly, from said defendant." This is certainly a defense under the act of 1862, and, if made out, the appellee may not have judgment against the appellant, either *de terris* or *de propriis*, as to costs. The averment may not be true, and on the trial the appellant may not be able to sustain it, but for the present we must assume it to be true, as there is nothing in the record conclusively showing that it is not.

Judgment reversed and procedendo awarded.

(222 Pa. 220)

COMMONWEALTH ex rel. ATTORNEY
GENERAL v. BEAVER VAL-
LEY R. CO.

(Supreme Court of Pennsylvania. June 23,
1908.)

RAILROADS (§ 75*)—TRACKS ON CITY STREETS.

Where a railroad company is incorporated under Act April 4, 1868 (P. L. 62), and the several supplements thereto, it can lay its tracks longitudinally on the streets of a borough, though the act under which the borough was incorporated provides that the streets of such city shall be common highways forever; they being the property of the state.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 183-185; Dec. Dig. § 75.*]

Appeal from Court of Common Pleas, Dauphin County.

Bill by the commonwealth, on the relation of the Attorney General, against the Beaver Valley Railroad Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Clapp, J., of the court below, filed the following opinion:

"This proceeding was instituted by the commonwealth of Pennsylvania ex rel. Hampton L. Carson, Attorney General, against the Beaver Valley Railroad Company, to restrain the defendant company from operating and maintaining its railroad longitudinally on Fifth street, in the borough of Beaver, to have the said railroad declared a public nuisance, to require the removal of said construction from Fifth street, and restore the street to the condition it was prior to the entry thereon by the said defendant company and its occupation thereof. From the admissions in the answer and the evidence taken on final hearing, we find the facts to be as follows:

"Findings of Facts.

"(1) The town of Beaver was laid out in pursuance of two several acts of assembly, approved, respectively, September 23, 1791 (3 Smith's Laws, p. 56), and March 6, 1793 (3 Smith's Laws, p. 90), in which it is, *inter alia*, provided 'that the Governor shall reserve out of the lots of said town so much land as he shall deem necessary for public uses,' and also 'that the streets, lanes and alleys of the said town and out lots shall be common highways forever,' and was incorporated into a borough by the act of assembly approved March 29, 1802 (3 Smith's Laws, p. 405).

"(2) The defendant company was incorporated September 5, 1899, under the act of April 4, 1868 (P. L. 62), entitled, 'An act to authorize the formation and regulation of railroad corporations,' and the several supplements thereto, for the purpose of constructing, maintaining, and operating a railroad between two points in Beaver county, Pa., the eastern terminus being at or near the point where the Beaver and Mercer state road, commonly called the 'Sharon Road,' crosses the Pittsburgh & Lake Erie Railroad in Beaver county, Pa., and the western terminus at or near a point on the Ohio river, about 500 feet south of the residence of John Moore, in Borough township, in said county and state.

"(3) The municipal authorities of the borough of Beaver by ordinance duly approved September 15, 1899, granted the defendant company the right to enter upon Fifth street, in the borough of Beaver, Pa., and to construct, maintain, and operate its railroad thereon longitudinally, which said ordinance

was accepted by the defendant company on September 20, 1899.

"(4) The defendant company, subsequent to the enactment and acceptance of said ordinance, located and constructed its railroad through the borough of Beaver, along and upon Fifth street, one of the "common highways" of said borough (laid out and dedicated in pursuance of the provisions of the act of 1791, *supra*) longitudinally, in the center of said street, and at grade therewith the whole length of said street, to wit, a distance of about 3,800 feet, which said street is intersected and crossed by several streets, viz., Buffalo street, Market street, Elk street, Branchbank street, Beaver street, and Mercer road, upon which several streets or roads, as well as upon Fifth street, there is comparatively little travel.

"(5) The construction of the said railroad on Fifth street was commenced in the latter part of October, 1903, and completed about June 1, 1904, since which time it has been in active operation. In the construction of its railroad the defendant company expended about the sum of \$130,000.

"(6) Between the date of the commencement of the construction of the railroad and the date of its completion the borough of Beaver and several abutting property owners filed injunction bills to restrain its construction on Fifth street, which several proceedings were duly dismissed; and on September 25, 1905, the present bill was filed.

"Discussion.

"The question to be determined in this case is: Has the Beaver Valley Railroad Company, a corporation duly incorporated under the act of assembly approved April 4, 1868, the right to occupy Fifth street, in the borough of Beaver, longitudinally with its railroad as constructed and for some time past operated thereon?

"It is not disputed that the railroad company is occupying Fifth street with the consent of the borough authorities, and in accordance with the terms of the ordinance granting it permission so to do.

"It cannot be questioned, under the numerous decisions of our appellate courts, that a highway is the property of the public, not of a particular district, but of the whole state, who may dispose of it by their representatives and at their pleasure, and in which no person, natural or corporate, has any exclusive interest unless it has been granted by the statute. *Philadelphia v. Trenton R. R. Co.*, 6 Whart. 25, 36 Am. Dec. 202. The right of the supreme legislative authority to authorize the building of a railroad on a street or other public highway is not to be doubted. *Commonwealth v. Erie & North-East R. R. Co.*, 27 Pa. 339, 67 Am. Dec. 471. 'The power of the Legislature to authorize the building of a railroad upon a public road is undubitable. * * * To the commonwealth belongs the franchise of ev-

ery highway within its limits as trustee of the public. Every public road therein exists by force only of the commonwealth's authority.' *Danville, etc., R. R. Co. v. Commonwealth*, 73 Pa. 29.

"The principle of law supported by the above authorities is not denied, but it is suggested that Fifth street is peculiar in its relation to the commonwealth, in view of the fact that it was dedicated as a 'common highway' under and in pursuance of the act of 1791, *supra*. We fail to see how this fact can in any wise interfere with the operation of the admitted general principle of law that the sovereignty of public roads remains in the commonwealth. The fact that the commonwealth has dedicated the street in question to public use does not lessen its control over it or prevent it from exercising the same sovereignty it admittedly would have if the street had been dedicated by some one else. We can see no force in this suggestion.

"The rights of railroad companies incorporated and organized under the provisions of the act of April 4, 1868, to occupy public highways longitudinally, have been so well settled by our appellate courts that any attempt on our part to discuss this right would be an affectation of learning and research. In the Appeal of Philadelphia, Germantown & Norristown Railroad Company, 2 Walk. 291, a proceeding in equity brought to restrain a railroad company, formed by the consolidation of several companies incorporated and organized under the general railroad laws of this commonwealth, from laying its tracks upon Lafayette street, in the borough of Norristown, longitudinally, the president judge of the court below, on a motion to continue the injunction, dissolved it, referred the case to a master, who submitted a report thereon, in which he adopted the views expressed by the court in its refusal to grant the preliminary injunction, which report, upon exceptions, was duly confirmed, whereupon the complainant appealed to the Supreme Court, who affirmed the decree of the court of common pleas in the following per curiam opinion: 'The sole contention is as to the right of the appellee to construct its road on Lafayette street in the borough of Norristown. The appellants own lots fronting on the street. They have no greater right than any private person owning a lot fronting thereon has to prevent the construction of the railroad. No question as to the measure of damages or giving security for the payment thereof arises. They are out of the question. The municipal authorities have given their permission to lay the track on the street. It is in the line of the corporate franchise of the appellee. Under these facts the right to lay it is too well sustained by the authorities to be successfully questioned.' Mr. Justice Trunkey, in *Penna. R. R. Co.'s Appeal*, 115 Pa. 514, 5 Atl. 872, says: 'A company organized under the general statute may locate its railroad on a street or al-

ley, because that statute expressly confers the power.' The commonwealth suggests that this language of the learned justice is obiter dicta, and was not well considered. To this suggestion we cannot accede; on the contrary, when it is noted that the opinion in *Penna. R. R. Co.'s Appeal* was filed little more than a year subsequent to the per curiam hereinbefore recited, it is very evident this statement was incorporated in the opinion by the learned justice with the disposition of the *Philadelphia, Germantown & Norristown R. R. Co.'s Appeal*, 2 Walk. 291, fresh in his recollection. This construction of the act of April 4, 1868, was also adopted by the master in *Phila. v. River Front R. R. Co.*, 173 Pa. 334, 34 Atl. 60, exceptions to whose report were overruled by the court of common pleas, and upon appeal the Supreme Court affirmed the judgment of the court below by a per curiam opinion, saying: 'The questions involved in the assignments of error, so far as are material, have been so fully considered by the learned master that we deem it unnecessary to add anything to what he has said.' See, also, *Penna. R. R. Co.'s Appeal*, 116 Pa. 55, 8 Atl. 914; *McAboy's Appeal*, 107 Pa. 548.

'The defendant also contended that, even if the commonwealth had any standing to proceed in equity, nevertheless by remaining quiet until defendant had expended a large sum of money in the construction of its railroad, in pursuance of authority contained, or believed to be contained, in its charter, and the general laws pertaining thereto, and until said railroad was fully completed and had been for some time in operation, the commonwealth waived and by its laches lost its right to proceed in equity. The defendant company commenced work on the construction of its railroad on Fifth street in October, 1903. It was temporarily stopped by injunction, subsequently dissolved, after which the work on the railroad was resumed and completed about June 1, 1904. This bill was filed September 25, 1905, more than 15 months after the completion of the road and the commencement of its operation. The defendant expended a large amount of money in the construction of its road, and there is no evidence that the presence of the track in the center of Fifth street, which is 100 feet wide, is a public menace, or that it is a nuisance. There is some force in this position of the defendant. See *Commonwealth v. Turnpike Co.*, 153 Pa. 47, 25 Atl. 1105; *Commonwealth v. Pittston Ferry Bridge Co.*, 148 Pa. 621, 24 Atl. 87; *Hellman v. Street Ry. Co.*, 175 Pa. 188, 34 Atl. 647; *Hellman v. Street Ry. Co.*, 180 Pa. 627, 37 Atl. 119. But in view of the well-settled right of the defendant to construct and operate its railroad on Fifth street, as it has done, it is unnecessary for us to pass upon

the question of laches raised by the defendant.

"Conclusions of Law.

"Wherefore we conclude that the defendant had the lawful right to construct and operate its road longitudinally on Fifth street in the borough of Beaver, and that the plaintiff's bill must be dismissed. And now, July 16, 1906, this cause came on to be heard on final hearing, was argued by counsel, and upon consideration thereof it is ordered, adjudged, and decreed that the plaintiff's bill be dismissed at its costs. The prothonotary is directed to enter this decree nisi and give notice thereof to the parties or their counsel, and, unless exceptions be filed within the time limited by the equity rules, enter the above decree as a final decree."

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. A. McConnell, M. Hampton Todd, Atty. Gen., John F. Cox, Jas. A. Stranahan, and W. S. Moore, for appellant. George B. Gordon, M. E. Olmsted, and A. C. Stamm, for appellee.

PER CURIAM. The decree dismissing the bill is affirmed on the opinion of the learned judge of common pleas, at the cost of the appellant.

(222 Pa. 208)

In re DULL'S ESTATE.

Appeal of McCORMICK et al.

(Supreme Court of Pennsylvania. June 23, 1908.)

CONVERSION (§ 16*)—DIRECTIONS IN WILL.

Testator gave to his wife the furniture and household goods and house and lot in which he resided to enjoy as long as she desired, after which they were to be sold by his executors and become a part of his estate, and provided that the legal share of his real estate and personal property should be paid to his wife as her share of his estate. He also gave a legacy in money and the balance of his estate to certain relatives, and directed his executors to dispose of all his estate within three years after testator's death. Held, that the direction to sell converted all of his real estate into personalty of which the widow took one-half.

[Ed. Note.—For other cases, see *Conversion*, Cent. Dig. §§ 38-43; Dec. Dig. § 16.*]

Appeal from Orphans' Court, Mifflin County.

In the matter of the estate of C. P. Dull. From a decree dismissing exceptions to auditor's report, Henry B. McCormick and Vance C. McCormick appeal. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

S. P. Wolverton, M. W. Jacobs, S. P. Wolverton, Jr., and Grant Herring, for appellants. W. U. Hensel, for appellee.

STEWART, J. What interest in his estate did the testator intend that his widow should take? The clause in the will relating to her

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is as follows: "To my beloved wife, Hannah Wiley Dull, I give, devise and bequeath the furniture, pictures, household goods, horses, carriage, and house and lot in which we now reside, to have and to hold and enjoy as long as she may desire to live there, after which time I direct that they be disposed of by my executors and become part of my estate. I also direct the legal share of my real estate and personal property to be paid to my said beloved wife as her share out of my estate." By the next succeeded item a legacy of \$1,500 is given to a relative, and immediately following occurs this residuary clause: "All the balance of my estate I devise to my three sisters, Mrs. Hannah Criswell, Mrs. Nancy Macklin and Mrs. Margaret Horning, or their heirs, share and share alike, to be paid by my executors as hereinafter named." What is given the widow is her "legal share." These words, standing alone and unqualified by other expressions and provisions in the will, would indicate with much certainty—there being no children—an intention that she should take one-half of the personal property absolutely, and the income of one-half of the real estate during life. Since the law seeks to give effect to the testator's intention as derived from the whole will, the inquiry must be to discover whether any other or different purpose is elsewhere expressed, or indicated with equal or greater certainty. The will contains a positive, express, and unconditioned direction to the executors to dispose of all the balance of the estate within three years after the testator's death. This balance evidently embraced all the real estate owned by testator at the time of his death, even the house and lot devoted to the widow's use, in the event of her occupancy of it terminating within the period fixed. It is designated as balance, for the reason that in an earlier part of the same clause testator had directed that a certain sand property of large value should be retained and operated by the executors for a period not exceeding five years. This property the testator sold in his lifetime; but it having been set apart in the will from the rest, since it was the only piece of real estate thus distinguished, the direction to sell included all else.

What, then, is the legal significance of this direction to sell or dispose of all the testator's real estate; and how does it reflect the testator's intention with respect to the share of the widow? The right of a testator to make land money, to effect his own purpose, is unquestionable; and it follows from this right that persons claiming property under a will directing its sale must take it in the character which the will imposes on it. This results not from the application of any artificial rule, or any equitable doctrine, but solely because it is the testator's expressed desire. How could a testator make it more certain and conclusive that he did not intend his beneficiary to take his real estate,

than by directing its sale? In such case it is not the law that works the conversion, but the will that directs it. The law sometimes employs a fiction in aid of a testator's intention, and by use of it the conversion which the testator ordered is anticipated in such a way that what is ordered to be done is regarded as actually accomplished; but that fiction is without application here, and the doctrine of equitable conversion, much discussed upon the argument, plays no part. If the question were as to when the conversion arose, whether at the death of the testator, or when the sale was actually made, then the fiction and doctrine would apply; but no such question concerns us here. It is enough to know that there is a positive direction to convert, and the result must have been the same whether actual conversion or equitable was contemplated. The evident purpose of the testator in directing a sale of his land was in connection with the distribution among his beneficiaries; and the presumption is that he knew, if his lands were sold as he had directed, the proceeds would be distributed as personalty. It is not pretended that the will gives to the three sisters who take the residue any estate in the lands. Conversion as to them is admitted, and it is freely allowed that all the interest they have is in the execution of the trust through which they are to receive their shares in money. The effort is to distinguish between them and the widow in this regard.

Because the testator has described the interest given the latter as a "legal share," it is argued that his intention must have been to confine her share within the limitations of intestacy; that is to say, one-half of the personal estate absolutely and one-half the income of the real estate during life. That the testator could have so limited and restricted her share is a matter of course; but since the legal share may under certain conditions, when there is real estate, embrace the one-half the entire estate, regarded as personalty, the question remains, what was this testator's understanding as to the meaning of the words used? In this connection the fact that his will directs a conversion of the real estate is of large significance. Under this provision what he was distributing to his beneficiaries was money, not land, and it was the money to be derived from the sale of the land that he had under contemplation. A widow's legal share under conditions we have here, the estate being personalty, would be the one-half absolutely. It is always a legitimate presumption that a testator in framing his will knew the law, and intended such results as would follow through the law, unless he provides to the contrary. Not only does the will contain no contrary provision, but every provision and direction is consistent with the purpose to make the widow's share payable directly to her out of the net result obtained through

a sale of the entire estate, divested of all charges. It is as much because of what the will does not contain, as of what it does, that we reach the conclusion that the testator intended his widow to take one-half the whole absolutely. It contains nothing which in the remotest way suggests that her share is to be a charge upon the real estate, or that it shall be held in trust in case the land be sold discharged of it, or that it was income she was to receive, or that her ownership was to be qualified in any way. On the contrary, in express terms, it directs that this legal share be paid to her out of the estate, just as it provides that the shares of the three sisters are to be paid to them. This was the will of a man of extensive business experience, owning large estates in land. It shows an anxiety on his part that his lands when sold should sell to the largest advantage. It would be apparent to any one of the most limited experience and observation that this result would be impossible were a dower of one-half the whole value to be charged upon the land. Did he contemplate such a sale? We cannot think so. If he did not, but intended a sale outright, then, if appellant's view be correct, we are confronted by this other circumstance so unusual in testamentary dispositions as to be remarkable, that he created a fund for the widow for life without giving any directions at all with respect to its investment, control or management, other than that it was to be paid to her. That he intended a sale which would divest the dower we have no doubt; that he intended the widow to receive but the income of one-half the purchase money during her life is not only inconsistent with the general scheme of the will, but conflicts with the express provision which requires that her share be paid to herself. A careful examination of the will in all its parts has satisfied us that the conclusion reached in the court below awarding the widow the one-half of the entire estate as personalty accords with the expressed intention of the testator.

The appeal is dismissed, at the cost of appellants, and the decree is affirmed.

(222 Pa. 226)

SMITH v. METROPOLITAN LIFE INS. CO. OF NEW YORK.

(Supreme Court of Pennsylvania. Oct. 5, 1908.)

1. INSURANCE (§ 585*)—LIFE POLICY—RIGHT TO PROCEEDS.

The naming of a beneficiary in a life policy to whom payment is to be made is a gift of a benefit in the future and is contingent on the circumstances, and carries with it no obligation to the beneficiary that the donor will keep the policy alive, and the nature of the thing given would seem to imply that the beneficiary must survive the insured.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 585.*]

2. INSURANCE (§ 589*)—RIGHT TO PROCEEDS—CHANGE OF BENEFICIARY.

Where a husband insures in favor of his wife, but makes no further disposition of the insurance money to her personal representative or otherwise, he is entitled on surviving her to change the beneficiary to some other person.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1472-1474; Dec. Dig. § 589.*]

3. INSURANCE (§ 587*)—RIGHT TO PROCEEDS—CHANGE OF BENEFICIARY.

Where an insured, desiring to substitute his daughter as beneficiary for his wife, who had died, applied to the agent of the insurance company, and was furnished with a printed blank called "change of designation," which he executed, and this change of designation was delivered to the company and accepted by it, and for more than seven years it received premiums on the basis of such change, the company is estopped to deny the validity of the change, whether strictly in accordance with the requirements of the by-laws of the company or not.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 587.*]

4. INSURANCE (§ 665*)—RIGHT TO PROCEEDS.

A clause of a life policy that production thereof by the company and a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the personal representative, husband or wife, or relative by blood or lawful beneficiary, shall be conclusive that such sum has been paid, and that all claims under the policy have been satisfied, does not render a receipt given to the executor of insured a defense as against a beneficiary whose rights are fixed by the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

Appeal from Court of Common Pleas, Schuylkill County.

Action on life policies by Esther A. Smith against the Metropolitan Life Insurance Company of New York. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

James B. Reilly and George W. Ryon, for appellant. R. H. Koch and Guy E. Farquhar, for appellee.

MITCHELL, C. J. Gordon took out five separate policies of insurance on his own life. No beneficiary or person to whom the insurance should be paid on the death of the insured was named in any of the policies, but in the applications for three of them, in answer to the printed question as to whom the money should be payable, the name of his wife was written. In the other two there was not even this designation of a beneficiary, but it was conceded at the trial that the insurance was intended for her benefit and that the policies were handed to her by the insured. The trial court, therefore, treated all the policies as alike in her favor as beneficiary, and for the purposes of this case no question on this point need be considered. The wife died first, and subsequently the husband by written order, on a blank

"change of designation" furnished by the company, appointed his daughter, the plaintiff, as the beneficiary. She brought suit, and on the trial was nonsuited on the ground that the interest in the policies had vested in the wife, and at her death passed to her administrator as part of her estate.

In support of this result, reliance is had principally on the cases of *Anderson's Estate*, 85 Pa. 202, *Brown's Appeal*, 125 Pa. 303, 17 Atl. 419, 11 Am. St. Rep. 900, and *Entwistle v. Insurance Co.*, 202 Pa. 141, 51 Atl. 759. The facts, however, in these cases were so different that none of them can be regarded as a controlling authority for the present. In *Anderson's Estate* the policy was payable to the wife, "her executors, administrators or assigns." The insured (husband) having died insolvent, the money was claimed by his creditors, but it was held that it was an asset of the wife. In *Brown's Appeal* the policy was payable to the wife, and in case of her death before that of the insured then to her children. The wife and the husband jointly executed an assignment, and, after the wife's death, it was held on interpleader that the children had title under the original contract, and it could not be divested by the assignment. In *Entwistle v. Insurance Company* the insurance was payable to the wife, and, if she died before the husband, then to the children, but, if the husband survived both wife and children, then to his legal representatives. By the terms of the policy, its value was convertible into cash at the option of the holder after 15 years. Husband and wife sought to exercise the option, but it was held that the children had a beneficial interest which brought them within the term "holders," and could not be divested without their sanction. In all the foregoing cases the contingency presented by the state of facts was one expressly provided for in the policy, and it is beyond question that where such is the case the terms of the policy, which is the substantial contract of the parties, must govern. But where, as in this case, a state of facts exists for which the policy makes no express provision, a very different question is presented. In *Brown's Appeal* it was said that the death of the wife in the lifetime of her husband "extinguished her interest in the policy," and in *Entwistle v. Insurance Company* "the interest of the wife was wholly contingent upon her surviving her husband. * * * If the wife die before the insured, she will take nothing under the policy." These expressions, of course, and the decisions in which they were used, were based, as already said, on the language of the policies, but the same result would follow upon general principles. Where all the conditions of fact expressly provided for in any contract have failed and the contract is silent as to anything further, regard must be had to the fundamental intent and effect of the contract. The contract of life insurance contemplates a payment by the

insurer upon the death of the insured. That is the certain primary intent, and does not admit of doubt.

The secondary question, to whom is the payment due, is contingent on the circumstances. The naming of a beneficiary to whom payment is to be made is a gift of a benefit in future, but is contingent on the circumstances. Thus it carries with it no obligation to the beneficiary that the donor will keep the policy alive by continuing to pay the premiums. That is contingent on his doing so voluntarily. And the nature of the thing given would seem to imply that the beneficiary must survive the insured. Thus in the present case the gift is equivalent to a provision that when the husband dies, having kept the policy alive, the wife shall be entitled to the money. But the intent is to provide for her, not for any other, and, if she has died first, the expressed intent is incapable of fulfillment, and we are not at liberty to supply a further intent which the donor did not indicate. He might have done so by naming her executor, or administrator, or children, at his own choice, but as he did not do so we are not authorized to make a choice for him. The natural presumption is that he did not desire such result, nor intend to continue to pay premiums for the benefit of any other person. At the inception of the contract the whole disposition of the insurance money was within the control of the insured. He might have provided in the policy for its disposition under any and all conditions, but he did not. By the designation of his wife as the party to receive it, he vested a right in her and to that extent parted with his control. But he did nothing more, and on her death before his the condition failed, and the right of control which he had only parted with on condition returned to him, and, in the absence of any further disposition by him, would have become an asset of his estate.

The cases relied upon by the learned court below, as already said, differed so entirely in their essential facts that they are not authority for this. No Pennsylvania case has decided the question now raised. Outside of this state the decisions are not in entire harmony, but the weight of authority is with the views above expressed. In 13 Am. & Eng. Ency. of Law, p. 654, the general rule is thus stated: "Ordinarily where the insured survives those specified to take at his death, the insurance money, where no other disposition is made of it, becomes, at his death, a part of his estate, to be administered as his will, or, in the absence of a will, as the law directs. * * * But where a person, as a husband, takes out a policy on his life in favor of another as the wife, without further mention, and pays the premiums, and he survives the beneficiary, he may change the policy for the benefit of any other person, as a subsequent wife." *Id.* 656.

This brings us to the consideration of the plaintiff's claim. The wife, the beneficiary designated in the applications, died in 1897, and the next year the insured substituted his daughter, the plaintiff, as beneficiary. The testimony was that, desiring to do so, the insured applied to the agent of the insurance company, was furnished by him with printed blanks, called "change of designation," which he executed, thereby substituting his daughter, the plaintiff, as beneficiary, in place of his wife who was dead. These changes of designation were delivered to the defendant company and were accepted by it. The company thus recognized the right to change the beneficiary, accepted the method of doing so, and for more than seven years the insured continued to pay and the company to receive the premiums on the basis of such change. Whether the papers were strictly in accordance with the requirements of the by-laws of the company is immaterial. So far as the case was developed, every element of estoppel exists to prevent the company from now disputing their validity. As the trial in the court below, however, resulted in a nonsuit, no evidence was given for the defendant, but it appears from the affidavit of defense that the company paid the insurance money to one Thomas S. Gordon, executor of the insured, and reliance is apparently placed on a clause in the policies, varying somewhat in expression but substantially to the effect that "the production by the company of this policy, and of a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the executor or administrator, husband or wife, or relative by blood, or lawful beneficiary of the insured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been fully satisfied." Similar clauses are not uncommon in the class known as "Industrial Insurance," where the amounts and estates are small and the purpose is to avoid the necessity of the expense of formal administration by law. But they are not intended, and could not be allowed, to override rights fixed by the policies. If, for example, the wife had survived the husband in this case, no such clause as that quoted could make a payment to his executor a valid defense against her vested claim as primary beneficiary. If the plaintiff's substitution as beneficiary was valid, as *prima facie* it appears to be, the payment to Thomas S. Gordon, as executor of the insured, is no defense.

But it is intimated that the fact as well as the good faith of the nominal substitution as between father and daughter are open to question. As the case did not reach the stage

for evidence on that point, we express no opinion upon it.

Judgment reversed, and procedendo awarded.

(222 Pa. 257)

FLOYD et al. v. KULP LUMBER CO.
(Supreme Court of Pennsylvania. Oct. 5, 1908.)

1. TAXATION (§ 810*)—TAX TITLES—EJECTMENT—PRESUMPTIONS AND BURDEN OF PROOF.

Where, in ejectment, defendant exhibited a title, derived from a treasurer's sale for taxes assessed on the land as unseated, regular in form and long subsequent to the acquisition of the title exhibited by plaintiffs, derived from a like sale, the burden is on plaintiffs to prove a defect alleged in defendant's title, that the land was assessed in the same year as seated land as well, and was therefore exempt from sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1606; Dec. Dig. § 810.*]

2. TAXATION (§ 810*)—TAX TITLES—EJECTMENT—EVIDENCE.

On an issue, in ejectment, of whether the land in dispute was assessed for a certain year as seated as well as unseated land, so as to be exempt from sale, the assessment lists for the year preceding and the two years following the year in question were irrelevant.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1607; Dec. Dig. § 810.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in the admission of evidence, which is harmless, is not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error; Cent. Dig. § 4153; Dec. Dig. § 1050.*]

4. JUDGMENT (§ 664*)—CONCLUSIVENESS—EFFECT OF REVERSAL.

On an issue, in ejectment, of whether the land in dispute was assessed for a certain year as seated as well as unseated land, so as to be exempt from sale, a verdict and judgment against persons under whom defendant claimed in a prior action of ejectment were improperly admitted, where on appeal such judgment was reversed, and plaintiff in that action was thereafter nonsuited.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1175; Dec. Dig. § 664.*]

5. EVIDENCE (§ 208*)—JUDICIAL ADMISSIONS—PLEADINGS.

On an issue, in ejectment, of whether the land in dispute had been assessed for a certain year as seated as well as unseated land, so as to be exempt from sale, the pleadings, requests for instructions, and assignments of error in a prior action of ejectment against those under whom defendant claimed, inconsistent with the position taken by it, were admissible as admissions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. § 208.*]

6. EVIDENCE (§ 246*)—JUDICIAL ADMISSIONS—ADMISSIONS BY COUNSEL.

The admissions of an attorney of record bind his client in all matters relating to the trial and progress of the cause.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 945; Dec. Dig. § 246.*]

7. EVIDENCE (§ 265*)—ADMISSIONS—CONCLUSIVENESS.

Admissions in the form of the pleadings, requests for instructions, and assignments of error in a prior action of ejectment against a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

party's predecessors in title, inconsistent with the position taken by it, are not conclusive, so as to authorize the direction of a verdict for the adverse party; but their effect is for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1035-1039; Dec. Dig. § 265.*]

8. TRIAL (§ 142*)—QUESTIONS FOR JURY.

Where a writing is not a dispositive instrument, but is put in evidence merely to show an extrinsic fact, it is for the jury to say what inference is to be drawn therefrom.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

Appeal from Court of Common Pleas, Huntingdon County.

Ejectment by J. B. Floyd and others against the Kulp Lumber Company. Judgment for the plaintiffs, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and STEWART, JJ.

W. M. Henderson, A. Reed Hayes, and S. P. Wolverton, for appellant. James S. Woods and W. H. Woods, for appellees.

STEWART, J. To defeat plaintiffs in their action, defendant relied upon a title which had its origin in a treasurer's sale of the land in dispute for unpaid taxes assessed for the year 1838 on the land as unseated. No question was raised as to compliance with legal requirements in connection with this sale, or that the defendant had legally succeeded to the title acquired thereby. The one question in the case was whether this particular tract was assessed for the year 1838 as seated land, as well. It was conceded that, if assessed as seated land for that year, it was not liable to sale for taxes assessed as unseated land, and that a purchaser under such a sale could acquire no title. The defendant having exhibited a title derived from a treasurer's sale for taxes assessed on the land as unseated, entirely regular in form, and long subsequent to the acquisition of the title exhibited by plaintiffs, derived from a like sale, the prima facies was with the defendant, and the burden was on the plaintiffs to prove the alleged defect in the later title; that is, that the land was assessed in the year 1838 as seated land, and therefore exempt from sale. To this end they offered the assessment lists for the years 1837, 1838, 1839, and 1840. All were embraced in one offer. The relevancy of the list for 1838 is obvious; but how the other lists could reflect any light upon the question at issue is not apparent. If they had any relevancy, it certainly was not disclosed in the offer, and we see nothing in the case that made them pertinent, at least in the connection in which they were offered. Had prejudice resulted from their admission, it would have been sufficient ground for reversal under the first assignment of error; but so far as we can see the error was harmless. The

lists show that in each of these years this particular tract, distinguished as the land included in the George Hill warrant, containing 400 acres in Barree township, was assessed as unseated land. The title to the tract was admittedly in Henry Steely, who died in 1838. The lists of seated land during these same years showed several tracts assessed in the name of Henry Steely; one of them being for 400 acres in Barree township, but without any other description whatever. The mere fact that the assessments are upon tracts of land of equal acreage would not of itself warrant an inference that the tracts were one and the same.

To establish their identity plaintiffs were allowed, under objections to be considered later on, to introduce in evidence the record as it appears in the continuance docket of a former action of ejectment brought to No. 38, January term, 1845, for the same tract of land, between Adam W. Benedict, plaintiff, and David Milliken and Samuel Milliken, defendants, with the writ and other papers filed in that case, "for the purpose"—so runs the offer—"of showing that the land in controversy in No. 38, January term, 1845, is the identical land of which the land in the present suit is an undivided one-half part, and for the further purpose of showing that on the trial of that case David and Samuel Milliken, under whom the defendant claims title, proved that the land in controversy in this suit, which was assessed on the unseated list in Barree township in 1838, is the identical land assessed in Barree township on the seated list to Henry Steely for the year 1838, and that the taxes on the seated list for 1838 were paid before the sale to David Milliken in 1840." That the evidence included in this offer had tendency to prove the fact contended for is quite apparent; and the only question was as to the weight and force to be allowed it. The effort on the part of the defendant in that action was to defeat the plaintiff's claim of title under the treasurer's sale to Benedict by showing that in the years 1839 and 1840 the tract now in dispute was assessed as seated land. This was one of the questions submitted to the jury, and the verdict was for the plaintiff. On appeal to this court (*Milliken v. Benedict*, 8 Pa. 169) the judgment was reversed, with a venire, upon considerations which do not here concern us, and which therefore need no further reference. The last entry in the continuance docket under this particular number is: "Now, 15 Nov., 1851, plaintiff becomes nonsuit. Judgment." It thus appears that there was no judicial determination of any matter in that case which could in any wise prejudice the defendant in this. The effect of the reversal of the judgment was to place the parties to the action in the same condition as they were before the judgment was rendered. Their respective rights after

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

reversal were just what they would have been, had the case never been tried. How or why the plaintiff "became nonsuit" does not appear, nor is it of any consequence to inquire. It is enough to know that it could not have been because of anything the defendants had done. That judgment followed nonsuit is immaterial; for neither judgment nor verdict helps in any way to identify the land in controversy as the land that was assessed as seated. No facts were established by either side through any judicial inquiry touching the merits of this controversy. It follows that the verdict and judgment, being wholly irrelevant, were improperly admitted.

Not so, however, with respect to the papers in the case—the pleadings, the requests for instructions, and the assignments of error. These were offered as extrajudicial admissions on the part of the Millikens that the land they were claiming was in fact seated land in 1838. It may be that the requests for instructions and assignments of error show more or less of an inconsistency between the positions taken by the defendants in that case and those taken by the defendant in this. If there is anything in them which can properly be construed as an admission by the Millikens, either express or implied, of the fact here asserted by the plaintiffs—that the land was seated in 1838—they were certainly admissible in evidence. Touching this matter, it is quite enough for us to say that in our opinion this test was met. True, it may be, and doubtless is, that these requests and assignments were drawn by counsel; but in such case the law makes no distinction. "The concessions of attorneys of record bind their clients in all matters relating to the trial and progress of the cause." *Truby v. Seybert*, 12 Pa. 101. "That the pleadings in prior causes must be treated as the parties' admissions, usable as evidence in later cases, must be conceded." *Wigmore on Evidence*, § 1066.

Nor does the fact that the action in which these papers were used was brought by other parties than the plaintiffs here, without privity between them, make them inadmissible. Between the defendants in that suit and the defendant in this there is unquestionable privity of title, and this is quite sufficient. "In the case before us," says Kennedy, J., in *Gibblehouse v. Stong*, 3 Rawle, 437, "the testimony offered and rejected was not of that character which, in a technical sense, comes under the denomination of hearsay. It comes under what is considered the declarations or admissions of the party to the suit or his privies; that is, those under whom he claims, in respect to which the general rule of law is just as well settled that they shall be received in evidence as that hearsay shall not. All a man's own declarations and acts, and also the declarations and acts of others to which he is a privy, are evidence so far as they offer any presumption against him, whether

such declarations amount to an admission of any fact, or such acts and declarations of others to which he is privy afford any presumption or inference against him. * * * And this rule, admitting the confessions and declarations of the party, extends not only to the admission of them against himself, but against all who claim or derive their title from him; in other words, between whom and himself there is a privity. * * * Privities in estate, such as vendor and vendee, assignor and assignee, stand upon the same footing in this respect to each other that privities in blood do. I know of no distinction." *Cowan & Hill*, in *Notes to Phillips on Evidence*, No. 481, p. 644, state the rule as follows: "The owner's estate or interest in the same property afterward coming to another by descent, devise or right of representation, sale, or assignment, in a word, by any kind of transfer, whether it be by act of the law or an act of the parties, whether the subject of the transfer be real or personal estate, corporeal or incorporeal, choses in possession, or choses in action, the successor is considered a claimant under the former owner; but whatever he may have said affecting his own rights, before parting with his interest, is evidence equally admissible against his successor, claiming from him, either immediate or remotely. And in this instance it makes no difference whether the declarant be alive or dead; for though he be a competent witness, and present in court, his admissions are receivable. This doctrine proceeds upon the idea that the present claimant stands in the place of the person from whom his title is derived and has taken it cum onere; and as the predecessor may have taken a qualified right, or sold, charged, restricted, or modified an absolute right, and as he might furnish all the necessary evidence to show its state in his own hands, the law will not allow third persons to be deprived of that evidence by any act of transferring the right to another."

This, then, was the state of the evidence: There was nothing outside the requests for instructions and assignments of error in the case of *Benedict v. Milliken* which in the remotest way tended to identify the land in dispute with the land that was carried on the assessment list of 1838 as seated. We have not overlooked the charge of the court in that case, or what was offered as the judge's notes of the evidence. The former was not admissible to prove what had been testified to on the trial; and the latter were not proven. The objection to each should have been sustained. The plaintiff's case in rebuttal rested wholly upon the alleged admissions in the requests for instructions and the assignments of error. Whatever these admissions were, however definite and unqualified they may seem, they were open to explanation or correction; in other words, they were controvertible. It was not a question of construc-

tion of the legal effect of the writings, but a question of probative effect of the alleged admissions contained in them. Did these admissions identify the land then in dispute with the land on the seated list in 1838? This was a question which the jury alone could determine; and it was equally for the jury to say what weight the admissions were entitled to in this action. "Where a writing is not a dispositive instrument, but is put in evidence merely to show an extrinsic fact, it will be for the jury to say what inference is to be drawn therefrom. When documents are offered in evidence as the foundation of an inference of fact, whether such inference can be drawn from them is a question for the jury." 11 Ency. of Plead. and Prac. p. 80.

In giving binding instructions in favor of the plaintiff, the learned trial judge used this language to indicate the ground upon which he based his conclusions: "The record of the case of *A. W. Benedict v. David and Samuel Milliken*, brought to No. 38, January term, 1845, for the George Hill tract, showing that in that case David and Samuel Milliken, the then owners of the alleged tax title, proved that the taxes for 1838 on the George Hill tract, assessed to Henry Steely on the seated land of Barree township for that year, were paid before the sale to David Milliken in 1840. David Milliken and Samuel Milliken and their successors in title are therefore estopped from alleging the contrary. This we say to you is the law and controls this case, and it was thoroughly established by the testimony that has been adduced." As we have already said, the record in the case referred to shows nothing as proved. The verdict having fallen with the reversal of the case, it was inconclusive with respect to everything on which it rested. If in the course of the trial the Millikens asserted, either in requests for instructions or in their assignments of error, that the land was seated in 1838, or any fact which would warrant such inference, it was entirely competent to prove the fact as an admission binding on the present defendant. If they introduced the evidence of witnesses to the same end, it was entirely competent to show this fact also, for like reason. But whether they did one or the other, or both, were questions of fact for the jury in the present case to pass upon. The court could assume nothing with respect to them. And even though the admissions were established, still their effect would be for the jury. There being here no estoppel by record, to say that the alleged admissions might have such effect would be to misapprehend entirely the nature and purpose of estoppel. Admissions work estoppel when they have been made to influence the action of others and have been acted upon. But how does it appear that Benedict, in purchasing the tax

title to the land in 1842, was influenced in any way by admissions made by the Millikens? Even if such fact were shown, there is no privity between the present plaintiffs and Benedict that would enable them to have any advantage from what Benedict himself might assert in this regard.

Any fuller discussion of the several assignments of error is unnecessary. In what we have said, we have indicated certain specific errors to which the assignments have directed our attention; and these assignments are sustained. With the evidence confined within proper limits, the case was for the jury.

The judgment is reversed, and venire facias de novo awarded.

(223 Pa. 217)

MOHN v. PENNSYLVANIA STEEL CO.

(Supreme Court of Pennsylvania. June 23, 1908.)

MASTER AND SERVANT (§ 281*)—INJURIES TO SERVANT.

In an action for the death of an employé of a steel company, where the evidence showed that deceased worked at a gas-making plant which produced two kinds of gas, and that, when one kind was to be produced, one of the valves attached to the machine was to be opened and the other closed, and that deceased opened both simultaneously, and was fatally burned, a verdict for defendant was properly directed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 987-996; Dec. Dig. § 281.*]

Appeal from Court of Common Pleas, Dauphin County.

Action by Margie Mohn against the Pennsylvania Steel Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Wm. M. Hargest and Swartz Bros., for appellant. W. F. Darby, John R. Geyer, and John E. Fox, for appellee.

POTTER, J. This was an action brought by the widow of John Mohn to recover damages for the death of her husband, caused, as was alleged, by the negligence of the defendant company. The negligence charged was failure to keep in good order a valve connected with its gas-generating plant. It appears from the evidence that John Mohn, who was an experienced workman, was employed as a fireman at the gas-making plant of the defendant company, and was fatally burned on May 16, 1904, dying the following day. The gas made at the plant was of two kinds—"producer gas," an inferior quality, and "water gas," which was of a higher grade. Distinct pipes and receptacles were provided for the carriage and reception of the gas in the process of making. The machinery included the use of two four-way hydraulic

cocks, two to each generator, which operated valves known, respectively, as the "producer gas valve" and the "water gas valve." The hydraulic cocks were operated by means of hand levers. When either gas was being produced, the appropriate valve was to be opened and the other one was to be closed. In changing from one kind of gas to the other, it appeared that the safe and proper practice was to throw the lever controlling the valve which had been closed, and as soon as, and not until, it was opened, to throw the other lever; thus closing the second valve. In other words, the valves should not have been operated simultaneously. At the time of the accident Mohn attempted to change from "water gas" to "producer gas"; but instead of first throwing the lever connected with the producer valve, thus opening it, and then pulling the one connected with the water gas valve, thus closing that one, he threw both of them simultaneously. The result was the closing of the water gas valve, and as the producer valve, which had been closed, stuck and refused to open, there was no outlet for the gas in the proper channel. Seeing this, and doubtless fearing an explosion, Mohn endeavored to open the top of the generator, and while so engaged the gas rushed out and fatally burned him.

Complaint is made that the four-way cock would not work, and as a result the accident followed; but, if we have correctly understood the testimony, no harm would have resulted from the sticking of this valve, had the operator followed the safe method of moving one valve at a time. There was evidence that Mohn had been warned against throwing both levers at the same time, and it would also seem that his knowledge and experience as a gas maker would have suggested the danger of that method of operation. However, the testimony does not sustain the contention of plaintiff's counsel, under any aspect of the case; for the sticking of the valve of which complaint is made seems to have occurred some 10 days prior to the accident, and whether anything was then done to make the valve work smoothly does not appear. But, at any rate, it did continue to work, and was moved approximately every three minutes after that, night and day, until the accident occurred. No break was shown in the valve, and no cause for its sticking, or working hard, was shown. Whether it was for lack of oil or from heating and expanding, or from some other temporary cause, did not appear. For all that was shown by the testimony, the sticking was apparently of the most temporary character, when it gave some trouble 10 days before, with no reason for further complaint during the intervening time. We see nothing in the evidence to sustain the charge that the valve was defective. On the

contrary, it appeared that the valve when examined was found to be in good condition, in no need of repair, and that it continued in constant use in precisely the same way for years after the accident. It is plain, as the trial judge says, that the accident occurred because of the manner in which the apparatus was operated by the deceased, rather than from any defect in the device itself.

We think the court below very properly directed the verdict to be rendered in favor of the defendant, and the judgment is affirmed.

(223 Pa. 297)

COMMONWEALTH v. CARAFFA.

(Supreme Court of Pennsylvania. Oct. 12, 1908.)

CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Failure of the judge in his charge to refer to evidence of good character is no ground for reversing a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.*]

Appeal from Court of Oyer and Terminer, Cambria County.

John Caraffa was convicted of murder in the first degree, and appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

S. L. Reed and H. H. Myers, for appellant. J. W. Leech and D. P. Weimer, for the Commonwealth.

PER CURIAM. The fact of the killing of the deceased by the prisoner was not denied, and the only assignment of error is to the omission of the judge, in his charge to the jury, to refer to the evidence of good character. He was not bound to do so. How detailed a judge's reference to the evidence shall be is largely in his discretion, even in criminal cases. Though he may not omit all mention of the crucial or controlling facts, yet he is under no obligation to discuss every item of the evidence even upon such facts. To do so would many times tend to confuse rather than to assist the jury. While it was said, in a concurring opinion in *Meyers v. Commonwealth*, 83 Pa. 131 (though it was not the basis of the decision), that it is the duty of a judge trying a man for his life to charge fully upon the law as applicable to the facts, and this without regard to the points presented by counsel, yet this, it must be observed, was said of the charge upon the law, not upon the greater or less detailed reference to the facts. And even in regard to the charge upon the law, it must be read in connection with the general rule, as shown in the later case of *McMeen v. Com.*, 114 Pa. 300, 9 Atl. 878, that the omission to charge upon a point to which the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

attention of the court is not called and request made is not error. "The law of Pennsylvania as to the weight of good character is more favorable to the accused than the common law, or the law of most other states, but it has not gone so far as to give it any special prominence or superiority to the other facts in evidence in the case." *Commonwealth v. Beingo*, 217 Pa. 60, 66 Atl. 153. In the present case the good character of the prisoner was a very subordinate fact, and the learned judge below in refusing a new trial was justified in saying, "The evidence was so meager that the mention of it would have but emphasized its meagerness."

Judgment affirmed, and record remitted for purpose of execution.

(222 Pa. 302)

COMMONWEALTH v. LEWIS.

(Supreme Court of Pennsylvania. Oct. 12, 1908.)

1. CRIMINAL LAW (§ 773*)—INSANITY AS A DEFENSE—INSTRUCTIONS.

An instruction, in a trial for murder, that if the prisoner, though he labored under partial insanity or delusion, understood the nature of his act, and knew it was wrong, and had mental power sufficient to apply that knowledge to his own case, and knew that if he did the act, he would do wrong and receive punishment, and that, if the act was contrary to the dictates of justice and right and injurious to others, he would be responsible, and that the law is that, whether insanity be general or partial, the degree must be so great as to have taken from accused the freedom of moral action, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1825; Dec. Dig. § 773.*]

2. CRIMINAL LAW (§ 834*)—INSTRUCTIONS.

A judge is not bound to adopt the language of points, but may choose his own form of expression, and if it expresses the law fully and accurately, nothing further is necessary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2014; Dec. Dig. § 834.*]

Appeal from Court of Oyer and Terminer, Chester County.

Irwin A. Lewis was convicted of murder in the first degree, and appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Wm. S. Windle and Thomas W. Pierce, for appellant. Robert S. Gawthrop, for the Commonwealth.

PER CURIAM. The defense being insanity, the learned judge below charged the jury that: "If the prisoner, although he labors under partial insanity, hallucination, or delusion, did understand the nature and character of his act, had a knowledge that it was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and he knew if he did the act he would do wrong and would receive punishment, and if, further, he had sufficient power of memory to recall the relation in which

he stood to others, and others stood to him, and that the act in question was contrary to the plain dictates of justice and right, injurious to others, and in violation of the dictates of duty, he would be responsible; or, putting it in briefer shape, the law is that whether the insanity be general or partial the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action. These are the guides as to the insanity that will excuse the commission of the crime, if you find that such a crime has been committed." This is the language of Ludlow, P. J., in *Sayres v. Commonwealth*, affirmed in 88 Pa. 291, 299, and repeatedly cited by this court as a correct and adequate definition of the law of insanity in trials for murder. *Com. v. Wireback*, 190 Pa. 138, 42 Atl. 542, 70 Am. St. Rep. 625; *Com. v. Barner*, 199 Pa. 335, 49 Atl. 60. Counsel for the prisoner presented five points for charge on the subject of insanity, dealing with more detailed reference to the prisoner's actions and the rule of responsibility in regard to them. All of them were declined by the judge, on the ground that they were sufficiently covered by the general charge above quoted. Notwithstanding the earnest argument of counsel, and our careful examination of these points, we have not found, in any or all of them, any substantial element or principle of law not exactly covered and answered in the passage quoted. They are only variations and expansions of phraseology.

It has been repeatedly held that the judge is not bound to adopt the language of points, but may choose his own form of expression; and, if it expresses the law fully, and with substantial accuracy, nothing further is necessary.

The judge's charge is not made to a technical and critical audience, scanning closely every phrase capable of a construction which would be error, but is addressed to a jury of plain men of various ages, education, intelligence, and experience, and is intended to inform them as to the law, and to guide them in its application to the facts as they may find them from the evidence. Having given them one plain, full, and adequate statement of the law, it need not do more.

Judgment affirmed, and record remitted for purpose of execution.

(222 Pa. 307)

In re HENDERSON.

(Supreme Court of Pennsylvania. Oct. 12, 1908.)

ELECTIONS (§ 126*)—PRIMARIES—BALLOT-NOMINATIONS.

Under Primary Election Law, Feb. 17, 1906 (P. L. 37, § 4), prescribing the form of a ballot and providing for the making of a cross in the square to the right of each candidate for whom the voter wishes to vote, where no name of a candidate of one party is printed on the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

primary ballot, and a number of electors write in the blank space on the ballot the name of the candidate of the other party, and no other person is voted for, such candidate is entitled to have his name printed on the ballot as the candidate of such party.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 128.*]

Appeal from Court of Common Pleas, Armstrong County.

From an order dismissing objections to nomination of Harry B. Henderson, Harry C. Golden appeals. Affirmed.

The following is the opinion of Patton, P. J., of the court below:

"The act of Assembly, approved February 17, 1906 (P. L. 36), providing a uniform method of electing party officers, made a radical change in the manner of conducting primary elections. Section 4 of said act prescribes the form of said ballot, and directs, *inter alia*, 'make a cross (X) in the square to the right of each candidate for whom you wish to vote. If you desire to vote for a person whose name is not on the ballot, write or paste his name on the blank space provided for that purpose.' At the spring primary held in Armstrong county on April 11, 1908, one person was to be chosen by the electors of said county for the office of register and recorder. If the provisions of this act were carried out (and in the absence of allegations to the contrary we must presume that they were), the chairman of the county committee would give notice to the county commissioners of the names of the party officers to be filled, and the commissioners in turn would advertise this fact in at least two newspapers of general circulation. If any person desired to become a candidate for the nomination for register and recorder in any party, it became his duty, if he desired to have his name printed upon the official ballot, to prepare and circulate a petition for that purpose, have it signed by 50 qualified electors, and file it with the county commissioners at least three weeks prior to the primary. Harry B. Henderson, as the Republican candidate for the office of register and recorder, strictly complied with this act of Assembly, and was duly nominated for said office by that party. No person desired to become a candidate for the office of register and recorder on the Democratic ticket. At least no person expressed any such desire by circulating and filing a petition, as required by the act of Assembly. It then became the duty of the county commissioners to prepare the official ballot for the primary election, and in doing so the law requires that they should provide a blank space, in which any elector, who desires to vote for a person whose name was not on the ballot, might write or paste his name. If the commissioners complied with the law (and we are bound to presume that they did) in preparing the Democratic

ballot, they would leave a blank space as above provided. In this space the law expressly authorized any Democratic elector to vote for any person whose name was not on the ballot. As Harry B. Henderson's name was not on the ballot, 20 electors, being a plurality of the votes cast for the office of register and recorder, following the letter of the law, voted for him. The vote so cast was counted by the election board, returned by them to the county commissioners, and computed by them, and a certificate granted to said Harry B. Henderson that he was the legal nominee for register and recorder on the Democratic ticket. It is apparent that the letter of the law was strictly complied with, and that on the face of the proceedings he is entitled to the certificate given him.

"The petitioner assigns seven reasons why said nomination should be declared illegal and void. The first, second, fifth, and seventh reasons are in effect that it was not intended or allowed by the 'Uniform Primary Act' that the Democratic party should be allowed to place on nomination a recognized Republican as its candidate for the said office. We remark that there is no such provision in the act of Assembly. If the Legislature had intended any such limitations of the right of franchise, it would have been very easy to have written in the act after the word 'person,' the words, 'of the same political affiliation.' In the absence of any such qualification we must presume that the Legislature meant just what it said. It is argued that by so construing the law it will permit one political party to interfere with the nominations of the other. Not so. No Republican interfered in any manner with the Democratic electors. But a plurality of the latter, not having an avowed candidate of their own, thinking that Mr. Henderson was the man best qualified to fill the office, expressed their desire to have him fill it, by the way pointed out by the law, *viz.*, by writing his name in the blank space provided for that purpose. We see nothing in the letter or spirit of the law to prevent them from indicating by their votes whom they desired to have placed on their ballot as their candidate. It is argued that the nomination of Mr. Henderson is against the spirit of the act. But no authority has been cited, nor can any be found, to sustain this contention. On the contrary, in *Magee's Nomination*, 18 Pa. Co. Ct. R. 225, it is said by Judge McPherson: 'At least in the absence of a rule to the contrary, a nominating convention of one party is certainly at liberty to choose a candidate of a different political faith. This power has been exercised repeatedly without challenge, and indeed its existence is not denied.' We all know that it is of frequent occurrence for one party to indorse the candidate of another. In our own county last year Thos. W. Williams, the Republican candidate for county

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

surveyor, was placed upon the Democratic ticket, just in the same manner as Mr. Henderson is now placed, and his name was printed on the official Democratic ticket in the fall without challenge.

"The third reason is that there is no petition filed by at least 50 electors to have Mr. Henderson's name placed upon the ballot, and the sixth reason is that there is no certificate of nomination filed. The respondent does not claim to have his name on the ballot by petition or certificate, but under that provision of the act which allows an elector to write his name in the blank space provided for that purpose. The fourth reason is that the 'Uniform Primary Act' does not authorize the elector to vote for any person whose name is not printed on the ballot. This reason is contradictory of the form of the ballot above quoted, and also the provision in the act that declares, 'The voter may designate his choice, as indicated by the instructions shown on the form of ballot above set forth.' We are also of the opinion that the complainant as an elector has entirely mistaken his remedy in objecting to 'the nomination certificate or paper under Act April 21, 1903 (P. L. 224) § 1.' This act was passed prior to the 'Uniform Primary Act,' and its cumbersome methods are not applicable to the present law. The objections before us are not so much to the nomination papers as to the counting of the votes. Section 11, Act Feb. 17, 1906, provides: 'Any person aggrieved by any decision of the county commissioners relative to the counting of votes, may appeal therefrom to the court of common pleas of the proper county, whose duty it shall be to hear such appeal, and to make such order as right and justice shall require.' Uriah H. Cook is the party aggrieved, and could have taken an appeal as above provided. Or Cook might have proceeded by writ of mandamus against the county commissioners to compel them to have his name printed on the ballot, and thus raised the legal questions involved. However, we place our decision upon the broad ground that, no Democratic elector having sought to have his name placed upon the official ballot as his party's candidate for register and recorder, any member of his party had the right to write the name of any elector, be he Democrat, Prohibitionist, Socialist, or Republican, in the blank space provided for that purpose, and that it was the duty of the election officers to count said votes, and the commissioners to compute and canvass the returns, and that, Harry B. Henderson having received the plurality of votes cast by the Democratic party at the primary election, he is the legal candidate of that party for the office of register and recorder, and it is the duty of the proper officers to print his name on the official ballot as such candidate.

"And now, August 22, 1908, the objections

are dismissed at the cost of the petitioner."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

R. L. Ralston and C. E. Harrington, for appellant. H. N. Snyder, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the court below.

(222 Pa. 304)

COMMONWEALTH v. GARRITO.

(Supreme Court of Pennsylvania. Oct. 12, 1908.)

1. CRIMINAL LAW (§ 1180*)—NEW TRIAL—APPEAL.

The whole subject of new trial, including misconduct of jurors, is within the discretion of the trial court, and its judgment will not be disturbed except for manifest error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1180.*]

2. HOMICIDE (§ 332*)—APPEAL—REVIEW.

The review in the Supreme Court, under Act Feb. 15, 1870 (P. L. 15), providing for the determination of whether the ingredients necessary to constitute murder in the first degree shall have been proved to exist, is limited to the inquiry whether competent evidence had been given which, if believed, will sustain the conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 699, 700; Dec. Dig. § 332.*]

Appeal from Court of Oyer and Terminer, Berks County.

Salvatore Garrito was convicted of murder in the first degree, and appeals. Affirmed.

One of the jurors had, before the case was called for trial, formed and expressed an opinion that the defendant was guilty and should be hung, and stated that he hoped he would get on the jury, and that if he would, he would hang him. This was not known to the prisoners or their counsel until after the verdict was rendered.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

George D. Humbert, for appellant.

PER CURIAM. The first assignment of error is to the overruling of the appellant's reason for new trial that a juror had before the trial expressed the opinion that defendant was guilty and should be hanged. It appears that the juror on his voir dire, when first called, admitted that he had formed an opinion, but testified that he could disregard such opinion and render a verdict on the evidence. This made him a competent juror under all the cases. On the motion for a new trial, however, an affidavit was presented, averring not only the expression by the juror of an opinion of the prisoner's guilt, but an intention to hang him if he could get on the jury. The learned judge investigated this charge, and found it not sustained. It is sufficient to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

say that the whole subject of new trial including alleged misconduct of jurors is largely within the discretion of the trial judge, and his conclusions upon disputed facts will not be disturbed except for serious and manifest error.

The second assignment is that the evidence does not warrant a conviction of murder of the first degree. This assignment seems to be founded on the provision of Act Feb. 15, 1870 (P. L. 15), requiring the Supreme Court to review the law and the evidence, and "to determine whether the ingredients necessary to constitute murder in the first degree shall have been proved to exist." But this review is limited to the inquiry whether competent evidence has been given which, if believed, will sustain the conviction. Whether it shall be believed or not is exclusively for the jury. *Com. v. Morrison*, 193 Pa. 613, 44 Atl. 913. The objection on which the assignment is based in the present case is that the witness furnishing the testimony which established the degree of the crime was not worthy of belief. But the credibility was for the jury, and is not within our province.

Judgment affirmed, and record remitted for purpose of execution.

(75 N. H. 40)

STEARNS v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Merrimack. Oct. 6, 1908.)

1. NEGLIGENCE (§ 68*)—CONTRIBUTORY NEGLIGENCE.

The conduct of the parties resulting in injury to one of them is to be judged, not by the fact that injury has resulted from the course pursued, but in the light of the circumstances known or discoverable by ordinary care when the course followed was decided upon.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 92; Dec. Dig. § 68.*]

2. RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

That a person killed in a railroad crossing collision drove upon the track knowing the train was approaching does not conclusively establish his negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1171; Dec. Dig. § 350.*]

3. RAILROADS (§ 348*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Though, in an action for the death of a person at a railroad crossing, there was no direct evidence that decedent was acquainted with the rule of the railroad company prohibiting the running of freight trains over 25 miles an hour, or that he had seen the particular freight train pass at about that hour, yet it did appear that he had been driving to the depot with milk for four years, and that occasionally a freight train would pass ahead of the milk train, it might reasonably be found, in the absence of evidence that the railroad company's employes were accustomed to run freight trains, or the particular train, at that place in violation of its rules, that decedent knew the time it took the train, as it should be and was customarily run, to reach the crossing, even if he was not led to believe by the absence of the station whistle that it would

slow down for a stop, and, being aware of the speed of his team, judged that there was time to cross.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 348.*]

4. RAILROADS (§ 333*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

That one of the horses of a person killed at a railroad crossing was somewhat afraid of the cars is to be considered with the other facts upon the question whether a man of ordinary prudence would have done as decedent did.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 333.*]

5. RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a person of ordinary prudence, having reached the conclusion that his prudent course was to drive over the track ahead of a train, would then have given his whole attention to carrying out the course he had decided upon and not have again looked toward the train, or would have diverted his attention from his team and again looked, is a question of fact.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1169-1176; Dec. Dig. § 350.*]

6. RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

An assumption by a traveler on the highway that railroad employes are not approaching the crossing with a reckless disregard of its dangers is not conclusive evidence of negligence in the traveler.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1187; Dec. Dig. § 350.*]

7. RAILROADS (§ 338*)—ACCIDENTS AT CROSSING—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Where trainmen after they discover, or ought to discover, the danger of a traveler at a crossing, can, with the facilities at their command, prevent injury by due care and fail to do so, the railroad company is liable.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1096, 1097; Dec. Dig. § 338.*]

8. RAILROADS (§ 337*)—ACCIDENTS AT CROSSINGS—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

A failure to stop a train after the danger of a traveler on the highway became apparent cannot be held to be the cause of a collision with him where the only situation in which the train could have been stopped must have been one from which no injury would have resulted.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 337.*]

9. RAILROADS (§ 337*)—ACCIDENTS AT CROSSINGS—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Where, if trainmen ought to have recognized the danger of a traveler on the highway when they were at a certain point, they could not have stopped the train by applying the brakes, it is immaterial that they did not do so until the train was nearer the crossing.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 337.*]

10. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE.

The action of a train under application of brakes is not a matter of common knowledge, and, there being no evidence tending to show that the trainmen could have checked the speed of the train sufficiently to have permitted a person killed at a crossing to cross, that question was improperly submitted to the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

11. RAILROADS (§ 338*)—ACCIDENTS AT CROSSINGS—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Where, if an engineer was negligent, it was before a traveler imprudently attempted to cross, and at a time when, if he had seen the traveler, he might have properly assumed that he would stop and permit the train to go by, the railroad company cannot be held liable on the ground that, after discovery of the traveler's danger, the engineer might by the exercise of due care have avoided the collision with him.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1096, 1097; Dec. Dig. § 338.*]

12. RAILROADS (§ 337*)—ACCIDENTS AT CROSSINGS—FAILURE TO WHISTLE.

Where a traveler was aware of the approach of a train in time to protect himself notwithstanding it did not whistle, and it does not appear that whistling, after he attempted to cross, would have prevented the collision, the railroad company cannot be held liable for failure to whistle.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1094; Dec. Dig. § 337.*]

Transferred from Superior Court, Merri-mack County.

Case for negligent death by Wyman D. Stearns, administrator of the estate of Charles C. Stearns, deceased, against the Boston & Maine Railroad. Verdict for plaintiff, and case transferred from the trial term. Verdict set aside, and new trial granted.

The plaintiff's evidence tended to prove the following facts: The defendants' tracks at South Danbury run nearly north and south. A station and milk platform, situated on the west side of the tracks, are reached by a private way which the railroad has provided over its land for the use of patrons, and which furnishes a means of access to the station from the main street of the village, which is located about 10 rods east of the railroad. The milk train, so called, is due at the station from the north at 8:31 a. m. About 20 minutes past 8 on the morning of November 1, 1906, Charles C. Stearns, the plaintiff's intestate, who had delivered milk at the station for four years, drove a pair of horses attached to a wagon loaded with milk into the private way leading to the station, with the intention of taking his load to the milk train. When he reached a point 57 feet east of the westerly track, he could see in a northerly direction up the tracks. A heavily loaded freight train, about two hours late and not scheduled to stop at South Danbury, was approaching from the north. The plaintiff continued on his way, attempted to pass over the tracks before the approaching train, and was killed by the collision which resulted. The place of collision was not a highway crossing, and was not provided with bars, gates, or flagmen. As Stearns drove toward the tracks and the train approached the station, a man who stood upon the platform waved his hand up and down over the

track occupied by the train for the purpose of preventing Stearns from crossing, and also shouted to him with a like motive. Other facts are stated in the opinion. The defendants excepted to the denial of their motions for a nonsuit and the direction of a verdict in their favor and also to the submission to the jury of the question whether the defendants could have prevented the collision by ordinary care after they knew or ought to have known of the danger.

Martin & Howe, for plaintiff. Mitchell, Foster & Lake (Fred C. Demond, on the brief), for defendant.

PARSONS, C. J. Stearns, the plaintiff's intestate, was killed by a collision between the team which he was driving and the defendants' train upon a crossing provided by them for his use. He drove upon the crossing, knowing that a train was approaching. Does this fact, with the subsequent collision, conclusively establish that his attempt to cross was negligent? The contrary was held in *Davis v. Railroad*, 68 N. H. 247, 44 Atl. 388, and *Folsom v. Railroad*, 68 N. H. 454, 38 Atl. 209. The conduct of the parties resulting in injury to one of them is to be judged, not by the fact that injury has resulted from the course pursued, but in the light of the circumstances known or discoverable by ordinary care when the course followed was decided upon. In the former of the cases cited the colliding train was running "at a rate of speed three times as great as that allowed by the defendants' rules." It was said: "It must be presumed that the rules were made to be enforced, and that they were generally obeyed. Although the deceased may not have known of the existence of the rule, yet he was familiar with the crossing, frequently traveled over it, and might reasonably act on the belief that the train would be run at the usual speed in passing the station. There was at least fair room for argument that, if the rule had been obeyed, he would have had sufficient time for crossing without injury or unreasonable risk, and that it would not have been an imprudent act." *Davis v. Railroad*, 68 N. H. 247, 251, 44 Atl. 388; *Nutter v. Railroad*, 60 N. H. 483, 485. In *Folsom v. Railroad*, 68 N. H. 454, 38 Atl. 209, the person injured having been placed in a position of danger without fault on his part, his error of judgment in attempting to escape by crossing the track in advance of the train was held not necessarily negligence. These positions have not been overruled in the later cases upon which the defendants rely. *Gahagan v. Railroad*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; *Waldron v. Railroad*, 71 N. H. 362, 52 Atl. 443; *Wright v. Railroad*, 74 N. H. 128, 65 Atl. 687, 8 L. R. A. (N. S.) 832. The first two cases hold that one approaching a railroad

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

crossing is bound to exercise care commensurate with the danger of the situation, and that, where the evidence discloses without question or conflict that no care whatever was exercised, there is no question for submission to the jury, while the latter, overruling *Huntress v. Railroad*, 68 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600, holds that, in the absence of all evidence, the burden of proof resting upon the plaintiff to show care cannot be supplied by any presumption resting upon the general desire of life or fear of injury.

That certain acts, such as the failure to look or listen upon approaching a railroad crossing, conclusively establish negligence as a part of the cause of an injury, has been repeatedly argued without success in negligence cases. In *Gahagan v. Railroad* it was said: "An exact definition of care and negligence establishing what acts are careful and what acts or omissions are careless at all times, in all places, and under all circumstances, would be a great convenience in judicial administration; but, unless the rule that due care is the care of the ordinarily prudent person under all the circumstances is abrogated, it can never be said logically that the mere presence or absence of certain evidentiary facts will always determine the question without reference to other facts appearing in particular cases." *Gahagan v. Railroad*, 70 N. H. 441, 445, 50 Atl. 146, 55 L. R. A. 426; *Smith v. Railroad*, 70 N. H. 53, 88, 47 Atl. 290, 85 Am. St. Rep. 596; *Roberts v. Railroad*, 69 N. H. 354, 45 Atl. 94; *Davis v. Railroad*, 68 N. H. 247, 249, 250, 44 Atl. 388. Without a departure from the fundamental principles of the law of negligence as understood in this jurisdiction, it cannot be held that the fact that the party injured in a railroad crossing collision went upon the track knowing a train was approaching conclusively establishes his negligence, regardless of all other evidence in the case. "Decisions are to be found wherein such a doctrine has been upheld in other jurisdictions, but they proceed upon a theory so at variance with the law of negligence in this jurisdiction as to be of little value here. The rule in this state is that each case is to be determined in the light of its own circumstances." *Bass v. Railway*, 70 N. H. 170, 172, 46 Atl. 1056.

The apparent conflict of the cases cited by the defendants results mainly from the method of statement. In *State v. Railroad*, 76 Me. 357, 49 Am. Rep. 622, a case particularly relied upon, it is said: "One in full possession of his faculties who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be but is in fact struck by it, is *prima facie* guilty of negligence; and, in the absence of a satisfactory excuse, his negligence must be regarded as established." This appears to be merely another way of stating the rule

in this state: That the plaintiff cannot recover without offering evidence from which his conduct, whatever it was, can reasonably be found to have been prudent. The real ground of the decisions in other jurisdictions, which have been cited, appears to have been that there was nothing in the evidence in the particular cases justifying the conduct of the party injured. If this be the true meaning of the cases, they are not in conflict in principle with the law of this jurisdiction. If it is not, they cannot be followed here. Perhaps it cannot be fairly said that the defendants' position is as broad as above stated, or as might be inferred from the selections from various authorities quoted in brief and argument. The position stated in the brief is that "It could not reasonably be found from the evidence that the deceased exercised due care for his own safety." This requires a consideration of the evidence.

It is conceded, as already stated, that Stearns attempted to cross the track knowing that a train was approaching. There was evidence that at his rate of travel after discovering the train he would have crossed in safety in advance of the train if its speed had not exceeded 25 miles per hour, but he was struck by the train because its speed exceeded 50 miles an hour. The causes of the injury were, therefore, in this view of the evidence, the speed of the train, conceded under the circumstances of the case to warrant the conclusion the defendants were negligent, and Stearns' decision to cross, made upon seeing the train. As there was no evidence Stearns intended to commit suicide, it could be found he made the attempt because of a mistake as to the speed of the train. There was evidence from which it is claimed that Stearns may have reasonably understood that the approaching train was the milk train, which stopped at the South Danbury station, and the speed of which while slowing down for the stop would be much less than 25 miles per hour. The train was, however, a freight, over an hour behind time, running about 10 minutes in advance of the regular time of the milk train. Whether Stearns understood the train to be the milk train or recognized it as a freight it is claimed is mere speculation; but assuming he knew, or must be held to have known, the train was a freight, it does not follow he must be charged with knowledge of its excessive speed. The regular speed of this freight at this point, according to the time-card, was a fraction over 22 miles an hour, and the rules of the road prohibited the running of freight trains over 25 miles an hour. Another rule required a long blast of the whistle upon approaching stations at which no stop was to be made. There was evidence that this whistle was omitted, or not properly given. There was no direct evidence that Stearns was acquainted with the rules of the road, or had seen

this particular freight pass at about this hour; but it appeared that he had been driving to this train with milk for four years, and that occasionally a freight would pass ahead of the milk train. It is to be presumed the defendant's road is operated in accordance with the rules, and it could be inferred that Stearns, by observation during his four years' attendance, had become acquainted with the customary manner of moving trains. In the absence of evidence that the defendants' employes were accustomed to run freight trains, or this train at this place, in violation of the rules of the road, it might reasonably be found that Stearns knew the time it took the train, as it should be and was customarily run, to reach the crossing, even if he was not led to believe by the absence of the station whistle that it would slow down for a stop, and, being aware of the speed of his team, judged there was time for him to cross—a conclusion which would have been correct except for the unusual speed of the train. There was also evidence that one of his horses was somewhat afraid of the cars. This fact, though not controlling, is evidence to be considered with the other facts in the case upon the question whether a man of ordinary prudence, placed in the situation Stearns was, with the knowledge he had or ought to have had, would have done as he did. As there was evidence tending to establish a belief in his mind that the train speed did not exceed 25 miles an hour, that question, if material, could not be taken from the jury. Nor can it be said that there was no evidence tending to show that the ordinary man would not have acted as Stearns did, in the face of the evidence that, upon the facts as it might be found he understood them, the course he pursued was safe. It is not the fact that prudent persons do not cross a railroad track when they know a train is approaching. To do so may be safe or dangerous. "No inflexible rule can be laid down as to the distance before a moving train within which it is safe to attempt a crossing. It will depend upon the rate of speed at which the train is moving and the condition of the person. Each case, therefore must measurably depend upon its own facts." *State v. Railroad*, 69 Md. 339, 14 Atl. 685, 688. It is urged that, although Stearns looked at and saw the train when he was 57 feet from the crossing, he did not again look toward the train until just as the engine was upon him. Whether a person of ordinary prudence, having reached the conclusion that his prudent course was to drive over the track, would then have given his whole attention to carrying out the course he had decided upon, or would have diverted his attention from his team, is a question of fact. "We have to deal with man as we find him. When we get information that fixes upon our minds an impression that a certain state of facts ex-

ists, we act upon that impression. We satisfy ourselves that we are right, and then go ahead. At least ordinarily prudent men do this. Dr. Gratiot [the plaintiff] saw an engine half a mile away that he supposed was on a switch, and, of course, not approaching him at all. He accepted this as a fact and acted on it; and there would be no more reason in requiring him to look constantly up the track to learn whether he was mistaken about this supposed fact than to require men in their multitudinous affairs to hesitate at every step and question not only the correctness of their judgment, but even the truth or falsity of what seem to be the facts that surround them. It would be a great boon to humanity if no mistakes could occur; but to require men to hesitate to act upon what seems manifest to their eyes and ears, simply because it is possible that they may not have seen and heard the fact as it is, would virtually stop business and commerce." *Gratiot v. Railroad*, 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189; *Bonnell v. Railroad*, 39 N. J. Law, 189.

It has been held in several cases that the reliance of the engineer upon the assumption that a person whom he sees approaching a crossing at a distance will stop and allow the train to go by is not even evidence of negligence; and it can hardly be held that the highway traveler's assumption that the railroad employes are not approaching the crossing with a reckless disregard of its dangers, in the absence of evidence of such fact, is conclusive evidence of negligence in the traveler. There was no error in the denial of the motions for a nonsuit and verdict. But, although reasonable men might on the evidence have found Stearns' conduct careful, they might also have found it careless. The plaintiff claimed that if Stearns was negligent in attempting to cross the track, and thereby got himself into a position of danger from which he could not extricate himself, yet the defendants' servants in charge of the train in the exercise of due care ought to have seen him in season to have slackened the speed of the train and averted the accident. The defendants excepted to the submission to the jury of the question whether the defendants could have prevented the collision after seeing Stearns in a place of danger. The defendants concede as a matter of law that if the trainmen, after they discovered or ought to have discovered the danger, could with the facilities at their command have prevented the injury by due care, the defendants are liable. *Gahagan v. Railroad*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; *Yeaton v. Railroad*, 73 N. H. 285, 61 Atl. 522. The ground of the exception is that no evidence was produced before the jury upon which it could be found that the speed of the train could have been so slackened as to prevent the injury after the peril became apparent. Stearns saw the train when 57 feet from the crossing, whipped up

his team, and attempted to cross. It was at this point he came in sight of the train, and the trainmen, if observant, could and should have discovered his attempt to cross. At this time the train was about at the underpass; one witness placing the engine just north of it, so that the greatest distance of the train from the crossing upon any evidence in the case was 435 feet. The witness Chase testified that with the brakes in working order the train could have been stopped in 300 to 350 feet, if the speed did not exceed 25 miles an hour. If the jury believed the testimony of the trainmen that the speed did not exceed 25 miles an hour, and that of the plaintiff's expert Chase, and found that the brakes were in working order, they could have found that after the trainmen knew or ought to have known of Stearns' attempt to cross they could have stopped the train before it reached the crossing. But this would not authorize a verdict for the plaintiff, because both parties concede, and the fact is amply apparent, that in such case no injury could have resulted from a failure to apply the brakes, because Stearns, if the train was at or above the underpass when he started up his team, must have passed the crossing and reached a place of safety before the train reached the crossing, if its speed did not exceed 25 miles an hour. Stearns was driving at a slow speed, estimated at 4 miles an hour, until he observed the train, when he started up his horses into a 10-mile gait. If his speed after he attempted to cross averaged only 7 miles an hour, or 10 feet per second, in 8 seconds he would have traveled 80 feet, passed over the crossing, and reached a place of safety. During the same length of time the train at 25 miles per hour, or 36½ feet per second, would have traveled 290 feet, or less than the least distance in which the witness Chase estimates it could have been stopped. But the train and Stearns' team met on the crossing. Therefore either the train was much nearer the crossing or proceeding at much greater speed, or the defendants' experts were right and the plaintiff's wrong as to the distance within which the train could be stopped.

Whatever view of the facts is taken, it cannot reasonably be found that failure to stop the train after Stearns' peril became apparent was the negligent cause for the injury, upon evidence that the only situation in which the train could have been stopped must have been one from which no injury would have resulted. But the evidence of the experts on both sides as to the distance within which the train could be stopped was merely opinion, and was founded upon the proper working of the brakes. The defendants' evidence was that when the fireman, observing that Stearns was attempting to cross, called "Whoa," the engineer pulled the brake into the emergency position and applied the sand, and that that was all that could be done to check the train. There was

no evidence that this was not done, or that anything else could have been done. The only ground for controversy was when it was done; and the only ground for negligence in this respect that this action was not taken as soon as it should have been. Whether the brakes were applied before the station was reached, as the trainmen testified, or at the time of or just after the collision, as evidence offered by the plaintiff had some tendency to establish, it was therefore demonstrated that, with the brakes in the condition in which they were and the speed of the train as it actually was, the length of the train (1,400 feet) was required to bring the train to a stop.

It is suggested that, on the evidence as to the distance within which the train was stopped, the expert evidence, and the failure to show an inspection of the brakes after the accident, it could be found the brakes were not in working order, and that their failure to work was the reason the train did not stop in a less distance. This may be so. But the fact that the brakes were out of order tends to show, not that the train could have been more promptly stopped, but relieves the trainmen from the charge of negligence in not making a stop within less distance. As the trainmen could not have stopped the train by applying the brakes when the train was at the underpass, if they ought to have recognized Stearns' peril at that point, it is immaterial that they did not do so until the train was nearer the crossing. The only answer suggested to this reasoning is that, though the train could not have been stopped before reaching the crossing, its speed could have been slackened and time allowed Stearns to cross. In *Yeaton v. Railroad*, 73 N. H. 285, 61 Atl. 522, and in *Duggan v. Railroad*, 74 N. H. 250, 66 Atl. 829, there was evidence that, if the brakes had been applied, there would have been no accident, even if the train was not stopped. In *Folsom v. Railroad*, 68 N. H. 454, 38 Atl. 209, the evidence was that less than six inches of the back of the deceased's sleigh was within the zone of danger when the train reached it. It was apparent that, if the speed of the train had been a tenth of a second less, there would have been no accident. In this case the engine struck the rear quarters of the horses. To have prevented the accident, the train must have been delayed so that the wagon in which Stearns was riding could have entered upon the track, crossed it, and passed beyond the overhang of the engine before the crossing was reached by it. Although the time necessary for Stearns to have reached a position of safety may be estimated from the evidence, and there was conflicting evidence as to the distance within which the train could be brought to a stop when running at 25 or 50 miles an hour, there was no evidence of the time within which either operation could be performed. Neither was there

any evidence of the action of the brakes in checking the speed of the train.

The plaintiff appears to suggest in argument that the application of the brakes results in a decrease of speed directly proportionate to the distance traversed. The witness Clark testified that a train running 25 miles an hour could be stopped in 300 to 350 feet, if running 40 to 50 miles, in 1,300 to 1,400 feet, from which it can be argued that the rate at which the speed diminished increases with the distance traversed; for it would seem to follow that with the brakes set when the speed was diminished to 25 miles an hour 350 feet more would bring the train to a standstill, and that it would therefore require at least 950 to 1,050 feet to reduce the speed from 50 to 25 miles. This may not be so. The action may be just the other way, more effective at first and having a less retarding effect for some reason or other the longer the distance traveled, or the retarding effect may be exactly proportional to the distance. However this may be, the action of a train under application of the brakes is not a matter of common knowledge. There was no evidence before the jury tending to show that the trainmen could have checked the speed of the train sufficiently to have permitted Stearns to cross in safety. A conclusion that an earlier application of the brakes, at any time after Stearns had created the danger by his negligence, would have prevented the injury, would have been mere conjecture founded on no evidence. The question was improperly submitted to the jury, because there was no evidence upon which it could be determined in the plaintiff's favor.

There was evidence that one Woodward, who saw Stearns when he turned into the passageway, stood on the station platform and waved his arms across the track, motioning to Stearns to stop; and it is claimed that the train was then opposite Langley's house 800 feet away, and that Woodward's motions, though not intended as a signal to the train to stop, should have been seen and so interpreted by the engineer, and that at that distance the train could have been stopped or the speed slackened sufficiently to have prevented the injury. It does not seem reasonable to convict the engineer of negligence because he did not understand a signal for Stearns as one for him. But, however that may be, if the engineer was negligent at this time, it was before Stearns imprudently attempted to cross, and at a time when, if he had seen Stearns, he might have properly assumed Stearns would stop and permit the train to go by. Except for Stearns' starting up his team, the engine would not have collided with the team. The only collision possible would have been between Stearns' horses and the side of the

train. The trainmen's negligence before Stearns had created the danger by his negligence could not be held a failure to save him from the results of his own want of care.

The failure to whistle at this time as a cause of the injury stands on the same ground, with the further objection that the purpose of the whistle is to give notice of the approach of the train, of which it is conceded Stearns was aware in season to protect himself. After he attempted to cross with knowledge of the approaching train, and was engaged in the attempt, there is no evidence further signaling by the whistle, if there was opportunity for it, would have stopped Stearns' team or prevented the injury.

There is no occasion to consider the remaining exceptions. The exceptions to the denial of the motions for a nonsuit and verdict are overruled. The exception to the submission of the second issue to the jury is sustained.

Verdict set aside. New trial granted.

(75 N. H. 52)

THEOBALD v. SHEPARD BROS.

(Supreme Court of New Hampshire. Merrimack. Oct. 6, 1908.)

1. TRIAL (§ 252*)—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

In an action for compensation for moving a building, if there was no evidence tending to show that defendants agreed to assume responsibility for injuries to plaintiff's workmen from his negligence, it was proper to instruct that the evidence would not warrant such a finding.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

2. WORK AND LABOR (§ 28*)—EVIDENCE—SUFFICIENCY.

In quantum meruit for services in moving a building under a special contract, the evidence held insufficient to show an agreement by defendants to assume responsibility for injuries to plaintiff's workmen caused by his negligence.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 28.*]

3. APPEAL AND ERROR (§ 1001*)—REVIEW—QUESTIONS OF FACT—SUFFICIENCY OF EVIDENCE.

A finding as to the meaning and construction of testimony must be based upon a reasonable understanding of it, and a finding will not be permitted which is reached by giving testimony, an arbitrary or unreasonable meaning.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3930; Dec. Dig. § 1001.*]

4. APPEAL AND ERROR (§ 1001*)—REVIEW—QUESTIONS OF FACT—SUFFICIENCY OF EVIDENCE.

A bare scintilla of evidence will not support a finding or verdict, but there must be substantial evidence having a reasonable tendency to establish it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3923-3934; Dec. Dig. § 1001.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. TRIAL (§ 142*)—QUESTION FOR JURY—PRELIMINARY QUESTION FOR COURT.

Whether evidence offered to establish a fact has a logical and reasonable tendency to do so is a preliminary question for the court, and if it can be seen that men, considering the evidence as jurors are bound to do, may find that it proves such fact, the court must then submit the evidence to the jury, but if it appears that they could only reach such a conclusion by conjecture or speculation, the evidence should be excluded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

6. WORK AND LABOR (§ 30*)—INSTRUCTIONS—AMOUNT OF COMPENSATION.

In quantum meruit for services in moving a building under a special contract, if, in the absence of a special agreement, the owner would be liable for damages to the public caused by moving the building along the street, an instruction that if the contractor never understood the owner relieved him from responsibility for injuries to the workmen by his negligence, the responsibility still rested upon the contractor, did not warrant an inference by the jury that the amount of the contractor's compensation would be enhanced thereby.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 30.*]

7. WITNESSES (§ 406*)—CONTRADICTION—COMPETENCY OF CONTRADICTORY EVIDENCE.

In an action for services in moving a building, where plaintiff had testified that another who was employed therefor could not move it, but did not testify why he failed, evidence by defendants that the former contractor did not move the building because he became sick did not contradict plaintiff's evidence, and was inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1277; Dec. Dig. § 406.*]

8. APPEAL AND ERROR (§ 971*)—REVIEW—QUESTIONS OF FACT—PRELIMINARY QUESTIONS.

The qualification of an expert witness to testify is a preliminary fact for the trial court, and its ruling is not subject to exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3852; Dec. Dig. § 971.*]

9. EVIDENCE (§ 213*)—ADMISSIONS—OFFER TO COMPROMISE.

In an action for the value of services performed under a special contract, a letter from plaintiff to defendant, intended as an offer of compromise, was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 745; Dec. Dig. § 213.*]

10. TRIAL (§ 121*)—ARGUMENT OF COUNSEL—COMMENT ON EVIDENCE.

In an action for the value of services in moving a building, testimony by plaintiff, that he knew of no one in the state who did as heavy work of that nature as he did, justified a statement in argument that plaintiff was the only man in the state who could do the work.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 204-206; Dec. Dig. § 121.*]

Transferred from Superior Court, Franklin County.

Action by George L. Theobald against Shepard Bros. Verdict for plaintiff, and case transferred from the superior court on defendants' exceptions. Exceptions overruled.

The work was mainly done under charge of the plaintiff's foreman, and covered a

period of 20 days. The plaintiff's evidence tended to prove that the contract was that he should receive an amount equal to the actual cost of doing the work, and a good profit in addition thereto. The "good profit" was understood to embrace use of tools and personal services, with the responsibilities which attach to such an undertaking. The defendants' evidence tended to prove that the contract was as above stated, with the exception that the defendants were to assume the risks as shown by their testimony. The plaintiff denied that there was any agreement that the defendants were to assume any risks, and claimed that he assumed all risks and responsibilities as an independent contractor.

All the defendants' evidence bearing upon their contention that the contract was that they should assume certain risks was the testimony of the defendants themselves. John S. Shepard, one of the defendants, testified as follows: "In regard to the work, or the liability, we discussed that thoroughly. He said he hired the men; he says he told his men that this was a class of work, this was a work, if they wanted to go to work at that kind of business, if they got their fingers pinched, anything of the kind, it would be on them; it was their work. On the other hand, in all the other risks of the building would be on us; that we should have to take care of it. And I asked him lots of questions in regard to the liability, what might happen, accidents, or what liability, as he had moved buildings and we never had had any experience in that line; and asked him in regard to it how we were to protect the building. He said he thought there would be no trouble, seldom had any trouble; if a horse was frightened, or any damage done, or any one hurt, it would be on us; he was simply doing plain day work. And of course we protected the building, put up lanterns by night, and picked up after the men."

Seth B. Shepard, the other defendant, testified as follows: "Theobald said there was no trouble with moving the building; he would take hold and move it, and he would move it at cost, and should want a good profit, and we should take the risk; and he was to have what material there was, what lumber and ties and things like that that were on the spot." "Q. Who should take the risk? A. Shepard Bros. We were to take all risk. Q. You recollect of anything, any other talk in connection with assumption of risk? A. Well, we asked him what some of the risks were, and he said, of course—and what would be necessary to do—he said, of course, it would be necessary to light up around the building and like that, and that there wasn't very much risk; of course there might possibly be some ac-

cident or something, but they rarely ever had any."

The defendants did what work was necessary to warn the traveling public of the dangers incident to the moving building, to wit, they placed barrels and planks in the highway and hung up lanterns at night. The plaintiff knew they did this, but claimed that he understood they were thereby saving themselves the expense which he would otherwise have charged them for doing this work.

The defendants excepted to a part of the charge to the effect that there was nothing in the case which warranted the jury in finding that the plaintiff was relieved of responsibility (1) to his servants and (2) to Shepard Bros. in the performance of the work. They also excepted to that part of the charge relating to the caring for the traveling public, wherein the court said: "If Theobald never understood that they were relieving him from any responsibility, although the Shepard Bros. may have thought they were—if their minds never met on that proposition—then the responsibility still rested on Theobald."

Martin & Howe, for plaintiff. Leach, Stevens & Couch, for defendants.

WALKER, J. If there was no evidence legally tending to prove that the defendants agreed with the plaintiff, as a part of the contract, that they would be responsible for all injuries the workmen might suffer occasioned by the plaintiff's negligence, the court committed no error in saying to the jury that there was nothing in the case to warrant such a finding. It is elementary that a finding of fact must be predicated upon some evidence. An examination of the testimony bearing on this branch of the case fails to disclose any evidence of such an agreement. John S. Shepard's testimony indicates plainly that he did not intend to include in the risks assumed by the defendants the plaintiff's liability to his men for injuries they might receive while engaged on the work; nor did Seth B. Shepard in his testimony refer to that subject. Both witnesses testified that they talked over the matter of risks they were to be responsible for in detail with the plaintiff, and both say, substantially, the risks referred to such injuries as the public might suffer by reason of the moving of the building along the street or highway. The testimony has no reasonable tendency to prove that the defendants intended to assume any other or greater liability.

When it said the defendants were to assume all the risks incident to the work, a question of the interpretation of language arises; and this is in effect a question of intention. What did the witnesses intend by the language used? This question is not solved by giving an arbitrary or unreason-

able meaning to verbal testimony. In finding what a witness means, it is not permissible to reach a result which reasonable men could not entertain. Upon such a question of fact, the finding or verdict must appear to be based upon some reasonable understanding of the meaning of language as understood and sanctioned by the court. A bare scintilla of evidence is not sufficient to support unreasonable verdicts. However it may have been in ancient times, a mere spark of evidence does not authorize a finding of fact, contrary to what is admittedly reasonable. "Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but decisions have established a more reasonable rule to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." *Paine v. Railway*, 58 N. H. 611, 614. "We do not mean to say that a mere scintilla of evidence would suffice to sustain an award; but in the absence of any evidence of prejudice, partiality, or corruption, or a manifest mistake on the part of the referee, the award must stand if there appears to have been any substantial evidence upon which the referee could properly proceed to find an award in favor of the party producing it, upon whom the burden of proof was imposed." *Free v. Buckingham*, 59 N. H. 219, 224. In the present state of the law upon this subject, extended discussion of the decisions is unnecessary. "In the absence of some evidence as to the fact, a judicial trial does not substitute an unfounded guess or conjecture for the legal proof which the law requires." *Deschenes v. Railroad*, 69 N. H. 285, 291, 46 Atl. 467, 470. And "some evidence" means evidence having a logical and reasonable tendency to prove the fact. Whether it has that tendency is a preliminary question for the court. This is not the same as saying that the court may substitute its judgment for the judgment of the jury upon the weight of the evidence or the inferences to be drawn from it. If the court can see that reasonable men, considering the evidence as jurors are bound to consider it, may find that it proves the existence of a material fact, the court has performed its preliminary duty, and must then submit the evidence to the jury; on the other hand, if it appears that reasonable men upon the evidence could only reach that conclusion by conjecture, chance, or doubtful and unsatisfactory speculation, it is equally the duty of the court to withdraw or exclude the evidence from the consideration of the jury. See *Hovey v. Brown*, 59 N. H. 114; *Hardy v. Railroad*, 68 N. H.

523, 536, 41 Atl. 179; *Horan v. Byrnes*, 70 N. H. 531, 533, 49 Atl. 569; *White v. Dakin*, 70 N. H. 632, 47 Atl. 611; *Dame v. Car Works*, 71 N. H. 407, 52 Atl. 864; *Cohn v. Saidel*, 71 N. H. 558, 568, 53 Atl. 800; *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916; *Reynolds v. Fibre Co.*, 73 N. H. 126, 59 Atl. 615; *Miller v. Railroad*, 73 N. H. 330, 338, 61 Atl. 360; *Wright v. Railroad*, 74 N. H. 128, 65 Atl. 687, 8 L. R. A. (N. S.) 832; 2 *Thomp. Trials*, § 2246 et seq.

The claim that from the defendants' evidence it could be reasonably and properly found that they agreed to assume the risk of the negligence and want of skill of the plaintiff's employes in moving the building—that is, that they would release and waive all claims they might otherwise have against the plaintiff for damage to the building caused by the unskillful and negligent conduct of the men engaged in moving it—cannot be sustained. The language of the witnesses does not require so broad a construction. The assumption of "all risk," when read in connection with the subject under discussion by the parties at the time of the contract, evidently related to the liability to the public for damages occasioned by moving the building. And this construction of the language of the witnesses is strengthened materially by a consideration of the fact that it is extremely unusual, if not quite absurd, for a man, when employing a contractor to do work involving peculiar knowledge and skill, like the moving of large buildings for considerable distances, to agree to be satisfied with a bad result due to the fault of the contractor or his employes. Whether such a contract would be legally binding is a question that need not be considered; the point of our observation is that, if the parties intend to make such a peculiar contract, it would be natural to expect that they would use apt language to convey their meaning, and that, when called upon to testify as to its terms, they would not leave their meaning to be inferred from ambiguous and doubtful phrases. One important part of an agreement by A. to move a building for B. is that A. will do the work in a reasonably careful and prudent manner; B. is entitled to the best result of the undertaking which ordinary care and prudence on the part of A. can accomplish. Presumably, he employs A. in order to have the benefit of his skill; but if he does not—if he waives his ordinary right to the skillful performance of the work—the evidence of such an unusual course of dealing should be something more than ambiguous language from which it is as reasonable to infer the nonexistence of such an understanding as its existence. "It is the very great improbability that the parties intended a result so absurd that leads to the conclusion, in the absence of evidence to the contrary, that they had no such intention." *Kendall v. Green*, 67 N. H. 557, 563, 42 Atl. 178, 181; *Opinion of the Justices*, 72 N. H. 605, 607, 608, 55 Atl. 943;

Rollins Engine Co. v. Forge Co., 73 N. H. 92, 96, 59 Atl. 382, 68 L. R. A. 441.

As applied to this case, the question is, whether it could be reasonably and logically found from the defendants' evidence that it was agreed that in case the building was negligently moved, resulting in material loss to them, they waived their claim against the plaintiff therefor. It is difficult to conceive how reasonable men could reach that conclusion, or how they could say on the evidence that it is more probable than otherwise the parties entered a contract so unusual, if not absurd. It is a mere conjecture or possibility that they had that intention, not a rational or logical probability. "Upon this point reasonable men could not differ, and but one sustainable verdict could be rendered. Hence it was proper for the court to refuse to submit the question to the jury." *Waldron v. Railroad*, 71 N. H. 362, 364, 52 Atl. 443, 445.

The charge of the court with reference to the defendants' assumption of the plaintiff's responsibility to the public was correct. The defendants excepted to a single sentence of the charge on this subject, wherein the court said: "If Theobald never understood that they were relieving him from any responsibility, although the Shepard Bros. may have thought they were—if their minds never met on that proposition—then the responsibility still rested upon Theobald." The responsibility here referred to evidently means such responsibility as would belong to the plaintiff if no special agreement had been made in regard to it. Taking the charge as a whole, the jury could not have understood from it that, if there was no special agreement as to the risks connected with the work, the plaintiff would be entitled to recover compensation for a risk which was legally chargeable to the defendants, or that he could recover on account of risks for which he was not legally chargeable. If in the absence of a special agreement, the defendants would ultimately be liable for damages to the public caused by moving the building along the street, as claimed by them (*Thomas v. Harrington*, 72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742), the instruction excepted to did not warrant an inference by the jury that the plaintiff's damages were enhanced thereby.

The fact that before the defendants employed the plaintiff they had let the job to one Davis, who commenced to do the work but finally gave it up, was introductory to the testimony of the plaintiff that Davis "couldn't move the building." For the purpose of contradicting the plaintiff, the defendants offered to show that the reason Davis gave up the work was because he was sick, and they excepted to the refusal of the court to receive this testimony. Davis' sickness, if it was a fact, may have furnished a reason why he did not or could not carry out his contract; but it did not contradict the plaintiff's evidence that he was unable to

complete the work. As the plaintiff did not testify why Davis failed to do the work, the proffered evidence was properly excluded as immaterial.

The ruling of the court that certain witnesses were not qualified to give an opinion as to the expense of moving buildings presents no error. The qualification of one to testify as an expert is a preliminary fact to be found by the court, and is not subject to exception. *Jones v. Tucker*, 41 N. H. 546. Nor was it error for the court to find that a certain letter written by the plaintiff to the defendants, offering to make a discount, was intended as an offer of compromise under the circumstances, and to exclude it for that reason. *Bartlett v. Hoyt*, 33 N. H. 151, 165; *Field v. Tenney*, 47 N. H. 513, 521; *Colburn v. Groton*, 66 N. H. 151, 158, 28 Atl. 95, 22 L. R. A. 763; *Jenness v. Jones*, 68 N. H. 475, 44 Atl. 607.

The remark of the plaintiff's counsel in argument, that the plaintiff was the only man in the state who could do this work, was justified by the plaintiff's testimony that he knew of no one in the state who did as heavy work as he did.

Exceptions overruled. All concurred.

(75 N. H. 64)

STATE v. BURT.

(Supreme Court of New Hampshire. Grafton. Oct. 6, 1908.)

1. RAPE (§ 18*)—STATUTORY PROVISIONS—"MAN."

Under Pub. St. 1901, c. 278, § 15, providing that, if any man shall unlawfully and carnally know any woman child under the age of 16 years, he shall be imprisoned, etc., the word "man" includes persons of the male sex who are capable of committing rape, and is not limited to adult males.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4315-4316.]

2. RAPE (§ 23*)—INDICTMENT AND INFORMATION—SUFFICIENCY—AGE OF FEMALE.

An indictment for rape under Pub. St. 1901, c. 278, § 15, providing that, if any man shall carnally abuse any woman child under the age of 16 years, he shall be imprisoned, etc., need not charge that the child on whom the offense was committed was under 16 years of age; and an indictment charging abuse of a child under the age of 15 years, to wit, of the age of 11 years, was sufficient.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 27; Dec. Dig. § 23.*]

3. INFANTS (§ 68*)—CRIMES—RIGHTS AS TO PROSECUTIONS.

Since Laws 1907, p. 120, c. 125 (Juvenile Court Act), regulating the treatment and control of delinquent children, by section 18 (page 124) expressly provides that it shall not be construed to repeal any portion of the criminal law of the state, etc., defendant in a trial for rape was not entitled to be tried under the provisions of the act on the ground that he was a minor under 17 years of age; the proceeding being brought under the penal laws.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 68.*]

4. CRIMINAL LAW (§ 730*)—TRIAL—REMARKS OF COUNSEL—ACTION OF COURT.

In a trial for rape, the state's solicitor in his opening and defendant's counsel in his closing argument stated to the jury that conviction might result in a sentence of 30 years' imprisonment. Subject to exception, the state's solicitor said in his closing argument: "I believe if you look at this candidly you can come to but one conclusion, and that is that the boy is guilty of the crime, etc. Do not be frightened that he will get 30 years in prison. It is a mere possibility. It is a probability that, whatever your verdict may be, he will never see the prison wall." Held but an erroneous statement of the law, which, the jury having been instructed to disregard it, did not render the trial unfair.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

Bingham, J., dissenting in part.

Exceptions from Superior Court, Grafton County; Stone, Judge.

Merritt Burt, Jr., was convicted of rape, and brings exceptions. Exceptions overruled.

Marshall D. Obleigh, for the State. Fred B. Lang and George W. Pike, for defendant.

BINGHAM, J. The indictment is sufficient. It charges that the respondent, at Haverhill, in our county of Grafton, on the 3d day of August, 1907, unlawfully and carnally knew and abused C. W., a woman child under the age of 15 years, to wit, of the age of 11 years. Section 15, c. 278, Pub. St. 1901, reads as follows: "If any person shall ravish and carnally know any woman, committing carnal copulation with her by force, against her will, or if any man shall unlawfully and carnally know and abuse any woman child under the age of sixteen years, he shall be imprisoned not exceeding thirty years." The indictment in this proceeding is brought under the latter provision of the statute; and it is argued by counsel for the respondent that the word "man" as there used means a male adult, as distinguished from a boy, and is an essential allegation in an indictment charging the offense. But it seems to us that the sense in which the word is used is to be ascertained by considering the mischief or evil to be remedied in the enactment of the law, namely, the prevention of illicit intercourse between the sexes and the consequent evils. This being the purpose of the law, the word "man" must have been intended to apply to and include persons of the male sex who have arrived at the age of puberty, or are capable of committing rape. "There is quite as good reason for curbing the impetuosity of youth as for laying the ban upon men of maturer years." *State v. Sellar*, 106 Wis. 346, 350, 351, 82 N. W. 167; *Kenyon v. People*, 26 N. Y. 203, 211, 84 Am. Dec. 177. The history of our statute also shows that the words "any person" and "any man" have been used indiscriminately, without distinction of meaning, and not as descriptive of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

offense. Laws (Ed. 1830) p. 137, tit. 27, c. 3, § 6; Rev. St. 1843, c. 214, § 6. It was not necessary that the indictment should charge in the language of the statute that the woman child upon whom the offense was committed was "under sixteen years of age." These words simply fix a period in the age of women below which the crime will be committed upon them, whether accomplished with or without their consent. It was first fixed at 10 years. Laws (Ed. 1830) p. 137, tit. 27, c. 3, § 6. In 1887 it was raised to 13 years (Laws 1887, p. 482, c. 99, § 1), and subsequently to 16 years. Laws 1897, p. 30, c. 35, § 1. The allegation in the indictment as to age is sufficiently definite. It gives positive information as to the child's age, and that she was below the age of consent. *Bonner v. State*, 65 Miss. 293, 3 South. 663; *State v. Erickson*, 45 Wis. 86.

The request of the respondent that he be tried under the provisions of the juvenile court act regulating the treatment and control of dependent and delinquent children (Laws 1907, p. 120, c. 125), upon the ground that he was a minor under seventeen years of age, was also properly denied. Although his conduct may have been such that in a proceeding before a justice or police court under the provisions of chapter 125 he could have been found to be a delinquent child, it is to be noted that this proceeding is not brought before such a court or under the provisions of chapter 125, but in the superior court under the penal laws of the state, charging the respondent with the commission of a crime. Section 18, c. 125, expressly provides that it shall not "be construed to repeal any portion of the criminal law of the state, nor to in any manner abridge the powers of the superior court"; and, as this is a criminal proceeding brought in the superior court, it necessarily follows that the provisions of this chapter are in no way applicable. Moreover, chapter 125 does not contemplate the punishment of children for infractions of the criminal laws. Its purpose is to provide them with an environment such as will save them to the state and society as useful and law-abiding citizens. This is clearly pointed out in section 19, where it directs "that the care, custody, and disposition of a child shall approximate as nearly as may be that which should be given by its parents." The same purpose is manifested in sections 15 and 16, where provision is made for binding over to the superior court for trial any child brought before a justice or police court under section 5, who in its opinion "ought to be subjected to punishment" for "violation of any of the laws of this state." Original jurisdiction is given to justices and police courts by section 2, and it would seem that section 18 preserves the right of appeal to the superior court in such matters.

The solicitor in his opening and counsel for the respondent in his closing argument stated to the jury that conviction might result in a sentence of 30 years' imprisonment. Subject to exception, the solicitor in his closing argument said: "I believe if you look at this candidly, go all over it, that you can come to but one conclusion, and that is that the boy is guilty of the crime of which he stands charged. Do not be frightened that he will get 30 years in prison. It is a mere possibility. It is a probability that, whatever your verdict may be, he will never see the prison wall." My associates are of opinion that this was but an erroneous statement of law which the jury were instructed to disregard, and that it did not render the trial unfair. In this I do not agree. It seems to me that the conduct of the solicitor had a direct tendency to cause the jury to treat the matter of arriving at a verdict lightly, and to prejudice the respondent's cause. They are also of opinion that the exception taken to the remarks of the trial court should not be sustained; that the conduct of the respondent's counsel was captious and merited the rebuke given.

Exceptions overruled. All concurred.

(75 N. H. 69)

PARMALEAU v. INTERNATIONAL PAPER CO.

(Supreme Court of New Hampshire. Coos. Oct. 6, 1908.)

1. MASTER AND SERVANT (§ 278*)—DEFECTIVE APPLIANCES—NEGLIGENCE—EVIDENCE.

Evidence, in a servant's action for personal injuries, that after an accident an examination of a brake on a car showed that the catch on the brake would not work, was not of itself sufficient to show that the master did not furnish a reasonably safe brake.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 141*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—METHODS OF WORK—RULES—DUTY TO PROMULGATE—"REASONABLY SAFE METHOD OF OPERATION."

When the character of the work is not complicated or attended with obvious and inherent dangers, or when the general method of doing it, long established and recognized by the employes, does not appear to be unreasonably or unnecessarily dangerous, the master need not provide rules, or command specifically the observance of a system of work which his employes adopt and observe without special instructions; a reasonably safe method of operation, customarily followed, being in effect equivalent to the establishment of reasonable rules, so far as the master's duty in this respect is concerned.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 283; Dec. Dig. § 141.*]

3. MASTER AND SERVANT (§ 141*)—INJURIES TO SERVANT—RULES AND REGULATIONS—FAILURE TO PRESCRIBE.

Plaintiff was employed in unloading cars switched onto a track running into defendant's mill. When a car was to be moved down the track, it was the custom for one man to go to the brake on top of the car and when ready noti-

fy another employé to knock out a trig placed under the wheels, thereby permitting the car to run down the grade. Plaintiff, who was lower down the track, knew of this custom and that a car was about to be started. The brakeman, before going to his post, shouted to an engine-man, and thereupon the employé on the ground, without ascertaining whether any one was at the brake, knocked out the trig, and the car ran down the track and collided with another car on which plaintiff was working, and injured him. Held, that defendant's failure to require some definite signal when a car was about to be liberated, or to adopt a rule requiring a different signal to attract the attention of the engine-man from that given to kick out the trig, was immaterial and did not show negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 283; Dec. Dig. § 141.*]

Transferred from Superior Court, Coos County.

Action by Frank Parmaleau against the International Paper Company for injuries through negligence. Case transferred from the superior court on plaintiff's exception to an order of nonsuit. Exception overruled, and judgment for defendant.

The plaintiff's evidence tended to support the following facts: The plaintiff was employed by the defendant, and his work required him to unload pulp wood from cars which had been switched onto a track running into one of the mills. He had been employed in this way for about 3 months, the business requiring the unloading of some 15 cars each day. The loaded cars were left on the track some distance above the mill, and it was the business of the workmen to take them down the track to the mill. The track had a grade, and the cars when left by the engine were usually held in position by a trig placed under the wheels and by having the brake set. When a car was to be moved down, one man would go to the brake upon the car, and when he was ready notify a man on the ground to kick out the trig. If the brake was in working order, the brakeman could control the movement of the car and stop it at a place called the "carrier," where it would be partly unloaded, and then taken farther down to a place called the "tank," where the unloading would be completed. There were two gangs, consisting of 3 or 4 men each. One gang took the cars standing on the track down to the carrier and unloaded a part of the wood, and the other gang, when they had unloaded a car at the tank and sent it away, came up the track to the carrier to take the car standing there down to the tank. This was a signal to the carrier men to start up the track to bring down another car. A few times during the plaintiff's employment he had seen cars come down which could not be stopped at the carrier. He also knew that the brakes would not always work satisfactorily, and that, if they did not, a loaded car was liable to run by the carrier and strike the car at the tank with more or less

force. On the morning of the accident the plaintiff was employed at the tank. After the men had unloaded the car, the plaintiff went up to the carrier to take the car standing there down to the tank, and the men at the carrier thereupon went up the track to bring down a fully loaded car. The plaintiff saw them go away and knew what they were going for. He saw two of them sanding the track, and two others, Ellis and Clouthier, going ahead toward the car. In the meantime he got upon the car at the carrier, and by working the brake was taking it down to the tank, when the other car came down with no one in control of it and collided with the car he was upon. The impact threw him off, and he was injured thereby. After the accident an examination showed that the "catch" on the brake would not hold. There was no other evidence of its condition before the accident. When Ellis and Clouthier reached the fully loaded car, an engine, which was sometimes used in taking cars down, was standing on another track. Ellis, who was not within sight of Clouthier, motioned and shouted to the switchman on the engine to attract his attention, and thereupon Clouthier kicked out the trig and the car started, with no one at the brake. Clouthier did not testify. The defendant had established no special rules for doing this work.

Sullivan & Daley and Herbert I. Goss, for plaintiff. Rich & Marble and Drew, Jordan, Shurtleff & Morris, for defendant.

WALKER, J. There is nothing in the evidence warranting the inference that the brake was improperly constructed, or that its defective condition had existed for such a length of time that the defendant is chargeable with knowledge that it was out of repair and would not work. If it was the defendant's duty to furnish reasonably safe appliances for controlling the movement of the cars, and to repair defects in the brakes discoverable upon reasonable inspection, the evidence is not sufficient to authorize a finding that it did not perform its duty in these respects. *St. Pierre v. Foster*, 74 N. H. 4, 64 Atl. 723; *Klinefelter v. Company*, 74 N. H. 276, 67 Atl. 573; *Smith v. Railroad*, 73 N. H. 325, 61 Atl. 359. In fact, it appears that the defendant's system of dealing with loaded cars received from the railroad company was such that this defect would have been discovered and the danger averted, but for the intervening negligence of the fellow servant, who removed the trig before the brakeman could mount the car and attempt to control its movement by operating the brake. The case is not one of the concurring negligence of the master and a fellow servant, but one where the usual course of the master's business was interrupted by the carelessness of the fellow servant.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

But the plaintiff takes the position that, if the defendant was not negligent in a legal sense in providing a defective brake, it was negligent in not prescribing definite rules for the conduct of its business, and that its omission in this respect was the proximate cause of the accident. An employer's duty to promulgate rules for the guidance and protection of his servants in respect to the details of the work in hand does not arise in all cases, and it is unnecessary in this case to enter upon a discussion of the question when they are and when they are not required. It is sufficient to hold that when the character of the work is not complicated and intricate and attended with obvious and inherent dangers, or when the general method of doing it, long established and recognized by the employes, does not appear to be unreasonable or unnecessarily dangerous, the employer is under no obligation to provide rules, or to command specifically the observance of a system of work which his men adopt and observe without special instructions. A reasonably safe method of operation, customarily followed, is in effect equivalent to the establishment of reasonable rules, so far as the employer's duty in this respect is concerned.

In this case, the method of operation, which it is conceded was ordinarily adopted, does not appear to be unreasonable. Nor would the evidence authorize a finding that it was unreasonable, considering the work to be accomplished. The custom was, when a car was to be moved down the track, for one man to go to the brake on the top of the car, and, when he was ready, to notify the man on the ground to knock out the trig. The man at the brake would thus be in control of the car in its course down the track. It was not their custom or the rule adopted by them to start a car in the absence of a brakeman. If it had been, the system would doubtless be deemed defective and dangerous. There was therefore no necessity for a formal rule that a car should not be started until the man at the brake signified that he was in position to control the car. The fact that no such man was at the brake on the car in question was not due to the want of a reasonable rule or system, but to the omission of Clouthier, who removed the trig without knowing whether the brakeman was at his post and without receiving a signal from him that he was ready. A formal rule or regulation issued by the defendant would not have prevented this oversight on the part of Clouthier, any more than the actual system of operation with which he was fully acquainted.

It is said that the defendant should have provided for the giving of some definite signal when a car was about to be liberated. The object of a signal would be, of course, to convey information to the men so that

they could protect themselves from being injured by the moving car. But it appears that all the men, including the plaintiff, knew when a car near the switch would start. When the plaintiff, on the morning of the accident, went up to the carrier, he saw the carrier crew start toward the car above and knew that as soon as they got there they would proceed to put that car in motion down the track directly behind the car he was upon. He would have had no more information if they had actually told him that they were going to start the car. And he also knew that a loaded car, not under proper control of the man at the brake, would come down the track of its own momentum and attain considerable force when it reached a point in the vicinity of the tank. It does not appear how special instructions or rules would have aided him in protecting himself from the known and obvious dangers of his employment. *Collins v. Car Co.*, 68 N. H. 196, 38 Atl. 1047.

Finally, it is urged that there should have been a rule requiring the giving of a different signal to attract the attention of the engineman from that given to kick out the trig, because it may be that Clouthier, who did not testify, may have mistaken Ellis' signal to the fireman as the brakeman's signal to him to start the car. But the manner of doing this work required Clouthier to take his signal from the man on the top of the car. He knew, or might easily have learned, that no one was in that position, and consequently that no signal to him would be given. It was plainly his duty, before obeying a signal, to ascertain whether it proceeded from one in a position to give it. He knew that a signal when no one was on top of the car was not intended as an order to him to kick out the trig. We therefore reach the same conclusion as before: that a rule requiring different kinds of signals to him and to the engineman would not have prevented him from starting the car when no one was at the brake. The essential rule was not to start the car until the brakeman was in a position to control it; and this was the rule in accordance with which the men operated.

As the plaintiff's evidence is not sufficient to prove actionable negligence on the part of the defendant, the nonsuit was properly ordered.

Exception overruled; judgment for the defendant. All concurred.

(76 N. J. L. 568)

TIMLAN et al. v. DILWORTH.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

1. TRIAL (§ 136*)—QUESTIONS FOR COURT AND JURY.

What is a reasonable time, when the facts are undisputed, and different inferences cannot

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

reasonably be drawn from the same facts, is one of those questions of fact which, because they are for the court, and not for the jury, are sometimes, though inaccurately, called questions of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 318; Dec. Dig. § 136.*]

2. LANDLORD AND TENANT (§ 164*)—INJURY TO TENANT—NEGLIGENCE OF LANDLORD.

The rule as to when the question of reasonable time is for the court and when a question of fact for the jury discussed.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 164.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Bridget and Patrick Timlan against John Dilworth. Judgment for plaintiffs affirmed by the Supreme Court (67 Atl. 433), and defendant brings error. Reversed.

Gilbert Collins and John W. Queen, for plaintiff in error. Frederick Snow Kellogg and Raymond Dawson, for defendants in error.

DILL, J. The writ of error in this case brings up for review a judgment upon the verdict of a jury in favor of the plaintiffs, and the principal assignment of error is based upon the refusal of the trial court to nonsuit the plaintiffs. In cases of negligence, where the trial judge is requested to nonsuit or direct a verdict for the defendant, his duty is to determine whether any facts have been established by evidence from which negligence may be reasonably inferred. If none, there is no case to go to the jury; but, if from facts established negligence may reasonably be inferred, it is for the jury to say whether from those facts negligence ought to be inferred. *Hummer v. Lehigh Valley R. R. Co.* (N. J. Err. & App.) 67 Atl. 1061. In 1881 Mr. Justice Reed, in the Supreme Court, after reviewing the decisions in this state and elsewhere, denied the doctrine that a mere scintilla of evidence was sufficient to carry a case to the jury, and said: "In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Baldwin v. Shannon*, 43 N. J. Law, 596, at p. 603. This decision has been often cited in this court, and always with approval. See, also, 15 Eng. Ruling Cas. p. 68 et seq.

The preliminary question involved in this case is whether there was any evidence showing, or fairly tending to show, some wrongful act or neglect of the defendant, or some omission of duty which he owed to the plaintiffs. The facts from which it is claimed negligence may be imputed to the defendant are not controverted, and different inferences

could not have been reasonably drawn from these facts. The plaintiffs, husband and wife, tenants of the defendant in a tenement house in Jersey City, charge him with negligence in the care of a hand elevator or dumb-waiter, used on the premises for hoisting coal and other articles from the cellar to the upper floors of the building. While the wife was using the dumb-waiter the nut on the eye that held the rope gave way, and the apparatus fell; and, for the purposes of this review, at least, it must be deemed to be true that she was injured under the circumstances and in the manner testified to by her. The defendant had purchased the premises only a few days before the accident. He took title on Wednesday, March 14, 1906, and the accident occurred on Sunday, March 18, 1906. He made no inspection of the dumb-waiter between the time he took title and the time of the accident. Before purchasing, and on or about the 8th of February, 1906, he went to the premises with one John O'Connor, a builder, and examined the building, including the dumb-waiter, and found all apparently in good condition. On Monday, March 12th, two days before he took title, he went again and made another examination of the house, tested the dumb-waiter, and found that it worked satisfactorily. When he made this inspection he questioned the tenants, and the janitress especially, as to whether the dumb-waiter was in good order, and the janitress told him, and in the presence of one of the plaintiffs, that the dumb-waiter was all right, but was working "very stiff" because it had new ropes, and "had just been overhauled." Excluding the day on which the defendant took title and the day upon which the plaintiff was injured, there intervened only 2½ working days, the intervening Saturday being a half holiday (2 Gen. St. 1895, p. 1941), in which to make a more thorough inspection of an apparatus which, as he was advised, had been overhauled just prior to the time when he took title. In the meantime, no notice, actual or constructive, was given the defendant of any defect in the apparatus. The plaintiffs and other tenants had frequent occasion for using and observing the dumb-waiter, and no one appears to have noticed that it was dangerous or unsafe. On this state of facts the learned trial judge below declined to nonsuit the plaintiffs or direct a verdict.

Upon the conceded fact that the landlord failed, in the interim between the taking of title and the occurrence of the accident, to make an inspection of an apparatus which he learned, just before taking title, was in good order and had just been overhauled, the court sent the case to the jury to determine, as a question of fact, whether there was a failure to make an inspection within a reasonable time. The question therefore

arises whether, under the circumstances of this case, the question of a reasonable time was for the court or for the jury. We do not pass upon, but we expressly reserve, the question whether, under the facts in this case, the landlord was charged with the duty of keeping the dumb-waiter in repair, so as to make him responsible under the rule of *Gillvon v. Reilly*, 50 N. J. Law, 26, 11 Atl. 481, and *Siggins v. McGill*, 72 N. J. Law, 263, 62 Atl. 411, 3 L. R. A. (N. S.) 316, 111 Am. St. Rep. 666, approved by this court in *McCracken v. Meyers* (N. J.) 68 Atl. 805. Even assuming that it was the duty of the landlord to use reasonable care to keep the apparatus in question in repair, yet such duty, and the resulting duty of inspection, would be subject to the rule laid down by Mr. Justice Dixon in the Supreme Court, to the effect that: "To ascertain the time or times for making repairs, we must invoke the usual legal implication, applicable to contracts indefinite as to the time of performance, that they must be performed with reasonable diligence and promptness. This legal rule, applied to the present contract, imposed upon the landlords the duty of properly inspecting the premises, and of making such repairs as a due inspection would show to be necessary. But it cannot be stretched so as to include an obligation to repair what a reasonable examination would not discover to be in need of repair. Such straining would deprive the rule of the very element which makes it applicable to contracts in general—the underlying idea of reasonableness." *Frank v. Conradi*, 50 N. J. Law, 23, at p. 25, 11 Atl. 480. In *Furniture Co. v. Bd. of Education*, 58 N. J. Law, 646, at p. 652, 35 Atl. 397, at p. 399, Mr. Justice Garrison, speaking for this court said: "The question of reasonable time is generally one of fact for the jury, and is always so when it rests upon conflicting inferences as to the mutual effect of the conduct of the parties to the transaction." Subsequently, in 1904, the present chancellor, then Mr. Justice Pitney, said: "In this, as in all cases where questions of reasonable time, opportunity, or the like are at issue, the determination of what is reasonable, where the facts are in dispute, or the inference to be drawn from undisputed facts is in doubt, is a question of fact, and not of law." *Burr v. Adams Express Co.*, 71 N. J. Law, 263, at p. 269, 58 Atl. 609, at p. 611. Where the proofs are conflicting, the question is often a mixed one of law and fact. In such a case the court should instruct the jury as to the law upon the several hypotheses of fact insisted upon by the parties. In accord with the opinions of Mr. Justice Garrison and of Chancellor Pitney, *supra*, is the converse of the proposition, viz., that what is a reasonable time, when the facts are undisputed, and different inferences cannot reasonably be drawn from the same

facts, is a question for the court, not for the jury. *Wright v. Bank of Metropolis*, 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356; *Loring v. City of Boston*, 48 Mass. 409. "Reasonableness in such cases belongeth to the knowledge of the law, and is therefore to be decided by the justices." 1 Coke Litt. 644 (56b). Whether a reasonable time had intervened for the owner to make an inspection after taking title to the premises, under the circumstances of this case, was in our opinion one of those questions of fact which, because they are for the court, and not for the jury, are sometimes, though inaccurately, called questions of law. It was the duty of the court to hold, as we now do, that under the facts of this case the landlord's failure to make an inspection of the apparatus in question, in the interim between the taking of title and the occurrence of the accident (2½ working days), was not a failure to make an inspection within a reasonable time. To leave this question to the jury was error.

The judgment, therefore, is reversed, with costs, and a new trial ordered.

(77 N. J. L. 71)

ROSENGARTEN v. DELAWARE, L. & W. R. CO.

(Supreme Court of New Jersey. Nov. 9, 1908.)
TRIAL (§ 159*)—NONSUIT AT TRIAL—GROUNDS
—FAILURE OF PROOF.

Where the arm of a plaintiff, a passenger on a railroad car, was injured by the falling of the car window by which she was sitting, there being no evidence that the window catch was defective or that the defendant's servants set the window unlatched, *held*, that a nonsuit was correct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 360-361; Dec. Dig. § 159.*]

(Syllabus by the Court.)

Appeal from District Court of Orange.

Action by Ethel Rosengarten against the Delaware, Lackawanna & Western Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

William A. Lord, for appellant. Max A. Stallman, for appellee.

REED, J. This appeal brings up a judgment of nonsuit. The plaintiff, an infant, sued by her next friend to recover damages for an injury caused by the falling of a car window in a car in which she was sitting while riding as a passenger upon the defendant's railroad. The negligence charged in the state of demand is the failure of the defendants to inspect and keep in order and repair the window fastenings and appliances that would prevent the windows from falling.

The mother of the plaintiff, with the plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiff and another daughter, Rose, boarded the train of the defendants at Highland avenue. They seated themselves in a double seat, Ethel, the plaintiff, sitting next to an open window. Rose sat opposite, facing Ethel and next to a closed window, and the mother sat on the seat with Rose next to the aisle. The mother testified on the trial that she opened the window next to Rose by pressing upon the lever on the window catch and raising the window, and, when she had raised it up to the rest or shelf attached to the window casing, she released the lever which she was holding down, and the plunger came down over the shelf, and the window was thus held up in place. She testified that the other window, next to which Ethel sat, was apparently up as far as it would go, but that she did not examine it or pay any particular attention to it to see whether it was held up by the catch or not. Ethel, the plaintiff, had her elbow resting on the window sill, under the open sash, and, when the train was going fast around a curve just west of Orange station, both windows fell; the one where Ethel was sitting striking her on the arm near the elbow. The mother testifies that the conductor was told of the accident, and he asked her if she wished to have the window raised again, and, being told "Yes," he raised both windows, and had to exert some strength to make the plunger in the catch come out and rest upon a projection to hold up the window next to Ethel. The windows remained open the rest of the journey.

It is perceived that the window that injured Ethel was already up when she took her seat. Who raised this window does not appear. That the window was not on the catch is quite obvious. When raised, the only protection against the window closing by the jarring of the train is the catch which fastens the window when opened to its full extent. If there was negligence of the defendant, it must have existed in one of two ways: In failing to provide an effective catch, or in a neglect of duty in permitting a window to remain partly open, unfastened by the catch. There is no proof that the catch on the window by which the plaintiff sat was defective. Therefore the only ground for imputed negligence to the defendant would be that it was the duty of its servants to see, if the window was raised at all, that it was raised until secured by the catch. Now, if the windows were under the entire control of its servants, if no one was permitted to raise them but some one of the train crew, then the responsibility for the accident might well be put upon the railroad company. The windows of a car, however, are designed to be opened and closed by the passengers at their pleasure. The company does not pretend to supervise the act of a passenger in adjusting a window to

suit his convenience. One passenger raises and a succeeding passenger closes the same window, and this change goes on as successive passengers occupy the same seat. No responsibility rests upon the company for the act of a passenger in leaving a window unlatched. The fall of this window, which so far as appears was left unsecured by some previous passenger, presents a question quite different from the fall of a lamp or a rack in a car, over which the company's agents have entire control, and with which the passengers have no right or duty to interfere. Unless it was actually shown that some one of the railroad crew had left the falling window in the position from which it fell, the inference that it was left in that position by a passenger would be much stronger than that it was left by a servant of the defendants. In this situation no negligence can be imputed to the defendants. The cases of *Strembel v. Brooklyn Heights R. R. Co.*, 110 App. Div. 23, 96 N. Y. Supp. 903, and *Faulkner v. B. & M. R. R.*, 187 Mass. 254, 72 N. E. 976, deal pertinently with similar situations.

The judgment should be affirmed.

(77 N. J. L. 125)

CONNORS v. NEWTON.

(Supreme Court of New Jersey. Nov. 9, 1908.)
LANDLORD AND TENANT (§ 167*)—DANGEROUS PREMISES—INJURY TO THIRD PERSONS.

Where a platform between the sidewalk of a public street and a store became suddenly out of repair, such store being occupied by a tenant, and a person passing over such platform in order to enter the store was injured, *held*, in a suit against the owner of the premises for such injury, that, in the absence of a right reserved to the landlord to re-enter the demised premises for the purpose of repairing them, the tenant will be deemed to be chargeable with the duty of making such repairs.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 672; Dec. Dig. § 167.*]

(Syllabus by the Court.)

Appeal from District Court of Jersey City.

Action by John J. Connors, by his next friend, Annie Connors, against John H. Newton. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

James J. Murphy, for appellant. Ziegner & Lane, for appellee.

VOORHEES, J. This is an appeal from the judgment of the First district court of Jersey City, rendered in favor of the defendant in an action brought to recover for personal injuries sustained by the plaintiff. The case was tried by the court without a jury. The appellant has specified two points pursuant to rule 90 of this court, viz., that the finding of the court was contrary to law, and that the verdict should have been for the

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plaintiff. Inasmuch as the determination of the judge is made final and conclusive upon questions of fact by section 205 of the district court act, and appeal is given only with respect to the determination of the court in points of law (section 206), it may be doubted whether in the present case sufficient specification under the rule has been made to entitle the appeal to be heard. Resolving this doubt in favor of the appellant, we have examined the state of the case as settled by the judge.

The plaintiff was injured on Sunday evening about 8 o'clock by stepping into an uncovered opening in a wooden stoop or platform leading from the sidewalk to the house owned by the defendant on Henderson street, Jersey City. The platform was used for an approach to a store in the possession of the defendant's tenants. It was about seven feet wide from the store door to the sidewalk. The hole was about one foot from the store window, and was 17 by 24 inches. The hole in the platform had formerly been covered by a door leading down into a cellar beneath the building, which, however, was wet, and not used for any purpose. Some time in 1906 the cellar door was removed, and the opening covered by stout slats, about 1½ inches in thickness, leaving small apertures between the slats for ventilation. The slats were fastened down to the joists which supported the platform by brass screws. The tenants in the store from the time of putting down the slats had considerable trouble with mischievous boys in the neighborhood, who were accustomed wantonly to tear up the slats and leave the hole uncovered. This had been done late on Saturday night, or early on Sunday morning prior to the accident. The store was used as a candy and cigar store by William O'Toole and his wife, tenants of the defendant; Mr. O'Toole being otherwise employed at night, and his wife generally taking charge of the store. Mr. O'Toole saw that the hole was uncovered when he returned from his work at half past 6 o'clock Sunday morning. His wife had covered the hole with a couple of planks which were nailed down. Mr. O'Toole, on returning Sunday morning, seeing these planks lying out in the street on the car track, replaced them before he went into the house, and the planks were still in place when he went to work at 7 o'clock on Sunday evening. Plaintiff was a neighbor, living about one block from the premises, and was a frequenter of the store in the premises. No notice was given to defendant, the landowner, that the covering of the platform was defective or had been torn up until the Monday morning following the accident, when the platform was at once repaired.

It appears that the platform was not a part of the sidewalk, for it led from the sidewalk to the house and was an approach

to the store, the door of which was about seven feet from the sidewalk. It was not used for any purpose except in connection with the store, for the cellar door formerly existing in the platform had been removed and slats permanently screwed down substituted. The inference is that the platform was part of the demised premises, and so the tenant, not the owner, in the absence of an agreement to the contrary, no right of entry being reserved to the landlord, would be liable for repairs. *Board of Health v. Eastlack*, 68 N. J. Law, 586, 52 Atl. 999. The nuisance according to the proof did not exist at the time of the letting and so the liability for repairs rests upon the tenant. *Ingwersen v. Rankin*, 47 N. J. Law, 22, 54 Am. Rep. 109. Moreover, unless the owner could be held to be an insurer that the sidewalk on his premises shall be safe (assuming that the platform formed a part of the sidewalk), then there was a question of fact as to his negligence under all the circumstances. The court decided that for the defendant, and such question of fact is not reviewable here. Whether the landlord had a right of entry for the purpose of repairing was a question in the case decided favorably to the defendant. The decision of this was a jury question, and the court sitting as a jury was charged with the conclusive determination of this matter of fact. *O'Malley v. Gerth*, 67 N. J. Law, 612, 52 Atl. 563.

The judgment is affirmed.

(77 N. J. L. 64)

KEENAN v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Supreme Court of New Jersey. Nov. 9, 1908.)

INSURANCE (§ 523*)—LIFE POLICY—MISSTATEMENT AS TO AGE.

A policy of insurance contained the condition that, if the age of the insured shall have been understated, the amount of insurance or other benefit will be equitably adjusted. It was discovered after his death that the insured, who had stated his age as 45, was, in fact, 46 years of age. *Held*, that an equitable adjustment would consist in paying the beneficiary such an amount as the premiums actually paid would have insured at the true age of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1307; Dec. Dig. § 523.*]

(Syllabus by the Court.)

Action by Maude L. Keenan against the Mutual Life Insurance Company of New York. Verdict for plaintiff. Rule to show cause made absolute.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Edward A. & William T. Day, for the rule. William M. Clevenger, opposed.

REED, J. On June 29, 1903, James R. Keenan insured his life in the Mutual Life Insurance Company of New York for the benefit of his wife, Maude L. Keenan. The

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

total amount of his insurance was \$20,000 covered by two policies for \$10,000 each. Mr. Keenan died on March 15, 1907. In his application for the policies he stated that he was born March 23, 1858. It is admitted that he was born a year earlier, so that, instead of being 45 when insured, he was 46 years of age. Each policy was written subject to the provisions, requirements, and benefits stated on its back. One of these provisions is as follows: "The company will admit the age of the insured upon satisfactory proof. Failing such proof, if the age shall have been understated, the amount of insurance or other benefit will be equitably adjusted." The company paid to the plaintiff, who was the beneficiary, the sum of \$9,616 on each policy, this being the amount which the annual premiums of \$393.60 paid by the insured would if paid by a person 46 years of age purchase. This action is brought to recover \$384 on each policy, being the difference between \$9,616 paid on each and the full amount insured on each policy, namely, \$10,000.

On the trial the theory upon which the recovery by the plaintiff rested was that the insured should have paid each year on each policy \$409.30 instead of \$393.60, and that the difference each year—\$15.70—together with the interest upon each payment for the number of years the policy was in force, should be deducted from the face value of the policy. This theory seems to have been adopted by the jury, which returned a verdict for the plaintiff for \$646.66. The contract of life insurance is one in which, in consideration of the payment annually, semi-annually, or quarterly of a fixed sum by the insured, the company agreed to pay a certain amount to the insured, or to his named beneficiary, upon the event of the death of the insured. The annual or stated sum to be paid by the insured is fixed by his expectancy of life. In calculating this expectancy, one, perhaps the chief, element to be regarded, is the age of the insured at the time of the execution of the contract. The calculated period during which the annual or other fixed premiums are to be paid is the basis upon which the amounts of each annual or fixed premium or stated premium is fixed. These premiums are so adjusted that the risk of death from year to year during the period of life expectancy will be paid for in advance. The younger the insured, the less the risk of death, and so the less the periodical payments for the insurance of a particular amount. A person, therefore, who states his age as 45, when he is in fact 46, years of age, is getting an insurance against a risk for which he is not paying. In the absence of fraud on the part of the insurer—when he deserves nothing—it is equitable that in case of his death the company shall pay so much as the insured has paid for, and no more. The theory upon which the verdict was found violates the

scheme upon which the contract is based. Instead of this theory being one under which the risk is paid for in advance, it becomes one which compels the company to assume a risk upon credit, and the amount credited is never to be paid by the insured during his life, but is only to be deducted by the company from the amount of the policy upon his death. Such a system, if applied to the entire amount of premiums, would be inconceivable in practice, for it would not merely bankrupt the insurance company, but would make it impossible for the company to accumulate any assets to meet its losses. Any theory which leads to such a result cannot be equitable.

On the trial one Berry produced what he styled rules enforced by the Mutual Life Insurance Company. One of these rules was headed "Changes of Age," and read: "Increased payment payable in the future will be made subject to the payment of the difference of premium with 5 per cent. compound interest." This rule covered instances where during the life of the insured it was discovered that he had understated his age. For this reason the witness gave it as his opinion that equitably the company should take the same course upon the death of the insured in adjusting the amount to be paid. The opinion of the witness was of no value whatever. He had never known of an adjustment made after the death of the insured under these conditions. He knew of no rule in the insurance world respecting an equitable adjustment. He was entirely disqualified to give an opinion on what was an equitable adjustment, and his testimony should have been overruled.

But, assuming that the rule of the company is in evidence, it has no significance respecting the question to be now solved. When the understatement is discovered before the death of the insured, the company has the right to do one of two things: To say to the insured, (1) "Your policy can stand for the amount for which you have paid," or (2) "If you choose to pay what you should have paid, with interest, then in consideration of that payment, and in consideration of full payment in the future of the amount of premiums proper at your age, we will put you upon the footing of a full paid premium paying insured." This, it is perceived, is a mere change of contract. The company had the right during the life of the insured to make a new contract. Up to that time the insured had only been insured for the amount for which he had paid, and, if death occurred before a new adjustment, the old contract controlled, and rightly so. But, when he had paid what he should have paid, and agreed to pay the new rate, the company received in advance the consideration for the future risk in excess of the old risk. At no time had the company insured him on credit. The inequity of the rule insisted upon by the plaintiff is that it is not uni-

form in its results, and would operate with great hardship upon an insured who lived to a great age, and the difference of whose stated age and whose real age was considerable. Mr. Bunyan gives an instance where the application of this rule left nothing to be returned by the insurance company. Bunyan's Law of Life Insurance, p. 115. On the other hand, the rule that the amount paid shall be what the insured paid for in advance is adopted by the Legislature of this state (P. L. 1907, pp. 133, 134) and by the Legislature of six other states. Although the statute in our state was passed subsequent to the execution of the contract in this case, it exhibits the legislative sense of what is equitable in the present situation.

We think the verdict must be set aside, and a new trial granted. We think also the court should have directed a verdict for the defendant.

(77 N. J. L. 90)

KURSHEEDT et al. v. STANDARD BLEACHERY CO. et al.

(Supreme Court of New Jersey. Nov. 9, 1908.)
NEW TRIAL (§ 102*)—NEWLY DISCOVERED EVIDENCE.

On an application for a new trial on the ground of newly discovered evidence, if it appears that testimony has in fact been discovered since the former trial, which, by the use of reasonable diligence, could not then have been obtained, and that such testimony is material to the issue, goes to the merits of the case, and is not cumulative, the application will be granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 210; Dec. Dig. § 102.*]

(Syllabus by the Court.)

Action by Edmund B. Kursheedt and others against the Standard Bleachery Company and others. Verdict for defendants. Order to show cause made absolute.

Argued, June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

Chauncey G. Parker and Francis H. Kinnicut for plaintiffs. John M. Bell, for defendants.

TRENCHARD, J. The plaintiffs were in the business of making aprons from bleached goods called "lawn," and bought the goods unbleached "in the gray," as it is called, and at different times between January 1, 1905, and May, 1907, sent such goods amounting to 3,159,873 yards to the defendants' bleachery to be bleached. The plaintiffs' claim was that the process of bleaching caused a stretch or increase in the goods bleached, amounting to at least 1 per cent of the yardage, and that by the contract between the parties the plaintiffs were entitled to this stretch; and, notwithstanding the plaintiffs' rights, the defendants had appropriated the stretch to their own use. The defense seems to have

been a denial that the goods had been stretched by the bleaching in the defendants' works.

The jury found a verdict for the defendants, whereupon the plaintiffs obtained a rule to show cause why a new trial should not be granted on the grounds, among others, of newly discovered evidence and that the verdict was contrary to the weight of the evidence.

Reviewing the evidence before the jury, it appears that there was no substantial dispute that, under the contract between the parties, the plaintiffs were entitled to the stretch, if any, that arose from bleaching. To sustain the verdict for the defendants, the jury must have been able to properly find from the evidence that the plaintiffs failed to show that the goods were stretched and that the stretch was appropriated as claimed. With respect to this question, we are in such doubt that we cannot say that the verdict is so clearly against the weight of the evidence as to justify us in disturbing it on that ground.

Coming now to the new evidence taken under the rule, we observe that it is of three kinds: First. That relating to the "count" or the number of threads to the inch in the lawns bleached for the plaintiffs by the defendants. Second. That relating to the "Northrup Loom." Third. Direct evidence given by certain former employes of the defendants as to the stretch or "overs" which was obtained at the works of the Standard Bleachery, and what was done with it. It is unnecessary to state with greater particularity this evidence. It is sufficient to say that much, if not all, of it has in fact been discovered since the former trial; that, by the use of reasonable diligence, it could not have been then obtained; that it is material to the issue, and goes to the merits of the case, and is not cumulative. Under these circumstances the motion for a new trial ought not to be denied. *Van Riper v. Dundee Mfg. Co.*, 33 N. J. Law, 152.

Let the rule to show cause be made absolute.

(77 N. J. L. 181)

WALSH v. MAYOR, ETC., OF CITY OF NEWARK et al.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. MUNICIPAL CORPORATIONS (§ 294*)—PUBLIC IMPROVEMENTS—NOTICE.

When a public improvement is made without notice, actual or constructive, to the owner of land specially benefited thereby, of the intention to make such improvement, he cannot be assessed for special benefits, unless by some act he has waived his legal right to a hearing.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 778; Dec. Dig. 294.*]

2. MUNICIPAL CORPORATIONS (§ 319*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—WAIVER OF OBJECTIONS.

Where the proceedings of the municipal authorities plainly indicate that the improvement

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is intended to be made at public expense, and no assessment for special benefits is contemplated, the fact that the landowner stood by and saw the improvement being made is no waiver of his right to be heard or to notice of the contemplated improvement, if he is to be assessed for benefits; for, under such circumstances, the municipality would be estopped from charging laches.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 833; Dec. Dig. § 819.*]

(Syllabus by the Court.)

Application for writ of certiorari by Patrick J. Walsh against the mayor and common council of the city of Newark and others. Writ allowed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Riker & Riker, for prosecutor. Francis Child, Jr., for defendants.

BERGEN, J. This is an application for a writ of certiorari, based upon the following facts: Vailsburg was annexed to Newark January 1, 1905. The prosecutor's land is located in what was Vailsburg, and it has now been assessed, by the municipal authorities of the city of Newark, under proceedings taken since the annexation, for benefits accruing from a public sewer constructed by Vailsburg before annexation. The proceedings by the authorities of Vailsburg were as follows: An ordinance was passed December 9, 1903, for the establishment of a joint system of sewerage, according to which all sewers should be constructed within the limits of Vailsburg, and connected with the joint outlet. Under the ordinance lateral sewers were constructed, and Vailsburg issued its bonds to defray the expense. A sinking fund was created to provide for the bonds, and a portion of the fund had been raised by taxation in Vailsburg before annexation. The terms of the annexation required the city of Newark to pay the bonded indebtedness of Vailsburg. In 1903 the authorities of Vailsburg called a public meeting of the citizens to consider the question of constructing the lateral system of sewers, and at that meeting the unanimous opinion expressed was that the system should be constructed at the expense of the borough, and that no assessment should be made for benefits arising from the improvement. After this public meeting an ordinance was introduced and passed by the legislative body of Vailsburg providing for the construction of the lateral sewers. No notice of the intention to make said improvement, or to adopt an ordinance looking to that end, was ever given to the prosecutor, or to any of the citizens of Vailsburg liable to be assessed for benefits. The lateral sewers were constructed in 1904. The municipal authorities of Vailsburg issued its bonds, sold them, and out of the proceeds paid the cost of

the improvement. In 1904 the tax levy contained the amount necessary to pay the interest on the bonds, and also \$2,000 on account of the principal thereof. After the improvement had been made and paid for out of the proceeds of the sale of its bonds, and after Vailsburg had been annexed to the city of Newark, an act was passed by the Legislature of this state (P. L. 1905, p. 414) declaring, in substance, that whenever municipalities, or portions thereof, have been annexed to, or consolidated with, any other city, and any local improvement or improvements have been or shall be made in and by such municipality so annexed, prior to such annexation or consolidation, for or on account of which no assessment has been or shall be made upon the property in such municipality peculiarly benefited thereby, it shall be lawful for the proper local authorities of the city to which any such municipality is or shall be annexed, to make an assessment upon all property peculiarly benefited by such improvement. It is under this act that the assessment was levied upon the property of the prosecutor for the improvement above set out, which assessment it is sought to review by the writ now prayed for.

The situation, concisely stated, is this: The borough of Vailsburg by an ordinance determined to build certain sewers. No notice was given to the prosecutor of the intention to adopt the ordinance other than such as may be implied from the public meeting called by the authorities of Vailsburg, at which the question was discussed whether the sewers should be built at public expense or not, and where the persons present expressed the unanimous opinion that it should be done at public cost. Following the adoption of the ordinance, the improvement was made, the bonds of the city issued to pay for it, and no attempt made by the authorities of the borough of Vailsburg to levy any assessments for benefits; the conduct of the municipal authorities of Vailsburg plainly indicating that no specific assessments against property for sewer benefits was contemplated. Under these circumstances, after the annexation, and the assumption by the city of Newark of the bonds issued to pay for the cost of the improvement, the city seeks, under the act of 1905, to assess the property of the prosecutor for alleged benefits arising from the improvement. We think that the law is well settled in this state that the owners of property liable to assessment for a public improvement are entitled to either constructive or actual notice of the date and place when and where they may be heard before the improvement is determined upon or made. In our judgment the public meeting did not amount to notice of an intention to pass an ordinance that might cast a burden upon the prosecutor. On the

contrary the action of the common council of Vailsburg, in the adoption of the ordinance without notice, the making of the contract, the issuing of bonds for the payment of the whole cost, indicates that no assessment against the prosecutor was contemplated. The proceedings of the borough council of Vailsburg do not show any notice of intention to adopt the ordinance, nor is there proof that any was given, and under the rule in this state, where an improvement is made without notice to the landowner who may be liable to an assessment, he has been deprived of his constitutional right to be heard, which subsequent legislation cannot cure. Nor can it be said that this prosecutor stood by and saw an improvement made for which he was likely to be assessed without protest, so as to waive his objection, because the case shows that he was led to believe that the general scheme of improvement was to be made at public expense, and that no assessment would be levied against him, and the municipality would now be estopped from charging him with laches.

For these reasons we think that the writ ought to go, and it will be allowed.

(77 N. J. L. 95)

MARTER v. HENRY SANCHEZ CO. et al.
(Supreme Court of New Jersey. Nov. 9, 1908.)

1. ACTION (§ 42*)—MISJOINDER OF CAUSES.

A plaintiff cannot in one action assert an independent liability of a corporation in one count, an independent liability of the individual directors of the corporation in another count, and the liability of both the corporation and the individual directors in a third count.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 42*]

2. PLEADING (§ 193*)—DEMURRER—MISJOINDER OF CAUSES.

A misjoinder of counts affords cause for a general demurrer to the declaration.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 435; Dec. Dig. § 193*]

(Syllabus by the Court.)

Action by J. Byard Marter against the Henry Sanchez Company and others. Demurrer to declaration sustained.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

Cyrus D. Marter and Samuel H. Richards, for plaintiff. William M. Seufert, for defendants.

TRENCHARD, J. The plaintiff in this action sues the Henry Sanchez Company, Henry Sanchez, and Gumersindo Sanchez. The action is brought upon a promissory note for \$1,000, made by one of the defendants, the Henry Sanchez Company, a corporation of this state, to the plaintiff. The first count of the declaration charges the company alone with liability. The second

count avers that the company was dissolved under the corporation act of this state; that the two individual defendants were directors of the company, and became trustees for the creditors under the statute; that they have corporate assets of the company in their hands sufficient to pay all outstanding liabilities of the company. On these facts the second count seeks to recover against these two directors alone. The declaration also contains common counts, under which the plaintiff seeks to hold all three defendants. The defendant Gumersindo Sanchez demurs upon the ground, among others, that the three counts or causes of action are improperly joined.

We think the demurrer should be sustained. The plaintiff cannot in one action assert an independent liability of the corporation in one count, an independent liability of the individual directors of the corporation in another, and the liability of both the corporation and the individual directors in a third count. *Dunn v. Pennsylvania R. R. Co.*, 67 N. J. Law, 377, 51 Atl. 465. He may, under the authority of section 55 of "An act concerning corporations" (P. L. 1896, p. 295), sue all of the directors by the name of the corporation, or in their own names or individual capacities, or he may, under the authority of section 92 of the act (P. L. 1896, p. 306), sue any one or more of the directors. He cannot, however, join all of them in one count (either in the name of the corporation or in their own names), and only some of them in another. Such misjoinder of counts affords cause for a general demurrer to the declaration. 1 Chit. Pl. 202, 205, 665; 2 Saund. 117b; *Drummond v. Dorant*, 4 T. R. 360; *Dunn v. Pennsylvania R. R. Co.*, 67 N. J. Law, 377, 51 Atl. 465.

The demurrer will be sustained.

(77 N. J. L. 149)

WILLOUGHBY v. ERIE R. CO.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. RAILROADS (§ 348*)—ACCIDENT AT CROSSING.

Held that, by the clear weight of evidence in this case, the plaintiff contributed to the accident by his negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1144-1149; Dec. Dig. § 348*]

2. RAILROADS (§ 330*)—ACCIDENT AT CROSSING.

The raising of the safety gates across the highway at a railroad crossing will not excuse a person intending to cross the tracks from the duty of looking and listening.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1072; Dec. Dig. § 330*]

(Syllabus by the Court.)

Action by Alfred Willoughby against the Erie Railroad Company. Verdict for plaintiff. Rule to show cause made absolute.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

John L. Johnson, for plaintiff. Cortlandt & Wayne Parker, for defendant.

VOORHEES, J. The plaintiff, the driver of a brewery wagon, in crossing the Erie Railroad at Bloomfield avenue in the city of Passaic, was injured by a collision with an east-bound train. Plaintiff was attempting to cross from south to north. The railroad tracks are constructed through the middle of Main avenue, the right of way being about 45 feet in width, and are fenced in on both sides with a fence and privet hedge. On the south side of the right of way Main avenue is 60 feet in width, and has two trolley tracks upon it, the nearer trolley track being about 14 feet from the railroad. Bloomfield avenue is 50 feet in width. West-erly 279.80 feet from Bloomfield crossing is the Jefferson street crossing. The train which did the damage was running from west to east. The hedge is $4\frac{1}{2}$ feet high. The brewery wagon driven by the plaintiff was of sufficient height so that the plaintiff sitting upon it had a clear view over the top of the hedge. It was claimed, however, that five (5) telegraph poles located about 125 feet apart parallel with the right of way obstructed his view of the track. Of these poles the first, 5 inches in diameter, stood 30 feet from Bloomfield avenue crossing, then next were two other 5-inch poles, then an 18-inch and 12-inch pole. The wagon had stopped about 20 feet away from the gates, which were down because of a train passing to the westward. The horses were standing crosswise, diagonally across Main street, facing toward the gates.

The plaintiff testified: "I looked around and couldn't see nothing, and I started driving. The gates lifted up, and I looked around and couldn't see nothing. I started on and drove my horses on, and when I got just to the gate I looked around again and couldn't see nothing. When I drove on the track I looked around again. Just as my horses got on the track I heard a shout, and I looked around and saw a train approaching through a cloud of smoke." This smoke came from the train which had just passed going westward, and was first seen by the plaintiff when he got on the track. The smoke had then come down. He did not hear any whistle or bell. On cross-examination he said that, when the west-bound train had passed, "I looked both ways and I listened, and looked up the track and couldn't see nothing. When the gates lifted up I looked around again and couldn't see nothing, so I started to drive." He also said that the gates went up about a couple of seconds after the west-bound train passed, and a couple of seconds after the gates went up he started. It is not disputed that the locomotive of the west-bound train and that of the east-bound train which inflicted the injury passed each other at about the Jefferson street crossing

about 280 feet distant from Bloomfield avenue.

It is quite evident from the testimony that a train could be seen at a distance of 700 feet. The photographs offered also demonstrated this fact. One witness says he saw two wagons waiting at the gates, one on each side of the Bloomfield avenue crossing, and that when the gates went up both wagons started to pass over. As soon as he opened the gates the wagons started to go over. Another witness, the driver of one of the wagons, says the west-bound train wasn't quite passed before the gates were opened and he and the plaintiff both started to cross. A woman called at him and waved her hand, and he turned and saw the train and pulled his horses back, while the plaintiff whipped up his horses; that they both started before the gates were completely up. Another witness saw the trains pass at Jefferson street, and saw the plaintiff coming under the first gate. The end of the west-bound train was clear of the crossing and the two trains were passing each other at Jefferson street. Another witness, standing on the west side of the crossing between the trolley tracks and the railroad, saw the train coming from the depot and stepped forward to stop the plaintiff, but his horses were then on the track. He had to turn his horses somewhat, and then proceeded across when the gates were nearly up. This witness says: "I stepped forward to stop him. At the same time he saw the train himself and lashed his horses." The depot referred to was over 700 feet from the crossing. These witnesses were all produced on the part of the plaintiff.

The fact that about the time of the raising of the gates, and a second or so before the plaintiff turned his horses in preparation to start across the railroad, the east-bound train had about reached Jefferson street crossing, say 300 feet away (for the two trains met there), is quite conclusive upon the point that before the plaintiff had passed upon the track and while yet in a place of safety the east-bound train had approached within 700 feet of the crossing, and had come well within his line of vision and was unobscured by smoke. If it be true that he looked before starting, he must have looked ineffectually. If the track was obscured by smoke when he looked he ought to have waited until the smoke had cleared away. His testimony negatives the idea that there was smoke at that time, for plaintiff says he did not see the smoke until the west-bound train had passed and he had gotten upon the tracks. If the poles interfered, such obstruction was easily overcome. A slight movement on the part of the observer would have accomplished it, and prudence should have dictated to the plaintiff, if indeed he discovered that he could not see because of the poles, to take a different standpoint for his observation. He, however, did not complain

of the poles. He said he didn't see anything.

The Court of Errors, in *Central R. R. v. Smalley*, 61 N. J. Law, 277, 39 Atl. 695, has laid down the rule that the duty of a traveler in crossing a railroad to look and listen must be performed by doing those things which will make its performance reasonably effective. Therefore the plaintiff, with a view of over an eighth of a mile, must be held to have contributed to the accident by proceeding to cross without observing the approaching train, for a proper observation must have revealed it. *Diele v. Erie R. R.*, 70 N. J. Law, 138, 56 Atl. 156; *Beeg v. N. Y. S. & W. R. R.*, 70 N. J. Law, 56, 56 Atl. 169; *Winter v. N. Y. & L. B. R. R.*, 66 N. J. Law, 677, 50 Atl. 339; *Van Riper v. N. Y. S. & W. R. R.*, 71 N. J. Law, 345, 59 Atl. 26.

The raising of the gates did not excuse him from exercising this caution, for it has been held that the neglect to give warning by a railroad of the approach of a train to a highway crossing, when even so gross as to amount to a declaration that the way is safe for travelers, does not absolve a person about to cross the tracks from the duty of making an independent observation. *Swanson v. Central R. R. Co.* (Ct. Err. & App.) 63 N. J. Law, 605, 44 Atl. 852. The clear weight of evidence is that the view was unobstructed, and that the plaintiff contributed to the accident by his negligence.

The defendant's counsel requested the court to charge the jury that if they find that the plaintiff's negligence is shown by a preponderance of the evidence they need go no further and a verdict should be found for the defendant, provided that negligence contributed to the accident. This the court refused to do. It was a sound proposition of law, and should have been charged.

The rule will be made absolute, and a venire de novo awarded.

(77 N. J. L. 101)

QUAGLIANA v. JERSEY CITY, H. & P. ST. RY. CO.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. CARRIERS (§ 318*)—INJURIES TO PASSENGER.

The first reason relied upon in this case for new trial is that the verdict was against the weight of the evidence, and was not sustained in point of fact.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 318.*]

2. NEW TRIAL (§ 96*)—ABSENCE OF WITNESS.

A new trial will not be granted on account of surprise in the absence of a witness, where reasonable diligence was not used by the applicant to procure his attendance, and where his absence was not due to the improper conduct of the prevailing party.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 192; Dec. Dig. § 96.*]

(Syllabus by the Court.)

Action by Glachino Quagliana against the Jersey City, Hoboken & Paterson Street Rail-

way Company. Verdict for defendant. Rule to show cause discharged.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

Vredenburg, Wall & Carey, for plaintiff.
Leonard J. Tynan and Howard MacSherry, for defendant.

TRENCHARD, J. This action was brought by the plaintiff to recover compensation for injuries to his foot, alleged to have been caused by reason of his being thrown from and run over by a trolley car of the defendant company as he was attempting to board the car. The trial at the Essex circuit resulted in a verdict for the defendant. The plaintiff was allowed this rule to show cause why the verdict should not be set aside.

The first contention of the plaintiff is that the verdict was contrary to the weight of the evidence. There is no merit in this contention. The story of the plaintiff, that the car had come to a standstill, and, as he was in the act of boarding it, the car suddenly started forward, is corroborated by only one witness. On the other hand, the contention of the defendant company is that the car in question was bound south toward Hoboken, and on approaching a junction it stopped 25 or 30 feet north of the same in compliance with the rule requiring cars to stop before crossing intersecting tracks; that this stop was only momentary; that the car started up again, and then a large crowd of Italians and others, of whom the plaintiff was one, who were standing on the south side of the junction, rushed towards the car, and that the plaintiff, who was among them, in attempting to board the moving car when it was partly across the intersecting tracks, in some way fell, and either his foot was injured by the car wheel, or caught in some part of the intersecting tracks, and was so injured that it became necessary to amputate it. This account of the accident, as given by the defendant company, is corroborated by several witnesses. The verdict was therefore not contrary to the weight of the evidence.

The next contention of the plaintiff is that one Bagley, a material witness for the plaintiff, was influenced by the defendant to absent himself from the trial, and that his absence justifies this court in granting a new trial. Misconduct of the prevailing party or his attorney in inducing a witness to absent himself from the trial is ground for a new trial. *Carey v. King*, 5 Ga. 75; *Barron v. Jackson*, 40 N. H. 365; *Crafts v. Union Mut. F. Ins. Co.*, 36 N. H. 44. But the misconduct must be clearly established. *Marsh v. Monckton*, 1 Tryw. & G. 34. The affidavits in this case, taken in pursuance of the rule, do not disclose misconduct upon the part of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the defendant or its attorney. It appears that both sides desired to use Bagley as a witness. He was subpoenaed by the defendant, but not by the plaintiff. When he appeared at the office of the attorney of the defendant at about 10 o'clock in the morning of the day of trial he was intoxicated, and because of his condition was informed that he was not needed that day, but was requested to be in court the next following morning. The plaintiff voluntarily moved his case notwithstanding the absence of the witness. The action upon the part of the defendant's attorney in excusing the witness was, we think, in good faith and evinces no misconduct on his part. The controlling reason why the plaintiff did not have the benefit of Bagley's testimony was that he had neglected to subpoena him. A new trial will not be granted because of the absence of a witness due to the negligence of the applicant. *Sherrard v. Olden*, 6 N. J. Law, 344; 29 Cyc. 872.

Let the rule to show cause be discharged, with costs.

(77 N. J. L. 59)

STURM v. HUCK.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. LANDLORD AND TENANT (§ 124*)—LEASE OF BEDROOM.

A lease of a bedroom does not carry with it, as a necessary incident, a right to a supply of water.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 124.*]

2. LICENSES (§ 44*)—REVOCAION.

Where a landlord demises a bedroom, and permits the tenant to obtain water from other rooms in the house, such permission is a mere revocable license, and vests no legal right.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 98; Dec. Dig. § 44.*]

(Syllabus by the Court.)

Appeal from District Court of Hoboken.

Action by Wendelin Sturm against William Huck. Judgment for plaintiff, and defendant appeals. Reversed.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

John Griffin, for appellant. Frederick Diefenbach, Jr., for appellee.

SWAYZE, J. The plaintiff was tenant of the defendant, under a lease which described the premises demised as "all the front bedroom on the top floor of the house known as No. 111 Zabriskie street, in said city of Jersey City, and the shop in the rear of said house." It was proved at the trial, over the defendant's objection, that at the beginning of the tenancy, and for several years thereafter, the plaintiff used to go into other rooms of 111 Zabriskie street, and take water from them into the room described in the lease; and that after October 23, 1907, the

defendant refused to allow the plaintiff to obtain water as before. The trial judge conceived that this constituted an unlawful interference with the plaintiff's rights in the bedroom, and gave judgment in his favor. The lease makes no mention of appurtenances, but we think the case need not be rested on that fact. We know of no rule of law that obliges a landlord, in the absence of express agreement, to supply water to tenants. The precise question has arisen in Massachusetts and Rhode Island, and been decided adversely to the tenant. *Leighton v. Ricker*, 178 Mass. 564, 54 N. E. 254; *Sheldon v. Hamilton*, 22 R. I. 236, 47 Atl. 313, 84 Am. St. Rep. 839.

A somewhat similar question was before our court of chancery in *Oliphant v. Richman*, 67 N. J. Eq. 280, 59 Atl. 241. In that case the lease was of a lot at the edge of a mill pond, with the privilege of building and maintaining an icehouse thereon, which was to be used for no other purpose than an icehouse. It was the custom of the lessee, for several years, to fill the house from the lessor's pond. It was held that the taking of the ice amounted to no more than a license; and the lessee was enjoined from the cutting and removing it. In the present case, the plaintiff argues that water is so essential to the use of a bedroom that the right to take it passes as a necessary incident, and cites *Hill v. Schultz*, 40 N. J. Eq. 164, as authority; but in that case it was held that the right to have a platform retained in a horizontal position on the street to enable customers to approach a show window was not a necessary incident to the use of the demised premises.

A supply of water to a bedroom is no more necessary than a supply for a dwelling house, or than heat, light, furniture, or bedding; all alike are commodities, with which the tenant must supply himself in the absence of an agreement to the contrary with his landlord.

The fact that the plaintiff was allowed for some years to obtain water from other rooms in the house, being at best a mere license and so indefinite in character that it would be impossible to determine its precise extent, invested the tenant with no legal right.

Let the judgment be reversed, and the record remitted for a new trial.

(77 N. J. L. 134)

WALLACE v. HAINES.

(Supreme Court of New Jersey. Nov. 9, 1908.)

MASTER AND SERVANT (§ 219*) — INJURY TO SERVANT—ASSUMPTION OF RISK.

A drum, part of a laundry mangle, was revolving rapidly towards a rigid rod which extended across the machine parallel with, and about one inch from, the drum. The plaintiff was employed as a laundress, in which service it was her duty to see that the machine was supplied with the materials to be laundried. The drum was carrying a fabric towards the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rod, between which and the drum it was passing, and the plaintiff placed her hand upon the drum in trying to remove a fold in the fabric. The rapid motion of the drum carried plaintiff's hand to and under the rod, causing the injury for which suit was brought. The machine was not defective, and the plaintiff, having worked with mangles of similar character, was familiar with the construction and operation of the machine causing the injury. *Held*, that the danger of having her hand drawn under the rod, if she put it on the revolving drum, was an obvious one, the risk of which plaintiff had assumed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 618; Dec. Dig. § 219.*]

(Syllabus by the Court.)

Error to Circuit Court, Atlantic County.

Action by Anna C. Wallace against Newton Haines. Judgment for plaintiff, and defendant brings error. Reversed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

C. L. Cole, for plaintiff in error. J. J. Crandall, for defendant in error.

BERGEN, J. At the close of the plaintiff's case it appeared that she, while in the employ of defendant as laundress, was injured by a mangle, which is a machine used in the work she was employed to do; that the parts of the machine causing the injury were a revolving heated drum, and a small rigid metal rod extending from one side of the mangle to the other parallel with, and about one inch from, the drum; and that the injury was caused because, in trying to straighten a fold in the fabric which was being carried on the drum, her hand was caught between the drum and rod, and so seriously burned as to require its amputation. There was no evidence that the machine was defective; for, although there was some evidence that the rod was not equally distant along its whole length from the drum, that evidence was on plaintiff's motion stricken out, and all that remained to go to the jury was the fact that with a drum rapidly revolving towards a metal rod, with but the space of an inch between the drum and rod, the plaintiff put her hand on the drum to remove a fold in the fabric which was being carried on it between the drum and rod, and that in so doing her hand was carried with the drum and caught between it and the rod. We are of opinion that such a result was the obvious consequence of her act, and that the case falls directly within the rule laid down by the Court of Errors and Appeals in *Mika v. Passaic Print Works* (recently decided) 70 Atl. 327, and the refusal to grant the motion for a nonsuit made by the defendant at the close of plaintiff's case was an error which requires the reversal of this judgment. The charge to the jury discloses that there was no disputed question of fact submitted. Certain legal principles were stated, which if applied to the undisputed facts entitled the defendant to a favorable direction.

The judgment is reversed, and a venire de novo ordered.

For damages suffered by him as the result of the injuries to his wife, the husband of the plaintiff, Campbell Wallace, brought his suit and recovered a judgment against this defendant, which was removed to this court by a writ of error, and, as his right to recover rested upon the same facts, the cases were argued together. We have determined that the proofs did not support the judgment in favor of the wife, and the conclusion in that case controls the result in the action brought by the husband.

The judgment in that case is also reversed, and a venire de novo ordered.

(77 N. J. L. 110)

ALCOTT v. PUBLIC SERVICE CORPORATION OF NEW JERSEY.

(Supreme Court of New Jersey. Nov. 16, 1908.)
STREET RAILROADS (§ 86*)—INJURY TO TRAVELER—EVIDENCE.

The fact that plaintiff's wagon wheel caught in a switch device, whereby plaintiff was thrown and injured, will not ipso facto furnish the basis for a verdict against defendant, where the latter presented uncontradicted exculpatory proof that the switch was of standard pattern and in general use, and that it was properly laid and inspected.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 185; Dec. Dig. § 86.*]

(Syllabus by the Court.)

Error to Circuit Court, Camden County.

Action by Charles M. Alcott against the Public Service Corporation of New Jersey. Judgment for plaintiff, and defendant brings error. Reversed.

Argued June term, 1908, before the CHIEF JUSTICE and TRENCHARD and MINTURN, JJ.

E. A. Armstrong, for plaintiff in error. John W. Wescott, for defendant in error.

MINTURN, J. The plaintiff was driving a loaded wagon on Broadway, between Walnut and Newton avenues, in Camden, in April, 1908. He had frequently driven over the same route, and was familiar with the locality. Upon this occasion, as he approached a cross-over, used by defendant company as part of its track system to switch cars to an adjoining track, he turned to the right with the view of leaving the track for the purpose of passing a team ahead of him. Instead of leaving the track, however, his wheels skidded or slid along the track until one of the wheels came in contact with what is called "the mate" in the switching device, at which point the wheel became locked and the wagon suddenly stopped, throwing the plaintiff from his seat, causing him the injuries which form the basis of this suit.

The writ of error is directed mainly to the exceptions to the refusal of the court to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

nonsuit and to direct a verdict, substantially upon the grounds that no act of negligence, and no omission of legal duty by defendant, had been shown upon which a verdict against it could be predicated. The various assignments of error, as well as defendant's requests to charge, are based upon this conception of the absence of legal liability upon defendant's part as a tortfeasor. To support this contention, upon the motion to direct a verdict, the record shows that the switch in question was of standard make, was commonly used in street railway traffic, had been properly installed, and that it was daily inspected by competent employees. It furthermore appeared that it was in good order upon the day of the accident, and also upon the day before, and the day after the accident. In view of this status, the utmost that can be claimed in favor of the plaintiff's right of action is that the doctrine of *res ipso loquitur* required the defendant to exculpate itself by furnishing proof of the performance of its legal duty, which proof would be tantamount to negating the existence of actionable negligence. *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, 23 Atl. 167; *Collins v. W. J. Express Co.* (N. J. Err. & App.) 70 Atl. 344. Such uncontradicted proof having been offered in this case, we are unable to perceive that any element of negligence existed upon which the verdict can be legally predicated or supported; and a verdict should, therefore, have been directed for the defendant. *Bobbink v. Erie R. R. Co.* (N. J. Err. & App.) 69 Atl. 204.

The judgment of the circuit court is reversed.

(77 N. J. L. 167)

KARL v. DIAMOND.

(Supreme Court of New Jersey. Nov. 9, 1908.)
NEW TRIAL (§ 127*)—WAIVER OF OBJECTIONS.

The application for, and acceptance of, a rule to show cause why a new trial should not be allowed by one holding a bill of exceptions is a waiver of all exceptions not expressly reserved.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 256; Dec. Dig. § 127.*]

(Syllabus by the Court.)

Error to Circuit Court, Passaic County.

Action by John Karl against Elvina F. Diamond. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Lewis A. Allen and Andrew Foulds, Jr., for plaintiff in error. Louis A. Cowley, for defendant in error.

BERGEN, J. This action was brought to recover a debt claimed by the plaintiff to be due to him from the defendant for furnishing materials and labor necessary to "erect

and finish, the plumbing, tinning, gas and water piping and hot water heating" in a building of the defendant, which debt it was averred in the pleadings was, by virtue of our mechanic's lien law, a lien on the building. The declaration, after setting out the special contract and the common counts, avers in due form that the debt was a lien on the building and lands therein described. The plea was general issue only. The record shows that, after verdict, a rule to show cause why a new trial should not be granted was allowed on the application of the defendant, without the reservation of exceptions taken, and after hearing this rule was discharged.

Section 214 of the practice act (Act April 14, 1903 [P. L. p. 593]) declares that, if the party holding a bill of exceptions applies for a rule to show cause why a new trial should not be granted, the granting thereof shall be a waiver of his bill of exceptions except on points expressly reserved in said rule. On this argument, upon due notice, plaintiff moved to strike out all the assignments of error which were founded upon the bills of exception taken by the defendant. There can be no doubt of the propriety of this motion, and it should be allowed, because the defendant in applying for and accepting a rule to show cause why a new trial should not be granted is declared by the statute to have waived his bill of exception, and the only assignment based upon the record is that the declaration is not sufficient in law to sustain the action of the plaintiff. We think that the declaration is sufficient, and plaintiff in error has presented no argument in his brief in support of a contrary view.

The judgment below is affirmed, with costs.

(77 N. J. L. 178)

TOWN OF UNION IN HUDSON COUNTY v. HUDSON COUNTY BOARD OF TAXATION.

(Supreme Court of New Jersey. Nov. 20, 1908.)
TAXATION (§ 493*)—COUNTY BOARD—ALTERATION OF ASSESSMENT—CERTIORARI.

The action of the county board of taxation in increasing or decreasing the assessed value of property, which in their judgment is not truly valued, as authorized by the statute of 1906 (P. L. p. 210), is not reviewable on certiorari unless the board violates some legal principle in adjusting the value of real estate subject to taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 879; Dec. Dig. § 493.*]

(Syllabus by the Court.)

Application by the Town of Union for a writ of certiorari to the Hudson County Board of Taxation. Writ denied.

Argued June term, 1908, before REED, BERGEN, and MINTURN, JJ.

J. Emil Walscheld, for prosecutor. William D. Edwards, for defendant.

BERGEN, J. The prosecutor, as one of the taxing districts of the county of Hudson, applies for a writ of certiorari to review the proceedings of the Hudson county board of taxation fixing the quota of taxes to be raised by the prosecutor. The principal reason urged for the allowance of the writ is that the relator increased the valuations of real estate, as contained in the duplicate of ratables of the town of Union, to the extent of 5 per cent., but made no change in the assessments against personal property. The record sought to be reviewed discloses that the county board of taxation, by resolution, declared that the value of the real estate as assessed in the duplicate to certain owners therein named was "relatively less than the value of the other property in the county," and the assessor was directed to amend his duplicate by increasing the taxable valuation to the extent indicated by the county board. It further appears that, having adjusted the relative values of all of the real estate, it then determined that its true value was 5 per cent. less than it should be, and, by resolution, required the assessor to add that percentage to the total amount of the real estate as valued and assess it proportionately to each parcel contained in the duplicate. The duty of the county board of taxation is declared to be to secure the taxation of all property at its true value, and it is given the supervision and control of all the assessors and other officers charged with the duty of the assessment of taxes; to view and inspect, as far as possible, the various assessed properties in the different taxing districts in their respective counties, and to make revision and correction after such view and inspection; to increase or decrease the assessed value of any property not truly valued; and to add to the duplicates any property which has been omitted, "and in general to do and perform all acts and things necessary for the valuation of all property in said county equally and at its true value," and it is also charged with the duty of reviewing taxes on appeal. P. L. 1906, p. 210. It thus appears that under the statute referred to the county board of taxation has the power to correct and revise the value of all taxable property, and to require the respective assessors to amend their duplicates or lists of taxable property so that they conform to the values fixed by the board, and it is our opinion that, unless the county board of taxation violate some legal principle in making the assessments, its action is not reviewable by certiorari on the application of a taxing district or of an individual, because in performing that duty they are merely aiding the assessors in arriving at the true value of the respective properties in the taxing district, and a mistake in valuation is only an error of judgment which each taxpayer may have corrected by the board of equalization

of taxes, as provided in the act establishing such board (P. L. 1906, p. 123), section 3 of which act provides that if upon complaint of any taxing district it shall appear that any other taxing district is, by inequality of valuation or otherwise, avoiding or escaping its fair share of the common burden, the board shall cause investigation to be made, and shall render such aid and assistance as it may be able to give for the purpose of arriving at a fair and equitable adjustment of values, and, among other things, it has the power, if it shall appear that the assessment of any property is greater than the true value thereof, to reduce said assessment to that amount.

In the case under consideration we find nothing illegal in the principle adopted, and, if the result produces an excessive valuation in any instance, the property owner has his appeal, first, to the county board, and, second, to the state board. The statute last referred to requires the state board, upon appeal of any taxing district or an individual, to evidence its determination by a judgment duly signed by at least three of its members and filed with its clerk. And in a proper case a writ may be applied for to review that judgment.

We find nothing in the present case which justifies the allowance of the writ, and the application for it is therefore denied.

(77 N. J. L. 207)

In re LANG.

(Supreme Court of New Jersey. Nov. 9, 1908.)
CRIMINAL LAW (§ 981*)—INSANITY AFTER CONVICTION.

Section 13 of "An act concerning the commitment of insane persons into institutions for the cure and treatment of the insane of this state, their confinement therein and their support while so confined," provides that "if any person in confinement under commitment, indictment or sentence or under any other process, shall appear to be insane," a judicial inquiry shall be had, and, if insanity be found, such person shall be committed to an asylum until restored to reason, etc. P. L. 1906, p. 722. *Held* that, in the case of one convicted of murder in the first degree and sentenced to death, the statute does not alter the common-law rule that to prevent the execution of such sentence the insanity must be of such character as to render the prisoner incapable of understanding the nature of the proceedings against him, and his impending fate and execution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2497; Dec. Dig. § 981.*]

(Syllabus by the Court.)

Certiorari to Court of Common Pleas, Middlesex County.

In the matter of the alleged insanity of Frederick Lang. Verdict finding him sane, and he brings certiorari. Order affirmed.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

Allan H. Strong, for prosecutor. George Berdine, opposed.

PARKER, J. The present proceeding is in form a certiorari directed to the Honorable Theodore B. Booraem, judge of the court of common pleas of Middlesex county, and brings up an inquiry had before him pursuant to section 13 of the act entitled "An act concerning the commitment of insane persons into institutions for the cure and treatment of the insane in this state, their confinement therein and their support while so confined." (P. L. 1906, pp. 715, 722).

Frederick Lang, the prisoner, had been convicted in the Middlesex over of murder in the first degree, and was confined in the Middlesex county jail under sentence of death when an application was presented by the warden of said jail, pursuant to section 13 already referred to, alleging that the prisoner was insane. The judge thereupon instituted an inquiry and proceeded to take proofs as to the insanity of the prisoner as required by the act. A jury was called in, evidence taken in open court in the presence of counsel for the prisoner, and the jury, having been charged by the court as to the law, returned a verdict that the prisoner was sane; and thereupon the judge made an order reciting these proceedings, and finding and determining upon the said verdict and pursuant to the statute that the said Frederick Lang was sane. The prosecutor's claim is that this order was illegally entered because the test of insanity laid down by the judge in his charge to the jury was erroneous. This is the sole ground alleged for setting aside the proceedings.

Without deciding whether certiorari is the proper form of review for a proceeding of this kind, or whether it can be reviewed at all, we have thought it best, in view of the importance of the question raised, to decide it upon its merits. Stated shortly, the question for decision is whether under the circumstances the test of insanity is that laid down by the common law, or whether it had been modified by statute. The judge, in charging the jury, laid down the test of insanity in the following language: "If, therefore, a person sentenced for a crime is capable of understanding the nature and object of the proceedings going on against him, if he rightly comprehends his own condition in reference to such proceedings and can conduct his defense in a rational manner, he is, for the purpose of undergoing punishment, deemed to be sane, although on some other subjects his mind may be deranged or unsound. If the prisoner has not, at the present time, from the defects of his faculties, sufficient intelligence to understand the nature of these proceedings against him, and his impending fate and execution, the jury ought to find that he is not sane, and upon such finding he may be ordered to be kept in custody until his disability is removed." The judge also dealt with a request which had been presented on behalf of Lang, as follows: "I have been requested by Mr. Strong to charge you

as follows: 'If the mental condition of the defendant is such as would have made it proper that he should be committed to an insane asylum in case he had not been convicted or accused of crime, the jury should find that he is insane.' I decline to charge you to that effect, as, in my mind, that is not the law of the land. A man may be insane and commit a crime and yet know the difference between right and wrong. He may be insane on one subject and commit a crime in no respect connected with the special species of insanity that he is afflicted with. So a man may be insane after trial and after judgment and be a fit subject to be committed to an insane asylum, yet, if his sanity be only partial and he be able to comprehend, as I have said, the situation, and know the nature of the proceedings that are being taken against him, and can understand and appreciate his fate and intelligently confer with his counsel, he cannot claim immunity from punishment." To the portions of the charge above quoted, and to the refusal to charge as requested, exceptions were duly noted.

Counsel for the prosecutor concedes that the portion of the charge above quoted and the ruling on the request are entirely in accordance with the rules of the common law; and indeed this is obvious. 4 Blackstone, 25; *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216. It is argued, however, that this common-law test has been changed by statute in this state, and this on two grounds: First, that the definition of insanity contained in the lunatic asylum act of 1847, although not embodied in the act of 1906, is still in force and should be applied to that act; secondly, that as the act of 1906 provides for the first time a comprehensive schedule with regard to the commitment to asylums of lunatics of every class, criminal or otherwise, including persons in confinement and under sentence of any kind, the same test of insanity is necessarily applied to criminal lunatics under sentence as would justify the commitment to an asylum of any lawful citizen, either for the purpose of treatment, and, if possible, cure, or to insure the public safety. We have given to both these propositions the full consideration that the importance of the case demands, and find ourselves unable to sustain either of them. The last section of the lunatic asylum act of 1847 (P. L. p. 29; *Nixon's Digest*, 1868, p. 522; *Revision 1877*, p. 607, § 40) contains the following definition of insanity: "The terms 'lunatic,' 'insane,' as used in this act, include every species of insanity and extend to all deranged persons and to all of unsound minds other than idiots." The same section is re-enacted in the act of 1893, which was a general revision of the lunatic asylum act, and will be found as section 47 of that act (Gen. St. 1895, p. 1989).

It will be observed, however, that the definition is restricted to the acts in question, and neither act applies to murderers condemned to death. Section 28 of the original

act of 1847 (Nixon's Digest, p. 526) corresponds in many features to section 13 of the act of 1906, under which the proceedings now under review were had, and begins as follows: "If any person in confinement, under indictment, or under sentence of imprisonment, or for want of bail for good behavior, or for keeping the peace, or appearing as a witness, or in consequence of any summary conviction, or by way of any test, or under any other than civil process, shall appear to be insane, the judge of the circuit court of the county where he is confined shall institute a careful investigation," etc. So that at the time of the passage of this act, section 28 extended to convicted criminals under sentence of imprisonment, but not to those under sentence of death. The clause "or under sentence of imprisonment," was eliminated from the act of 1847 in the next year (Act March 9, 1848 [P. L. p. 213]; Nlx. Dig. 529, pl. 72), so that from 1848 down to 1906 the transfer to asylums of insane persons under sentence of imprisonment was regulated, if at all, by other statutes hereinafter referred to. And at no time until the act of 1906 does there appear to be any statutory provision regulating the procedure in the case of murderers condemned to death; and this was the state of the law at the time of the investigation of the insanity of one Clifford, a condemned murderer, by the late Justice Lippincott in 1899 (In re Clifford, 22 N. J. Law J. 176), on which occasion the investigation was had by the judge without a jury and the determination arrived at by the rules of the common law. At that time the criminal procedure act of 1898 was in force, and sections 169 and 172 (P. L. 1898, pp. 924 and 927) provided respectively for the examination and removal, in proper cases, of convicts confined in county institutions or the state prison, as the case might be; section 172 being merely a re-enactment of the amendment of section 8 of the state prison act of 1876 (P. L. p. 260), found in Gen. St. 1895, p. 3155, § 19, and neither section, of course, applying to those under sentence of death.

Counsel for the prisoner in this case maintains that while the act of 1906 is essentially a revision of all the preceding legislation in regard to these matters, it does not have the effect of repealing section 41 of the act of 1847, defining insanity, as re-enacted in 1893, and that that section is still in force, and should be resorted to as prescribing the proper test of insanity for any case coming under the act of 1906, and especially the present case. Our view, however, is to the contrary. Not only was the statutory definition of insanity by its terms confined to cases arising under the act in which it was contained, and therefore not applicable to cases arising under any other act, except a supplement or amendment, which the act of 1906 is not, but we think also that the course pursued by the Legislature when enacting the revision of 1906 as a general revision of all these mat-

ters, in expressly omitting any definition of insanity, is significant as indicating the intention of the lawmakers not to disturb the existing law in that regard. Our conclusion, therefore, is that, so far at least as relates to cases like the present, the statutory definition of insanity, even if now in force and unrepealed, has no application.

The other argument is that, as the act of 1906 is a comprehensive scheme, using the words "insane" and "insanity" in reference to all classes of persons mentally deranged, whether criminal or otherwise, including convicts under sentence, it intends that the same test of insanity should be applied to all, and that, if the inquiry had been conducted in relation to the prisoner as if he were a lawful citizen, the jury must have found, on the evidence submitted, that he was insane, and this would lead to his commitment to an asylum instead of his execution. Conceding, for present purposes, that the evidence before the jury was such that they must have found a verdict of insanity in the case of a lawful citizen, we cannot agree that the Legislature intended the same test of insanity to be made the ground of deferring execution indefinitely in a case like the present. On this branch of the case the omission of any definition of insanity from the statute is equally significant as on the other. It is, of course, entirely proper that a lawful citizen, or one accused of crime awaiting trial, or convicted of crime punishable by imprisonment, who is mentally deranged in any way, should be transferred to an asylum for treatment, and, if possible, cure, and also as a measure of protection to the public or his fellow prisoners, as the case may be. He has his life to lead, and public policy requires that he should be treated so as to lead it to the best advantage on his release, if a prisoner, from his imprisonment. But the case of a murderer sentenced to death is different. His life is forfeited; and we are not willing to adopt the view that in cases where the law has decreed that a murderer should be put to death, and the court or a jury has found that he is conscious of having committed a crime, is aware that he is amenable to punishment, and is appreciative of his situation as a murderer condemned to death, he shall be permitted to escape just punishment because of a mental infirmity which has no bearing on any of these features of the case. If this be the law, the capacity to distinguish between right and wrong with respect to an act of murder would become for all practical purposes an academic question in cases of murder committed under the influence of an irresistible impulse, as in *State v. Graves*, 5 N. J. Law J. 54, *Mackin v. State*, 59 N. J. Law, 495, 36 Atl. 1040, and *Genz v. State*, 59 N. J. Law, 488, 37 Atl. 69, 59 Am. St. Rep. 619, if it could be shown in an investigation under the statute that such impulse was due to mental derangement still persisting; or, indeed, if any other mental derangement,

however insignificant or irrelevant, could be made to appear. We should not be willing to say that the Legislature intended to enact such a drastic change in our jurisprudence without some definite evidence of that intent, and such evidence we fail to find in the statute under consideration.

We think a close examination of the act of 1906, in all its features, will show that its intention was not to make any change in the existing tests of insanity, but rather to draw into a general scheme of procedure all cases in which by the existing law commitment to an asylum is called for. In the main it is a re-enactment of former legislation, with the addition of requirements in every case and in many cases where such requirements did not previously exist, relating to the making out of applications and the form of such applications, where they are to be filed, to whom delivered, and so on. We conclude, therefore, that the words "insane" and "insanity" as used in the act of 1906 have a meaning which varies with the particular case coming within the purview of the act, and that that meaning in the present case is unchanged from its common-law meaning, and was clearly and accurately stated by the judge in his charge to the jury, part of which is above quoted.

The order brought up by the writ will therefore be affirmed.

(77 N. J. L. 153)

WINTERS v. BOARD OF POLICE COM'RS OF JERSEY CITY.

(Supreme Court of New Jersey. Nov. 9, 1908.)

MUNICIPAL CORPORATIONS (§ 181*)—POLICE—REGULATION OF OFFICERS.

It will not be presumed that a rule of a police department promulgated under the police tenure of office act (2 Gen. St. 1895, p. 1534), providing that "each member in his conduct and deportment must be quiet, civil and orderly," applies to the conduct of a member when excused from duty or to his deportment in private life. To have such effect, the rule should clearly express such purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 463; Dec. Dig. § 181.*]

(Syllabus by the Court.)

Certiorari on the prosecution of Benjamin F. Winters against the Board of Police Commissioners of Jersey City to review proceedings on his trial. Judgment reversed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Merritt Lane, for prosecutor. John Milton, for defendant.

VOORHEES, J. This writ of certiorari is brought to review the trial of the prosecutor, who was a patrolman on the police force of Jersey City, and against whom charges were made upon which was had a

trial resulting in the conviction of the prosecutor and his discharge from the force.

The insistence of the prosecutor is that the board of police commissioners had no jurisdiction to try the charges because the accused had been excused from duty and was out of the city of Jersey City at the time the acts charged occurred, the occurrence being laid in West Hoboken; that the board of police commissioners has not by its rules attempted to govern the conduct of its men when without the city, there being no rule applying to the general conduct of an officer; and that the evidence did not prove a violation of rule 9 of the police department, with a violation of which the prosecutor was charged. The evidence shows that the prosecutor, a married man, was calling upon a married woman at her home in the absence of her husband, and that the husband, having returned unexpectedly, the prosecutor secreted himself in a bedroom, where he was found by the husband, and driven from the house. The evidence warrants the conclusion that the prosecutor desired to conceal his presence in the house, and that his purpose was not a proper one, for if his visit was that of a friend, and the object of his call was that which he gives, there was no reason why he should undertake to conceal himself from the husband or any other accidental caller. The so-called tenure of office act (2 Gen. St. 1895, p. 1534) was intended to elevate and preserve the efficiency of the police force in cities, and to raise the personnel of its members. To that end, it provides that tenure of office shall not be precarious, and that members shall not be removable at will for political reasons or for any other cause than incapacity, misconduct, nonresidence or disobedience of just rules and regulations, and then only after written charges, stating the cause of complaint, shall have been preferred, signed by the person preferring them and filed, and after said charges have been publicly examined into by the appropriate municipal board upon reasonable notice to the person charged, so that every person against whom a charge may be preferred may have a fair trial and every reasonable opportunity to make his defense.

It is urged as a reason why jurisdiction does not attach for offenses committed without the limits of Jersey City that the board has no power to compel a witness to appear except within the confines of Jersey City. This is not so. Section five of the tenure of office act provides that the board shall have power to issue writs of subpoena for witnesses, which writs shall be served in the same manner as subpoenas issued out of the court for the trial of small causes. Section 9 of the small cause act (P. L. 1903, p. 253) provides that he (the justice) may award writs of subpoena for witnesses in the other coun-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ties of this state. It is undoubtedly true that it was the intent of the act, not only to prescribe as a ground for dismissal the violation of the established rules of a police department, but the most casual reading will show that the Legislative purpose was to make misconduct involving moral turpitude equally a ground for dismissal, and that, too, whether such misconduct occurred when such officer was on duty or not. Whether an act of a lower degree would not likewise be a valid cause for dismissal it is not necessary to determine. It would be strange, indeed, if under the term "misconduct," a member could not be dismissed for habitual drunkenness, or for theft, or forgery, or any other act of a criminal nature. And it may be that the commission of immoral acts such as are proved in the present case could not be considered other than "misconduct" under the statute. We think, therefore, that misconduct under the statute may be charged whether it occurs during duty hours or at other times according to the nature of the act and its natural and probable effect upon the discipline and tone of the force. Indeed, one of the qualifications for appointment is good moral character, and that the appointee shall not have been guilty of a crime involving moral turpitude. By inference the necessity for such qualifications fortifies the above construction.

The difficulty in this case, however, lies in the form of the written charges. The charges so preferred are specified to be in violation of rule 9. Rule 9 provides that "each member in his conduct and deportment must be quiet, civil, and orderly." It is found in a book entitled "Rules and Regulations of the Police Department," promulgated by the department. These rules are for "the better government and discipline of the department." Manifestly they are rules for the guidance and governance of the members of the police force in the performance of their duties; that is, while actually engaged therein. It will not be presumed that the authorities intended to establish a code of morals regulating the private life of the officers at all times and under all circumstances, unless an intention so to do clearly appears in the rules. Rule 9 is evidently regulative of the demeanor of officers while on duty, and does not apply to their conduct when excused from duty or to their deportment in private life. It was within the power of the police board to formulate a rule to reach the conduct of officers when not on duty (*Alcutt v. Police Commissioners*, 66 N. J. Law, 173, 48 Atl. 1006), but to have that effect the rule should clearly express such purpose. The charges, by reference to rule 9, are narrowed, and the proof does not sustain it when thus limited by the rule.

The trial was conducted with the formality requisite for such a tribunal to observe

and sufficient for securing a fair trial to the accused under the act. *Reilly v. Jersey City*, 64 N. J. Law, 508, 45 Atl. 778. In reviewing the testimony offered, we think it was ample to convict the defendant of misconduct, but by the written charges the offense was confined to a violation of rule 9, and, the proof being that the offense was committed while the prosecutor was excused from duty, it is not sufficient to convict him of such violation. Hence there must be a reversal, and the conviction must be set aside.

(77 N. J. L. 36)

DAAB v. HUDSON COUNTY PARK COMMISSION.

(Supreme Court of New Jersey. Nov. 9, 1908.)
EMINENT DOMAIN (§ 155*)—COMPENSATION—
PERSONS ENTITLED—LESSEE.

Section 7 of the act to regulate the ascertainment and payment of compensation for property condemned or taken for public use (Act March 20, 1900; P. L. p. 82) does not authorize a separate action at law by a lessee for the value of his estate.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 421-424; Dec. Dig. § 155.*]

(Syllabus by the Court.)

Action by Philip Daab against the Hudson County Park Commission. Demurrer to the declaration sustained.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

Leon Abbett, for plaintiff. Frank H. Hall, for defendant.

SWAYZE, J. The declaration avers that the defendant took proceedings to condemn lands; that the commissioners' report fixed the value of the land at \$132,800, and of the buildings, fences, and improvements thereon, \$3,000, making in all \$135,800, which the commissioners reported to be the total value in a gross sum of all the interests, estate, and shares in said land and property, whether in possession, remainder, or expectancy, and the total damages to be paid by the petitioner, the present defendant; that the plaintiff was the occupant, and was in possession of the land under a valid and subsisting lease, and was the owner of the buildings, fences, and improvements; that the value of his estate in the land and property was \$25,000.

The action is sought to be sustained under section 7 of the act to regulate the ascertainment and payment of compensation for property condemned or taken for public use. Act March 20, 1900 (P. L. p. 82). The section enacts that the report, together with the petition and orders, or a certified copy thereof, shall be plenary evidence of the right of the owner to recover the amount awarded, with interest and costs, in an action upon contract in any court of competent jurisdiction, in a

*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes.

suit instituted against the petitioner, after neglect to pay the same for 20 days after the filing of the report, and shall, from the time of filing the report, be enforceable as a lien upon the property taken, and any improvements thereon.

If the present action can be maintained, the defendant may be subjected to one or more other actions by the owner of the reversion or by persons claiming other estates in the land. The act provides no machinery by which the amount awarded can be apportioned among the several parties in interest. Section 6 requires the commissioners to view the land or other property, and to make a just and equitable appraisal of the value of the same and an assessment of the amount to be paid by the petitioner for such land or other property and damages. This evidently contemplates an award in a gross sum for the value of all the estates in the land, such as was made by the commissioners in this case. Section 7 gives the right of action only to the owner, and not to the owners, or to the owner of any estate in the land; and his right is to recover the amount awarded, which can only mean a single amount. It is to be recovered in an action upon contract in a suit to be instituted against the petitioner; that is, one suit only. We are unable to see, and we are pointed to no authority which justifies such a splitting up of the cause of action as the present suit involves.

The other language of the statute indicates that no such suit at law is necessary for the amount awarded is made enforceable as a lien upon the property taken; and in a suit in equity to enforce such a lien, which is substantially a vendor's lien, the other parties interested in the fund might be brought in, and the fund distributed. Such was the view taken by the English courts in *Walker v. Ware, Hadham & Buntingford Railway Company*, L. R. 1 Eq. 105; 35 L. J. Ch. 94. The inability of the commissioners under similar proceedings to determine the value of separate estates was adverted to by the Court of Errors in *Bright v. Platt*, 32 N. J. Eq. 362, 370, 371. The defendant is entitled to judgment upon this demurrer.

(77 N. J. L. 164)

FREAS v. CITY OF CAPE MAY.

(Supreme Court of New Jersey. Nov. 9, 1908.)
MUNICIPAL CORPORATIONS (§ 185*)—POLICE OFFICERS—DISCHARGE.

In order to entitle a police officer to the benefit of the tenure of office act of 1899 (P. L. p. 26), he must have been employed as a regular member of the police force, and one appointed under the second proviso of section 1 of that act, in cases of emergency or for parts of a year, may be discharged without having charges preferred against him or a hearing thereon.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 185.*]

(Syllabus by the Court.)

Certiorari on a prosecution of Joseph Freas to review the action of the council of the city of Cape May in discharging him from the police force. Application for writ denied.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Norman Grey, for prosecutor. J. Spicer Leaming, for defendant.

BERGEN, J. The prosecutor seeks a writ of certiorari for the purpose of reviewing the action of the common council of the defendant municipality in discharging him from its police force. The claim of the prosecutor is that, under an act regulating the tenure of office of cities (P. L. 1899, p. 26), he cannot be lawfully discharged without charges having been made against him, and be permitted a hearing thereon. It is admitted that he was discharged on October 2, 1906, by a resolution of the common council without the presentation of any charge.

The act of 1899 provides that "the officers and men employed in the police department of every city shall severally hold their respective offices during good behavior, efficiency and residence in the city where employed, and no person shall be removed from office or employment in the police department of any city for political reasons, or for any other cause than incapacity, misconduct, non-residence or disobedience of just rules and regulations; * * * provided further that it shall be lawful for the board, body or persons in the respective cities of this state having authority to employ members of the police department therein, to employ officers or men temporarily in cases of emergency or for parts of years in cases where their services are not needed throughout the entire year, and discharge them at the expiration of such temporary employment." The third section of the act provides that no officer or employé in the police department of any city shall be removed from office except for just cause, and then only after a legal charge stating the cause of complaint shall have been preferred against such officer, and after the said charge shall have been publicly examined into by the proper board or officer upon reasonable notice to the person charged. Under this act, if the prosecutor was employed in the police department of the city, and not employed under the proviso authorizing the employment of officers or men temporarily in cases of emergency or for parts of years, then he is entitled to his writ. The only question to be passed upon is, in which class was he employed? for it is clear that the act limits the tenure of office to persons regularly appointed without limitation as to term, but does not apply to persons temporarily appointed or to those appointed for special purposes.

The prosecutor does not claim that he was regularly appointed for an indefinite term, and the record of his appointment taken from the minutes of the common council shows that on June 2, 1904, the common council elected summer police officers from names submitted by the mayor, and among the persons so elected was the prosecutor. The case shows that in the city of Cape May persons are temporarily appointed as "summer policemen." This term has in Cape May a definite meaning, namely, special officers employed about the 1st of June in each year, who are discharged at the pleasure of the common council. The prosecutor went into office and continued to serve as a policeman until October 2, 1906. The minutes of the common council show that in June, 1905, the prosecutor's name was sent to the council by the mayor as an applicant for a position as summer policeman, and that he was then elected to that office; that on April 3, 1906, a resolution was adopted by the council that the prosecutor and other persons be discontinued as officers, and on the same day he and others were elected special officers to serve until July 1, 1906, and that on June 5, 1906, he was elected to serve "until September 15, or sooner." He was regularly discharged by the resolution complained of in October, 1906. Against this record the prosecutor testified that, although his claim was submitted by the mayor to the common council as an applicant for the position of summer policeman, as indicated by the minutes, he did not in fact make any application to the mayor to have his name submitted to the common council, but there is evidence showing that, after his name was submitted to the council, he applied to some of the members for their votes in confirmation of his appointment. The prosecutor rests his right to this writ upon the claim that although he was not appointed in the first instance as a regular member of the police force for an indefinite term, that, because he was not discharged at the end of the summer of 1905, he held over, and that he thereby became a regular appointee entitled to the benefit of the act of 1899. The evidence leaves no doubt in our minds that it was not the intention of the common council or the understanding of the prosecutor that he was appointed a member of the regular police force, but, on the contrary, that he was an appointee under the proviso contained in the first section authorizing the employment and discharge of policemen temporarily in cases of emergency or for parts of years in cases where their services were not needed throughout the entire year. That they did not discharge him at the end of the summer season, but permitted him to continue his services for a longer period, does not change the distinct terms of his employment. There is, of course, a presumption of law that persons

dealing with the official of a municipality, who is serving the city in a particular capacity, that he was regularly appointed even where no official act making the appointment can be shown; but that presumption would not exist in any dealing between the city and its official when the foundation of the officer's right to hold office is limited by a resolution which, on its face, discloses that the appointment was special and not general.

The conclusion which we have reached is that the writ ought not to go because the affidavits upon which this application is based show that the original appointment was temporary in its character, and nothing appears to show that there was not a case of emergency requiring his continuance in office beyond the summer season of 1904.

The application for the writ of certiorari is denied, with costs.

(77 N. J. L. 182)

BOURGEOIS v. BOARD OF HEALTH OF OCEAN CITY.

(Supreme Court of New Jersey. Nov. 9, 1908.)

MUNICIPAL CORPORATIONS (§ 636*)—VIOLATION OF HEALTH ORDINANCE—JURISDICTION OF PROSECUTION.

A justice of the peace has jurisdiction to hear and determine violations of health ordinances in cities where no police justice has been appointed or provided for. The mayor of such city has no exclusive jurisdiction. He is given in some matters the same powers as police justices appointed in any city, but the powers given the mayor are not exclusive, and, in the enforcement of the health act of 1887 (P. L. p. 80), a justice of the peace of the county has jurisdiction in all cities in his county where the option to provide for a police justice has not been exercised, and no such officer exists.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1402; Dec. Dig. § 636.*]

(Syllabus by the Court.)

Certiorari on the prosecution of Anderson Bourgeois against the Board of Health of Ocean City to review a conviction for a violation of the health ordinance. Rule dismissed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Bourgeois & Sooy, for prosecutor. Apgar & Boswell, for defendant.

BERGEN, J. The prosecutor was convicted before a justice of the peace of violating the health ordinance of Ocean City, and seeks to reverse the judgment of conviction upon the ground that the justice was without the required jurisdiction to hear and determine the question. The only objection we can consider is that relating to the jurisdiction of the court. The other questions raised relate either to the proof or merits, and should have been corrected, if erroneous, by appeal. *Board of Health v. Cattell*, 73 N. J. Law, 516, 64 Atl. 144.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The principal point argued is that as the act (P. L. 1897, p. 46), confers upon the mayor the same jurisdiction to enforce ordinances as is given to a police justice when appointed, and as a police justice is given exclusive jurisdiction in such matters, the mayor was the only judicial officer having jurisdiction to hear and determine violations of the health ordinance. This claim has no merit. The jurisdiction given the mayor under section 25 (P. L. 1897, p. 60) is not exclusive, and it is admitted that the common council of the city had not exercised its option under section 78 of the same act to establish a police court. Section 18 of the health act (P. L. 1887, p. 89) provides "that every district court in any city, and every justice of the peace in any county, and any police justice or recorder in any city is hereby empowered" to enforce the health code. There being no court or judicial officer in Ocean City having exclusive jurisdiction over the enforcement of the law relating to public health as enacted in P. L. 1887, p. 80, we are of opinion that under that statute a justice of the peace of the county of Ocean had jurisdiction of the matter under review.

It is further urged that the conviction does not state that the cause was heard in a summary manner, but this is disposed of contrary to the prosecutor's claim in *Board of Health v. Rosenthal*, 67 N. J. Law, 216, 50 Atl. 439.

Another objection is that no notice was given. This was not necessary. Section 18 of the health act (P. L. 1887, p. 89) does not require notice before suit. Notice is only required under section 14 if the city proposes to abate a nuisance and charge the expense thereof to the delinquent.

The rule is dismissed, with costs.

(77 N. J. L. 220)

NICHOLAS v. ORAM.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. MASTER AND SERVANT (§ 265*)—LIABILITY FOR INJURIES TO SERVANT.

To hold one liable as master for injury to another claiming to have been his servant, the relation of master and servant must be shown to have existed.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 265.*]

2. PRINCIPAL AND AGENT (§ 22*)—EVIDENCE OF AGENCY—DECLARATIONS OF AGENT.

If the employment is claimed to have been effected through an intermediary, the authority of such intermediary as representing the master should appear, and cannot be inferred from evidence of his own statements.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 40; Dec. Dig. § 22.*]

(Syllabus by the Court.)

Action by William Nicholas against Robert F. Oram. Verdict for plaintiff, and defendant applied for a rule to show cause why the

same should not be set aside and a new trial granted. Rule made absolute.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

William C. Gebhardt, for plaintiff. James H. Neighbour and Paul A. Queen, for defendant.

PARKER, J. This suit is to recover damages for personal injuries sustained by the plaintiff because of the giving way of a scaffold on which he was working. The scaffold was on the roof of a house under construction, belonging to one Keenan, and plaintiff at the time of the accident was engaged as helper, carrying slate up a ladder and depositing it on the scaffold for use by the slater. The declaration alleges in the first count that defendant was a builder, and employed plaintiff to work on the scaffold in question, and that defendant failed to take proper care to have the scaffold safe for such purpose, so that it broke and injured plaintiff. The second count is rested on an alleged procurement and invitation of plaintiff by defendant to work on a scaffold that was unsafe, and as to which defendant had not exercised legal care. The case was submitted to the jury, who returned a verdict for plaintiff, and the matter is before us on a rule to show cause why the verdict should not be set aside and a new trial granted.

Of the several grounds that are urged in support of the rule we think one is sufficient to dispose of the case as presented. In our judgment the plaintiff failed to make due proof of the fundamental fact, either of his employment by defendant, or other invitation on the part of the defendant to work at the house in question. He (plaintiff) was not regularly in the employ of Oram, and never saw him nor had any communication with him, either before the accident, or afterwards in connection with this work. Plaintiff was regularly employed, if at all, by a slate roofing contractor named Searing, and was actually working for him on the day before the accident. On that day, Searing testifies, defendant Oram asked him to let him have a man or two to help him out with his contract for the Keenan house, and Searing told Oram that he could not spare any men because of a job that he was to begin on the next day, and that Oram went away apparently angry; that very shortly afterwards Searing heard that his engagement for the next day was off because the building was not ready for him. He did not, however, communicate with Mr. Oram, and did not see him until after the accident; but that on that day, while Searing was at supper, a man named Eckhardt came to him, and said that Mr. Oram wanted him to send his men up the next day, and so the next morning Searing told them, including plaintiff, that "there was a job to be done, if they wished to do it, they could,"

and plaintiff, relying on this remark of Searing's, went that morning to the Keenan house, and was working there when injured. It also appeared by Searing's testimony that after the accident he went up and examined the broken scaffold, and on his way from thence met the defendant, who asked if the men would come back, and, on being told they would not, said they would get no pay for what they had done if they did not come back. This is substantially everything in the case to connect Oram with the fact of plaintiff's going to the Keenan house to work. Eckhardt was not called by plaintiff, and when sworn for defendant denied that Oram had given him any directions to go and see Searing, or that he had in fact seen him about getting any men to work. It is apparent that, when Oram left Searing in dudgeon because he could not have the men, there was absolutely nothing by way of employment or invitation between Oram and the plaintiff. All that occurred after that was the alleged visit of Eckhardt, who, according to Searing's testimony, undertook to act as agent or messenger for Oram, to ask for the men once more. But there is nothing except Eckhardt's statement on that occasion to show that Oram had sent him, or that Oram even knew that the men would be available, and that statement was of course pure hearsay, and incompetent to bind Oram, unless it appeared in some legal way that Oram had authorized him to make it. Ryle v. Manchester Building & Loan Ass'n, 74 N. J. Law, 840, 67 Atl. 87. Nor does the interview of Searing with Oram after the accident help the case. It is evidence to show that Oram had heard the men had gone to work on the house, and that he was willing to pay them if they would go on; but it is without evidential force to show that Oram had any such prior knowledge of their intended going as to charge him with any duty of care in providing a safe place for them to work.

Motion was made to nonsuit, on the ground, among others, that the evidence had not properly connected Oram with the plaintiff's going to work at the house in question. This motion should have been granted.

The rule to show cause will be made absolute.

(77 N. J. L. 173)

MCCORMICK v. HESSER.

(Supreme Court of New Jersey. Nov. 9, 1908.)

MUNICIPAL CORPORATIONS (§ 705*)—INJURY TO PEDESTRIAN—COLLISION WITH AUTOMOBILE.

If a person approaching a street crossing, being warned of the coming of an automobile, looks and sees the machine coming towards the crossing, not more than 130 feet away, and thereupon proceeds to cross the street in front of it without again looking or paying any attention to the approaching vehicle, he is guilty of contributory negligence, and cannot recover for

injuries caused by a collision with the machine, for, being warned, and seeing the machine coming towards the crossing he intends to pass over, it is his duty to sufficiently observe the position of the automobile to avoid a collision if possible.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. § 705; * Highways, Cent. Dig. § 460.]

(Syllabus by the Court.)

Appeal from District Court of Perth Amboy.

Action by William H. McCormick against William H. Hesser. Judgment for plaintiff. Defendant appeals. Reversed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Beekman & Spencer, for appellant. Joseph E. Stricker, for appellee.

BERGEN, J. The plaintiff's case shows that on September 16, 1907, about 15 minutes before 11 o'clock in the evening, he was walking across the city park in Perth Amboy towards a street crossing; that when he was within 10 feet of the curb he heard the sound of the horn on defendant's automobile; that he then saw the machine coming, about 130 feet away; that he proceeded, and when he had gone into the street about 25 feet from the curb, a distance of 35 feet from where he was when he saw it, he was struck by the defendant's automobile; that he did not look towards the machine after he first saw it and heard the warning given by defendant, and did not see it again until he was run against. On this defendant moved for nonsuit, which was refused. We think it should have been granted. The plaintiff saw the automobile coming towards him, and heard the warning when it was only 130 feet away, and then, without looking again, or paying any further attention to it, walked into the street where he knew, or should have known, the automobile would pass. We think it was the duty of the plaintiff, when he saw the machine approaching and heard the warning given by the defendant, to observe where he was going, and that, in walking into the street in front of an approaching vehicle without using his eyes and making some attempt to avoid a collision, he deliberately placed himself in a position of danger, and was thereby guilty of negligence which contributed to the accident.

The judgment below is reversed.

(77 N. J. L. 175)

RANKIN v. CENTRAL R. CO. OF NEW JERSEY et al.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. DISMISSAL AND NONSUIT (§ 81*)—SETTING ASIDE—GROUNDS.

A judgment of nonsuit will not be set aside, when it appears that the plaintiff could not recover without such an amendment of the pleadings as would create and institute a new

suit, with a new question, in a controversy between different parties.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 186, 187; Dec. Dig. § 81.*]

2. DEATH (§ 55*)—ACTIONS—AMENDMENT OF DECLARATION.

A suit instituted in New Jersey by the administratrix of a deceased person for damages under the death act, when the death, charged to the negligence of the defendant, happened in the state of Pennsylvania, where the only person entitled to prosecute an action for such damages is the widow of the deceased, cannot be maintained by such administratrix in the courts of this state, nor will an amendment of the summons and declaration be allowed, the effect of which is to make the widow of the deceased the plaintiff in the place of the personal representative who instituted the suit.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 72; Dec. Dig. § 53.*]

(Syllabus by the Court.)

Action by Catharine Rankin, administratrix, for the death of her intestate, against the Central Railroad Company of New Jersey and another. There was a judgment of nonsuit, and plaintiff applied for a rule to show cause why the same should not be vacated. Rule discharged.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

James M. E. Hildreth, for plaintiff. Nelson Y. Dungan, for defendants.

BERGEN, J. A judgment of nonsuit having been entered in favor of the Philadelphia & Reading Railway Company, a rule to show cause was allowed why it should not be vacated. The rule permitted the taking of affidavits, from which it appears that the plaintiff had retained a member of the bar of the state of New Jersey, who brought suit in her name, as administratrix of her husband, and that issue was joined on August 18, 1906; that the case was noticed for trial at the following September term of the Hudson county circuit court, but was not tried; that it was not noticed for trial for the December term, 1907, of that court, and upon notice given by the defendant, the Philadelphia & Reading Railway Company, to the counsel of record the nonsuit was granted. It also appears that on October 23, 1907, the plaintiff consulted a nonresident attorney, Mr. Charles H. Edmunds, a member of the bar of the state of Pennsylvania, who on November 9, 1907, called upon the attorney of record, and was told by him that he had retired from the case, and had handed over to the plaintiff the papers connected therewith. The nonresident attorney, instead of retaining a member of the bar of this state to prosecute the matter, undertook, by conferences with the counsel of the defendant, to make a settlement, in which he was not successful, and on November 30th, more than a month after his client had discharged her New Jersey counsel and employed Mr. Edmunds, he retained Mr. Hil-

dreth, the present attorney of record. It was then too late for Mr. Hildreth to give notice of trial for the succeeding December term, and, so far as the case shows, no attempt was made to give such notice, for want of which the nonsuit was allowed. It is quite clear that the failure to give the notice of trial was due to the fact that plaintiff had employed a nonresident attorney, one presumably unacquainted with the practice in this state, or, if acquainted, disqualified from acting as attorney of record for her. Whether such methods of practice in our courts should be encouraged by relieving parties from the natural result of such a proceeding need not be passed upon in this case, because the judgment ought not to be opened under the well-established rules of procedure in this state.

The declaration in this case shows that the suit was instituted to recover damages for the death of plaintiff's intestate, caused by an accident which happened in the state of Pennsylvania, which it is charged resulted from the negligent act of the defendant, but there is no averment in the declaration that there is any statute in that state which would entitle the plaintiff to recover, and no proof can be introduced to support an action for damages resulting from the death of the deceased through the negligence of the defendant, because in the absence of such statute the presumption is that the common-law rule prevails; and, in order to prove that there is such a statute in a sister state, it must be averred in the pleadings. If the declaration should be amended, and the statute of Pennsylvania set up in the pleadings, it would appear that the right of action is vested in the widow, and not in the personal representative, and as was said by Mr. Justice Garrison, in *Lower v. Segal*, 59 N. J. Law, 66, 34 Atl. 945, "The right of action being vested in the widow, she is the only person who can maintain the suit whether in the domestic tribunals or elsewhere, since she is everywhere the widow of the husband whom she survives." Therefore, if a case of surprise and merits had been disclosed and this judgment opened, the plaintiff having brought her suit as the personal representative of the deceased, and not as widow, she could not recover without an amendment of her pleadings, so, in order that the plaintiff might proceed with her action, it would be necessary to amend all of the pleadings that it might appear that she was prosecuting her action as widow, and not as the personal representative of the deceased. Such an amendment was refused in a similar case in *Lower v. Segal*, 60 N. J. Law, 99, 36 Atl. 777. In that case an action was instituted by a wife as administratrix to recover damages for the death of her husband, which occurred in the state of Pennsylvania, and she applied for leave to amend the summons and declaration

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in such manner that the action might appear to be one brought by the widow of deceased, instead of his personal representative, and it was there held by this court, Mr. Justice Magie writing the opinion, that the amendment would not continue the existing suit except in mere form, but would create and institute a new suit, with a new question, in a controversy between different parties. The determination in that case would be controlling in this; and, if no nonsuit had been granted, and the plaintiff was now moving for the amendment necessary to state her cause of action in a form necessary for recovery, it would be refused. In *Fitzhenry v. Consolidated Traction Co.*, 63 N. J. Law, 142, 42 Atl. 416, the application was to amend the pleadings, in a suit brought by a father to recover for the loss of services upon the death of his son, by adding the words "Administrator of the estate of Joseph Fitzhenry, Jr., deceased," as the name of the plaintiff in the summons and declaration, but the amendment was refused, citing *Lower, Administrator, v. Segal*, 60 N. J. Law, 99, 36 Atl. 777.

It thus appears that, for want of an amendment which the court would not allow if applied for, the plaintiff has not stated a cause of action, and a nonsuit would ultimately follow, and under such circumstances the present judgment of nonsuit ought not to be opened, and the rule to show cause is discharged.

(77 N. J. L. 147)

STOLARZ v. ALGONQUIN CO.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. MASTER AND SERVANT (§ 155*)—DUTY TO WARN SERVANT—OBVIOUS DANGER.

Where injury is caused to a servant from the operation of a dangerous machine, such danger of being obvious, a cause of action by the servant against the master cannot be grounded upon the negligence of the master in failing to warn such servant of the danger or to give him instructions regarding the machine, because in such case both servant and master have equal means of forming a correct judgment of the danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 310; Dec. Dig. § 155.*]

2. MASTER AND SERVANT (§ 153*)—DUTY TO WARN SERVANT—NOTICE OF INEXPERIENCE.

The inexperience of a servant must come either actually or by inference to the knowledge of the master, to charge the master with the duty of warning the servant, and then it becomes the duty of the master to warn the servant against such dangers as the servant is not reasonably expected to know and such as are not obvious to him.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 314, 316, 316½; Dec. Dig. § 153.*]

(Syllabus by the Court.)

Error to Circuit Court, Passaic County.

Action by John Stolarz against the Algonquin Company. Judgment for plaintiff,

and defendant brings error. Reversed, and a venire de novo ordered.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Michael Dunn, for plaintiff in error. Lewis A. Allen and Andrew Foulds, Jr., for defendant in error.

VOORHEES, J. The plaintiff, a Pole, unable to speak English, 19 years of age, was the employé of the defendant, and was injured by having his hand cut in a machine with cylindrical rollers, in which there were hooks or sharp protruding teeth or nails, used for spinning yarn. He had been in this country only one week at the time of the injury, and on the third day of his service to the defendant the accident happened. It was his duty when the strands or ropes of yarn broke to twist them together and feed them into the machine. The rollers upon which are the nails or teeth are in plain sight and revolve slowly, say 3½ turns a minute. So far as the rollers are concerned, there is no doubt that they were quite obvious. It is admitted that he had never been instructed. He had been working on the day of the accident on the machine from morning. The accident happened at half past 11. The plaintiff's description of the accident is that the boss told him to go and fix a broken rope of yarn that ought to go through the machine. He went to the machine and tried to adjust the rope. He was a little distance off, and he stretched himself out and was caught between the rollers. He made an attempt to put the end in, but was too far distant, and his hand got caught in the machine.

A nonsuit should have been granted. While there was evidence that the master had notice through his agent who hired the plaintiff that the servant was inexperienced, a "greenhorn," and there were also other indications of such inexperience, more or less obvious, namely, his inability to speak the language and the fact that he was under age, yet the danger was a perfectly obvious one. The plaintiff must be chargeable with the fact that two revolving drums, intended to draw in between them yarn, will, if his hand comes in contact with them, draw that in also and injure it. The plaintiff's testimony also discloses that he knew that there was such danger in coming in contact with these revolving parts. So it is quite clear that the plaintiff's injury did not result from any latent or concealed danger, or one unknown to him. The injury, therefore, is not traceable to any asserted negligence of the master for failing to warn the servant or to give him instructions. The case is quite like *Mika v. Passaic Print Works* (N. J. Err. & App.) 70 Atl. 327, where, a servant's hand being caught between two revolving cylinders, in

plain sight, it was held that, if the master was negligent in failing to instruct the servant in the operation of the machine, the injury was not due to such neglect, for both servant and master had equal means of forming a correct judgment of the danger.

Error is also assigned upon that portion of the charge of the court declaring, "Where persons without experience in the use of machinery of a dangerous character are employed, it is the duty of the employer to give notice and warning against these dangers to which the employé is exposed." This is too broad. Inexperience must have come either actually or by inference to the knowledge of the master, and then the dangers to be warned against must be such as the employé is not reasonably expected to know, or as are not obvious to him.

The judgment is reversed, and a venire de novo ordered.

(77 N. J. L. 217)

LAVIN v. PUBLIC SERVICE RY. CO.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—EVIDENCE.

Appeals from district courts being limited to questions of law, this court will not, on such appeal, review a finding of fact if there is any legal evidence on which such finding may be supported.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

2. APPEAL AND ERROR (§ 204*)—REVIEW—OBJECTIONS NOT MADE BELOW.

Nor will the admission of illegal evidence be reviewed when no valid objection was made at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258, 1259; Dec. Dig. § 204.*]

3. APPEAL AND ERROR (§ 1078*)—OBJECTIONS WAIVED.

Grounds for reversal not discussed in either argument or brief will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

(Syllabus by the Court.)

Appeal from District Court of Jersey City. Action by Bridget Lavin against the Public Service Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

Edwards & Smith, for appellant. Samuel A. Besson, for appellee.

PARKER, J. The district court judgment brought up by this appeal was for damages sustained by plaintiff because of injury to her cab, horse, and harness growing out of a collision with a trolley car operated by defendant, and which collision took place at the intersection of Clinton street and Twelfth street, in Hoboken. Clinton street runs north

and south, and contains one car track on which the car in question was moving northwardly. Twelfth street runs at right angles to Clinton street, and through this the cab, driven by "a certain youth" named Vietheer, was proceeding in an easterly direction. The case was tried without jury, and a stenographic transcript is certified on this appeal as a state of the case, pursuant to P. L. 1905, p. 259. In addition to this, the district court has certified, pursuant to rule of this court, certain findings of fact on the evidence taken at the trial. Only two of these findings are challenged. They are as follows:

(6) The plaintiff's cab driver, when he saw that the motorman of the car was not going to respect his right to cross first, tried to stop his cab and allow the car to pass.

(7) Owing to the absence of warning signals, the high speed at which the defendant's car was moving, although the plaintiff's cab driver exercised reasonable precautions to avoid the collision by trying to stop his cab when he saw the latter was not going to respect his right to cross the track first, the collision was unavoidable.

If there was any evidence capable of supporting these findings, they cannot be reviewed here, the statute already cited giving an appeal on questions of law only. N. Y. & N. J. Telephone Co. v. Connelly, 69 N. J. Law, 182, 54 Atl. 219; Phelps v. Seymour, 70 N. J. Law, 626, 57 Atl. 129; Skidmore v. Johnson, 70 N. J. Law, 674, 675, 57 Atl. 450; Burr v. Adams Express Co., 71 N. J. Law, 263, 58 Atl. 609; Hanson v. P. R. R., 72 N. J. Law, 407, 60 Atl. 1101; Dale v. See, 51 N. J. Law, 378, 381, 18 Atl. 306, 5 L. R. A. 583, 14 Am. St. Rep. 688. The driver testified as follows: "Q. Could you stop? A. No, sir; I tried to. I tried to do the best I could, and when I tried to swing to one side and I started to swing he came up against me and hit me right in the back." It is true that a good deal of the testimony of this witness tends to show that he attempted to get across in front of a car that was only a few feet away and approaching rapidly; but the court sitting as a jury was entitled to infer from his testimony that he tried to stop, but seeing he was certain to be struck if he did, then tried to turn up Clinton street parallel with the car. This disposes of the attack on finding No. 6.

Finding No. 7 depends in part on findings Nos. 3, 4, and 5, which appellants concede are proper. They are to the effect that the car was going at high speed, and that no bell was rung or warning signal made; that the cab reached the crossing first; and that the motorman did not respect the right of the cab driver to cross the street first. Appellants say the evidence demonstrates conclusively that the driver attempted to cross after it appeared that his right to cross first would not be respected, thus bringing this

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

case within the line of decisions typified in *Earle v. Consol. Trac. Co.*, 64 N. J. Law, 573, 46 Atl. 613. We think it was inferable from his testimony that he recognized and attempted to exercise his right of crossing, assuming that the car was properly equipped with braking appliances and a careful motorman and did not observe until too late that the motorman "could not control the brakes." His testimony was quite contradictory, but would support this inference—on such an inference, finding No. 7 was proper. This leads to the conclusion that the nonsuit asked for was properly denied.

The other point urged by the appellant is that an item of \$30 for repairing was allowed in fixing the damages, which was based on illegal evidence. Plaintiff was allowed to testify that she had received an estimate from a painter who named this amount as the cost of repainting, the work not having been done. This comes clearly within the ruling in *Arata v. Sullivan*, 63 N. J. Law, 46, 42 Atl. 839, and it would have been legal error to admit the evidence if seasonable objections had been interposed; but no objections of any kind were made at the time. At the conclusion of the trial defendant's attorney requested the court to disregard this \$30 item, but only on the ground that the work had not been completed. That fact would not render it incompetent. Were this the law, plaintiff would have to repair damages and wait for the conclusion of repairs before being in a position to prove what damages had been sustained.

One or two other points were raised at the trial, and are assigned as causes for reversal, but there was no oral argument, and no mention of these points is made in appellant's brief. They have, therefore, not been considered. *Hanson v. Penna. R. R.*, 72 N. J. Law, 407, 60 Atl. 1101.

The judgment will be affirmed.

(77 N. J. L. 89)

DURBROW v. HACKENSACK MEADOWS CO. et al.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. EVIDENCE (§ 164*)—BEST AND SECONDARY—RESOLUTION OF CORPORATION.

If a resolution passed at a meeting of the board of directors of a corporation was correctly recorded, then the minutes afford the best evidence as to the contents of the resolution, and none other will be received when the minutes are at hand. If the correctness of the minutes is to be attacked, it is necessary first to offer them for that purpose.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 546, 547; Dec. Dig. § 164.*]

2. CORPORATIONS (§ 410*) — OFFICERS AND AGENTS—SCOPE OF AUTHORITY.

A resolution of a board of directors of a land company authorizing an agent to execute on behalf of the company agreements for the sale of its property does not empower the agent to make a contract which is not for the sale of

property, and is entirely outside of the ordinary course of its business.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 410.*]

3. EVIDENCE (§ 185*)—BEST AND SECONDARY—DEMAND FOR PRODUCTION OF ORIGINAL—NECESSITY.

Where, by the presumption of law, a contract is in the hands of the adverse party, secondary evidence as to its contents will not be received in the absence of any demand upon the adverse party to produce the original.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 642; Dec. Dig. § 185.*]

4. EVIDENCE (§ 182*)—BEST AND SECONDARY—PROOF OF EXECUTION.

The nonproduction, under demand, of a contract, the existence of which was denied, will not justify proof of its contents by secondary evidence without first proving its existence and due execution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 604; Dec. Dig. § 182.*]

(Syllabus by the Court.)

Action by William Durbrow against the Hackensack Meadows Company and another. Plaintiff was nonsuited, and thereupon applied for a rule to show cause why the same should not be set aside and a new trial granted. Rule discharged.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

Northrop & Griffiths and William D. Edwards, for plaintiff. Collins & Corbin, for defendant Hackensack Meadows Co. Marshall Van Winkle, for defendant Arthur L. Meyer.

TRENCHARD, J. The plaintiff in this suit seeks to recover from the defendants, the Hackensack Meadows Company and Arthur L. Meyer, compensation for bringing about an arrangement between the Hackensack Meadows Company and the Federal Contracting Company whereby the latter company filled in land of the Meadows Company with soil taken from the bottom of the New York Bay. The plaintiff's claim was that he was authorized to make this arrangement, if he could, and was promised compensation by Meyer, on behalf of the Meadows Company, in case he succeeded. At the trial at the Hudson circuit there was no evidence showing any authority on the part of Meyer to bind the company in making this arrangement, nor any other evidence upon which liability could be rested, and a nonsuit was directed by the court. Whereupon the plaintiff applied to the trial judge for, and was allowed, a rule to show cause why the judgment of nonsuit should not be set aside and a new trial granted.

The contention in this court is that there was a failure of proof only because the trial judge overruled testimony offered which would have shown authority originally conferred on Meyer to bind the company, or

else a ratification of his act. In order to show such authority in Meyer, the plaintiff first attempted to prove by the witness Elwell that at a meeting of the directors of the Meadows Company at which the witness was present, although not a director, a resolution was passed appointing Meyer general manager with power to bind the company. This testimony was properly overruled as not the best evidence. If the resolution was correctly recorded, then the minutes afforded the best evidence as to its contents, and none other was competent in view of the fact that the minutes were at hand. If the correctness of the minutes was to be attacked, it was necessary first to offer them for that purpose. *Van Hook v. Somerville Mfg. Co.*, 5 N. J. Eq. 137; 26 Amer. & Eng. Enc. of L. (2d Ed.) 1005. For the same purpose the plaintiff also attempted to prove by the same witness the adoption by the directors of the company of a resolution authorizing Meyer to execute on behalf of the company agreements for the sale of its property. We incline to think that this testimony was in a like position, and therefore also was properly overruled for the reasons already indicated, but, however that may be, the resolution contained no authority to Meyer to make the contract in question, which was not for the sale of property, and was outside of the ordinary course of the business of the company. 10 Cyc. 924.

The plaintiff next offered to prove, by the witness Elwell, the terms and provisions of a contract alleged to have been made in writing between the Meadows Company and Meyer "relative to the compensation that he was to receive, and the duties he was to perform, as general manager of the company." This testimony was properly excluded for two reasons: First. The writing, if it existed, and had been duly executed, was presumed to have been in the hands of either one or the other of the defendants. The plaintiff by the rule of law was required to make his proof of the contract by the highest evidence which, under the circumstances of the case, the law presumed to be, or ought to be, in his power. He called on the Meadows Company to produce it. They denied having any such contract, and, in effect, denied its existence. He should then have called upon the defendant Meyer to produce it. This he did not do. Until that was done secondary evidence of the contents of the paper was inadmissible. *Den v. McAllister*, 7 N. J. Law, 46. Secondly. The offer was made without previous proof of the existence and due execution of the contract. The nonproduction, under demand, of a contract, the existence of which was denied, will not justify proof of its contents by secondary evidence without first proving its existence and due execution. 17 Cyc. 536. For the evident purpose, although not so stated, of proving

a ratification by the company of Meyer's alleged agreement with the plaintiff, the latter next attempted to prove by the witness Elwell what action was taken by the board of directors of the Meadows Company with respect to a "bill from Mr. Durbrow." As hereinbefore remarked, Elwell's testimony was not the best evidence of what occurred at the directors' meeting; that should have been shown by the minutes. It does not appear that the question was asked for the purpose of disproving an entry in the minutes, nor to supply an omission therein. The evidence was therefore properly overruled.

The whole case discloses no evidence upon which a judgment for the plaintiff could have been rested, and hence the nonsuit was properly directed.

Let the rule to show cause be discharged, with costs.

(77 N. J. L. 61)

BRYANT, Commissioner of Labor, v. N. Z. GRAVES CO.

(Supreme Court of New Jersey. Nov. 9, 1908.)

OFFICERS (§ 113*)—OBSTRUCTING IN PERFORMANCE OF DUTIES.

In the trial of an action to recover a penalty, under section 28, Act 1904 (P. L. p. 160), for obstructing and hindering the inspectors of the Department of Labor while in the performance of their duties, it appeared that two inspectors applied at the office of the defendant; that the door of the office was locked, but some one within told them to go to the gateman. They went to the gateman, told him who they were, handing him a card upon which was the official position of the one inspector and showed him the official badge. The gateman refused to admit them. *Held*, that from the testimony the jury might have inferred that the unexplained act of the gateman was the act of the defendant, and so raised a prima facie case to go to the jury, and that a nonsuit was error.

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 113.*]

(Syllabus by the Court.)

Appeal from District Court of Camden.

Action by Lewis T. Bryant, Commissioner of Labor of New Jersey, against the N. Z. Graves Company, to recover a penalty. Judgment for defendant, and plaintiff appeals. Reversed.

Argued June term, 1908, before BERGEN, VOORHEES, and REED, JJ.

Nelson B. Gaskill, Asst. Atty. Gen., for appellant. John W. Wescott, for appellee.

REED, J. This action was brought to recover the sum of \$50 for one penalty for violating section 28 of the act entitled "An act regulating the age and employment, safety, health and work hours of persons, employes, and operatives in factories, workshops, mills, and all places where the manufacture of goods of any kind is carried on, and to establish a department for the en-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

forcement thereof." Act March 24, 1904 (P. L. p. 160). Section 45 of this act provides for the appointment of a commissioner, assistant commissioner, and inspector of labor. These officers are empowered at all reasonable times to enter and inspect factories, mills, workshops and places where the manufacture of goods of any kind is carried on. Section 26 enacts that "no persons shall interfere with, delay, obstruct or hinder by force or otherwise, the commissioner or assistant commissioner or inspector in the performance of their duties." The defendant, the N. Z. Graves Company, operate in Camden a factory known as the "Camden White Lead Works," wherein white lead is manufactured. On October 27, 1907, Henry Kuehnle and Lewis Holler, both inspectors of the department of labor, went to the factory of the defendant for the purpose of making an inspection. They went first to the office. The door of the office was locked. These inspectors knocked repeatedly, and a voice from the inside of the office said to them, "Go to the gateman. See the gateman outside." They went to the gateman, told him who they were, handing him a card upon which was the name of Holler with his official position thereon, and he showed the gateman his official badge. The gateman refused to admit the inspectors. This was the testimony upon the trial, and at the close of the commissioner's case, the trial judge directed a verdict for the defendant. We think this direction was erroneous. It is not denied that the inspectors were excluded from the defendant's factory, and that this exclusion obstructed and hindered the inspectors from the performance of their duty. The substantial ground upon which the direction of the trial judge is defended is that it did not appear from the testimony that the gateman was the servant of the defendant when he refused admission to the inspectors; but, from the facts proved, we think the jury could have drawn the conclusion that the gateman was the servant of the defendant. The inspectors went first to the appropriate place—the office of the company. They were directed by some one in the office to the gateman. They went to the gateman, so far as appears the only gateman. The fact that he was stationed at the gate was a fact from which the jury could have inferred that he was there as the servant of the company, stationed there to guard the gate and exercise his authority in admitting those who were entitled to enter, and excluding those who were disentitled to enter. Nor is the inference that the act of the servant was the act of the master destroyed by the fact that the action is for a penalty. In *Atty. Gen. v. Sidden*, 1 Crompt & Jer. Rep. 219, the master was held liable for the fraudulent act of his servant committed in violation of the revenue laws. The court held that the

action was a civil suit to recover penalties given by the statute. It was held that the acts committed by the servant raised an inference that he was acting for and with the assent of the master, but it was a privilege of the master to show the contrary. In *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314, the defendant's servant prepared and delivered at the plaintiff's factory skimmed milk, in violation of the penal statute, and it was held that this raised a prima facie case against the master, which could be rebutted by him. Among the cases cited in the opinion in this case are *Locke v. Stearns*, 1 Metc. (Mass.) 562, 35 Am. Dec. 382; *Commonwealth v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *Bennett v. Judson*, 21 N. Y. 238. In the present case, the defendant, instead of producing evidence to repel the prima facie inference against him, remained silent.

The direction of a verdict for the defendant in these circumstances was error, and the judgment should be reversed.

(77 N. J. L. 128)

**FIDELITY TRUST CO. v. BOARD OF
EQUALIZATION OF TAXES OF NEW
JERSEY et al.**

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. TAXATION (§ 386*)—ASSESSMENT—DEDUCTION OF LIABILITIES.

In the taxation of trust companies, under section 18, Act 1903 (P. L. 1903, p. 405), the full amount of capital and accumulated surplus must be ascertained by deducting from the gross assets, at their true value, the liabilities and debts of the company.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 386.*]

2. TAXATION (§ 386*)—TRUST COMPANIES—ASSESSMENT.

From the full amount of capital and accumulated surplus of trust companies thus ascertained, the true value of all assets by law exempt from taxation is to be deducted. The balance thus ascertained is the amount upon which the tax is to be assessed, less the amount of the assessment upon their real estate.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 386.*]

(Syllabus by the Court.)

Certiorari on the prosecution of the Fidelity Trust Company against the Board of Equalization of Taxes and others to review an assessment. Assessment set aside, and judgment reversed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Samuel W. Beldon, for prosecutor. Francis Child, Jr., and Herbert Boggs, for defendants.

VOORHEES, J. The writ in this case runs to the board of equalization of taxes of New Jersey, to remove its judgment affirming the decision of the Essex county board of taxa-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion, which upon appeal to it confirmed a tax assessment for the year 1907, made and levied against the prosecutor, the Fidelity Trust Company. From the agreed facts in the case it appears that the trust company is a corporation existing under the laws of New Jersey, with its office in the city of Newark; that on the 20th day of May, 1907, its capital and accumulated surplus amounted to \$9,269,342.71; that it held real estate amounting to \$56,778.25; that its capital and accumulated surplus on that date were pro tanto invested in nontaxable or exempt securities to the amount of \$9,000,439.59. Deducting the last two items, a taxable balance is shown of \$212,124.87. On the above balance of \$212,124.87, being the capital and accumulated surplus after deduction of the value of its real estate and its nontaxable securities, the assessment for the year 1907 was made against said company by the taxing authorities of Newark. The tax so assessed was thereupon duly paid by the prosecutor. It appears also that among the assets of the company are 1,505 shares of the capital stock of the Union National Bank, of Newark, of the par value of \$150,500, and that these shares, after the assessment had been made against the prosecutor upon its capital stock and surplus, were in addition thereto assessed for taxation at the sum of \$228,960. From the assessment of these bank shares the appeal in question was made to the board of equalization of taxes, which by its judgment confirmed said tax.

The revised tax act of 1903 (P. L. 1903, p. 405, § 18) provides "that every fire insurance company and every trust company shall be assessed upon the full amount of its capital stock paid in and accumulated surplus. The real estate belonging to every such corporation, however, shall be taxed in the taxing district where such real estate is situated and the amount of assessment upon such real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus as herein provided for." That the stock and securities exempt by law should be deducted in computing the taxable value of the capital and accumulated surplus is settled by the case of *Trenton v. Standard Fire Ins. Co.* (N. J. Sup.) 68 Atl. 1111, and *Lippincott v. Lippincott* (N. J. Err. & App.) 69 Atl. 502. There is no merit in the contention that the bank stock escapes taxation by reason of making the assessment upon the capital and accumulated surplus, or that such fact conclusively appears because the value of such bank shares exceeds that of the net taxable capital and surplus. In order to ascertain the capital and surplus it is necessary to find the true value of the gross assets. From this must be deducted debts and liabilities. The remainder will be the value of the capital and surplus, if any. This remainder for the purposes of taxation is to be still further reduced by the assessment of the real estate and nontaxable securities of the

company, and it is evident that, if these bank shares were included in the gross assets, as we must presume they were, they have not escaped taxation. Their value has been computed in and contributed to the portion of the gross assets which have been set off against the liabilities. This method of assessment is only a mode of ascertaining the value of the property of the trust company above its liabilities. Of course, it presupposes that the values used to this end are true values within the constitutional meaning. The result obtained is similar to assessments against individuals, where the assessors value all the property and deduct debts.

Having thus ascertained these results, there is one remaining factor to be considered. Is this net result made up in whole or in part of nontaxable property? If so, then such nontaxable securities must be deducted; for to tax the fund, composed of exempt property, is to tax such exempt property. *Newark City Bank v. Newark*, 30 N. J. Law, 13. This also must be so in order to make uniform the method of taxation of the assets of corporations and the property of individuals. Therefore it appears that in the present assessment the bank stock has been taxed. It is included in the general statement; but, as the liabilities are offset against it, it has lost its identity just as all other assets lose their identity in this method, but their value is not dissipated by being thus dealt with. Having thus shown that the stock has not escaped taxation, the contention that the eighteenth section of the tax act of 1903 is in violation of paragraph 11, § 7, art. 4, of the Constitution, because exempting trust companies from taxation upon national bank stock as such held by them, must fall.

The final point made by the defendant is that the capital stock must be valued at its true value, and that, as its selling price in 1907 was about \$600 per share the assessment should be upon \$12,000,000, from which the deduction for nontaxable securities, \$9,000,000, should be made, leaving \$3,000,000 for taxation. This, however, is not the method prescribed by the act. It is true, as before said, that all the securities should, in ascertaining the total assets, be valued at their true values. This presumably has been done by the officers charged with the duty of making the assessment. Thus the true value of all the property of the company has been ascertained. The market value of shares is not the criterion prescribed by law, and may not in fact indicate the aggregate values of all the securities. All possible taxable value will be gathered up in the two items of capital and surplus.

The assessment on the bank stock as such, in addition to and separated from the assessment on capital stock and surplus, should be set aside, and the judgment of the state board reversed.

(77 N. J. L. 125) *

MILLER v. LAI.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. MALICIOUS PROSECUTION (§ 72*)—MALICE—PROBABLE CAUSE.

In an action for malicious prosecution, the court, having instructed the jury that there was no malice, left the question of lack of probable cause to the jury; *held* error, because both malice and want of probable cause are essential to support the action.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 168-173; Dec. Dig. § 72.*]

2. MALICIOUS PROSECUTION (§ 28*)—MALICE—WANT OF PROBABLE CAUSE.

Want of probable cause being merely evidence of malice, not malice itself, the jury must find the existence of malice to support a judgment for the plaintiff.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 59; Dec. Dig. § 28.*]

(Syllabus by the Court.)

Appeal from District Court of Passaic.

Action by David Miller against Harry Lai. Judgment for plaintiff. Defendant appeals. Reversed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Randal B. Lewis, for appellant. John E. Benson, for appellee.

VOORHEES, J. This is an appeal from the district court of the city of Passaic. The action was brought for false imprisonment and malicious prosecution, and was tried before the court and a jury, and a verdict rendered for the plaintiff.

The defendant is a Chinaman conducting a restaurant in Paterson. About midnight several men entered the restaurant, ate a meal, and when requested to pay for it assaulted the defendant and his employes. The assailants ran out, and customers in the place summoned the police, who came and found the defendant badly beaten and in a semiconscious state. The defendant knew none of his assailants. The police began an investigation. One of the policemen gave the defendant a slip of paper containing three names alleged to be his assailants, which the defendant took to the police station next morning. This slip did not contain the name of the plaintiff, and when it was presented by the defendant, accompanied by a police officer, to the secretary of police, with whom police reports are filed, the secretary erased one name and inserted that of the plaintiff, saying, "Miller (the plaintiff) is the man you want." The secretary's information was based upon reports filed with him made by policemen detailed on the case. The defendant took the slip of paper as amended by the secretary to the recorder, who prepared the complaint and issued the warrant upon which the plaintiff was arrested. The plaintiff, after spending 24 hours in jail, was released on bail, and then went to the de-

fendant's place of business, where the defendant failed to identify him, and stated that maybe he had arrested the wrong one, and two days later, at the trial in special sessions, again failed to identify the plaintiff. The plaintiff had been twice arrested by the police before this time. The defendant had never known the plaintiff, and has not much knowledge of the English language or the customs of the country.

At the close of the plaintiff's case a motion for a nonsuit was made on the ground that there was no right of action for false arrest (imprisonment), as the prosecution was regular and the court from whence it issued had jurisdiction, and that there was no action for malicious prosecution, as the plaintiff had failed to show malice or lack of reasonable and probable cause in making the complaint. The motion was denied. At the close of the defendant's case the motion was renewed on the grounds above stated, and on the further ground that the defendant had shown that he had reasonable and probable cause for making his complaint. The court allowed the motion as to the count for false imprisonment, and further held that there was no actual malice in the case, but denied the nonsuit as to the count for malicious prosecution. The defendant then moved for the direction of a verdict in his favor on the ground that there was no malice, and that lack of reasonable and probable cause had not been shown. Thereupon the court charged the jury that there was no actual malice shown in the case, but the question for them to decide was whether or not the defendant had reasonable and probable cause to cause the plaintiff's arrest. The court was requested to charge that the defendant had reasonable and probable cause for his complaint against the plaintiff. This was refused. The court thereupon charged that the question of reasonable and probable cause was one for the jury to decide. The jury found in favor of the plaintiff for \$100 and costs.

In an action for malicious prosecution it is incumbent upon the plaintiff to show that there was no probable cause for the prosecution, and also that the defendant was actuated by malice in instituting such prosecution. There must be both want of probable cause and malice. If probable cause is shown, then the question of malice becomes immaterial, because, there being probable cause, one of the essential elements necessary to maintain the action is disproved. The question of the existence of reasonable and probable cause must be decided by the court, and should not be left to the jury. *Magowan v. Rickey*, 64 N. J. Law, 402, 45 Atl. 804; *Robitzek v. Daum*, 220 Pa. 61, 69 Atl. 96. Whether the proof of certain facts constitutes probable cause is a question of law, and it is error to submit such question to the

jury. *Travis v. Smith*, 1 Pa. 234, 44 Am. Dec. 125.

The court having taken from the jury the question of malice, submitted only the question of probable cause, against the defendant's request for binding instructions. This was error. As there must be malice shown, and the court distinctly found that malice was not present, an essential element was absent, and there should have been a direction for the defendant. *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116; *Crescent City, etc., Co. v. Butchers' Union*, 120 U. S. 149, 7 Sup. Ct. 472, 30 L. Ed. 614.

The plaintiff cannot support the judgment, except there be evidence of malice, from which the jury has found its existence. *Schofield v. Ferrers*, 47 Pa. 194, 86 Am. Dec. 532. There seems to be an entire absence of any facts from which malice could be imputed to the defendant.

The judgment is reversed.

(77 N. J. L. 54)

SPERRY v. BARBER.

(Supreme Court of New Jersey. Nov. 9, 1908.)

MUNICIPAL CORPORATIONS (§ 978*)—DEPUTY RECEIVER OF TAXES—TERM.

The term of office of the deputy receiver of taxes of the city of Trenton is a term fixed by law, and is coterminous with the term of the receiver, whose deputy he is.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 978.*]

(Syllabus by the Court.)

Quo warranto by the Attorney General, on the relation of Washington E. L. Sperry, against John W. Barber. Judgment for relator on demurrer to plea.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

Frank S. Katzenbach, Jr., and Erwin Marshall, for relator. W. H. Apgar, for defendant.

SWAYZE, J. The defendant Barber was appointed deputy receiver of taxes by Frederick Gilkyson, who was elected receiver of taxes of Trenton, and held office for the term beginning January 1, 1904, and extending to January 1, 1906, and re-elected for the term from January 1, 1906, to January 1, 1908. Barber took the oath of office as deputy receiver January 1, 1904, and gave a bond to the city for the faithful performance of his duties. On January 1, 1906, he gave a new bond, and entered upon the discharge of the duties of his office for a second term of two years. At the election in November, 1907, Berrien was chosen receiver of taxes to succeed Gilkyson, and Gilkyson's term expired on the 1st day of January, 1908. Berrien thereupon appointed three deputy receivers,

two of whom were confirmed by the common council, as required by the city charter. The third was not confirmed. The plea avers that the defendant is a veteran of the Civil War, and claims the benefit of the act of 1907 (P. L. p. 37), protecting those officers whose term is not fixed by law. To this plea there is a demurrer. The question presented is whether Barber held an office whose term was not fixed by law. The claim of the relator is that the term of Barber expired at the same time as the term of Gilkyson, the receiver, whose deputy he was. The defendant claims the contrary.

The appointment was made under the provisions of the city charter, which authorized the receiver of taxes to appoint, with the consent of the common council, one or more deputies, who should have power to do all, or every act or acts, which it should be lawful for the said receiver of taxes to do. The term of the receiver of taxes is fixed by the charter at two years.

We think the relator is correct in his contention, and are led to this conclusion by the fact that the only acts which the defendant can do are acts which it would be lawful for the receiver of taxes, who appointed him, to do. When the act uses the language "the said receiver of taxes," it points to the former part of the section, and evidently refers to the receiver of taxes, to whom is given the power to appoint. Such also is the ordinary signification of the word "deputy." It naturally connotes one who acts for the man whose deputy he is. The fact that the power to appoint is conditioned upon the consent of the common council, and that the deputy is required to give such security as the common council shall direct, is not sufficient to overcome the provision which vests the power of appointment in the receiver of taxes, and defines the powers of the deputies. We cannot doubt that, even after the consent of the common council had been obtained, the receiver might still refuse to make the actual appointment. We do not think that the appointment is complete at the instant the common council consents. *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60. Nor is the fact that the common council is authorized to direct what security shall be given by the deputy receiver of taxes conclusive. That bond is properly required for the protection of the city. The money is to be handled by the deputy receiver, but it by no means follows that, because the common council directs what security shall be given, the receiver of taxes ceases to be responsible for his deputy's acts. We think, therefore, that the term of Mr. Barber was fixed by law, and expired at the same time with the term of Mr. Gilkyson. The relator is entitled to judgment upon the demurrer.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

COLBERT v. THORNLEY.

(Supreme Court of Rhode Island. Nov. 25, 1908.)

EXECUTORS AND ADMINISTRATORS (§ 17*) — RIGHT TO APPOINTMENT—NEXT OF KIN.

A brother of intestate, whose father is living but does not apply for administration, is not entitled to administer the estate as intestate's next of kin, because he could inherit as next of kin if the father was not living.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Application for administration on the estate of Minnie F. Colbert, deceased. From an order of the municipal court appointing William H. Thornley, Jr., administrator, Edmund Colbert appealed. An order of the superior court dismissed the appeal, and appellant brings exceptions. Overruled on the opinion of the superior court, which is as follows:

"This is a motion to dismiss the appellant's appeal from the decree of the municipal court of the city of Providence appointing the appellee administrator on the estate of Minnie F. Colbert. The only reason of appeal necessary to consider is that the appellant was next of kin of the intestate, and therefore aggrieved by the decree not appointing him administrator. The appellant is a brother of the intestate, and the record shows that the father of the intestate was living at the time of the decease of the intestate. The case has been argued by both parties on the assumption that the father was still living when the decree was entered appointing the appellee, who was not related to the intestate. We shall consider the case on this assumption.

"The motion is based on the ground that the appellant has no interest in the estate which gives him a right to appeal. We can consider the motion only on the ground stated in the reasons of appeal that the appellant is next of kin of the intestate. If the appellant were next of kin within the meaning of the statute determining the right of appointment, the appellant would have stated a good reason of appeal, because he would have been the one entitled under the statute to appointment whether he had any financial interest in the estate or not. The appellant claims that he is next of kin, although the father of the intestate is living, because he would inherit as next of kin if the father were not living, and the father has not claimed the appointment. The appellant cites some interesting cases which appear to sustain his contention as to statutes similar to our own; but his contention that a person who is not next of kin, so as to entitle him to inherit as next of kin within our stat-

utes, determining the appointment of administrators on intestate estates, does not appeal to us as in accordance with the spirit of Rhode Island decisions. Our decisions appear to interpret our statutes on appointment as basing the appointment on the ground that the person appointed has a direct financial interest in the estate, and so would be likely to conserve it. *Schouler, Ex. § 111; Williams, Ex. p. 513; Johnson v. Johnson, 15 R. I. 109, 23 Atl. 106.* The decisions cited by the appellant go beyond this, and reason that a person who is not, but might have been, next of kin, so as to inherit, would be likely to look out for the interest of the estate. Our decisions do not appear to adopt such suggestions. The language of the court in *Mowry v. Latham, 17 R. I. 482, 23 Atl. 14*, was: 'We are therefore of the opinion that as Edwin H. Mowry, if competent, would be entitled to the administration, his representative appointed by law to guard his interest is entitled to the administration in preference to a person who would have been next of kin had Edwin H. Mowry died before his brother, and a fortiori in preference to a stranger nominated by such person.' Our opinion therefore is that the appellant was not entitled under the statute to the appointment as administrator, and that upon this ground alone he was not aggrieved by the decree of the court appointing the appellee, and is therefore not entitled to appeal from said decree.

"Motion to dismiss the appeal is therefore granted."

Irving Champlin, for appellant. Gardner, Pirce & Thornley (Henry W. Gardner, of counsel), for appellee.

PER CURIAM. We find no error in the decision of the superior court dismissing this appeal.

The appellant's exceptions are therefore overruled, and the case is remitted to the superior court for further proceedings.

STATE v. BENJAMIN.

(Supreme Court of Rhode Island. Nov. 30, 1908.)

1. HOMICIDE (§ 158*)—EVIDENCE—THREATS BY ACCUSED.

The state may prove that accused had threatened to do injury to decedent, or to kill him, though some of the threats were made about 18 months prior to the homicide, and though a witness could not recall the language used.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 294; Dec. Dig. § 158.*]

2. HOMICIDE (§ 169*)—EVIDENCE—CONVERSATION BETWEEN ACCUSED AND DECEDENT AT THE TIME OF THE KILLING—ADMISSIBILITY.

The state may prove the conversation between accused and decedent immediately before the killing.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 341, 351; Dec. Dig. § 169.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. CRIMINAL LAW (§ 418*)—EVIDENCE—DECLARATIONS OF THIRD PERSONS—ADMISSIBILITY.

The statement of a third person made to the officers while arresting accused that the killing was not accidental was admissible on it appearing that such person, when making the statement, was so close to accused that she was touching him, or could have done so by a movement of her arm.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 968; Dec. Dig. § 418.*]

4. CRIMINAL LAW (§ 665*)—EVIDENCE—ORDER EXCLUDING WITNESSES FROM COURTROOM—VIOLATION—EFFECT.

The court properly allowed a newspaper reporter to testify, though he had been present in the courtroom during a part of the trial, notwithstanding the court had excluded all the witnesses, where at the time he was present he had not been summoned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1564; Dec. Dig. § 665.*]

5. WITNESSES (§ 350*)—IMPEACHMENT—CROSS-EXAMINATION.

Accused, testifying in his own behalf, may be asked on cross-examination as to whether or not he had been before convicted.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1147; Dec. Dig. § 350.*]

Exceptions from Superior Court, Kent County; Darius Baker, Judge.

Allen P. Benjamin was convicted of murder, and brings exceptions. Overruled, and cause remitted to the superior court for sentence.

During the trial the state asked a witness to state whether she had ever heard accused threaten to do injury to decedent, to which the witness replied that accused had made threats, but she could not recall the language used. Another witness testified that about 18 months before the killing accused had said that he would kill decedent if he ever got at him again. The state also proved the conversation between accused and decedent immediately before the shooting. The state further showed that a third person stated to the officers at the time of the arrest of accused that the killing was not accidental. The statement was made by the third person when she was standing so close to accused that she was touching him, or could have done so by a movement of her arm. The court excluded from the courtroom all of the witnesses, but permitted a newspaper reporter to testify, though he had been present in the courtroom during a part of the trial; he not having been at that time summoned by the state. Accused, when testifying in his own behalf, was asked by the Assistant Attorney General as to whether or not he had been before convicted, and the question was permitted. Exceptions were taken by accused to all the foregoing evidence.

William B. Greenough, Atty. Gen., and Henry W. Greenough, Ass't Atty. Gen., for the State. Samuel W. K. Allen, for defendant.

PER CURIAM. A careful consideration of the testimony leads us to the conclusion that the jury were warranted in finding the defendant guilty as charged.

The defendant's exceptions are without merit, and are therefore overruled, and the case is remitted to the superior court for sentence.

(29 R. I. 331)

FIRST BAPTIST SOCIETY v. WETHERELL.

(Supreme Court of Rhode Island. Nov. 27, 1908.)

EXCEPTIONS, BILL OF (§ 41*)—TIME FOR SIGNING.

Time allowed by the court for signing defendant's bill of exceptions does not inure to the benefit of plaintiff, both parties having excepted to the findings, and plaintiff's bill not having been signed by the trial justice within 20 days after the filing of the same, nor established before the Supreme Court within 30 days, must be dismissed, notwithstanding it was signed within the time allowed for signing defendant's bill.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 41.*]

Exceptions from Superior Court, Newport County; George T. Brown, Judge.

Action by the First Baptist Society against John R. Wetherell. Both parties excepted to the findings, and defendant moves to dismiss plaintiff's bill of exceptions. Motion granted.

Sheffield, Levy & Harvey, for plaintiff. Gardner, Pirce & Thornley, for defendant.

PER CURIAM. This is a motion made by the defendant to dismiss the plaintiff's bill of exceptions because said bill of exceptions was not allowed by the trial justice of the superior court within 20 days after the filing of the same, nor established before the Supreme Court within 30 days of the filing thereof. The action was in trespass and ejectment to recover four parcels of land. The matter was heard before Mr. Justice Brown sitting without a jury, and he rendered a decision in favor of the plaintiff on two parcels and for the defendant on the other two parcels. Both parties excepted to the findings. The decision of the trial justice of the superior court was filed June 10, 1908. On June 15th the defendant filed his notice of intention to prosecute his bill of exceptions. At the same time the court extended the defendant's time for filing the transcript to July 1, 1908, and his time for filing the bill of exceptions to July 10, 1908, and subsequently extended his time for filing transcript to July 15th and for filing the bill of exceptions to July 25, 1908. On the 17th day of June the plaintiff filed its bill of exceptions with the clerk of the superior court, and the clerk transmitted the said bill of exceptions to the trial justice July 2, 1908. Upon a hearing on the 23d day

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of July, 1908, the defendant's exceptions were allowed, and the justice allowed the plaintiff's bill of exceptions nunc pro tunc as of June 17, 1908, because the delay, if any, was caused by the act of the court or its officers.

Whereupon the plaintiff argues as follows:

"It is undisputed that the general rule adopted by the Supreme Court of this state is that if a bill of exceptions be not allowed and signed within the time required by statute—that is, 20 days after the filing of the bill of exceptions—nor brought to the Supreme Court for allowance within 30 days of the filing, the said bill of exceptions cannot be heard on its merits by the Supreme Court. *Hartley v. R. I. Co.*, 28 R. I. 157, 244, 66 Atl. 576. In this case, however, that rule is not applicable for the following reasons:

"(1) The superior court continued to have jurisdiction of the whole case because: (1) The plaintiff's bill was signed within the time allowed for signing the defendant's bill. (2) The time allowed to the defendant inured to the benefit of the plaintiff.

"(2) There was proper cause for allowing the bill nunc pro tunc.

"(3) The Supreme Court has jurisdiction of the whole cause by reason of the perfecting of the defendant's bill of exceptions."

We see no merit in the argument. The jurisdiction of the superior court was not affected by the fact that the plaintiff had lost the right to prosecute its exceptions. It was not necessary for the court to have jurisdiction of more of the case than was involved in the allowance of the defendant's bill of exceptions. The fact that the plaintiff's bill was signed within the time allowed (by the court) for signing the defendant's bill did not extend the time allowed (by statute) for signing the plaintiff's bill. And to state that the time allowed to the defendant inured to the benefit of the plaintiff is to say that the court may amend the statute.

The motion is therefore granted, and the plaintiff's bill of exceptions is dismissed.

MONTGOMERY v. GARDNER et al.

(Supreme Court of Rhode Island. Nov. 25, 1908.)

1. FRAUDULENT CONVEYANCES (§ 104*) — TRANSACTIONS BETWEEN HUSBAND AND WIFE—CONSIDERATION—EVIDENCE.

A judgment debtor consented to a conveyance of his incumbered property to enable him to redeem it. For eight years he did not redeem, nor repay any part of the money paid for the conveyance. Subsequently the property was conveyed to his wife, who paid a fair market price by borrowing the money from a bank, secured by mortgage on the property and a pledge of a policy on the life of the debtor issued eight years before. The wife repaid the loan from the rents of the property. *Held*, that the transaction was not in fraud of the creditors of the debtor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 337-344; Dec. Dig. § 104.*]

2. FRAUDULENT CONVEYANCES (§ 240*)—ACTION TO SET ASIDE—LACHES.

A judgment creditor who permits a grantee of the debtor to treat the property as his own for 13 years, and while striving to pay the incumbrance thereon, is guilty of laches, precluding the right to sue to set aside the conveyance as fraudulent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 735, 736; Dec. Dig. § 249.*]

Appeal from Superior Court, Providence and Bristol Counties; William H. Sweetland, Judge.

Suit by Angeline Montgomery against Walter S. Gardner and another. From a decree of dismissal, complainant appeals. Appeal dismissed, and decree affirmed.

The following is the opinion of Sweetland, P. J., of the court below:

"The testimony discloses that the complainant was formerly the wife of the respondent Walter S. Gardner; that she was divorced from him in 1875; that in the decree entered in said divorce proceedings the said Walter S. Gardner was ordered to pay to the complainant the sum of \$312 per annum as alimony; that said respondent Walter S. Gardner paid to the complainant said yearly alimony until 1878, but that since 1878 the said Walter S. Gardner has made no payment of alimony under said decree; that in 1875, at the time of the divorce granted to this complainant divorcing her from said Walter S. Gardner, the said Walter S. Gardner was seised in fee of an estate on High street, near Main street, in Pawtucket, said estate measuring about 88 feet on High street and extending back 50 feet; that the said Walter S. Gardner was also possessed of a life estate in another tract of land on said High street measuring about 111 feet on High street and extending back from 43 to 52 feet; that at the time of said divorce the interest of Walter S. Gardner in both of said tracts of land was mortgaged to the Pawtucket Institution for Savings to secure a loan of \$3,500; that the complainant, as wife of said Walter S. Gardner, had released her dower in said mortgage; that in the year 1878 said Pawtucket Institution for Savings sold said interest of Walter S. Gardner under the power of sale contained in said mortgage; that said interest was purchased at the mortgagee's sale by an agent of said institution, and conveyed by said agent to said institution; that said institution held said estates until 1882; that during said time from 1878 to 1882 there appears to have been some agreement on the part of said institution to permit said Walter S. Gardner to redeem said estates; that in the year 1882 the said institution for savings conveyed said estates to Clarence T. Gardner, M. D., brother of said Walter S. Gardner, for the sum of \$3,500; that said Clarence T. Gardner at the time of said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

purchase delivered to Walter S. Gardner an agreement under seal, in which, among other things, the said Clarence T. Gardner declared that he had purchased said estates at the request of Walter S. Gardner and for the purpose of aiding said Walter S. Gardner in recovering the same or the value thereof, and said Clarence T. Gardner therein agreed to appropriate the rents and income of said estates to the payment of taxes, insurance, repairs, premiums upon a life insurance policy on the life of Walter S. Gardner held by said Clarence T. Gardner and interest upon the purchase money, and to appropriate the balance of said rents and income towards the repayment of said purchase money to him the said Clarence T. Gardner, and, upon a full repayment of said purchase money, to convey said estates to Walter S. Gardner, or to such person as he might then designate or to his heirs, and said Clarence T. Gardner in said agreement reserves the right to sell said estates at public auction upon the failure upon the part of said Walter S. Gardner to comply with certain conditions therein set out.

"I find that this transaction between Walter S. Gardner and Clarence T. Gardner was entirely for the purpose of enabling Walter S. Gardner to redeem said property; but that, although said Clarence T. Gardner held said estates from 1882 until 1890, the said Walter S. Gardner did not redeem, and that there had not been a repayment to said Clarence T. Gardner of any part of said purchase money, but that there was unpaid to said Clarence T. Gardner on the 18th day of February, 1890, the sum of \$3,344.59; that on the 18th day of February, 1890, at the request of or with the consent of Walter S. Gardner, said Clarence T. Gardner conveyed said estates to Louis L. Angell, Esq., and that on the same day the said Louis L. Angell conveyed said estates to the respondent Ellen M. Gardner, at that time the wife of said Walter S. Gardner; that said Ellen M. Gardner paid to Clarence T. Gardner as consideration for said conveyance the sum of \$3,344.59; that the said Ellen M. Gardner borrowed the money to make said payment from the City Savings Bank, giving to said City Savings Bank as security for said loan a mortgage on said estates, which mortgage and mortgage note were signed by both Ellen M. Gardner and Walter S. Gardner, and giving to said City Savings Bank as further security a pledge of a policy of insurance upon the life of Walter S. Gardner; that from the rents and income of said estates said Ellen M. Gardner was able to pay said mortgage note and also to purchase the estate on Warren avenue described in said bill.

"I do not find from this testimony that the conveyance of said estates on High street by Clarence T. Gardner to Louis L. Angell and by Louis L. Angell to the respondent Ellen M. Gardner was a transaction in

fraud of the complainant and the other creditors of Walter S. Gardner in order to postpone the complainant and said other creditors, and to prevent them from receiving their just debts. From a consideration of the testimony and all the circumstances, I do not find that Ellen M. Gardner paid less than a fair price for said estates. Walter S. Gardner was then a man 50 years of age, nearly blind, and the market value of his life estate would be very small, as a purchaser would not depend at all upon the expectation of life contained in the life tables, but would naturally consider the purchase of such an estate as purely a speculative transaction. Walter S. Gardner did live for a number of years and Ellen M. Gardner was enabled to pay off said indebtedness, but for over 11 years, while the estates were in the hands of the Pawtucket Institution for Savings and of Clarence T. Gardner, the attempt to reduce the indebtedness by means of the rents and income had failed. Walter S. Gardner did either permit or request his brother to convey said estates to Ellen M. Gardner, but I find that she paid a fair market price therefor, and that none of the purchase money was supplied by Walter S. Gardner. The most that can fairly be said in regard to the connection of Walter S. Gardner with the transaction is that he failed to avail himself of this further opportunity to redeem the estates, if, indeed, it would have been possible for him to have done so, which is not clear from the testimony. The loan to Ellen M. Gardner must have been based to a considerable extent upon the security of the policy of insurance on the life of Walter S. Gardner pledged to said City Savings Bank by Ellen M. Gardner. This policy of insurance was issued in 1882, and it does not appear in the testimony that in 1890 a new policy of insurance could have been procured upon the life of Walter S. Gardner to be used as further security to the City Savings Bank if Walter S. Gardner had desired to procure a loan from said bank and to have undertaken himself the redemption of said estates.

"The failure of Walter S. Gardner to undertake the redemption of said estates for his own benefit, even if it had been possible for him to do so, which does not appear, does not constitute fraud in the transaction by which the estates were conveyed to Ellen M. Gardner under which she undertook the redemption of said estates for her own benefit. I am also of the opinion that the conduct of the complainant in permitting the respondent Ellen M. Gardner to go on treating the estates in question as her own from 1890 to 1903, and striving to pay the indebtedness upon them, constitutes laches, and is a reason for refusing to grant the relief sought.

"The bill should be dismissed. Decree may be entered accordingly."

James C. Collins, Jr., George L. Wentworth, and Percy W. Gardner, for appellant. Cyrus M. Van Slyck and Frederick A. Jones, for respondents.

PER CURIAM. A careful consideration of the record in the above cause convinces this court that there is no error in the decision of the superior court, and that the same is in accord with the rights of the parties.

The appeal is dismissed, the decree of the superior court is affirmed, and the cause is remanded to the superior court for further proceedings.

HOLLEY v. JAMESTOWN & NEWPORT FERRY CO.

(Supreme Court of Rhode Island. Nov. 27, 1908.)

Exceptions from Superior Court, Newport County; Darius Baker, Judge.

Action by Charles Holley against the Jamestown & Newport Ferry Company. From a verdict for plaintiff, defendant brings exceptions. Exceptions overruled, and case remitted for judgment.

Gardner, Pirce & Thornley (William W. Moss, of counsel), for plaintiff. Clark Burdick, for defendant.

PER CURIAM. There is nothing to take this case out of the general rule laid down in *Wilcox v. Rhode Island Company*, 29 R. I. 292, 70 Atl. 913.

The defendant's exceptions are therefore overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

(104 Me. 62)

BERLAIWSKY v. ROSENTHAL.

(Supreme Judicial Court of Maine. March 4, 1908.)

SALES (§§ 201, 332*) — TERMS OF PAYMENT — PRESUMPTIONS — VESTING TITLE — DEFAULT IN PAYMENT — "CASH SALE."

In the absence of agreement or understanding between the parties as to terms of payment, the law presumes a sale to be a cash sale—that is, a sale conditioned on payment concurrent with delivery—and not a sale on credit, and a delivery in such case, f. o. b. car, as agreed, made in expectation of immediate payment, will not vest the title in the purchaser, and, if payment is not made, the vendor may repossess himself of the goods sold, and sell them to another.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 535, 536, 916; Dec. Dig. §§ 201, 332.*]

(Official.)

Exceptions from Superior Court, Kennebec County.

Action by Nathan Berlaiwsky against Hyman Rosenthal to replevy certain junk. The plea, general issue with statement, alleged that the title to the property at the time of the alleged taking and at the time of the replevy was in defendant, and not in plaintiff. Verdict for plaintiff, and defendant excepts. Exceptions sustained.

—Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

Fred W. Clair, for plaintiff. Brown & Brown, for defendant.

SAVAGE, J. Action of replevin of three tons of iron. The plaintiff bought the iron of one Welner on a certain Wednesday at an agreed price to be delivered f. o. b. car at Anson, to be shipped to Waterville. Welner loaded the iron on the car, and on the Monday following, while the car was still at Anson, he sold and delivered the iron to the defendant, who then shipped it to Waterville, where it was replevied by the plaintiff. The question tried was, Which party had title?

At the trial there was evidence from which the jury might have found properly, if they believed it, that the sale by Welner to the plaintiff was understood as a cash sale, that the plaintiff was to send a check for it, and that Welner held the iron at Anson until the check should be received. If so, the sale was conditional on payment, and, if no payment, unless payment was waived for the time being, the title to the iron did not pass to the plaintiff. *Stone v. Perry*, 60 Me. 48; *Seed v. Lord*, 66 Me. 580. And in such case the vendor, after a reasonable time, if payment was not made, might lawfully sell to another. But the verdict of the jury for the plaintiff negatived necessarily this proposition.

There was also evidence coming from the plaintiff himself tending to show that nothing whatever was said between the plaintiff and Welner as to when the iron was to be paid for, and that there was no understanding as to the terms of payment. Upon this phase of the case the presiding judge instructed the jury, in substance, that if the iron was sold by Welner to the plaintiff without any understanding as to the terms of payment, and if it was delivered on the car directed to the plaintiff in pursuance of their agreement, the iron belonged to the plaintiff, that the contract between them was completed, and that, if nothing more was said as to the terms of payment, the plaintiff had the right to the possession of the iron under the agreement, whether he sent his check for it or not. To these instructions the defendant has excepted.

The exceptions must be sustained. The court below seems to have proceeded upon the theory that, when a sale is made without any agreement or understanding as to terms of payment, it is to be deemed as sale on credit, in which case a delivery f. o. b. car, as agreed, would completely vest the title in the purchaser. But this is directly opposed to the doctrine declared in *Furniture Co. v. Hill*, 87 Me. 17, 32 Atl. 712, where

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

it was said that, under such circumstances, "the law presumes that the parties intended to make the payment of the price and the delivery of the possession concurrent conditions. The plaintiffs [who were the vendors in that case] would have had the right to retain possession until the purchaser had been ready to perform his part of the contract; or, if the goods had been delivered with expectation of immediate payment, and this had not been done, the plaintiffs had the right to retake possession of the goods."

In the absence then of agreement or understanding, as to terms of payment, "the law presumes a sale to be a cash sale—that is, a sale conditioned on payment concurrent with delivery—and not a sale on credit, and a delivery in such case *f. o. b. car*, as agreed, made in expectation of immediate payment, will not vest the title in the purchaser, and, if payment is not made, the vendor may repossess himself of the goods sold.

By this rule, under the evidence in this case, which is made a part of the bill of exceptions, if the jury had found, as they well might have found from the testimony of the plaintiff himself, that nothing whatever was said or understood between him and Weiner in regard to terms of payment, the jury would have been warranted in finding that the title to the iron was in the defendant, and not, in effect, necessarily in the plaintiff, as they were instructed. The instructions were therefore erroneous and prejudicial.

Exceptions sustained.

(104 Me. 56)

BUCKLEY v. BEAULIEU et al.

(Supreme Judicial Court of Maine. March 3, 1908.)

1. SEARCHES AND SEIZURES (§ 7*)—CONSTITUTIONAL GUARANTY—UNREASONABLE SEARCHES.

The constitutional guaranty that "the people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures" is a restraint upon officers executing a search warrant, as well as upon magistrates issuing it.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7.*]

2. SEARCHES AND SEIZURES (§ 7*)—UNREASONABLE SEARCHES—SEARCH WARRANTS—EXECUTION.

While officers in executing a warrant to search a dwelling house occupied by a family may, and should, search thoroughly in every part of the house where there is reason to believe the object searched for may be found, they should also be considerate of the comfort and convenience of the occupants, and be careful to injure the house or furniture no more than reasonably necessary.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7.*]

3. SEARCHES AND SEIZURES (§ 7*)—UNREASONABLE SEARCHES—CARE REQUIRED.

Where officers searching a dwelling house for intoxicating liquors have no reason to believe

that such liquors are concealed within the walls and partitions of the house, but desire to ascertain whether any pipes leading to some receptacle for liquors are concealed there, their sounding and even probing of the walls and partitions for that purpose should be done with as little damage as possible.

[Ed. Note.—For other cases, see Searches and Seizures, Dec. Dig. § 7.*]

4. SEARCHES AND SEIZURES (§ 8*)—ACTIONS FOR WRONGFUL SEARCH.

Where officers, for the purpose only of ascertaining whether such pipes are concealed within the walls and partitions of a dwelling, make use of an axe, a pickaxe, and crowbar, and tear out the paper, plaster, and laths entirely round the walls of every room on the first floor of a dwelling house for a width generally of from two to four feet, leaving the debris on the floors and carpets of the rooms, they act unreasonably, do unnecessary damage, and thereby exceed their authority and become liable to the owner therefor.

[Ed. Note.—For other cases, see Searches and Seizures, Dec. Dig. § 8.*]

(Official.)

Exceptions from Supreme Judicial Court, Androscoggin County.

Action by E. W. Buckley against Maxine Beaulieu and others. Verdict for defendants. Motion by plaintiff for a new trial and exceptions to certain rulings. Exceptions not considered. Motion for new trial sustained.

Action of trespass *quare clausum* for an alleged breaking and entering of the plaintiff's dwelling house in Lewiston. The defendants were deputy enforcement commissioners duly appointed under the provisions of chapter 92, p. 94, Pub. Laws 1903, known as the "Sturgis Law," and at the time of alleged trespass, by virtue of a warrant therefor duly issued by the municipal court of Lewiston, were engaged in searching the plaintiff's dwelling house for intoxicating liquors alleged to be concealed therein. The plaintiff is a resident of New York city, and the dwelling house, at the time of the alleged trespass, was occupied by his brother, Timothy F. Buckley, as a tenant at will.

The declaration in the plaintiff's writ is as follows:

"In a plea of trespass, for that the said defendants at Lewiston, on the 5th day of August, 1906, with force and arms, broke and entered the plaintiff's close in said Lewiston, and then and there with a pickaxe, bars, and other instruments ruined and destroyed to a large extent the plaintiff's building, tore down the walls of the house, cut, destroyed and defaced the walls, floors, and other portions of the plaintiff's house, against the law of the land and against the will of the plaintiff, and the plaintiff further alleges that these acts were done by the defendants willfully and wantonly, to the damage of the said plaintiff (as he says) the sum of \$1,000."

Plea, the general issue, with a brief statement as follows:

"That at the time of doing the acts com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plained of in plaintiff's writ, to wit, on August 5, A. D. 1906, the defendants and one A. B. Howard, of Auburn, in this county, were duly and legally appointed and qualified deputy enforcement commissioners of the state of Maine, and were acting as such; that the said A. B. Howard was then armed with a warrant legally issued from the municipal court of the city of Lewiston, in said county of Androscoggin, a court having general jurisdiction over the subject-matter, directed to the sheriff of our said county of Androscoggin, his deputies, the constables of the city of Lewiston, and of the several towns in said county, and the enforcement commissioners and deputy enforcement commissioners of the state of Maine, commanding them, or either of them, to enter the dwelling house and its appurtenances occupied by Timothy Buckley, and situated on the west side of Grove street in said Lewiston, being the same premises described in plaintiff's writ and declaration, and therein to search for intoxicating liquors alleged in said warrant to be then, on the said 5th day of August aforesaid, there unlawfully kept and deposited by said Buckley for illegal sale in the state of Maine; that said warrant was duly issued from said court on and bearing the date of said 5th day of August, aforesaid, bearing its seal and the teste of the judge thereof, and over the signature of A. K. P. Knowlton, its then duly appointed and qualified acting clerk; that said Howard was present and armed with and acting under said warrant, and directing said search in said capacity as deputy enforcement commissioner, during all of the acts complained of in plaintiff's writ and declaration; that said Beaulieu and said Stevens, in their said capacity as deputy enforcement commissioners, assisted in said search as aids of said Howard, and under the directions contained in said warrant; that all of the acts complained of in plaintiff's said writ and declaration which these defendants did at all were done in the execution of said warrant, in the presence and under the direction of the person, to wit, of said Howard, who was then and all of the time there personally present and armed with the same, and that neither of said defendants did any act which was not reasonable and necessary in the execution of said warrant; and that the said Howard and the said Beaulieu and Stevens, acting in their said several capacities, did all things required of them by said warrant according to the tenor thereof."

Argued before EMERY, C. J., and WHITEHOUSE, STROUT, and KING, JJ.

McGillicuddy & Morey, for plaintiff. Newell & Skelton and J. G. Chabot, for defendants.

EMERY, C. J. The decisive question in this case is whether the defendants in their execution of a warrant to search the plaintiff's dwelling house for intoxicating liq-

uors went so far as to violate the constitutional guaranty that "the people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures." This court in *State v. Guthrie*, 90 Me. 448, 38 Atl. 368, in considering the duty of an officer entrusted with a search warrant used the following language, viz.: "It is a sharp and heavy police weapon to be used most carefully lest it wound the security or liberty of the citizen. It was unknown to the early common law and came into use almost unnoticed in the troublous times of English history. Lord Coke denied its legality, but finally the courts and Parliament, recognizing its great efficiency, contented themselves with carefully restricting and controlling its use. *Entick v. Carrington*, 19 Howell's State Trials, 1030. The danger of its abuse has been so clearly apprehended in this country that constitutional barriers have been erected against it." This constitutional limitation upon its use is to be observed by the officer executing the warrant, as well as by the magistrate issuing it.

Whether the conduct of the officer in a given case was reasonable or unreasonable must be determined by all the circumstances of that case. No definite line can be drawn. The division is rather by a zone within which reasoning men might reasonably differ, but outside of which there would be a general concurrence of reasoning, thinking men. The general principle, however, is that, while the officers should search thoroughly in every part of the described premises where there is any likelihood that the object searched for may be found, they should also be considerate of the comfort and convenience of the occupants, should mar the premises themselves as little as possible, and should carefully replace so far as practicable anything they find it necessary to remove. As said in 2 Tiedeman on the Police Power, p. 787: "Under a constitutional government, of which the liberty of the citizen is the cornerstone, the privacy of one's dwelling is rarely ever invaded, and then only in extreme cases of public necessity and under such limitations as will serve to protect the citizen from any unusual disturbance of his home life."

In the case at bar the following facts appear from the testimony of the defendant officers themselves: They had a warrant to search the plaintiff's dwelling house for intoxicating liquors alleged to be unlawfully kept therein by the tenant. From the prior and contemporaneous conduct of the tenant and his wife the officers believed, and had reason to believe, that intoxicating liquors were somewhere in the house. They searched the house "thoroughly," and without hindrance, from attic to cellar inclusive, and even dug into the floor of the cellar. They examined the walls and floor of the cellar and the walls and floors of each room, includ-

ing the attic, but found no liquors, nor any indications of any receptacles, secret panels or openings, or communications with receptacles, nor any other indications as to where liquors might be hid. They sounded the walls "pretty thoroughly" with hammers, but no such indications were thereby discovered. The officers nevertheless insisted to the tenant and his wife that intoxicating liquors were somewhere in the house, and that, unless the location was revealed, they should break into the walls of the various rooms. The tenant and his wife declared there were no liquors then in the house; the officers having already by a prior search of the stable taken all they had. The officers thereupon, using an axe, pickaxe, and crowbar, broke into and tore out a strip from the interior walls of all the rooms below stairs from kitchen to front hall, inclusive, entirely round each room, tearing off the paper, plastering and lathing, and dropping the débris upon the floors and carpets. This strip was of varying width, mainly from two to four feet, and was so wide as to require an entire repapering of the rooms, besides the repairs of lathing and plastering. They did all this in the hope of finding, not the liquors, but some pipe or other clue leading to the liquors. The officers then departed, leaving the occupants to remove the torn paper, plaster, and broken laths and dust from the carpets and floors of their dwelling, and leaving the plaintiff, the owner, to restore his house, and make it again habitable.

Upon these facts we think it clear that the manner and extent of the search in this case were unreasonable and in excess of the officers' authority. Even if, under all the circumstances, not believing any liquors to be concealed there, they could lawfully have probed the walls in the hope of finding a pipe or other clue of the existence of which they had found no indications, such probing could have been sufficiently made with some slender probe with comparatively little injury. The destructive use of axe, pickaxe, and crowbar for that purpose was unnecessary and unreasonable, and hence unlawful.

It may be conceded that the defendants acted in good faith in the full belief, and with reason to believe, that the occupant was keeping liquors in the house in violation of law, but that is not a defense. In this civil action against them they are to be judged by their conduct, not by their motives except as to the assessment of damages. Officers must not allow their zeal and beliefs to blind them to the rights of the owners and occupants of the dwelling house they search. Those rights, as well as the interests of the prosecutor, are to be regarded and protected by officers. In this case the tenant was not convicted, but only accused, and only of a misdemeanor. The owner was not even accused. However confident the officers were

of the guilt of the occupant, the house and its owner were not thereby outlawed.

Motion sustained.

Verdict set aside.

(81 Vt. 429)

TAPLIN & ROWELL v. MARCY.

(Supreme Court of Vermont. Orleans. Oct. 14, 1908.)

1. WITNESSES (§ 199*)—COMPETENCY—PRIVILEGED COMMUNICATIONS—COMMUNICATION FROM CLIENT TO ATTORNEY.

Where defendant received a deed of premises from another and a chattel mortgage on his stock of goods, which were delivered to defendant, together with the account books, and the books were left with a lawyer who had been the mortgagor's attorney, a letter from defendant to the attorney, stating that defendant had written the mortgagor that he did not think there was any objection to the mortgagor's examining the books, and that he thought best to tell the mortgagor that defendant claimed anything that was due on the accounts, did not contain such a confidential statement as would render it a privileged communication between client and attorney, in the absence of any further showing of the relations between defendant and the attorney, and it was admissible, in an action for goods alleged to have been sold to defendant through the mortgagor as his agent, to show the relations between defendant and the mortgagor, and that defendant was claiming the books and what was due upon them.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 749, 750; Dec. Dig. § 199.*]

2. WITNESSES (§ 269*)—CROSS-EXAMINATION—SCOPE.

Where plaintiffs introduced the heading of a page in one of defendant's account books, the purpose of the evidence being expressly limited to show that the relation between defendant and another person was that of principal and agent, and not debtor and creditor, it was not error to confine cross-examination to that issue, and to exclude questions calling for explanation of items appearing under the heading.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 945-954; Dec. Dig. § 269.*]

3. PRINCIPAL AND AGENT (§ 21*)—EVIDENCE OF RELATION—COMPETENCY—NATURE OF TRANSACTION.

Where plaintiffs claimed to have sold goods to defendant through a third person as defendant's agent, who afterwards transferred his property to defendant, testimony of the third person that at the time of the transfer defendant had promised to pay for the goods was admissible, as showing the relation between defendant and the third person in their transaction, and that defendant had assumed the indebtedness to plaintiff contracted by the third person.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 39; Dec. Dig. § 21.*]

4. EVIDENCE (§ 241*)—ADMISSIONS OF AGENT—TIME OF MAKING.

Evidence of a person through whom, as defendant's agent, plaintiff claimed to have sold goods to defendant, that he had informed defendant's bookkeeper that defendant had agreed to pay witness' notes to plaintiffs was not competent as an admission of an agent, where at the time nothing was being done in respect to the transaction in which it was claimed he was acting for defendant, since to make such admissions competent, they must have been made while the agent was performing some act within

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the scope of his authority, and with reference to the act being done.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 887, 893-907; Dec. Dig. § 241.*]

5. EVIDENCE (§ 354*)—DOCUMENTARY EVIDENCE—ENTRIES IN ACCOUNT BOOKS.

Where plaintiffs' bookkeeper testified that she wrote the heading of the account with defendant in plaintiffs' account book, from her knowledge in regard to the matter, and according to instructions from plaintiffs when she made the first entry thereunder, the heading was admissible in evidence in connection with the bookkeeper's testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1438-1443, 1453-1459; Dec. Dig. § 354.*]

6. PAYMENT (§ 70*)—EVIDENCE—EXPLANATION OF TRANSACTION.

In an action for the price of goods alleged to have been sold to defendant through a third person as his agent, where an issue was whether the third person was acting as defendant's agent or whether the sales were to him personally, evidence was competent to show that lien notes taken in the name of the third person by plaintiffs were taken merely to hold title to the goods until they should reach their destination and were paid for, and were not taken in payment for the goods.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 213; Dec. Dig. § 70.*]

7. EVIDENCE (§ 332*)—COMPETENCY—EXCEPTIONS IN ANOTHER CASE.

In an action for the price of goods alleged to have been sold to defendant through L. as his agent, where the question was whether the sale was made to L. personally or as agent, and whether lien notes given by him were in his own behalf or for defendant, it was not error to exclude as evidence part of the record in another case between the same parties, in which the question was the identity of certain lumber levied on in the interest of plaintiffs under certain of the lien notes, containing a statement written by the present plaintiff's attorneys that the uncontradicted evidence of the plaintiff tended to show that the plaintiff sold to L. the goods in question on condition that he give a lien note for it, and that title was not to pass until it was paid for, especially where it was offered merely as a declaration by the plaintiff, and counsel, upon being asked by the court as to what it was a declaration of did not respond.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 832.*]

8. PAYMENT (§ 67*)—BY NOTES OF DEBTOR.

Ordinarily notes given by a debtor for the amount due from him on account are prima facie payment of the account.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 190; Dec. Dig. § 67.*]

9. PAYMENT (§ 73*)—EVIDENCE.

That payments through L. for goods were indorsed upon notes reserving title thereof in the seller was not conclusive as to the purpose for which the notes were given, but was merely evidence, to be considered in connection with other facts, as to whether the goods were sold to L. personally or as agent for defendant.

[Ed. Note.—For other cases, see Payment, Dec. Dig. § 73.*]

10. PRINCIPAL AND AGENT (§ 24*)—EXISTENCE OF RELATION—QUESTIONS FOR JURY.

In an action for the price of lumber and logs alleged to have been sold to defendant through a third person as his agent, whether lien notes given the seller by the third person were given by him personally or in behalf of defendant, the purpose for which they were given,

whether the account was merged in the notes, and the effect of indorsements of payments on the notes held to be for the jury.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 24.*]

11. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action for the price of goods alleged to have been sold to defendant through L. as his agent, where the question was whether the sale was made to L. personally or as agent, and whether lien notes given by him were in his own behalf or for defendant, and it appeared that plaintiff had prior thereto attempted to realize upon the notes by levying on the goods subject to their lien, and had defended the levying officer in an action against him by defendant, requested charges that, if plaintiffs gave the notes to the officer with instructions to realize upon the goods subject to their lien, it was an admission by them that they then understood and claimed that the notes represented a debt from L. to them, a part of which, at least, was then unpaid, that such action was a declaration by them that the sale was to L. personally, and not to defendant, and that, if plaintiffs defended the officer in the suit, that was an admission that the notes represented a debt due them from L., were properly refused, since they ignored the other evidence as to the purpose of giving the notes and the agency of L., and required the court to single out certain evidence and charge, as matter of law upon the weight to be given it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-466; Dec. Dig. § 194.*]

12. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

It appearing that plaintiffs credited payments for the goods on defendant's account, when received, and also after the commencement of the suit indorsed them on the notes as of the date when received, requested charges that the fact that plaintiffs caused the payments to be so indorsed was evidence that plaintiffs had not, before the indorsements, made any other application of the payments, that the making of the indorsements tended to show that plaintiffs understood that the payments were not made on account, and that the making of the indorsements was an admission that the payments were not made on account, were properly refused as requiring the court to disregard the other evidence, and plaintiffs' theory of the case, and declare the evidentiary force of the stated evidence as matter of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-466; Dec. Dig. § 194.*]

13. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMING FACTS.

In an action for the price of lumber and logs, where it was disputed whether the sale was to defendant through his agent on account, and whether lien notes, taken by the seller from the alleged agent, were merely for security or whether the sale was for cash, lien notes to be given for what was not paid for on delivery, plaintiffs to retain title until paid for, a charge that, though the contract was made with a person as defendant's agent, yet if the contract was that the sale was to be a cash transaction, with lien notes given for the lumber not paid for on delivery, etc., was properly refused, as assuming that the contract was made with defendant's agent, and that the sale was for cash.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-435; Dec. Dig. § 191.*]

14. SALES (§ 340*)—ACTION FOR PRICE—REMEDY.

If a sale of lumber and logs is for cash on delivery, with lien notes given for security for such part as is not so paid for, the notes are

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not payment, and the part not paid for on delivery is proper matter of charge on book, and can be recovered for in general assumpsit.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 929; Dec. Dig. § 340.*]

15. PRINCIPAL AND AGENT (§ 124*)—AUTHORITY—QUESTIONS FOR JURY.

Where the question whether defendant authorized L. to purchase logs on his credit depended upon conclusions to be drawn from correspondence between them, their course of business with each other, including dealings under written contracts, and any oral agreements between them, as well as the manner of conducting business between L. and plaintiffs, who sold him the logs, it was error for the court to single out two letters from the correspondence between defendant and L., and, without submitting them, treat them as conclusive on the question, and construe them as a matter of law, but the letters, even if susceptible to the construction given by the court, should have been submitted with the court's construction as a piece of evidence to be considered by the jury, together with other facts, in determining the question.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 724; Dec. Dig. § 124.*]

16. TRIAL (§ 252*)—INSTRUCTIONS.

Where an agent's authority to purchase lumber on credit, if any was given, was by parol, and not mentioned in letters, and one charge erroneously assumed that the authority to purchase logs on credit was given by two letters, a charge making the question of authority to purchase lumber on credit depend on whether the jury found that authority was given to purchase lumber the same as logs, thus placing the authority to purchase lumber on the same grounds, was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

Exceptions from Orleans County Court; John H. Watson, Judge.

Action by Taplin & Rowell against Frank F. Marcy. Judgment for plaintiffs, and defendant excepts. Reversed and remanded.

Young & Young, for plaintiffs. J. W. Redmond, for defendant.

WATERMAN, J. This is an action of general assumpsit for logs and lumber sold and delivered. Plea general issue, with notice and payment. The notice is to the effect that a suit, now pending in favor of the same plaintiffs against the same defendant, is for the same cause of action.

Plaintiffs claimed that defendant purchased the logs and lumber mentioned in their specifications, through one Lang as his agent, duly authorized by the defendant to make such purchases. Defendant claimed that his relation to Lang was only that of a commission merchant, selling the product of Lang's mill, taking security on the lumber for advancements of cash and commissions, and that he never authorized Lang to pledge his credit for logs or lumber, and that Lang was only authorized to act as his agent in making cash purchases of logs or lumber. The defendant claimed that the evidence in the case tended only to show that the logs and lumber in question were sold by the plaintiffs to Lang, individually, and not to the defendant through

him as agent, and that no credit was ever extended by the plaintiffs to either Lang or the defendant for the same; that the sale was a cash transaction, or lien notes to be given on such part as was not paid for on delivery, and that the business between Lang and the plaintiffs was transacted in accordance with that understanding, which existed between Lang and the defendant. The defendant lived at Palmer, Mass. The plaintiffs lived and were doing business at Barton, Vt., and Lang at South Barton, during the time covered by these transactions. There was no claim or evidence that the defendant had ever personally promised the plaintiffs or their agent to pay for the logs or lumber in question, or that he ever became obligated to pay for the same, except through Lang as his agent, unless the fact that he had substantially all the lumber sent to him, or his order, and the proceeds of all the lumber sold in his name, has a tendency to establish that fact. The plaintiffs never presented a bill or statement of their account to the defendant, but they called on Lang, from time to time, for payments on their account, claiming he was defendant's agent, and Lang assured them, when they called on him for payments, that the defendant would come up soon and settle the account. April 7, 1902, the defendant and Lang entered into a written agreement, by which Lang agreed to ship to the order of the defendant all the lumber cut out of that season's stock of logs, and all the logs in and about Lang's mill, and the defendant agreed to market said lumber upon commission, and account to Lang for the net proceeds, and apply the same in payment of advancements, with interest thereon, to advance Lang \$4,500 for one Johnson's interest in Lang's logs and lumber, and to advance Lang \$140 per week for 12 weeks. Johnson then held a lease of Lang's mill and premises at South Barton, and was to assign the lease to the defendant. On the same day, and as a part of the transaction, Lang gave the defendant a chattel mortgage of all his logs and lumber at or near his mill, to secure the defendant for the money he had advanced, or was to advance, to Lang. April 15, 1902, Johnson assigned his lease to the defendant, upon being paid the amount due him for money he had paid toward the logs. September 30, 1902, defendant and Lang made another written agreement similar to the one of April 7th, but covering the logs to be got out in the coming season, and providing that the logs and lumber should be and remain the property of the defendant until he should be fully paid for all money advanced by him. December 3, 1903, Lang gave the defendant a quitclaim deed of his mill and premises at South Barton, and a chattel mortgage of all the goods in his store. December 17, 1903, Lang turned over to the defendant the stock of goods he had at South Barton. De-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fendant took possession of the property deeded and turned over to him in December, and also took possession of the books of account which Lang had kept in his business, which were placed in the office of W. R. Aldrich of Barton. January 2, 1904, the defendant wrote a letter to Mr. Aldrich, inclosing a letter from Lang, and stating, in substance, that he had written Lang that he did not think there would be any objection to his going to Mr. Aldrich's office and looking at the books, if for any reason he desired to look at them, and that he thought it best to tell Lang if there was anything due from any of the accounts on the books, that defendant claimed the amounts due. Plaintiffs offered this letter in evidence, and it was received subject to defendant's objection and exception. It was offered as showing that defendant claimed the books of Lang that were then in the custody of Mr. Aldrich, and whatever was due upon them. It was objected to on the ground that it was a privileged communication, Aldrich being an attorney at law, and the retained counsel of the defendant, and that said letter was written to him by the defendant as his counsel, who then had the books in his possession. The contents of the letter do not show any confidential statement. It shows to some extent the relations then existing between him and Lang, and that he was claiming the books and what there was due upon them. Before the letter was admitted, Lang testified that Aldrich was his counsel when the books were left with him, and afterward refused to allow him to take possession of them. The exceptions show nothing further as to the relations between Aldrich and the defendant as counsel and client. We do not think this letter, in the circumstances, was a privileged communication, and it was admissible.

While defendant's bookkeeper was on the stand as a witness, testifying as to the defendant's books of account, showing his deal with Lang, the plaintiff offered in evidence the heading of a certain page of an account book as showing the way the account was headed and the manner of making entries, on the ground that the book did not show a debit and credit account, but was headed "Statement of R. B. Lang given July 1, 1903." Counsel for defendant stated he had no objection, and wanted it in the case. Plaintiffs' counsel expressly limited his offer to the purpose above stated, and it was admitted by the court for the purpose named. After the admission of the heading for that purpose counsel for defendant cross-examined the witness, and called his attention to a certain item in the statement, and asked him whether that item appeared in any manner on the book from which he made the copy of the statement, to which the witness answered in the negative, and then asked him, "Where did you get that item on this statement?" Without objection by counsel for plaintiffs the court said, "That item is

excluded for the present. It is not cross-examination"—to which ruling the defendant asked and was allowed an exception. The admission of the heading having been limited to one purpose—that of showing the manner of keeping the account by the defendant, particularly as to the heading—and not for the purpose of showing the amount due, or the correctness or incorrectness of the book as to the items appearing upon it, the questions asked the witness were not relevant to the heading, or the manner of keeping the accounts with Lang by the defendant, and were not proper cross-examination. One of the questions arising in the suit was as to the relations between Lang and the defendant. The plaintiff claimed that Lang was acting as defendant's agent, and that this manner of keeping the accounts between them, by the defendant, indicated that the relation of agency, and not that of debtor and creditor, existed. The sole object of the testimony admitted was to show this fact, and the cross-examination was properly confined to that. There was no error in this ruling of the court.

When Lang was on the stand as a witness for plaintiffs he was asked in his direct examination what took place between him and the defendant, at the time he transferred the mill property to the defendant, with relation to the plaintiff's account then due, and answered that the defendant agreed to take care of the lien notes previously given by Lang to them, secured upon the lumber, and was also asked what took place between him and defendant December 17, 1903, when he transferred his stock of goods in the store to defendant, and he answered, in substance, that defendant agreed, the same with reference to the lien notes that he did December 3d and 4th with reference to the account, to take care of the Taplin & Rowell lien notes; and, it appearing that Lang then told the defendant that the balance due Taplin & Rowell was about \$1,540, he was asked whether defendant then agreed to pay that amount if it was found to be correct, and he answered that he did, and upon the witness stating that upon two occasions in December he had turned over to the defendant every dollar of his property, he was allowed to state that, in consideration of his turning over to him all his property, the defendant said he would pay the debt due the plaintiffs for lumber which Lang had bought of them, as they claimed, for the defendant. All this testimony was received subject to objection and exception. The objection was that it was immaterial. It was material as showing the relations between Lang and the defendant. It had a tendency to show that defendant was then assuming the indebtedness contracted by Lang to the plaintiffs, and, in connection with the other testimony, that Lang had been his agent in doing the business; that the balance due on the account for lumber belonged to him to pay, and that through

Lang the plaintiffs had made a sale of the property to him. The evidence did not show that the defendant agreed to pay the plaintiffs out of the property turned over to him by Lang, but if it did not, his agreement to take care of plaintiffs' debt for lumber might indicate the relations he sustained to them, as well as to Lang. It was a part of the transaction of Lang's turning over his property to the defendant, and the understanding between them, to this extent, as to what Lang had been doing in the purchase of lumber with which the defendant had been connected in some way. Considered as that testimony left the matter, and without further explanation, it tended to characterize the relations between all three of the parties. In the same examination of Lang he testified that he had a looking over with the bookkeeper of plaintiffs at some time between December 3 and 17, 1903, and was then allowed to testify, subject to defendant's objection and exception, that he informed her of what the defendant had agreed to do in regard to the payment of the Lang notes. The defendant testified that he never agreed to pay the debt to the plaintiffs, but admitted that he drew a check for \$526.48 December 3, 1903, the amount which Lang then said defendant owed the plaintiffs. It was objected by defendant that the evidence did not tend to show that he ever instructed Lang to communicate to any one the alleged agreement on defendant's part to pay the Lang notes.

When this conversation between Lang and plaintiffs' bookkeeper took place, nothing was being done in carrying on any of the business in which it was claimed he had been acting for the defendant. The exceptions state he was looking over with the bookkeeper, but it does not appear that his statement had any connection with that. It was a statement of an agreement of the defendant, previously made, to pay the plaintiffs. While Lang's testimony as to this agreement, made while the transaction between him and the defendant was going on, and relating to that transaction, was admissible, upon the grounds previously stated, his relation to the bookkeeper of what the defendant had said was merely a recital of a past conversation, and in no way connected with any business or transaction then being carried on. It is not shown that Lang was authorized by the defendant to make such a statement, and the scope of his claimed agency was not broad enough to include such authority. The general principle governing the admissibility of testimony as to statements or admissions of an agent is that they must have been made while the agent was performing some act which was within the scope of his authority, and with reference to the act which was being done. *Greenl. Ev. § 113; Stiles v. Danville, 42 Vt. 282; Mason v. Gray, 36 Vt. 808; Hardwick Savings Bank v. Drenan, 72 Vt. 438, 48 Atl. 645.* Lang's

statement to the bookkeeper of what the defendant had previously said was no part of the *res gestæ*, but was rather *res inter alios*, and the admission of his testimony showing such statement was error. Plaintiffs offered in evidence the heading in their book of accounts at the commencement of the account with the plaintiffs, which their bookkeeper testified she made from her knowledge in regard to the matter, and according to her instructions from the plaintiffs, when she made the first entry, and was as follows: "Lumber shipped R. B. Lang's mill for Marcy by Taplin & Rowell." The entry was received subject to defendant's objection and exception. It was admissible in connection with the testimony of the bookkeeper. The plaintiffs' account of the lumber which they claimed they sold the defendant through Lang was admissible, and this heading was part of it, and characterized it as showing, in connection with the testimony, that they understood when the account commenced, and, before any question had arisen, that they were selling their logs and lumber to the defendant through Lang's agency. Plaintiff Taplin testified, without objection, that some lien notes were taken by plaintiffs covering the lumber. He was then asked by his counsel what his purpose was in taking those lien notes, and answered, subject to exception, that it was to hold the title of the logs until they got their pay; until they got down there; until they reached their destination. He was further asked what his purpose was in reference to whether the notes were taken in payment or settlement of this account, and answered, subject to exception, that they did not take the lien notes on the lumber to settle the account. An important question in the trial was whether Lang was acting as defendant's agent in the purchase of the logs and lumber, or whether the sales were made to him personally. The plaintiffs claimed that Lang was defendant's agent in everything that was done, and that they so understood from the beginning; that, although the sales were for cash or lien notes, as both parties conceded, the lien notes were taken in Lang's name merely for the purpose of protecting their title and their interests until the lumber should all be paid for, there being an interim of a few days between the shipment and its arrival at the place of destination and the receipt of a check from the defendant. They also claimed, as being consistent with this position, that the taking of the lien notes was for no other purpose than retaining their title as security for the purchase price, and was in no sense payment of the account. The notes were never entered on their books. Defendant's evidence tended to show that he was acting under the written agreements, and he claimed that the fact of taking the lien notes in Lang's name showed that they were treated as pay-

ment of the account, and that plaintiffs were dealing with him personally. Standing alone, it might have that tendency. But the transaction was subject to explanation. Its purpose might be shown. It comes within that class of cases in which oral testimony may be introduced to show the existing facts, and the purpose of the parties in executing notes or written contracts. The testimony was admissible for that purpose. *Labbee v. Johnson*, 66 Vt. 234, 28 Atl. 986; *Folett et al. v. Steele*, 16 Vt. 80.

It appeared that the defendant brought suit in trover against one Parker, a deputy sheriff, to recover for lumber sold by Parker upon two of the lien notes, given by Lang to plaintiffs, upon the ground that none of the lumber sold by Parker was included in the lien notes. The case was taken to the Supreme Court upon exceptions. 78 Vt. 73, 62 S. E. 19. The defendant in that case was indemnified by Taplin & Rowell for taking the lumber, and they assumed the defense of the case. The defendant in this case offered in evidence a part of the exceptions in that case, in which it was stated, in substance, that the uncontradicted evidence of the defendant in that case tended to show that Taplin & Rowell sold to Lang in 1903 a large amount of sawed lumber, and that it was all sold on condition that Lang was to give a lien note for it as soon as counted, and before it was used, and the title was not to pass until it was paid for, and defendant offered to show that attorneys for the plaintiffs, then acting for them defending that suit, wrote that paragraph in the exceptions. Plaintiffs objected to the admission of this evidence. Defendant's counsel stated it was a declaration by the plaintiffs in this case. The court inquired of him as to what it was a declaration, but counsel made no answer, and the evidence was excluded, to which defendant excepted. Except for the statement that it was sold to Lang, this is the same state of facts conceded to exist by parties in this case. The lumber was to be paid for when counted, or lien notes given. Lien notes were in fact given by Lang. The question in this case was whether the sale was made to him personally, or as agent of the defendant, and whether he gave the lien notes in his own behalf or for him. The transaction, so far as the lien notes showed, was a sale to Lang, and the lien notes given by him for the lumber. In the case of Marcy against Parker these plaintiffs were attempting to protect their rights under the lien notes given by Lang. Their rights, so far as that case was concerned, stood upon their sale to Lang, and taking the lien notes from him, and the identity of the lumber covered by the lien notes. That case resulted in a verdict for the plaintiff, the jury having found that none of the lumber so taken and sold by the defendant was specified in the two lien notes. In view of the questions litigated in that case and the position which the defend-

ant therein may have taken, and also what took place in court at the time the testimony was offered, we think it was properly excluded. The defendant also offered in evidence, as a part of his case, a statement by counsel for defendant in that case, in a discussion before the court, which was excluded, and which we consider inadmissible, in part for the reasons above stated, and in part because it was an argumentative statement by counsel based upon the facts appearing in that case.

A petition for a new trial was brought by the defendant in the same case, which contained a statement substantially like that in the exception as to what appeared on trial in regard to the sale of lumber, and that it was to remain the property of Taplin & Rowell until paid for. This was offered in evidence by the defendant and properly excluded, for the reasons before given as to the other evidence offered. At the close of all the evidence the defendant moved the court to direct a verdict for the defendant, upon the ground, first, that the plaintiffs' declaration is in the common counts in assumpsit, and their uncontradicted evidence is that the contract between them and Lang was that they were to have cash or lien notes for their logs and lumber as counted off, and were not to part with their title until they had received their full pay, that all the logs and lumber were sold and delivered according to that contract, and that they have received either cash or lien notes for the same, as agreed, and that the entire debt of plaintiffs is evidenced by and merged in said lien notes, and plaintiffs disclaim recovery upon the lien notes, and claim to recover only upon an alleged account, which in fact never existed. And, secondly, that even if all the talk took place between the plaintiffs and Lang, as they claim, and even if in all the negotiations Lang was the authorized agent of the defendant, having the power to bind the defendant in respect of the sale of the logs and lumber, still the lien notes executed by Lang for the very debt for which the defendant is now sued, being the purchase price of the logs and lumber, merged or took the place of all talk or negotiations between plaintiffs and Lang before their execution, and determine that the logs and lumber therein specified were sold to Lang and not to the defendant. And in support of this last ground the defendant urged that it appears that plaintiffs have brought a suit in trover against the defendant, which is still pending, based upon the lien notes; that they placed the lien notes in the hands of an officer, with instructions to realize upon the hardwood plank therein mentioned, that they defended the suit of this defendant against the officer, upon the theory that the two lien notes were valid against said Lang, and that they have indorsed all the money paid by Lang, on account of logs and lumber, upon said notes.

This motion was overruled, to which the defendant excepted.

It is generally true that notes, given by the debtor for the amount due from him on account, are prima facie payment of the account. In this case a litigated question is, Who is the debtor? To whom was the lumber sold by the plaintiffs? Did they sell it to Lang individually, or to the defendant through Lang as his agents? For the settlement of the matters of fact involved in these questions oral testimony was offered, and properly received. Although the sales were made by the plaintiffs to Lang, they claimed they were made to him as agent of the defendant, and although he gave lien notes, and signed them with his own name, that these notes were given by him in behalf of the defendant for the sole purpose of preserving the rights of the plaintiffs, and retaining their title, until they should actually receive the money for their property. Their testimony also tended to show that it was understood between them and Lang that these notes were not given in payment for the lumber, but only as security for the purchase price, as appeared by their book account. These material facts were testified to by the plaintiffs and Lang, and were disputed by the defendant, only as to the main question involved, as to whether Lang was his agent in the transactions. Defendant had nothing to do personally with the purchase of lumber from the plaintiffs. All this was done by Lang. But much testimony was introduced by him bearing upon the question of Lang's agency. The purpose for which the notes were given was in dispute. Both parties concede that plaintiffs were to have cash or lien notes for their lumber when counted. There was necessarily a delay of a few days between counting off and reporting to the defendant and receiving a check from him. The plaintiffs' evidence tended to show that the lien notes were given to secure the plaintiffs during this interim. The method of bookkeeping adopted by the plaintiffs was to credit checks of defendant, when received through Lang, upon the account which they kept of lumber sold. They also indorsed the same payments upon the lien notes, but not until after the commencement of this suit. The indorsements upon the notes were not conclusive, but were evidence merely, and could be considered by the jury in connection with other facts. The court could not hold, as matter of law, that the execution of the lien notes by Lang was conclusive evidence that he was acting for himself individually, and not for the defendant, nor that they were given in payment of the purchase price of the lumber, or in settlement of the account, nor that the account was merged in them, nor as to the weight to be given to the fact of their indorsement of payments upon the notes. All these matters were proper for the consideration of the jury under proper instructions from the court. The jury found that the notes were given as

security. The motion for a verdict was properly overruled.

The defendant requested the court to charge the jury, first, that if they found that plaintiffs caused the two lien notes already mentioned to be placed in the hands of an officer, with instructions to realize upon that part of the lumber therein specified, that act constituted an admission by them that they then understood and claimed that said two notes represented a debt due from Lang to them, a part of which, at least, was then unpaid; and, second, that such act constituted a declaration by them that they had sold to Lang, and not to the defendant, the lumber sought to be realized upon, and is direct evidence that the fact is so; and, third, that if they found that plaintiffs defended the officer in the suit of defendant against him for selling lumber on the two lien notes, such defense constituted a declaration by them amounting to an admission that said two notes represented a debt due to them from Lang, a part of which was the purchase price of the plank in question, and is direct evidence that said declaration is true. All these requests are based upon the theory that the mere giving of the notes by Lang constituted an indebtedness from him to plaintiffs, subject to no explanation of the purpose for which they were given, and that, by the attempt of the plaintiffs to enforce their lien under them, they were either absolutely bound to that position, or at least must now be held to have admitted that to be the true position. These requests would require the court to instruct the jury, in effect, that this is so as matter of law, not that they should consider their subject-matter as facts with the other evidence in the case, and give it such weight, as against the position now taken by the plaintiffs, as they might see fit. They ignore the evidence already in the case as to the agency of Lang, and the purpose for which the notes were given, and the claim of the plaintiffs that they were given only as security, and for holding their title until they should receive their pay. They ask the court to rule that the taking of the notes and enforcement of their lien under them was an admission or declaration by the plaintiffs that they were taken as representing a debt from Lang, and that they had sold the lumber to him, and not to the defendant, and was direct evidence that such declaration was true. This was asking the court to dictate to the jury as to the evidentiary force and effect they should give certain evidence. It would take from them the right to give it as much or as little weight as it deserved to have, and the right to say whether, in the light of the testimony and circumstances, it ought to have any weight at all as an admission. If they believed the plaintiffs' evidence, and considered their claims reasonable, they might not view their transactions in regard to the notes as an admission on their part, but as entirely

consistent with the theory of a sale to the defendant, through Lang as his agent. The requests were therefore properly refused.

The defendant also requested the court to charge, in substance, that the fact that the plaintiffs caused the payments toward the lumber to be indorsed on the lien notes as of the dates when the payments were made is evidence tending to show that plaintiffs had not, before said indorsements were made, made any other application of said payments; also that the making of such indorsements tended to show that plaintiffs understood said payments were not made on account; also that the making of such indorsements is an admission that the payments were not made on account. It appeared that the payments were credited in the account when received, and were indorsed on the notes, after the commencement of this suit, as of the date when received. The evidence as to this was uncontradicted, unless by the circumstances of the date of indorsement appearing on the notes, 'being different from the date when actually made. Here again the jury, if these requests had been complied with, would have been obliged to disregard the plaintiffs' theory and evidence in respect of the note transaction. The method which the plaintiffs claim was adopted to keep their lien good upon the property required the giving of lien notes, not as evidence of the debt, but as being necessary to preserve their security. No question was made as to the correctness of the items as credited and indorsed by plaintiffs, nor that there was but one payment of each item credited. If the jury found the plaintiffs' claim well founded, they might say that the credits upon the account and the indorsements upon the notes were consistent with their claim, the indorsements being made for the purpose of having the notes show the amount due, if the lien should be enforced. The amount due would have to be shown in some way, and the indorsements would enable them to compute the balance. Keeping account of these payments in these two ways, and as they claim for the reasons stated, the court could not tell the jury, as matter of law, that the mere fact of indorsement upon the notes would tend to show that plaintiffs had not before credited the same amounts in the account, especially as the exceptions state it appeared they were credited when received; nor that such indorsement would tend to show that they understood said payments were not made on account, or would constitute an admission that they were not so made. The way the account was kept, the giving of the notes, and why they were given, the credits and indorsements and their dates, were all matters of evidence, and before the jury, and they had the right to consider all the facts and circumstances, in arriving at a conclusion, in regard to the payments, and where they should apply, and where they did apply, and the force and effect of their ap-

plication, if any, as against the plaintiffs. All this bears upon the giving of the notes, and the purpose of their execution, and the court could not be required to select one piece of evidence, and give it prominence in the manner indicated by the requests, and disregard all other testimony on that subject. All the transactions and the conduct of the parties in relation to them were before the jury, and were proper subjects of consideration by them.

The defendant also requested the court to charge the jury that, although the contract in respect to the logs and lumber was made with Lang as agent of the defendant, yet if that contract was that the sale was to be a cash transaction, and that lien notes were to be given for the lumber or logs not paid for on delivery at the Lang mill, and that plaintiffs were to retain the property in the logs and lumber till paid for, and the business was transacted in accordance with this contract, then the plaintiffs cannot recover for the logs and lumber in this suit, and also excepted to the failure of the court to instruct the jury as to the defendant's claim that there was nothing to pay; on his theory nothing due which was proper matter of book account. This request assumes that the contract was made with Lang as agent; that the sale was for cash, and lien notes to be given for what was not paid for on delivery, plaintiffs to retain title until paid for. The method adopted between the plaintiffs and Lang for retaining title by the plaintiffs was by Lang's giving lien notes to hold what was not paid for. Although it was called a cash sale, there was a condition that lien notes should be given for what had not been paid for. If the defendant got possession of lumber which his agent Lang had purchased, but was not paid for by either, he would be liable to plaintiffs for the balance due for it. Again recurring to the theory and evidence of the plaintiffs, if the jury should find the plaintiffs' claim correct, then the plaintiffs properly charged all lumber to defendant, and credited all payments received, and took the lien notes executed by his agent for the sole purpose of security. Retaining their property in the logs means in this transaction, for security. The defendant's counsel in his brief says, of course, the lien notes were not given in payment of the logs and lumber. If they were given in payment, the title to the logs and lumber passed from Taplin & Rowell. The lien notes were given by Lang and accepted by Taplin & Rowell only as security. For all other purposes it was an absolute sale. The defendant cannot well refuse to pay for lumber which was permitted by plaintiffs to go into his possession before being paid for, on the ground that it was a contract for payment in cash on delivery; that he did not pay for it on delivery, and therefore is not liable to pay for it. Although lien notes were to be given for such part as was not paid for in cash, still if they

were given only as security, they were not payment. Such part of the lumber as was not paid for on delivery was proper matter of charge on book, and can be recovered for in general assumpsit. This request as stated was properly refused.

Several letters, written by the defendant to Lang, were introduced in evidence by the plaintiffs, and among them one dated January 24, 1903, reading as follows: "Replying to your favor of the 19th inst. which arrived during my absence from home will say that we do not care to advance money on logs until they are delivered and you can certify to the number of feet there are of them. This is the only way to do business and know what we are doing. Must have some system to our business or we shall not know where we are." And the other, dated January 27, 1903, reading: "Replying to your favor of the 26th inst. will say that we do not care to pay for logs until they have arrived at the millyard. When they are delivered at the mill and scaled so that you know how many feet you have you can send me a schedule of the number of feet of each kind and the amount per thousand that you are to pay and we will then attend to sending you a check to pay for them. As for advancing money on logs before they arrive at the millyard and are scaled so that we know what we are paying for, we do not care to do it, and if the parties that you buy of cannot wait until the logs are delivered and scaled it is better not to buy of them. We are not agoing to advance money haphazard and shall insist upon the business being done as we desire." The court charged the jury as follows as to these letters: "I instruct you that a fair construction and legal construction of those two letters is that, so far as logs were concerned which Lang was authorized to buy on Marcy's credit, to the extent, at least, of having those logs delivered in that millyard scaled, and the measure or scale sent to Mr. Marcy in Palmer, and time for him to get a check back, etc., that would not be a cash sale. It would, to a certain extent, be a sale on credit." The defendant excepted to this part of the charge, on the ground that the submission to the jury of the question whether the defendant authorized Lang to purchase logs on his credit was upon those two letters alone, disregarding all the other evidence, including conversations and correspondence between Lang and the parties, the manner of carrying on the business, and all the circumstances, and that, even if the construction of the letters may have been for the court, they should have been submitted to the jury with the construction given them by the court, together with all the other evidence in the case. There was considerable correspondence between the defendant and Lang, and several other letters from the defendant relating to the business appear in the exceptions. The case shows that defendant claimed that his

relation to Lang was only that of a commission merchant selling the product of Lang's mill, and taking security for advancements and commissions, and that he never authorized Lang to pledge his credit for logs and lumber, and that his evidence tended to show this; and he claimed that no evidence in the case tended to show that he had authorized Lang to pledge his credit for the purchase of either logs or lumber, and that the most that any evidence in the case tended to show was that Lang was his agent no further than to make cash purchases of logs or lumber, and that he kept his account with Lang and rendered him statements from time to time showing that this was the way he understood the relations between them.

Thus the two parties differed widely in their claims and in their evidence as to this particular question. The two letters related entirely to logs. In both the defendant specifically objected to advancing money for logs, and in the first he stated when he would pay for them; that is, as soon as he knew the amount. The understanding was that the title to the logs should remain in the vendor until paid for. The plaintiffs' testimony was they were to have cash or lien notes when delivered. By delivery at the millyard plaintiffs did not lose their property in the logs, nor the defendant acquire it. By such delivery the logs were where it was agreed they should be, and were the property of the defendant, as soon as paid for, if Lang bought them as his agent. Having been delivered there, if defendant should fail to pay as soon as notified of the amount, the plaintiffs would have the right to bring suit against him, if they were brought by Lang as his agent, or to assert their rights under the lien notes. Whether Lang was authorized to buy logs on Marcy's credit was a matter of importance, and upon which considerable testimony was offered on both sides, and it was closely contested. The plaintiffs claimed that Lang had the right to pledge the defendant's credit for logs delivered in the millyard until the pay could be received from defendant; and, while the defendant's version of his relations with Lang did not, in many respects, differ materially from that given by Lang and the plaintiffs as to the arrangement actually made, he strongly insisted that Lang had no authority to pledge his credit to the plaintiffs. His claim amounted to saying that Lang had exceeded his authority in the purchases made by him. He consented to pay \$526.48 as the balance he understood from Lang was due the plaintiffs, but when he was informed it was \$1,540 he declined to pay that amount. Whether Lang had exceeded his authority in this respect or not must of course, and did, depend upon the facts and circumstances shown in the case. He evidently had exceeded his authority in some respects, for he had used the money of the defendant to such an extent that he con-

veyed all his property to him to make good the deficiency. Not only did this depend upon all the correspondence, but upon the course of business between the defendant and Lang, from the beginning, including their deal under the written contracts, and any oral agreements or understandings between them, if any, altering or modifying these contracts, the manner of conducting business between Lang and plaintiffs and the knowledge and acquiescence of the defendant therein, the time of delivery of lumber, the length of time that must elapse after delivery before the cash of checks could be received, and any circumstances relating to the matter. The court by the instructions given took the question from the jury, and left nothing for them to decide as to the question of credit for logs purchased. Among the 11 special questions submitted to the jury there was none as to this. There was a question submitted as to Lang's authority to purchase lumber on the credit of the defendant. The defendant excepted to the failure of the court to submit a question as to whether Lang had authority to pledge the credit of the defendant in the purchase of logs, both at the time the court announced what special verdicts would be submitted, and after the charge was given. But the court treated that as a matter of law, and gave its construction of the two letters, and made no allusion to the other evidence in the case, nor submitted the letters to the jury, with its construction for their consideration and judgment in connection with the other evidence. The letters were treated as being conclusive on that point. Even if they were susceptible to the construction given them by the court, they should have been submitted to the jury, with the construction given them by the court, as a piece of evidence, together with all the other evidence and circumstances in the case.

In *White v. Lumiere et al.*, 79 Vt. 206, 64 Atl. 1121, 6 L. R. A. (N. S.) 807, it was said that, "while it is true that generally the construction of written instruments is a question for the court, it is likewise true that, where the case turns upon the proper conclusions to be drawn from a series of letters taken in connection with other facts and circumstances, it is one which may properly be referred to a jury." This was according to the law as laid down in *Rankin & Fidelity Ins. Co.*, 189 U. S. 242, 23 Sup. Ct. 553, 47 L. Ed. 792, and in *West v. Smith*, 101 U. S. 263, 25 L. Ed. 809. As the ultimate fact to be determined was the authority of Lang to pledge the defendant's credit for logs, the defendant under the circumstances had the right to have the jury consider all the evidence bearing on that subject. The general rule undoubtedly is that the construction of all written documents is a question of law for the court; and, when a contract is sought to be made out from such documents alone, it

is for the court to ascertain and determine its construction, whether the documents are many or few. But where the evidence in the case does not depend altogether upon written instruments, but upon other matters of fact, it is a question for the jury to determine what was the contract between the parties. *Roberts & Co. v. Bonaparte*, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689; *Bolckow v. Seymour*, 17 Com. Bench (N. S.) 107; *Moore v. Garwood*, 4 Excheq. 681; *Foster v. Mentor Life Association Co.*, 3 Ellis & Black, 78. In *Taylor on Evidence*, § 36, it is said, "Where a contract has to be made out partly by letters and partly by parol evidence, the jury must deal with the whole question." In 1 *Story on Contracts*, § 818, "If a contract is to be made out partly by written documents and partly by oral evidence, the whole becomes a question for the jury."

The defendant also excepted to that part of the charge in respect to the sixth special verdict, which was, "Was Lang authorized to purchase lumber of Marcy's credit?" The court said, "That depends upon whether you find by a fair balance of the evidence that Lang was authorized to buy lumber, as Marcy's agent, the same as logs. If you say that he was authorized by Marcy to buy lumber for him the same as he was to buy logs, then this follows the same as it does with logs. In other words, he had a right to buy it on the same credit with Marcy as far as length of time was concerned, because otherwise it would not be buying the same as logs. So you will answer that question yes or no, as you find it." The authority as to the purchase of lumber, if any was given, was by parol, not being mentioned in the letters. The instructions assume that the authority to purchase logs on credit was given by these two letters alone, and then place the purchase of lumber on credit, on the same basis. Of course, if the charge was erroneous in respect of logs, the same is true as to lumber, for it is placed on the same ground, and makes their finding depend upon Lang's authority to buy logs. The charge does not clearly discriminate between logs and lumber.

Other exceptions were taken which we do not deem it necessary to consider, as the same questions are not likely to arise in another trial.

Judgment reversed and cause remanded.

(108 Md. 537)

DRONENBURG v. HARRIS et al.

(Court of Appeals of Maryland. Nov. 14, 1908.)

1. DEATH (§ 35*)—RIGHT OF ACTION—JURISDICTION.

No action can be maintained in Maryland for the death of a person killed in the District of Columbia; but, under Code D. C. § 1301, making any person or corporation causing the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

death of a person within the District liable for such death, an action for the death could have been maintained by the administrator in the District of Columbia.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 50; Dec. Dig. § 35.*]

2. DEATH (§ 101*)—DAMAGES—PERSONS ENTITLED.

Code D. C. § 1303, provides that damages recovered in an action for death shall not be appropriated to the payment of the debts of the deceased, but shall inure to the benefit of his or her family and be distributed according to the statute of distribution in force in the District. Section 380 provides that the mother of the deceased shall be entitled to the whole amount recovered. A resident of Maryland was killed in a railroad accident in the District of Columbia, and the railroad company paid a sum of money in settlement of claims resulting from his death to the administrator of the deceased appointed in this state. *Held*, that money so paid did not belong to the estate of deceased, but to his mother, although she was not dependent upon him for support, and at the time of his death he was nearly of age; but any sum paid, the administrator on account of injuries received by deceased, or on account of damages to his estate, belongs to his estate, and must be accounted for by the administrator to the orphans' court.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 134-137; Dec. Dig. § 101.*]

3. EVIDENCE (§ 408*)—PAROL EVIDENCE—AFFECTING WRITINGS—"CONTRACTS."

A receipt by an administrator of money in settlement of liability for the death of the intestate and for the release of all claims is a contract within the rule excluding parol evidence to contradict or vary the terms of a written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829, 1830, 1836; Dec. Dig. § 408.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1513-1530; vol. 3, pp. 7615, 7616.]

4. EVIDENCE (§ 460*)—PAROL EVIDENCE AFFECTING WRITING—EVIDENCE ADMISSIBLE.

In the trial of issues as to plaintiffs' rights to money paid an administrator in settlement of a claim for the death of his intestate, evidence that the agent of the company paying the money was advised before he made the settlement that the only person with any claim against the company was the mother of deceased, and that the settlement must be made under the law of the District of Columbia, where the death occurred, that the form of the release was one the agent usually employed in such cases in settlement of claims under the laws of Maryland, and that the claim for the death of the deceased, referred to in the release signed by the administrator, was understood by the agent and the administrator to be the claim of the mother, does not contradict or vary the terms of such release, but was admissible to identify the subject-matter of the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115, 2116, 2118, 2119; Dec. Dig. § 460.*]

5. EXECUTORS AND ADMINISTRATORS (§ 314*)—DISTRIBUTION OF ESTATE—PROCEEDINGS.

Plaintiffs made claim in the orphans' court, as next of kin of deceased, to money received by the administrator from the railroad company causing his death, and that court sent to the circuit court issues as to plaintiffs' claims. *Held* that, on the trial of those issues, evidence of what the railroad company first offered in settlement, and why the orphans' court granted letters of administration to the stepfather of

deceased, and what the administrator did with the money received, and whether he had stated an account in the orphans' court, was inadmissible, as it could not have aided the court, sitting as a jury, to reach a finding.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 314.*]

6. WITNESSES (§ 405*)—CONTRADICTION—TESTIMONY SUBJECT.

Evidence to contradict a witness in regard to an immaterial matter is inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1273, 1275; Dec. Dig. § 405.*]

7. TRIAL (§ 199*)—QUESTIONS FOR JURY.

It is the duty of circuit courts to refuse to submit to a jury in a civil case an issue which presents only a question of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 467; Dec. Dig. § 199.*]

8. TRIAL (§ 386*)—TRIAL BY COURT—DECLARATIONS OF LAW.

Where a court sits as a jury, instructions presenting issues of law are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 901, 902; Dec. Dig. § 386.*]

9. TRIAL (§ 251*)—INSTRUCTIONS.

An instruction referring to an abandoned issue is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 587; Dec. Dig. § 251.*]

10. EXECUTORS AND ADMINISTRATORS (§ 314*)—DISTRIBUTION OF ESTATE—PROCEEDINGS.

Where plaintiffs' claims, as next of kin, to money in the hands of the administrator, are submitted by the orphans' court to the circuit court for trial, plaintiffs are in the attitude of charging the administrator with having money belonging to the estate which he has failed to account for, and the burden of proof is on them to establish the charge.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 314.*]

11. TRIAL (§ 35*)—SCOPE OF PROOF—MATTERS NOT IN ISSUE.

Where the claims of plaintiffs, as next of kin, to money in the hands of administrator, are referred by the orphans' court to a circuit court for trial, and the issues assume that the deceased came to his death by the negligence of a railroad company, the administrator need not prove that his death was so caused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 88; Dec. Dig. § 35.*]

12. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—EVIDENCE.

Where the claims of plaintiffs, as next of kin, to money in the hands of administrator, are referred by the orphans' court to a circuit court for trial, and the issues assume that the deceased came to his death by the negligence of a railroad company, a failure to require the administrator to prove that the death was so caused could not have prejudiced the plaintiffs.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1071.*]

Exceptions from Circuit Court, Carroll County; Wm. H. Forsythe, Jr., and Jas. R. Brashears, Judges.

David Fulton Harris and others having made claim in the orphans' court of Frederick county, as next of kin of Ephraim G. Harris, deceased, to money received by his administrator from a railroad company, the orphans' court, to determine whether the money so received belonged to the estate of the deceased, sent to the circuit court for trial

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

12 issues, and ordered that in the trial the said David Fulton Harris and the other claimants should be plaintiffs, and Reverdy Dronenburg, administrator, should be defendant. The case was brought to the Court of Appeals on exceptions by defendants to rulings of the trial court. Exceptions sustained, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

George A. Pearre, Jr., and Guy W. Steele, for plaintiff. Alfred Ritter and James A. C. Bond, for defendants.

THOMAS, J. Ephraim G. Harris, spoken of in the testimony as E. Gaither Harris, a resident of Frederick county, Md., was injured, on the 30th day of December, 1906, in what is known as the Terra Cotta wreck, on the Metropolitan Branch of the Baltimore & Ohio Railroad, in the District of Columbia, from which injuries he died the next day at the Casualty Hospital, in the District of Columbia. The deceased was a dentist, and up to the time of his death was practicing his profession. He was unmarried, within nine days of being of age, and died intestate, leaving a mother, Mrs Dronenburg (who was not dependent upon him, and to whose support he did not contribute in any way), David Fulton Harris, Earnest G. Harris, Charles E. Harris, and Ida May Keller, half-brothers and sister, children of his father, Asa I., Ethel, Irene, and William T. Harris, brothers and sisters, and Lee, Hiram, and Edward Dronenburg, half-brothers, children of his mother. Letters of administration were issued by the orphans' court of Frederick county to Reverdy Dronenburg, stepfather of the deceased, who, on the 9th day of February, 1907, received from the Baltimore & Ohio Railroad Company, through its agent, C. W. Egan, \$5,500 in discharge of claims growing out of the injury to and killing of the deceased. David Fulton Harris, Earnest G. Harris, Charles E. Harris, and Ida May Keller, half-brothers and sister of the deceased, and children of his father, having made claim in the orphans' court of Frederick county to their shares, as next of kin of the deceased, of the money received by the administrator from the railroad company, that court, on the 24th of December, 1907, for the purpose of determining whether or not the \$5,500 received by the administrator belonged to the estate of the deceased, sent to the circuit court for Frederick county for trial 12 issues, and ordered that in the trial of said issues the said David Fulton Harris, Earnest G. Harris, Charles E. Harris, and Ida May Keller should be plaintiffs, and Reverdy Dronenburg, administrator, should be defendant. The case was moved from the circuit court for Frederick county to the circuit court for Washington county, and from there to the circuit court for Carroll

county, where it was tried at the last May term of said court, and the record of which trial contains 18 exceptions to the ruling of the court on the evidence, and 1 exception to the granting of the plaintiffs' 10 prayers, to the overruling by the court of defendant's special exceptions to the plaintiffs' eleventh prayer, and to the rejection of the defendant's 28 prayers.

Before taking them up in the order in which they appear in the record, a statement of the law applicable to the main facts in the case will contribute to a clearer understanding and a more satisfactory disposition of the numerous exceptions to be considered. In the case of *Stewart v. United Elec. L. & P. Co.*, 104 Md. 333, 65 Atl. 49, 8 L. R. A. (N. S.) 384, 118 Am. St. Rep. 410, this court held that the negligent killing of a person in this state gives rise, under the law of this state, to two causes of action, one by the executor or administrator of the deceased, for such damages as was sustained by him in his lifetime, for the benefit of his estate, and the other by the state, for the use of certain equitable plaintiffs, under sections 1 and 2 of article 67 of the Code of Public General Laws of 1904, for such damages as they sustained by the death of the party injured. The first cause of action is the cause of action the deceased had, and which under the Code survives to his executor or administrator, for the benefit of his estate; while the course of action under sections 1 and 2 of article 67 is a new course of action, created by them, and one which the deceased never had. The damages sought to be recovered in the case referred to, and which this court said the administrator was entitled to recover, was for physical and mental pain and suffering and expense of the deceased, etc. In the case of *Ash v. B. & O. Railroad Co.*, 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461, Charles F. Weaver, a citizen of the state of Maryland, was killed in the state of West Virginia, by the alleged negligence of the railroad company, and his administratrix, appointed in this state, brought suit for the alleged killing under the law of West Virginia, which provided for the recovery of damages for the death of a person caused by the wrongful act of another, and further provided that: "Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be distributed to the parties, and in the proportion provided by law, in relation to the distribution of personal estate left by persons dying intestate. And in every such action the jury may give such damages as they deem fair and just, not exceeding \$10,000; and the amount so recovered shall not be subject to any debts or liabilities of the deceased; provided that every such action shall be commenced within two years after the death of such deceased person." The court, Alvey, C. J., deliver-

ing the opinion, after a careful review of the numerous cases bearing upon the question, held: That the statute of West Virginia was essentially different from our statute (sections 1 and 2, art. 67, of the Code of Public General Laws of 1904); that the action sought to be maintained was not a common-law action, but a special action given by the statute, which had no binding force beyond the limits of the state; that the statute of this state could not be made to apply to transactions that occurred in other states, and, as our statute cannot be so extended and applied, "there can be no reason why statutes of other states, not similar in their provisions to our own, though belonging to the same general class of legislation, should be allowed extraterritorial force and operation, by the courts of this state"; that an administrator appointed in this state receives his authority to maintain an action in this state from the laws of this state alone; and that "it is according to the laws of this state that he must conduct his administration and make distribution. There is no statute of this state, nor any principle of law known to our courts, whereby an administrator or executor is given the right to sue and recover in an action like the present; nor is there any law of distribution, in force in this state, that entitles the next of kin or distributees of decedent's estate to receive the money recovered in an action like the present, and, if the present administratrix were allowed to maintain the action, it would be exclusively by virtue of a foreign law, and it would only be by force of that law that she could be compelled to account for and make distribution of the money recovered. There is certainly no comity that requires one state to apply and administer the statute law of another in a case such as the present." See, also, *State, Use of Allen, v. P. & C. R. R. Co.*, 45 Md. 41.

Sections 1301, 1302, 1303, Code D. C., provide as follows:

"Sec. 1301. Liability.—Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured, or if the person injured be a married woman, have entitled her husband, either separately or by joining with his wife, to maintain an action and recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured, even though the death shall have been caused under circumstances which constitute a felony; and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin of such deceased

person: Provided, that in no case shall the recovery under this act exceed the sum of ten thousand dollars: And provided further, that no action shall be maintained under this chapter in any case when the party injured by such wrongful act, neglect, or default has recovered damages therefor during the life of such party.

"Sec. 1302. By whom suit to be brought.—Every such action shall be brought by and in the name of the personal representative of such deceased person, and within one year after the death of the party injured.

"Sec. 1303. Distribution of damages.—The damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall enure to the benefit of his or her family and be distributed according to the provisions of the statute of distribution in force in the said District of Columbia." Under section 380, Code D. C., the mother of the deceased would be entitled to the whole amount recovered under the provisions of sections 1301-1303. Section 329, Code D. C., provides as follows: "It shall be lawful for any person or persons to whom letters testamentary or of administration have been granted by the proper authority in any of the United States or the territories thereof to maintain any suit or action and to prosecute and recover any claim in the District in the same manner as if the letters testamentary or of administration had been granted to such person or persons by the proper authority in the said District; and the letters testamentary or of administration, or a copy thereof certified under the seal of the authority granting the same, shall be sufficient evidence to prove the granting thereof, and that the person or persons, as the case may be, hath or have administration."

In the case of *Railroad Company v. Barron*, 5 Wall. 90, 18 L. Ed. 591, in passing upon the statute of Illinois similar to that of the District of Columbia, the court held that it is not necessary for the recovery that the widow and next of kin should have had a legal claim on the deceased, if he had survived, for their support, and the ruling in this case was adopted by the Court of Appeals of the District of Columbia, in the case of *District of Columbia v. Wilcox*, 4 App. D. C. 90, Chief Justice Alvey delivering the opinion, as the proper construction of the District of Columbia statute. See, also, case of *U. S. Electric Lighting Co. v. Sullivan*, 22 App. D. C. 115. In the case of *Asphalt Co. v. Mackey*, 15 App. D. C. 417, the court said that the damages recoverable under the sections of the District Code referred to are not assets of the estate of the deceased.

It is clear, on the authorities and statutes referred to: (1) That no action could have been maintained in this state for the death of the deceased; (2) that an action could have been maintained by the administrator in this case in the District of Columbia to

recover for the death of the deceased; (3) that such damages as might have been recovered for the death of the deceased, or any sum of money paid on account of his death, would not belong to his estate; and (4) that to justify a recovery for the wrongful killing, under the Code of the District of Columbia, it is not necessary to show that the equitable plaintiff had any claim upon the deceased for support. It is not necessary to determine in this case whether the administrator could have recovered in any form of action for the injuries sustained by the deceased in his lifetime; but it is also clear, on the authorities cited, that if any sum was paid him on account of such injuries, or on account of damages sustained by his estate in consequence thereof, such sum belongs to his estate and should be accounted for by the administrator to the orphans' court of Frederick county.

At the trial of the case the defendant first moved to quash the third, fourth, fifth, sixth, ninth, and twelfth issues, which motion the court overruled, and the case was then tried before the court without a jury. The plaintiff, in addition to the facts already stated, proved by C. E. Egan: That he was a general claim agent for the Baltimore & Ohio Railroad Company; that he knew the administrator of the deceased; that he was familiar with the Terra Cotta wreck, and "the date of the settlement made on account of the loss sustained by the death and injury of Mr. Harris"; that he made the settlement of a claim with the administrator and took from him at the time of the payments the following releases:

Release No. 1.

"Received of the Baltimore & Ohio Railroad Company the sum of five thousand (\$5,000) dollars in full satisfaction, payment and discharge of all claims or demands which I, R. Dronenburg, administrator of the estate of E. Gaither Harris, deceased, now have, or may or can hereafter have against said railroad company, or for the death of said E. Gaither Harris arising out of accident to train No. 66 at Terra Cotta, D. C., December 30, 1906, and in consideration of the receipt by me of said sum I do hereby release and forever discharge the said company from all said claims or demands, as well as from all claims or demands of any kind whatsoever. Witness my hand and seal this 9th day of Feby., 1907. R. Dronenburg, Administrator of the Estate of E. Gaither Harris. [Seal.] Witness: C. W. Egan. Asa I. Harris."

Release No. 2.

"Received of the Baltimore & Ohio Railroad Company the sum of \$500.00 for all claims which I, R. Dronenburg, administrator, of Frederick, Md., now have, or can hereafter have, against the Baltimore & Ohio Railroad Company, arising out of the death

of E. Gaither Harris, of Washington, D. C., who met his death in the accident to train No. 66 at Terra Cotta, D. C., December 30, 1906, and for all compensation for lost time and all expenses and for pain and suffering endured by the deceased from the time of his injury until death. And in consideration of the said sum of \$500.00 I do hereby release and forever discharge the said the Baltimore & Ohio Railroad Company for all claims and demands of whatsoever kind. Witness my hand and seal this 9th day of Feby., A. D. 1907. R. Dronenburg, Administrator of the Estate of E. Gaither Harris. [Seal.] Witness: C. W. Egan. Asa I. Harris."

Said witness further testified that, "At the time these releases were executed, I paid the money to Mr. Dronenburg (the administrator). It was paid on account of the death of his stepson, Mr. Harris."

The questions asked and the testimony offered in the second, third, fourth, fifth, seventh, eighth, and tenth exceptions elicited was evidence tending to show that Egan was advised before he made the settlement that the only person who had any claim against the railroad company for the death of the deceased was Mrs. Dronenburg, that the settlement had to be made under the law of the District of Columbia, that the form of the release for \$5,000 was the one he usually employed in such cases, that the form of the release for \$500 was the form he generally used, under such circumstances, in settlement of claims under the laws of Maryland, and that the claim for the death of the deceased, referred to in the first release, was understood by him and the administrator at the time of the settlement to be the claim of Mrs. Dronenburg under the laws of the District of Columbia. This evidence was objected to by the plaintiffs on the ground that it was an attempt on the part of the defendant to vary the terms of the first release. The releases offered in evidence are not only receipts, but are contracts, and within the rule applicable to other contracts (2 Am. & Eng. Ency. of Law [1st Ed.] 745-748; 19 Am. & Eng. Ency. of Law [1st Ed.] 1123), and the general rule is too well established to require citation of authorities that as between the parties to a contract and those claiming under them parol evidence is not admissible to contradict or vary the terms of the written contract. Without determining whether or not the plaintiffs, who are here asserting claim to funds received under and by virtue of the two releases, are within the restrictions of the general rule (17 Cyc. 752b), the evidence referred to was not offered for the purpose, and could not have had the effect of contradicting or varying the terms of the contract between the administrator and the railroad company, or to show that the \$5,000 was not paid for the death of the deceased, but was offered to show that the claim for the death, in the

minds of the parties to the contract, and referred to in the first release, was the claim of Mrs. Dronenburg under the laws of the District of Columbia, in other words, to identify the subject-matter of the contract, which the defendant had a right to do. 17 Cyc. 724; 20 Am. & Eng. Ency. of Law (1st Ed.) 745-746; *Criss v. English*, 26 Md. 553; *Stockham v. Stockham*, 32 Md. 196; *Fryer v. Patrick*, 42 Md. 51. Responsive answers to the questions in the first, ninth, thirteenth, fourteenth, fifteenth, and sixteenth exceptions could not in any way have reflected upon the issues in the case. What Mr. Egan first offered, why the orphans' court granted letters of administration to Dronenburg, what he did with the money, and whether or not he has stated an account in the orphans' court, were entirely immaterial, and could not have aided the court, sitting as a jury, to reach a finding. For the same reasons, the court properly refused to admit the evidence offered in the seventeenth exception. There was no error in the ruling of the court in the sixth exception. The question was not confined to instructions from the orphans' court prior to the settlement with Egan. The evidence offered in the eleventh exception was inadmissible; it was not in contradiction of anything that D. Fulton Harris had said. The question in the twelfth exception was properly disposed of. It was not accompanied with an offer to show what advice the attorney gave, or that witness acted on it. There was no error in the refusal of the court to allow the questions in the eighteenth exception to be asked, as it was an attempt to contradict D. Fulton Harris in regard to an immaterial matter.

This brings us to the rulings of the court on the prayers. The further evidence in the case on the part of the plaintiffs is: That D. Fulton Harris took some part in the negotiations preliminary to the final settlement between Egan and the administrator; that he was looking after the interests of the estate of the deceased; that he told Egan he represented the estate; that he made a demand for a settlement for the benefit of the estate; and that he was not present at the final settlement between the administrator and Egan, which was made in the presence of Asa I. Harris. The evidence on the part of the defendant is: That the administrator in the settlement represented Mrs. Dronenburg; that D. Fulton Harris did not represent him, or make the demand for settlement on account of the estate; that he was only present during a part of the negotiations; that the \$500 was intended to be applied to funeral expenses, etc., and the \$5,000 was for the death of the deceased, and was paid in settlement of Mrs. Dronenburg's claim under the laws of the District of Columbia; and that both Egan and the administrator were advised before the settlement that the estate of the deceased had no claim against the railroad company for his

death. In all of the evidence, however, there is no evidence to show that the \$5,000 was not paid on account of the death of the deceased, or that the \$500 was not paid for the benefit of his estate, as stated in the two releases, or to show that D. Fulton Harris conducted the negotiations or accomplished the settlement with Egan as the attorney for the administrator or the representative of the estate of the deceased.

The first issue is whether or not the \$5,500. or any part thereof, was received by the administrator under section 103 of article 93 of the Code of Public General Laws of 1904, and the plaintiffs' first prayer instructs the court, sitting as a jury, that, if it finds that the administrator received the \$500 and executed the second release, then its finding under the first issue must be that the \$500 was received by the administrator as damages for the injury sustained by Ephraim G. Harris in his lifetime, and was properly granted. The release for the \$500 and other evidence in the case shows, as we have stated, that the \$500 was paid on account of damages the deceased and his estate sustained, and should therefore be accounted for to the orphans' court. The plaintiffs' second prayer asked the court for an instruction that if the court, sitting as a jury, find that the \$5,000 was received by the administrator, and that he executed the first release, then their finding should be for the plaintiffs on the first issue for the \$5,000. The first release shows that the \$5,000 was paid on account of the death of the deceased, and we have said that an amount recovered or paid on account of the death of a party does not belong to his estate, but must be disposed of under the statute of the state where he was killed. Under the statute of distribution of the District of Columbia, where the deceased met his death, the \$5,000 received by the administrator belongs to his mother, and his estate can have no interest in it, and the administrator is not required to account for it to the orphans' court of Frederick county. Plaintiffs' second prayer should therefore have been rejected. What we have said in regard to the plaintiffs' first prayer applies to their third prayer, which was properly granted, and what we have said in regard to the plaintiffs' second prayer also applies to his fourth and fifth prayers, which should have been rejected. Plaintiffs' sixth prayer refers to the fourth issue, which, if it presents any material issue, it is an issue of law, and the plaintiffs' sixth prayer, when read in connection with it, amounts to an instruction that because of the fact that the deceased was within nine days of being 21 years of age, and was not rendering his mother any support at the time of his death, there could have been no recovery on her account. This is in direct conflict with the ruling in the case of *Railroad Company v. Barron*, supra, and the case of *District of Columbia v. Wilcox*, supra, and for that rea-

son should not have been granted. In the case of *Cain v. Warford*, 3 Md. 454, appealed from the orphans' court of Baltimore City, the court said: "The obvious purpose of the sixteenth section is to enable the court to advise itself of the real facts in the case, but where there is no dispute in regard to them, as in this case, and nothing but a purely legal question to be determined, it is not incumbent on the court to order a plenary proceeding." See, also, *Smith et ux. v. Young*, 5 Gill, 197; *Warford v. Colwin*, 14 Md. 532; *Williamson v. Montgomery*, 40 Md. 373. While there can be no modifications in a court of law of issues sent from an orphans' court (*Cook v. Carr*, 20 Md. 403; *Cooke v. Cooke*, 29 Md. 538), a jury in civil cases cannot be required to pass upon questions of law, and it is the duty of the circuit courts to refuse to submit to the jury an issue that presents only a question of law. The plaintiffs' seventh prayer should not have been granted for the reasons stated in regard to plaintiffs' second prayer. The plaintiffs' ninth prayer permits the court, sitting as a jury, to ignore and disregard the terms of the first release, and should not have been granted, and for the same reason the plaintiffs' tenth and eleventh prayers should have been rejected. The defendant's special exception to the plaintiffs' eleventh prayer was properly overruled, although, as we shall observe later on, the evidence is not sufficient to justify a finding for the plaintiffs on the tenth and eleventh issues. D. Fulton Harris testified, when recalled by the plaintiffs, that he was acting as attorney for Mr. Dronenburg during part of the negotiations with Mr. Egan. The defendant's second, third, twelfth, fourteenth, and sixteenth prayers were properly rejected. There was evidence offered from which the court, sitting as a jury, could have found for the plaintiffs on the first and second issues, and the third, fifth, and eighth issues present issues of fact. The defendant's fourth, sixth, ninth, tenth, and eleventh prayers should have been granted; the evidence in the case not being sufficient to warrant a finding for the plaintiffs on the third, fifth, eighth, tenth, and eleventh issues. The fourth and sixth issues present issues of law, and should not have been submitted to the court, sitting as a jury, and the defendant's fifth and seventh prayers were therefore properly rejected, as were the defendant's thirteenth and fifteenth prayers. The defendant's eighth prayer referred to the seventh issue, which was abandoned, and was therefore properly rejected. The defendant's seventeenth prayer is covered by what has been said in regard to defendant's eleventh prayer, and was properly rejected. Defendant's nineteenth, twentieth, twenty-first, and twenty-second prayers were properly rejected as they ignore the release for \$500. While the twenty-second prayer refers only to the \$5,000, the conclusion of the prayer precludes the court, sitting as a jury, from

finding on the issues in favor of the plaintiffs as to the \$500 mentioned in the second release. The defendant's twenty-third and twenty-fifth prayers refer to the issues which presented only questions of law, and were therefore properly rejected. The defendant's twenty-fourth and twenty-seventh prayers refer to the fifth, tenth, and eleventh issues, and are covered by what has been said in regard to his sixth, tenth, and eleventh prayers, while the twenty-sixth and twenty-eighth prayers refer to the seventh and eighth issues, and there was no error in rejecting them. The seventh issue was abandoned, and the defendant's ninth prayer, referring to the eighth issue, we have said should have been granted. Defendant's eighteenth prayer, assuming it to be sound as an abstract proposition of law, which, however, we do not determine, might have been misleading to the court, sitting as a jury, and might have been treated as an instruction that notwithstanding the court, sitting as a jury, should find that the \$500 was paid as set forth in the second release, the court, sitting as a jury, could not find for the plaintiffs on any of the issues, and was therefore properly rejected. The plaintiffs are in the attitude of charging the defendant with having money belonging to the estate which he has failed to account for, and the burden of proof was on them to establish the affirmative of the issues, and the defendant's first prayer should therefore have been granted. *Yingling v. Hesson*, 16 Md. 112. The plaintiffs' special exceptions to the defendant's prayers on the ground that there was no evidence legally sufficient from which the court, sitting as a jury, could find that the death of the deceased was caused by the negligence of the railroad company, should not have been sustained. Some of the issues, if not all of them, assume that the deceased came to his death by reason of the negligence of the railroad company, and it was not necessary therefore for the defendant to prove it. *Townshend v. Townshend*, 7 Gill, 26; *Mason v. Poulson*, 40 Md. 355. Moreover, it only imposed an additional burden on the defendant, and could not have prejudiced the plaintiffs. Plaintiffs' special exceptions to the twenty-sixth and twenty-eighth prayers of the defendant were properly sustained, on the ground that there was no evidence in the case from which the court, sitting as a jury, could find that the \$500 was paid by the railroad company for the death of the deceased, or that the \$5,500 was paid for the death of the deceased, within the meaning of these prayers. There was evidence given by Mrs. Dronenburg that the \$5,000 was paid to her, but there was no evidence as to how the \$500 was applied, and the plaintiffs' exception to defendant's twenty-first prayer on that ground was properly sustained. What has been said in regard to the fourth and sixth issues disposes of the objections to them in the defendant's motion to quash. The other issues referred

to in the motion were not, for the same reason, objectionable.

The defendant was not prejudiced by the errors in the rulings in the second, third, fourth, fifth, seventh, eighth, and tenth exceptions, because there was no evidence in the case to show that the \$5,000 mentioned in the first release was not paid on account of the death of the deceased, or by the errors in the rulings in the nineteenth exception on the plaintiffs' special exceptions to his prayers, as the prayers were properly rejected on other grounds, and the errors are not therefore reversible errors, but, because of the errors pointed out, the rulings in the nineteenth exception, on the second, fourth, fifth, sixth, seventh, ninth, tenth, and eleventh prayers of the plaintiffs, and the fourth, sixth, ninth, tenth, eleventh, and first prayers of the defendant, must be reversed, and a new trial must be awarded.

Rulings reversed, as above specified, and new trial awarded.

(108 Md. 689)

LANSBURGH v. DONALDSON.

(Court of Appeals of Maryland. Nov. 14, 1908.)

TAXATION (§ 674*)—DUTY TO PAY TAXES—TENANTS—ACQUISITION OF TAX TITLE.

Where a tenant who was bound to pay taxes on leased premises by Code Pub. Gen. Laws 1904, art. 81, § 69, omitted to do so, and bought the property at tax sale, he held the tax title in trust for the landlord, who was therefore entitled to sue to have such title set aside.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1353; Dec. Dig. § 674.*]

Appeal from Circuit Court, Prince George's County; Geo. C. Merrick, Judge.

Appeal by Max Lansburgh against George T. Donaldson. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

Clayton E. Emig, for appellant. Fillmore Beall and Charles H. Stanley, for appellee.

BURKE, J. This is an appeal from an order of the circuit court for Prince George's county sustaining a demurrer to the bill of complaint and dismissing the bill. The bill, among other things, alleges the following facts, which are admitted by the demurrer to be true, and which, for the purposes of this appeal, are all the facts that need be stated: The complainant was the owner in fee of a farm situated in Prince George's county, and in the year 1892 he leased this farm to George T. Donaldson, the appellee, who agreed to pay an annual rental of \$100. The appellee entered into possession of the premises, and from time to time paid rent. The relation of landlord and tenant existed for a number of years, and during that time the

tenant removed from the premises valuable mineral under contract with the landlord, but has never accounted to him therefor, and he also became further indebted to the complainant on other accounts which he has failed to discharge. Donaldson failed to pay his rent promptly, and because of his failure in this respect the complainant was not able to pay the taxes due upon the property, and the farm was sold by public authority to enforce their collection. Donaldson was then in possession of the property as the tenant of the complainant purchased the premises at the tax sale. It is alleged that he fraudulently acquired the tax title to the premises, and that, while the relation of landlord and tenant existed, he fraudulently and without the knowledge and consent of the plaintiff applied moneys for the payment of said taxes on the premises at a time and period when he was indebted to the complainant for rent and for other moneys due under various other agreements arising and existing during the period of his tenancy. The plaintiff has made various efforts to reimburse Donaldson for moneys expended by him for taxes, and has offered and has been ready and willing to pay him any and all taxes which he may have paid for state and county purposes on account of the rented premises, but has been unable to effect a satisfactory settlement with him. The complainant tenders himself ready to account to the defendant for all taxes paid by him, provided the defendant account and pay for the use and occupation of the premises. The prayer for relief is (a) that the defendant may be decreed to hold the tax title to the land and premises described in the bill in trust for the complainant; (b) that an accounting may be had between the parties whereby the defendant may be charged with the use and occupation of the premises from the time he entered into possession thereof as tenant, and that he be credited with whatever sums of money he may have paid for state and county taxes on account of the land, and for other and general relief. The grounds assigned for the demurrer are (1) that the plaintiff has not stated such a case as entitled him to any relief; (2) that the plaintiff has adequate relief in a court of law. The court in its opinion found that the plaintiff was out of possession, and treated the proceeding as one to annul the tax deed under which the defendant has acquired a good prima facie title to the property, and dismissed the bill, for the reason that the plaintiff had "a full and adequate remedy at law by an action of ejectment in which proceeding all disputed questions raised by the bill can be fully adjusted."

It is provided by section 69, art. 81, Code Pub. Gen. Laws 1904, that: "The tenant or person holding a leasehold estate shall pay to the collector the taxes levied upon the de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mised premises, and shall have his action against the landlord for the sums so paid, and may deduct the same out of the rent reserved, unless otherwise agreed between the lessor and lessee. This section not to apply to Garrett county." The defendant at the time he purchased the property, being under a statutory obligation to pay the taxes, the facts alleged in the bill bring the case directly within the principle announced in *Oppenheimer v. Levi*, 96 Md. 296, 54 Atl. 74, 60 L. R. A. 729. A number of cases from other jurisdictions were cited at the hearing by counsel for the appellant to the effect that, under the allegations contained in the bill, a court of equity would have power to grant the relief prayed for in the absence of an obligation on the part of the tenant to pay taxes; but we prefer to rest the decision upon *Oppenheimer's Case*, in which Judge Pearce collected and reviewed the authorities which, under the facts stated in the bill, abundantly support the plaintiff's position. The opinion in that case, after stating the general rule announced in all the cases in this court upon the subject, "that those only who have a clear legal and equitable title to the land, connected with possession, have a right to claim the interference of a court of equity to give them peace, or dissipate a cloud on title," proceeds to say: "There are, however, well-established legal principles, applicable to the facts of this case, which, in our opinion, take it out of the general rule, and bring it within the exceptions in which equity has jurisdiction. These principles cannot be better stated than in the language of Judge Cooley, extracted from his law of taxation: 'Some persons from their relation to the land or to the tax are precluded from becoming purchasers on grounds which are apparent when their relation to the property and to the taxes is shown. The title to be given at a tax sale is a title based on the default of a person who owes to the public the duty to pay the tax, and the sale is made by way of enforcing that duty. But one person may owe the duty to the public and another may owe it to the owner of the land by reason of contract or other relations. Such a case may exist where the land is occupied by a tenant, who, by his lease, had obligated himself to pay the taxes. Where this is the relation of the parties to the land, it would cause a shock to the moral sense if the law would permit this tenant to neglect his duty, and then take advantage thereof to cut off his lessor's title by buying in the land at a tax sale. * * * There is a general principle applicable to such cases, which may be stated thus: That a purchase, made by one whose duty it is to pay the taxes, shall operate as a payment only. He shall acquire no right as against a third party by a neglect of the duty which he owed to such party. This principle is universal, and is so

entirely reasonable and just as scarcely to need the support of authority.'" Among the cases cited as supporting the principle stated by Judge Cooley is that of *Burgett v. Tallafiero*, 118 Ill. 516, 9 N. E. 834, in which it is held that "that, at most, the tenant could only become seised under the tax deed in trust for his landlord, if living; if dead, then, for his heirs, or assigns." It is stated in 24 Cyc. 954, that "a purchaser cannot acquire a title as against his landlord by a purchase of the premises at a tax sale, when the duty to pay the taxes for which the premises were sold devolved upon the tenant, either by statute or by agreement." To the like effect is the case of *Smith v. Specht*, 58 N. J. Eq. 47, 42 Atl. 590.

Assuming, as we must do, the truth of the facts alleged in the bill, we are of opinion that the lower court committed an error in sustaining the demurrer and dismissing the bill, and that its order to that effect must be reversed.

Order reversed, with costs, and cause remanded.

(108 Md. 640)

DAVIS et al. v. BLACKISTON.

(Court of Appeals of Maryland. Nov. 14, 1908.)

1. MORTGAGES (§ 367*)—FORECLOSURE—PERSONS WHO MAY QUESTION VALIDITY.

The only person who can complain that he is directly injured by a defect of title to property sold under mortgage foreclosure is the purchaser, as all that can be sold is the title of the mortgagor at the time of the recording of the mortgage, and if, by reason of any defect in the authority of the party making the sale, that title did not effectually pass to the purchaser, he, and not the mortgagor, is the sufferer therefrom.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 367.*]

2. MORTGAGES (§ 367*)—FORECLOSURE SALE—DUTY OF ASSIGNEE OF MORTGAGE.

It cannot be insisted that it was the duty of a mortgagee, before foreclosing and selling the property, to clear the title of an alleged cloud, where it is not shown that the land sold at a lower price because of such alleged cloud, nor that there were other bidders than the actual purchaser present at the sale, who for fear of the alleged cloud refrained from bidding a higher price for the land, nor that persons were deterred from attending the sale because of the doubt as to the title.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 367.*]

3. MORTGAGES (§ 367*)—FORECLOSURE—OPENING OR VACATING SALE.

Evidence in proceedings to prevent the ratification of the foreclosure sale of mortgaged property held not to show that the land failed to bring its true value at the sale because of an alleged cloud on the title.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 367.*]

Appeal from Circuit Court, Allegany County; Robert R. Henderson, Judge.

John W. Davis and another appeal from an order of the circuit court overruling exceptions to a sale of mortgaged property by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

D. James Blackiston and ratifying the sale. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

J. W. Scott Cochrane, for appellants. Richard S. Bell and D. James Blackiston, for appellee.

SCHMUCKER, J. This is an appeal from an order of the circuit court for Allegany county overruling the appellants' exceptions to a sale of mortgaged property and finally ratifying the sale. The mortgage was made in the usual form by the appellant and his wife to John B. Widener on May 5, 1898, to secure the payment of an indebtedness of \$390, which was represented by three promissory notes maturing at two, three, and four years from date, with interest. On the 20th of February, 1908, the mortgage, then long overdue, was assigned by the mortgagee for the purpose of foreclosure to D. J. Blackiston, who promptly took the requisite steps under article 66 of the Code (Pub. Gen. Laws 1904) for a sale of the mortgaged property, consisting of a farm of 332 $\frac{3}{4}$ acres. Before the sale was made, the appellant filed a petition in the mortgage proceedings for an order of court "staying and restraining the sale" because of the alleged mental incapacity of Widener at the time he executed the assignment to Mr. Blackiston. An order to show cause was passed on this petition, but, after an answer had been filed denying its allegations and testimony taken, the court dismissed the petition, and Mr. Blackiston sold the farm under the mortgage proceedings at public sale to the mortgagee, Widener, at the price of \$700. After this sale had been reported to the circuit court by Mr. Blackiston and an order of ratification nisi had been passed, the appellants filed exceptions to its ratification, for the same reason which they had assigned in their previous application to have it stayed. The grounds of objection to the ratification of the sale are thus stated in the exceptions:

"First. Because the assignment of mortgage to D. James Blackiston for the purpose of foreclosure, and under which said assignment said sale was made, is nugatory and void for the reason that the assignor was at the time of said assignment, and now is, a non compos mentis and incapable of executing a valid deed or contract.

"Second. Because, by reason of the mental capacity of the assignor of mortgage, no marketable title to the property was offered at the sale reported, and the property by reason thereof did not bring half its value."

No objection was made to the validity of the mortgage itself, or the mode and form of conducting the sale, nor was any offer made to pay the mortgage debt, nor was it, otherwise than inferentially, if at all, averred in the exceptions that there were persons ready and willing to give a higher price for

the property at the time of the sale who were deterred from bidding on it because of an apprehension that its title was doubtful or clouded. Strictly speaking, the only person who could complain that he was directly injured by a defect of title to the property sold under a proceeding like the present one is the purchaser. All that could be sold under the proceeding was the title of the mortgagor at the time of the recording of the mortgage, and, if by reason of any defect in the authority of the party making the sale that title did not effectually pass to the purchaser, he, and not the mortgagor, is the sufferer therefrom. *Warfield v. Ross*, 38 Md. 86.

The exceptants' ground of complaint, if any they have, apart from mere inadequacy of price, in reality is that the assignment of the mortgage to Mr. Blackiston was not void, but valid, and therefore the sale made by him did pass the mortgagor's estate to the purchaser, but that there existed an apparent, though not real, mental incapacity of the assignor so notorious as to cast a cloud upon Mr. Blackiston's title to the mortgage, and prevent the property from yielding its full value at the sale. They invoke in their behalf the proposition announced by this court in *Schindel v. Keedy*, 43 Md. 418, in reference to a sale about to be made under a decree in chancery of land freed of certain liens and subject to others, that, "where a trustee is advised before the sale of doubt in regard to the title or the nature and character of the interest of the property to be sold, it is his duty to use all reasonable efforts to disembarass the title of such doubt in order that the property may bring its fair market value." Assuming *ex gratia* that the rule applied in that case to the trustee about to sell under the decree in chancery is applicable in its full force to a mortgagee or his assignee in selling, *ex parte* under a power, only the interest of a mortgagor in mortgaged land, the record before us fails to present a case calling for its application. The evidence does not show that the land sold at a lower price because of the alleged cloud on its title. It does not appear that there were any other bidders than the mortgagee or his agent present at the sale who, but for fear of the alleged cloud, would have paid a higher price for the mortgaged land than that at which it sold. Nor is it shown that there were persons who were deterred from attending the sale because of doubt or apprehension of the validity of the title to be sold. The nearest approach to evidence bearing upon these essential facts is the testimony of the appellant himself, who testified, when asked why he allowed the farm to be sold for only \$700: "Because I was advised that he [presumably Mr. Widener] could not give a release on the mortgage; that's the way it was." He was then asked whether he had the money to pay more than \$700 for the farm, and he replied: "I did not have the money, but I could have gotten

it." His own counsel then, after calling his attention to these questions and answers, asked him: "Did not the opinion of Mr. Widener's inability to execute a release of the mortgage prevent and hinder you in borrowing money on the property?" to which he answered, "Yes, sir." He, however, mentioned the name of no one to whom he had applied to borrow money on the land and by whom he had been refused for the reason assigned by him, nor did he name or produce a single person who was deterred from attending the sale or bidding on the property because of an apprehended defect in or cloud upon the title to the land sold. This evidence, it is needless to say, falls far short of sustaining the appellants' contention that the mortgaged land failed to bring its true value at the sale because of any cloud real or apprehended upon its title. The evidence shows that the land sold for only about one-half of the value put upon it by the witnesses, but there is no evidence that the sale was not fairly conducted, and it was admitted in argument by the appellant that this was no such inadequacy of price as of itself to afford ground for setting aside the sale. It further appears from the evidence that the appellant had not even paid the interest on the mortgage debt for several years before the proceedings for its sale. We do not regard the evidence in the record touching the mental condition of Mr. Widener when he made the assignment of the mortgage to Mr. Blackiston as relevant to the real issues presented by the case, but we do not hesitate, after carefully reading all of that evidence, to say that we fully concur in the conclusion reached by the learned judge below, and expressed in his opinion, that it entirely fails to successfully impeach Mr. Widener's competency to make a valid deed, or to show that he failed to exhibit a sensible and intelligent purpose in connection with that transaction or a complete grasp of the situation which he then occupied.

The decree appealed from will be affirmed.
Decree affirmed, with costs.

(109 Md. 11)

MILLER et al. v. COSMIC CEMENT, TILE & STONE CO.

(Court of Appeals of Maryland. Nov. 14, 1908.)

1. CORPORATIONS (§ 76*)—STOCK SUBSCRIPTIONS—PROPERTY AS PAYMENT—AUTHORITY FROM STOCKHOLDERS—NECESSITY.

An agreement by a board of directors to receive a formula in exchange for stock was void, because not authorized by the "stockholders assembled in general meeting," as required by Code Pub. Gen. Laws 1904, art. 23, § 69.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 76.*]

2. CORPORATIONS (§ 456*)—CONTRACTS—PARTIAL INVALIDITY—DIVISIBILITY.

A contract, binding one to transfer a formula to a corporation and render services as a chemist in exchange for \$90,000 in stock and

\$10,000 in cash, and reciting that the cash should be in lieu of salary as chemist, though void as to the stock subscription for want of authority from the stockholders, as required by Code Pub. Gen. Laws 1904, art. 23, § 69, is valid as to the contract for employment, especially where the company accepted his services.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 456.*]

3. WORK AND LABOR (§ 10*)—INDIVISIBLE CONTRACTS—QUANTUM MERUIT.

If a corporate contract to exchange stock and cash for property and services, void as to the stock subscription was indivisible, the party rendering the services could recover on a quantum meruit for the services actually rendered and accepted by the company before receivership proceedings.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 10.*]

4. CORPORATIONS (§ 565*)—INSOLVENCY—CLAIMS—SERVICES.

Under a corporate contract to pay one \$10,000 for services, \$2,000 down, and \$200 a month, on liquidation of the company's affairs after 11 months' service his claim should be allowed for \$4,200, less credits, with due proportion of interest, he being entitled to full payment for salary accruing within three months before the receivership proceedings, and a dividend as a general creditor for the balance of his claim.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 565.*]

Appeal from Circuit Court No. 2 of Baltimore City; James P. Gorten, Judge.

Action by Charles F. Miller and others against the Cosmic Cement, Tile & Stone Company. From an order sustaining exceptions to an auditor's account and directing a restatement, plaintiffs appeal. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, and HENRY, JJ.

Edwin H. Brownley (Martin G. Kenney, of counsel), for appellants. B. B. Shreeves, for appellee.

SCHMUCKER, J. This is an appeal from an order of circuit court No. 2 of Baltimore City sustaining exceptions to an auditor's account, and directing its restatement in a designated manner. The account distributed the assets of the appellee company which had, by a previous order in this case, been placed in the hands of a receiver for liquidation because of its insolvency. The only claim involved in the exceptions is the one filed by Dr. P. B. Wilson, Jr., for a balance of \$9,415, alleged to be due on account of salary agreed to be paid to him as chemist. It appears from the record that Dr. Wilson after several years of experimenting had made what was believed to be a new and useful discovery in the production of cement, tile, and stone. During these experiments he had received financial and practical assistance from James F. Morrison and Morrill N. Packard. In July, 1904, the appellee company was incorporated, with a capital stock

of \$200,000, under the general laws of the state, by Morrison, Packard, Wilson, and others for the purpose of manufacturing and dealing in cement, tile, and stone, to be made after the formula discovered by Dr. Wilson. About \$17,800 of the stock was subscribed for by persons other than Dr. Wilson, and those subscriptions were eventually paid up to the company or its receiver. On July 28, 1904, at the first corporate meeting of the company, Dr. Wilson made to it in writing a proposition to "sell, dispose of and transfer" his discovery, and the secret formula embodying it, with the sole and exclusive right to the use thereof, to be paid for upon the following terms, as set forth in his offer: "The terms upon which I offer to sell and transfer the aforesaid discovery and formula to your company are that I shall receive the sum of one hundred thousand (\$100,000) dollars for the same, and that your company shall enter into a contract to employ me in the capacity of chemist for said company at such a salary as shall be determined upon to be fair compensation for my service, taking into consideration the earnings thereof. I agree to take as part payment of said sum of one hundred thousand (\$100,000) dollars, ninety thousand (\$90,000) dollars worth of the capital stock of your company at its par value, and the balance of ten thousand (\$10,000) dollars in such cash payments and as promptly and at such times as will not seriously interfere with the successful operations of your company financially. I agree that said cash sum of ten thousand dollars (\$10,000) shall be in lieu as salary as chemist, until said sum has been fully paid, as follows: Two thousand dollars (\$2,000) in cash upon the execution of said transfers and agreements and two hundred dollars per month (\$200.00) thereafter until said sum of ten thousand (\$10,000) dollars has been fully paid, said payments to commence on the first day of August, 1904." It is apparent from the terms of this proposed disposal of the discovery and formula to the company, in consideration, to the extent of \$90,000, of the issue by it of its capital stock, as well as from the manner of its attempted acceptance on the part of the company, that the transaction was intended to be a subscription by Dr. Wilson to that amount of its stock to be paid for in property, consisting of the discovery and formula, under the provisions of section 69, art. 23, Code. The proposition thus made was referred by the company to a committee of three directors for investigation, with instructions to report to a meeting of the board of directors to be held on July 28th, "to consider the propriety of making said purchase, and to fix the terms upon which it should be made." At the meeting of the board of directors held on July 28th this committee reported that after having "examined carefully the merits, worth, use, and adaptability of the discovery and formula

la offered by Dr. Wilson, both as to its scientific and commercial values," they found it to be of great present and prospective value, and they recommended its purchase upon the terms set forth in the offer of sale made by him. The offer was then formally accepted by a resolution of the board of directors, which also authorized the president of the company to do all acts on its behalf requisite to the consummation of the transaction.

The company having failed to pay the bonus tax to the state prior to the meetings of July 26th and 28th, the tax was paid, and the proceedings of the board of directors at those two meetings was formally ratified at a meeting of that board held on September 1, 1904. The record, however, contains no evidence that the acquisition by the company of Dr. Wilson's discovery and formula in return for the issue to him of \$90,000 of its stock was ever authorized by its stockholders assembled in general meeting pursuant to a call to consider the propriety of receiving it, as is required by section 69, art. 23, Code (Pub. Gen. Laws 1904), as a condition precedent to the validity of the acceptance by such corporation of any species of property in payment of subscriptions to any part of their capital stock. Neither a written transfer, nor an actual delivery of the formula, nor a disclosure of its contents, was ever made by Dr. Wilson to the company, nor were the \$90,000 of stock ever actually issued to him, but the company had the benefit of the use of the process described in the formula in its manufacturing operations, which were conducted under the direction and supervision of the doctor himself as its chemist. The formula remained in a safe deposit box in the Drovers' & Mechanics' National Bank in the joint custody of Morrison, Dr. Wilson, and Packard, where it had been for some time prior to the organization of the company. There was an understanding between the parties interested in the company that no certificates of stock should be issued until after the lapse of a year from its incorporation. The company, having thus obtained the use and benefit of Dr. Wilson's process, established a factory and plant, and endeavored, under his supervision, to manufacture and sell the products to which it was believed to be adapted. The material produced at the factory proved to be unsalable and of no market value, and the company became financially embarrassed, by its manufacturing enterprise, to such a degree that its insolvency supervened, and it was put in the hands of a receiver for liquidation, on the bill of complaint of a creditor, by an order of court passed in this case on June 12th, 1905. During the progress of the liquidation of the company's affairs, Dr. Wilson filed in the case his claim, as a creditor of the company, which forms the subject of the present controversy. That claim is stated upon the theory that the doctor is, under his agreement with the company, en-

titled to \$10,000 salary as its chemist, and the alleged balance of \$9,415 in controversy is arrived at by allowing credit on the \$10,000, for several payments made thereon, amounting to \$585. The auditor in his account distributing the net assets in the hands of the receiver, treated Dr. Wilson as a general creditor to the extent of \$9,415, and interest, and allowed him a dividend thereon. To that allowance exceptions were filed by the appellants William Hollingsworth, who is a creditor of the company, and James F. Morrison, who is both a creditor and stockholder. The exceptions go, among other things, to the validity of the claim and of the contract upon which it is founded. The learned judge below sustained the exceptions, and directed the statement of a new account, allowing a dividend to Dr. Wilson as a general creditor "upon \$2,000 as of the date of September 2, 1904, and a dividend upon the further sum of \$2,200 (being 11 months, at the rate of \$200 a month from August 1, 1904) less the sum of \$585 to be deducted from the said sum of \$2,200 at the times when the amounts were paid which constitute the sum of \$585." We think neither the theory adopted by the auditor in stating his account, nor the conclusion reached by the court below in its action upon the exceptions, was entirely correct.

We will first consider whether the attempted contract between Dr. Wilson and the company ever became binding upon the parties to it, and if so, to what extent. Its most essential feature, consisting of the effort to pay for \$90,000 of the capital stock of the company by a transfer to it of the formula for the manufacture of the articles therein mentioned, was void because of the failure, on the part of the company, to comply with the imperative and unequivocal requirements of the statute law relating to the issue of stock by corporations. Section 69, article 23, Code (Pub. Gen. Laws 1904) provides that: "Subscriptions to the capital stock of such of said corporations as have capital stock may be made in land or other property at a valuation agreed upon between the corporation and the subscriber where the property so subscribed shall be such as it is proper that the said corporation shall own for the advancement of the purposes for which it was incorporated, but such subscriptions shall not be otherwise received, nor shall they be so received unless the same shall have been previously authorized by the stockholders assembled in general meeting, pursuant to a call to consider the propriety of receiving the said subscription and of fixing the terms upon which it shall be received." It was beyond the power of the appellee to make a valid contract to receive property of any kind in payment for any part of its capital stock, in plain violation of the express conditions imposed upon it by that section. *Balle v. Calvert College*, 47 Md. 117; 9 Cyc. 475. Although the action of the board of directors of the com-

pany was ineffectual to authorize the acceptance of the discovery and formula of Dr. Wilson in payment for capital stock, it was not necessarily inadequate to make a valid contract for his employment as chemist, especially when it was followed up by an acceptance, on the part of the company, of his services in that capacity. The proposal of Dr. Wilson to the company was in a certain sense a twofold one. He offered to transfer to it his discovery and formula, and also to enter its service as chemist, and he exacted two things in return, the issue to him of \$90,000 in stock, and the payment to him of \$10,000. Although his proposal to the company in one place mentions \$100,000 as a gross consideration for the several things which he offered to do, the last clause distinctly states "that the said cash sum of ten thousand dollars (\$10,000) shall be in lieu of salary as chemist until said sum has been fully paid." We think the contract attempted to be made by the acceptance of this proposal should be held, upon a fair construction of its terms, to have been divisible, and the portion of it relating to the employment of the doctor by the company as its chemist be held to be binding upon the parties, although the part relating to the issue of stock and the transfer of the discovery and formula must, for the reasons already stated, be held to have been void. Even if the divisibility of the contract be held to be doubtful, the doctor would still be entitled to recover upon a quantum meruit for the services as chemist which were actually rendered by him and accepted by the company up until the appointment of the receiver. We have repeatedly held that, where the work provided for in a contract has been done by the party required thereby to do it, and his work has been accepted by the other party, a recovery therefor may be had on the common counts in assumpsit, and the contract price will be treated as the measure of damages. *Ridgely v. Crandall*, 4 Md. 435; *Appleman v. Michael*, 43 Md. 273; *City & Suburban Ry. Co. v. Basshor*, 82 Md. 405, 33 Atl. 635; *Walsh v. Janvey*, 85 Md. 240, 36 Atl. 817, 38 Atl. 938; *Southn. Bldg. Ass'n v. Price*, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206. In the last-mentioned case we held that, when the plaintiff had performed his part of a contract with a corporation, until the appointment of a receiver for the corporation rendered the further performance of the contract by him impossible, he was entitled to recover to the extent of the part performance made by him and accepted by the corporation. We have also held in a series of other cases that, when the appointment of a receiver for a building association rendered impossible the further performance by it of the contracts with its members, the contracts were thereby terminated and the members were entitled to be allowed by the auditor, in the liquidation of the assets of the corporation, for the value of the performance by them of their contracts until

the appointment of the receiver. *Low St. Bldg. Ass'n v. Zucker*, 48 Md. 448; *Peters Bldg. Ass'n v. Jaecksch*, 51 Md. 205; *Hampstead Bldg. Ass'n v. King*, 58 Md. 280; *Preston v. Woodland*, 104 Md. 642, 65 Atl. 336; *Southern Bldg. Ass'n v. Price*, 88 Md. 163, 41 Atl. 53, 42 L. R. A. 206.

The appointment of the receiver in the present case having rendered impossible the further performance by Dr. Wilson of his duties as its chemist, the further question remains as to the measure of compensation to be allowed him for his previous services in that capacity. By the terms of the contract \$2,000 were to be paid in cash "upon the execution of the transfers and agreements" called for by his proposal, and \$200 per month thereafter. As we have held the acceptance of his proposal by the board of directors of the company to be sufficient, in connection with the proposal, to constitute a valid contract of employment as chemist, we think that such acceptance should in equity be regarded as the "execution of the agreement" referred to in the proposal quoad that employment, and that the \$2,000 then to be paid should be included in Dr. Wilson's claim. The agreement to pay him so large a cash sum on entering the employment was an unusual one, but he testified, without contradiction, that it was demanded by him because he was required to abandon his practice in order to devote himself exclusively to the service of the company, and that he had explained that matter to the board of directors. He appears from the record to have served the company as chemist for the 11 months prior to the receivership, for which \$2,200 would be due him under the terms of the contract. We, therefore, think that Dr. Wilson's claim should be recognized as valid to the extent of \$4,200 less the \$585, admitted to have been paid him on account, making his actual claim amount to \$3,615, with a due proportion of interest. Of this claim \$600 should be allowed in full as salary accruing within three months anterior to the appointment of the receiver, and on the balance of the claim he should be allowed a dividend as a general creditor of the company.

The order appealed from will be reversed, and the case remanded for further proceedings in accordance with this opinion.

Order reversed and cause remanded for further proceedings in accordance with this opinion, the costs of the appeal to be paid out of the fund in the hands of the receiver.

(222 Pa. 271)

SCHOCK et al. v. SOLAR GASLIGHT CO.
(Supreme Court of Pennsylvania. Oct. 5, 1908.)

1. EVIDENCE (§ 99*)—RELEVANCY.

Evidence may be admissible as tending to prove a particular fact, which yet, by itself, is utterly insufficient for the purpose.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 123; Dec. Dig. § 99.*]

2. FRAUD (§ 52*)—EVIDENCE—ADMISSIBILITY.

The test by which the relevancy of evidence to establish fraud is to be determined is not whether it would be sufficient, in itself, to warrant an inference of fraud, but in such inquiry a wide latitude is allowed, the true limit of which is a fair connection with the transactions involved.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 48; Dec. Dig. § 52.*]

3. EJECTMENT (§ 106*)—EVIDENCE—SUFFICIENCY.

Evidence on an issue in ejectment, of whether a certain person, as whose property the premises in dispute were sold by his assignee in bankruptcy to plaintiff, was the real owner, notwithstanding the legal title was in defendant's predecessor, in whose name title was alleged to have been taken to conceal such person's ownership from his creditors, held sufficient to warrant an inference of fraud and to require a submission of that issue to the jury.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. § 307; Dec. Dig. § 106.*]

Appeal from Court of Common Pleas, Lancaster County.

Ejectment by H. O. Schock and others against the Solar Gaslight Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before FELL, BROWN, POTTER, ELKIN, and STEWART, JJ.

W. U. Hensel and D. McMullen, for appellant. Wm. H. Keller and John A. Coyle, for appellees.

STEWART, J. The question here at issue was whether Samuel Kurtz, as whose property the premises in dispute were sold by his assignee in bankruptcy to the plaintiffs, was at the time of such sale the real owner, notwithstanding the fact that the legal title was in the defendant's predecessor, the Tanners' Mutual Fire Insurance Company. The effort on the part of the plaintiffs was to show that in the original acquisition of the several properties Kurtz was the real purchaser, and that title was taken in the name of the insurance company with the double purpose, first, to secure the company for a loan made by it to Kurtz to enable him to make the purchase, and, second, to conceal Kurtz's ownership from his existing creditors; and to show, further, that of the money loaned to Kurtz by the company all had been repaid, except the sum of \$2,044.61, and that Kurtz's ownership of the property remained as originally acquired, subject only to the payment of this balance to the company. All the assignments of error, with an exception hereafter to be noted, relate to rulings of the court in admitting certain offers of evidence in support of plaintiff's contention. These do not require separate consideration, since each offer was to the same end, all were alike in general character, and all were objected to on the same ground—immateriality and irrelevancy. It may be that the evidence proposed in no one of the offers would be sufficient in itself to war-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rant a legal inference of fraud, but this is not the test by which relevancy of evidence is to be determined. "Evidence may be legally admissible as tending to prove a particular fact, which yet, by itself, is utterly insufficient for the purpose. It may be a link in the chain, but it cannot make a chain unless other links are added." *Express Co. v. Wile*, 64 Pa. 201. The rule as here stated finds most frequent application in cases where the effort is to establish fraud. This is because fraud always attempts concealment, and is ordinarily discoverable only as all the circumstances attending the transaction disclose it. In such inquiry a wide latitude is allowed. The true limit of such latitude is nowhere better defined than in *Kinzer v. Mitchell*, 8 Pa. 64, where it is said: "Facts or circumstances unconnected with the fraud alleged, and which could operate only by means of raising a prejudice against the individual, ought to be excluded; but fraud in its nature eludes the light and walks in ambushes and deceptions. It is therefore that a latitude, to the extent of a fair connection with the transactions involved, on the part of the actor or actors who are to be affected, is allowed. Fraud is never presumed. It must be proved. But it is often most effectively proved by a chain of connected facts and circumstances." The connection between the several offers in this case, and the particular transaction involved, is too apparent to call for discussion. Each was an offer to show something in the conduct of the parties to be affected, in the course of their business with relation to the matter in controversy, consistent with the theory advanced by plaintiffs, that the ownership of the property was in Kurtz, and which would necessarily call for explanation before any other theory could prevail. Except as these offers tended to establish the fraud charged, they were absolutely without prejudice to any one.

The remaining assignments, three in number, are directed to a single point—the sufficiency of the evidence to support the verdict. Collectively considered, the relevancy of the evidence for the plaintiff contained in the several offers becomes all the more apparent. The connection between them is at once observable, and together they exhibit a complete history of the transaction out of which the controversy arises. If the narrative thus exhibited be accepted as true, it is so strongly persuasive of the fact sought to be established—that the insurance company either in acquiring legal title to the premises, or in subsequently asserting such title against the creditors of the real owner, was, in complicity with such owner, attempting a fraud—that, in the absence of countervailing evidence, no jury would be justified in reaching a different conclusion. It would be useless in this connection to discuss the entire evidence. A brief reference to some salient feature will suffice. These show a purchase by Kurtz in his own name at a public sale of

two of the properties at the price of \$2,590. By written article he personally became bound for the unpaid purchase money, and gave as his surety Bechtel, who at the time was treasurer of the insurance company. A year and a half later Kurtz caused the deed for the properties to be made directly to the insurance company. Not only do the records of the insurance company show no authorization for the purchase of these properties, but the company's ledger shows that after the conveyance to the company, in the account with Kurtz, the latter was individually charged with the entire purchase money, and from time to time credited with interest thereon. The company never was in actual possession of either of the properties. Kurtz managed and controlled them as his own, never accounting to the company for any rents or income. Nowhere in the books or records of the company is there anything which can be construed into a claim of ownership by the company. The purchase of the other property—the Mt. Joy gas plant—was made ostensibly by Bechtel, and the deed therefor was to him in his individual capacity. Here, again, the books of the company show no authorization of the purchase; nor, for that matter, do they show anything that reflects light upon the acquisition of the properties, whether by payment of purchase money or anything else. It is from Bechtel's testimony alone that the fact is derived that \$733 of the purchase money in this case was paid out of funds of the insurance company. His check for this amount, or the record of it, was produced on the trial; but for this sum a charge is made against Kurtz on the company's ledger, together with interest from the date of Bechtel's check. Immediately upon the conveyance of the property to Bechtel the latter gave to Kurtz a power of attorney to manage the property "as fully, largely, and amply as he could do if personally present." Kurtz did so manage it, but made no return of income to either Bechtel or the insurance company. In 1895 Bechtel, retiring from the treasuryship, conveyed the property to the insurance company. If the plaintiff's case presented nothing more than the facts we have stated, these alone would be quite sufficient to warrant an inference of fraud, and a submission to the jury would have been unavoidable. There was more, however, and in a large measure; but we are concerned here only with sufficiency of the evidence to carry the case to the jury. Its sufficiency for this purpose abundantly appeared from the evidence we have referred to. The case was very carefully submitted by the learned judge presiding, in a charge which brought to the attention of the jury every explanatory circumstance relied upon by the defendant and every particle of evidence which could avail it in any way. The charge was so entirely fair and impartial, and so free from error, that it stands clear of all complaint here. The ver-

dict, as we read the evidence, vindicates itself just as certainly. The defendant in the action derived its title to the property in dispute from the Tanners' Mutual Fire Insurance Company. Since it is not pretended that the former has any equities other than those that could be asserted by the latter, it is unnecessary to distinguish them further in any discussion of the case.

The assignments of error are overruled, and the judgment is affirmed.

(222 Pa. 276)

In re METZGER'S ESTATE.

Appeal of SMITH.

(Supreme Court of Pennsylvania. Oct. 5, 1908.)

1. WILLS (§ 488*)—LATENT AMBIGUITIES—PAROL EVIDENCE.

A latent ambiguity in a description in a will may be explained by parol testimony to the extent necessary to remove it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1033; Dec. Dig. § 488.*]

2. WILLS (§ 561*)—DESCRIPTION OF LAND DEVISED.

Where testator owned two numbered lots of fixed dimensions, and in devising one of them describes it by number, and further states that it is the lot "now occupied by my nephew, and the land attached thereto," and there is no evidence to show that another lot has been carved from the original lot or that the nephew was in possession of less than the original lot, the description includes the original dimensions of the lot.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1221; Dec. Dig. § 561.*]

3. JUDGMENT (§ 736*)—RES JUDICATA.

The title to land is not res judicata under a decree of the orphans' court determining the ownership of rents from land in dispute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1204; Dec. Dig. § 736.*]

Appeal from Orphans' Court, Lancaster County.

In the matter of the estate of Charles W. Metzger. From an order refusing partition, Charles F. Smith appeals. Affirmed.

The following are the facts as found by Smith, P. J., in the court below:

"Charles F. Smith and Levi B. Smith, sons of Louisa Smith, who was of the residuary devisees and who died before Charles W. Metzger, the testator, have petitioned for an inquest in partition of real estate of which he died seised, and which is described in the petition as follows: 'The real estate devised as aforesaid consists of a lot of land situated on the west side of South Christian street, Lancaster city, county aforesaid, between East Vine and German streets, and contains 47 feet along said South Christian street, extending of that width in depth, in a westwardly direction 60 feet, more or less, to certain fence lines, upon which are erected a two-story brick building, used as a bakery, with frame shed attached thereto, bounded on the north by property formerly belonging to the Order of Odd Fellows, on the east by said South Christian street, on

the south by property of Charles Buckius, and on the west by other property formerly belonging to the estate of Charles W. Metzger, deceased.'

"The petitioners claim title under the following paragraph of the decedent's will: 'The residue and remainder of my estate, real, personal, and mixed, I give, devise, and bequeath to my brother, Gottlieb F. Metzger, my sister Mary E. Metzger, my sister Caroline Rogers, my sister Louisa Smith, and my niece Clara Rogers in equal shares and parts, if they are living at the time of the death of my said wife, and if any of them are deceased at the time of the death of my wife, then to the issue and descendants of such as are deceased leaving issue; and in the event of the death of any of them during my lifetime, or the lifetime of my wife, leaving no issue or descendants living at the time of the death of my wife, I direct the share to such one so given and devised shall be divided among the surviving legatees and devisees, and the issue and descendants of such as are deceased leaving issue and descendants living at the time aforesaid, the issue and descendants of any deceased legatee or devisee shall take the share or portion which their parent or ancestor would have taken if living at the time of the death of my wife.' To the citation an answer has been filed by Clara Rogers, denying any title in petitioners and averring title in Mary E. Metzger and herself as the sole and specific devisees of this 'lot of land' under the following codicil to the will: 'Codicil to my last will and testament above written and dated April 14, 1897.—I revoke the bequest of one thousand dollars to my sister Mary E. Metzger as therein mentioned, I give, devise, and bequeath to my sister, Mary E. Metzger, and my niece, Clara Rogers, and their heirs, in fee the dwelling house and lot of land No. 135 South Queen street and now occupied by my nephew John Metzger, and the land attached thereto, after the death of my wife.' The testator devised also as follows: 'I give, devise, and bequeath my home, being my dwelling house and lot of land attached thereto, No. 133 South Queen street, Lancaster, Pa., to my sister Mary E. Metzger, together with all the contents thereof, during her lifetime, as a home for herself and my niece Clara Rogers, and after the death of my sister Mary, if my niece Clara Rogers survives both my wife and my sister Mary, I give, devise, and bequeath the said premises to her and her heirs absolutely.' Nothing else is before us. Not even is the whole will incorporated in either the petition or the answer, nor is it attached to either. Reference is made in the petition to the place of its record, and we understand it is to be considered as of the petition.

"The cardinal streets of the city of Lancaster, and many parallel to them, are near-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ly aligned with the cardinal points of the compass. The divisions or blocks formed by the intersecting streets are practically rectangular and uniform in size. The lots fronting on the streets are distinguished by numbers affixed to the houses erected thereon. These lots originally did, and generally do, extend to alleys. Their depth is about 245 feet. When not qualified, a reference to one of these lots by number and streets conveys distinctly the information that it is a lot fronting on that street and extending in depth 245 feet to an alley. All of this is notorious in this community. South Queen street is one of the four cardinal streets of the city of Lancaster. In saying that he devises 'No. 133 South Queen street' and 'No. 135 South Queen street,' the testator in clear, concise language expresses an intention easily understood. He as certainly says that he gives the lots fronting on South Queen street and extending in depth to Christian alley as if he had described them by metes and bounds. If he had said nothing more, there would have been no chance for a dispute. Having thus tersely expressed his intentions, he then made the very common mistake of attempting to make certainty doubly sure. 'I give devise and bequeath to my sister Mary E. Metzger and my niece Clara Rogers and their heirs in fee the dwelling house and lot of land No. 135 South Queen street,' was sufficient. But he added the words, 'and now occupied by my nephew John Metzger, and the land attached thereto.' Two descriptions of the same property were unnecessary. Either would have answered. Eliminate the first—the 'No. 135 South Queen street'—and we have a devise to his sister, Mary E. Metzger, and his niece, Clara Rogers, of 'the dwelling house and lot of land * * * now occupied by my nephew John Metzger, and the land attached thereto.' From this it necessarily follows that the testator intended to give to his sister and niece more than the lot occupied by John Metzger. He adds the land attached to this lot. It is a legitimate inference that John Metzger did not occupy the whole of 'No. 135 South Queen street,' and the conclusion is irresistible that the testator devised to Mary E. Metzger and Clara Rogers no less than 'No. 135 South Queen street.' If it had been his intention to give them only 'the dwelling house and lot * * * now occupied by my nephew John Metzger,' what was his purpose in adding 'and the land attached thereto?' It was to give the land attached to the John Metzger lot with the John Metzger lot. This line of reasoning will also apply to the devise of No. 133 South Queen street.

"The petitioners asked to have partitioned 'sixty feet more or less' of the rear ends of No. 133 South Queen street and No. 135 South Queen street. This is admitted and such is the property described in the petition. As this 'lot of land' has been devised to Mary E. Metzger and Clara Rogers, it is no part

of the residue of the testator's estate, and therefore the petitioners have no standing and their prayer must be denied. There is nothing in the will to show that the testator did not intend to specifically devise 'No. 133 South Queen street' and 'No. 135 South Queen street,' and there is nothing in it to raise a doubt as to his intention. With the petition and answer we have only the will before us."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

B. F. Davis, for appellant. John E. Snyder, for appellee.

STEWART, J. The question here was whether a piece of ground with respect to which partition was asked in the orphans' court had passed to the petitioners—here the appellants—as residuary devisees under the will of Charles W. Metzger, deceased; or whether it is included within the testamentary description of two adjoining lots which by the same will were specifically devised to the appellee and another. If the disputed ground is embraced within the specific devise, then the petitioners, being without interest, were without standing, and the proceedings in partition were properly dismissed. Since it was a question of identifying the thing specifically devised, the case was one which properly called for parol evidence to enlighten the court with respect to matters of which, when made known to it, it would take judicial cognizance so far as not to require special proof that the testator did, in point of fact, dictate his will with reference thereto. But it was submitted on bill and answer without a particle of evidence extrinsic to the will. This was because of a mistaken view entertained that, since there was no apparent ambiguity in the testamentary description of the ground specifically devised, parol evidence was inadmissible. The learned judge in the opinion filed gives us clearly to understand that this was the view taken by the court; and the fact that there was no evidence offered can be explained only on the ground that counsel were of the same mind. It is made apparent, not by anything in the record, but by the argument made before us, and the opinion filed, that the contentions of the petitioners were that even conceding, for argument's sake, that the primary meaning of the words employed in the will to describe the ground specifically devised would include the disputed ground, any attempt to fit the description in the will, according to such primary meaning, to the property devised, would necessarily encounter a want of correspondence because of changed physical conditions existing when the will became operative. In other words, their contention was that there was a latent ambiguity in the testamentary description of the ground devised. A latent ambiguity can only be developed by extrinsic and collateral

circumstances, and it is always competent to show that such ambiguity exists. "But a discrepancy or an accordance between the whole or particular parts of the description may be shown by evidence dehors to create or to destroy an ambiguity which is said to be latent, because it is concealed by the will, and disclosed but by extrinsic circumstances." *Vernor v. Henry*, 3 Watts, 385. "When such latent ambiguity has once been made dehors the will, then the way is open for parol testimony to whatever extent may be necessary to remove it." *Brownfield v. Brownfield*, 12 Pa. 136, 51 Am. Dec. 590; *Brendlinger v. Brendlinger*, 26 Pa. 131. While the view taken by the court with respect to this matter was a mistaken one, it is not made a subject of exception, and is not brought to us for review by any assignment. The effect of it was to limit the inquiry to the terms of the will itself; the court having nothing else before it. The learned judge of the orphans' court somehow, certainly not from the pleadings in the case nor yet from the will, but with the submission of the parties, as the argument shows, derived the fact that the ground in dispute is composed of the rear ends of two adjoining lots fronting on South Queen street in the city of Lancaster, both of which—however the fact may now be—originally extended back about 245 feet to a public alley in the rear. But for this fact, judicially imported into the case, disclosing as it does the location of the disputed ground with reference to that admittedly within the specific devise, no correct understanding of the real dispute would have been possible. For all that appears in the pleadings the one may have been miles away from the other, as was the case in *Brendlinger v. Brendlinger*, supra, a circumstance which there proved to be a controlling consideration. We take the case as it is thus presented, and it remains only to be determined from the will itself whether the disputed ground falls within or without the description of the lots devised to the appellee and her co-tenant. The lots are separately devised, one in the main body of the will and one in the codicil. The first devise is as follows: "I give devise and bequeath my home, being my dwelling house, and lot of land attached thereto, to my sister, Mary E. Metzger, together with all the contents thereof, during her lifetime, as a home for herself and my niece, Clara Rogers, and after the death of my sister, Mary, if my niece, Clara Rogers, survive both my wife and my sister, Mary, I give, devise and bequeath the said premises to her and her heirs absolutely with its entire contents." The devise in the codicil reads thus: "I give, devise and bequeath to my sister, Mary E. Metzger, and my niece, Clara Rogers, and their heirs in fee the dwelling house and lot of land No. 135 South Queen street, now occupied by my nephew, John Metzger, and the land attached thereto, after the death of my wife." With respect

to the first, it is only necessary to remark that the will itself furnishes not merely an intelligible and sufficient description whereby the thing devised may be identified with reasonable certainty, but the description is so definite that without some extrinsic evidence to show that lot No. 133, when the will became operative, was not of the dimensions it had been when the testator acquired it—as that another lot had been carved from it and given another and distinct designation by number or otherwise—it is impossible to fit the description in the will upon anything else than the entire lot as it was when testator acquired it. The description of the lot devised in the codicil, while it is by number as in the case of the former lot, does not stop with such designation, but indicates the lot as the lot "now occupied by my nephew, John Metzger, and the land attached thereto." If by the words "land attached thereto" is meant land attached to the original lot No. 135, then clearly the reference is to land not involved in the present controversy. If the reference is to a part of lot No. 135, which because of its appropriation and separate uses by the testator in his lifetime, was not when the will became operative in the occupancy of the nephew, then the words employed, if not strictly necessary to an inclusion of such part of the lot in the devise, at least made the inclusion more definite and certain. In the one case they are of no significance in the present contention. In the other the only meaning to be given them makes against appellant's contention. Again, if in point of fact the nephew, John Metzger, was not in the occupancy of the entire lot No. 135 at the date of the will, such fact, if shown, would be entitled to consideration in any effort to fit the testamentary description to the thing devised. But here again we are utterly without evidence as to the situation and surroundings at that time. We are only permitted to know that the will tells us, viz., that lot No. 135, occupied by the nephew, John Metzger, was devised to appellee and her co-tenant. It is a well-settled rule that where a devise contains a plain and certain description of the thing devised, and this is followed by a reference to occupancy as an added description, such reference is to be regarded as a defective description if it indicates less than what is embraced in the prior plain certain description. The rule is thus stated by Mr. Jarman in his treatise on Wills (volume 2, p. 390): "Where the description is made up of more than one part and one part is true, but the other false, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected." We are permitted to know exactly what lot No. 135 contained when the testator acquired it, and are without anything, either in the will or extrinsic to it, to show that it was ever reduced in size. The description by number is plain

and certain as a testamentary description. Confining the inquiry to the will itself, and interpreting it in its own light, it is impossible to reach any other conclusion than that the devise to the appellee and her co-tenant covered lots Nos. 133 and 135 in their original entirety, extending from South Queen street to the public alley in the rear, thus embracing the ground in controversy. This disposes of the only two questions raised by the assignments of error.

Upon the argument it was strongly urged upon us that the question with respect to the appellant's ownership of the ground under the devise was res adjudicata. Indeed, appellant's main reliance was on this position; and undue confidence in its sufficiency may in part explain the failure to support their contention by parol evidence which was within their reach. But unfortunately for appellant there is nothing in this record, whether pleadings, evidence, exception, or assignments, which brings to our attention any adjudication with respect to the subject of this controversy other than that appealed from. In the argument we are referred to an appeal from the orphans' court of Lancaster county adjudicated in the Superior Court, in the case of *Smith v. Metzger*, 32 Pa. Super. Ct. 596, which it is claimed is conclusive of the controversy. While the question of res adjudicata is not properly before us, and while the case referred to is therefore not for present consideration, we have so far yielded to the earnestness with which appellant's contention is pressed as to give the case referred to full consideration. Unappealed from, it is conclusive as to what was involved in the case; but that was nothing more than the particular fund which was before an auditor for distribution. However much the question of title may have been considered by the court in determining the ownership of the fund for distribution—rents from the disputed ground—the decision settled nothing as to the title itself. We express no opinion as to the correctness of the court's reasoning and conclusions upon the question of title in that case. All we decide is that there is nothing in that case to conclude the appellee in this.

The order of the court is affirmed. The appeal is dismissed at the costs of the appellants.

(222 Pa. 293)

**COMMONWEALTH v. CLAIRTON
STEEL CO.**

(Supreme Court of Pennsylvania. Oct. 12, 1908.)

**TAXATION (§ 228*)—BANKS—PROPERTY TAX-
ABLE.**

Under Act July 15, 1897 (P. L. 292) § 1, exempting a bank or savings institution paying a four-mill tax upon the actual value of all the shares of its stock from local taxation, and providing that it shall not be required to

make any report to the local assessor or county commissioners of its personal property for purposes of taxation, and shall not be required to pay any tax thereon, a bank or savings institution is exempt not only from local taxation, but is not required to pay any tax on personal property owned by it.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 307; Dec. Dig. § 228.*]

Appeal from Court of Common Pleas, Dauphin County.

Action by the Commonwealth against the Clairton Steel Company. Judgment for defendant, and the Commonwealth appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Frederic W. Fieitz, Deputy Atty. Gen., and M. Hampton Todd, Atty. Gen., for the Commonwealth. M. E. Olmsted and A. C. Stamm, for appellee.

BROWN, J. The Clairton Steel Company, in its report to the Auditor General for the year 1906, reported that its bonds, to the amount of \$1,039,000, were held by state banks and savings institutions chartered under the laws of this state, which, with the exception of the Bank of Charleroi, the holder of \$4,000 of the bonds, had paid into the state treasury before March 1, 1906, the four-mill tax upon the actual value of all the shares of their stock, in accordance with the provisions of act July 15, 1897 (P. L. 292). The narrow question on this appeal is the correctness of the conclusion of the court below that the bonds held by the banks and savings institutions, other than the Bank of Charleroi, are exempt from taxation for the year 1906. If they are not, it was the duty of the appellee, through its treasurer, to collect the tax due the commonwealth, and, upon his failure to do so, it became liable for his default. *Commonwealth v. Delaware Division Canal Company*, 123 Pa. 594, 16 Atl. 584, 2 L. R. A. 798.

It is not necessary in disposing of this appeal to review the several acts of assembly relating to the taxation of the shares of the capital stock of banks and savings institutions, for the exemption which the appellee claims, if it exists, must be found in the act of 1897. Prior enactments throw no light upon the question and are of no assistance in interpreting that act. Following *People's Savings Bank v. Monongahela River Consolidated Coal & Coke Company*, 29 Pa. Super. Ct. 153, and what he conceived to be the plain and unambiguous meaning of the act, the learned judge below held the bonds to be exempt and in his conclusion we concur.

The first section of the act of 1897 provides: "That in case any bank or savings institution having capital stock, incorporated under the law of this state or of the United States, shall collect, annually, from the share-

holders thereof said tax of four mills on the dollar upon the actual value of all the shares of stock of said bank or savings institution according to the rule hereinbefore stated that have been subscribed for or issued, and pay the same into the state treasury on or before the first day of March in each year, the shares and so much of the capital and profits of such bank or savings institution as shall not be invested in real estate, shall be exempt from local taxation under the laws of this commonwealth." If the Legislature had stopped here, the contention of the commonwealth would have to prevail, for we so held in passing upon Act June 1, 1889 (P. L. 420), in which there is a similar provision. *Wilkes-Barre Deposit & Savings Bank v. City of Wilkes-Barre*, 148 Pa. 601, 24 Atl. 111. But in the same section the words immediately following are: "And such bank or savings institution shall not be required to make any report to the local assessor or county commissioners of its personal property owned by it in its own right for purposes of taxation, and shall not be required to pay any tax thereon." These words were not needed if relief was to be given only from local taxation, for that had already been given by what immediately preceded. They were therefore intended to have some other effect. Their clear meaning is that any bank or savings institution paying a four-mill tax upon the actual value of all the shares of its stock that have been subscribed for or issued shall not be required to pay any tax on personal property owned by it in its own right, and therefore shall not be required, "for the purposes of taxation," to make any report to the local assessor or county commissioners. That the Legislature intended that exemption from all further taxation should follow the payment of the four-mill tax is made clearer still from what immediately follows as to the exemption upon the payment of the ten mills tax. The clause as to this is: "Except however that any bank or savings institution incorporated as aforesaid, in lieu of the method hereinbefore set out for ascertaining the actual value of the shares of capital stock thereof, may elect to collect annually from the stockholders thereof a tax of ten mills on the dollar upon the par value of all shares of said bank that have been subscribed for or issued, and pay the same into the state treasury on or before the first day of March in each year; and the shares of such bank or savings institution, and so much of the capital and profits of such bank or savings institution, as shall not be invested in real estate shall be exempted from local taxation under the laws of this commonwealth." Here is not only a distinct limitation of the exemption to local taxation when the ten-mill tax is paid, but an expression of the legislative intent that the effect of the two payments shall not be the same. The payment of the

tax within the statutory period upon the actual value of the shares of the capital stock of the bank or savings institution is exemption of its personal property owned in its own right from any tax; the payment of the ten-mill tax is exemption from local taxation of so much of the capital and profits of the bank or savings institution as shall not be invested in real estate.

The bonds of the appellee held by the bank of Charleroi which paid the ten-mill tax are not exempt, and the appellee concedes its liability as to them.

Judgment affirmed.

(222 Pa. 299)

COMMONWEALTH v. PALMER.

(Supreme Court of Pennsylvania. Oct. 12, 1908.)

1. HOMICIDE (§ 3*)—PRESUMPTIONS AND BURDEN OF PROOF—ILLEGAL HOMICIDE.

Where an intentional killing with a deadly weapon has been established, an illegal homicide is presumed.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 5; Dec. Dig. § 3.*]

2. HOMICIDE (§ 244*)—SELF-DEFENSE—EVIDENCE.

Self-defense must be made out by a fair preponderance of evidence, where an intentional killing with a deadly weapon has been established.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 509; Dec. Dig. § 244.*]

3. CRIMINAL LAW (§ 561*)—EVIDENCE—REASONABLE DOUBT—SELF-DEFENSE.

To reasonably doubt that life was taken in self-defense is not to be satisfied that it was so taken; and, where this affirmative defense is left in doubt, it has not been established at all as a basis of acquittal.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 561.*]

4. CRIMINAL LAW (§ 814*)—TRIAL—INSTRUCTIONS—MATTERS NOT SUPPORTED BY EVIDENCE.

A point is properly declined and not read to the jury, where there is nothing in the case justifying its presentation.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1979; Dec. Dig. § 814.*]

Appeal from Court of Oyer and Terminer, Berks County.

Frank Palmer was convicted of murder in the first degree, and he appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Robert Grey Bushong and D. N. Schaeffer, for appellant.

BROWN, J. The victim of this homicide was a woman with whom the prisoner had lived in illicit relations. He admitted the killing, but attempted to justify it as an act of self-defense. His story on the trial was that they had quarreled a number of times; that on the evening of the killing they went to a lonely spot in the city of Reading, where

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

they again quarreled; that she there drew a revolver upon him, which he took from her and threw away; that she then grabbed him, and struck him with some object; that before he started with her to the place of the killing, he had put a razor in his pocket for his protection, thinking she would attempt to do him bodily harm, and that when she grabbed him a second time, believing his life was in danger, he threw his arm around her neck and, holding her head back, cut her throat; that without releasing him she sank down, and he then, sitting upon her stomach, cut her throat a second time. The uncontradicted evidence was that there were five cuts upon her body.

On this appeal, two errors are alleged to have been committed by the court below, the first in the following instruction to the jury: "As to whether a reasonable doubt shall establish the existence of a plea of self-defense, the law is this: If there be a reasonable doubt that any offense has been committed by the prisoner, it operates to acquit, but if the evidence clearly establishes the killing by the prisoner purposely, with a deadly weapon, an illegal homicide of some kind is established, and the burden then falls upon the prisoner, and not the commonwealth, to show that it was excusable as an act of self-defense. If, then, his evidence leaves his extenuation in doubt, he cannot be acquitted of all crime, but must be convicted of homicide in some of its grades of manslaughter at least." These are the exact words of Agnew, J., in his charge to the jury when specially presiding in *Com. v. Drum*, 58 Pa. 9. That charge was accepted at the time by his associates in this court as a clear and correct exposition of the law of homicide, and as a precedent and guide in the trial of such cases. We have since frequently approved it, the present Chief Justice very recently saying of it: "Its substantial accuracy has never been challenged." *Com. v. Paese*, 220 Pa. 371, 69 Atl. 891. When the commonwealth clearly establishes an intentional killing by the use of a deadly weapon, an illegal homicide is presumed. If the defense be insanity, the burden of sustaining it is upon those having charge of the defense, for the accused is presumed to be sane, and his insanity must be established by a fair preponderance of the testimony. *Ortwein v. Com.*, 76 Pa. 414, 18 Am. Rep. 420; *Meyers v. Com.*, 83 Pa. 131; *Coyle v. Com.*, 100 Pa. 573, 45 Am. Rep. 397; *Com. v. Barner*, 199 Pa. 335, 49 Atl. 60. And so of self-defense, for there is no presumption, in the face of clear evidence of intentional killing with a deadly weapon, that life was taken that life might be spared. The presumption is otherwise in the absence of anything developed to the contrary in the commonwealth's presentation of its case, and when the attempt is made to rebut that presumption by the af-

firmative plea of self-defense, it must be made out by a fair preponderance of evidence. The guilt of the accused must be established in the first instance beyond a reasonable doubt; and, when so established, he is not to be acquitted because the jury, after hearing him or his witnesses, may be in doubt whether he acted in self-defense. In making that defense he admits his intentional killing of another—a crime under divine and human law, unless it appear in the proof of the killing that it was excusable—and the burden is righteously upon him to show that it could not be avoided. "We may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where justified by the command or permission of the law, excused on the account of accident or self-preservation, or alleviated into manslaughter by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation it is incumbent upon the prisoner to make out to the satisfaction of the court and jury, the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former how far they extend to take away or mitigate guilt. For all homicide is presumed to be malicious until the contrary appeareth upon evidence." 4 Blackstone's Commentaries, 201. The burden of proving self-defense is not placed heavily upon one accused of taking life. Sacred as is human life, he is not bound to show beyond all doubt that he was compelled to take it, but is humanely permitted to satisfy the jury by a fair preponderance of the testimony that he killed under circumstances justifying his belief that his own life could not otherwise have been saved. To doubt, however, even to reasonably doubt, that life was taken in self-defense is not to be satisfied that it was so taken, and when this affirmative defense is left in doubt, it has not been established at all as a basis for acquittal.

There was nothing in the case justifying the presentation of the prisoner's sixth point, and it was therefore properly declined and not read to the jury.

Both assignments of error are overruled, the judgment is affirmed, and the record remitted for the purpose of execution.

(223 Pa. 285)

BLAND v. TIPTON WATER CO. et al.
(Supreme Court of Pennsylvania. Oct. 12, 1908.)

1. WATERS AND WATER COURSES (§ 188*)—POWERS OF WATER COMPANIES—WHO MAY SUE.

A water company had the right to supply water to the public within the limits of a designated township, and a riparian owner on

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the stream from which the supply was taken brought a bill, under Act June 19, 1871 (P. L. 1360), to restrain the company from delivering water to a railroad company within the limits of the township, which company, after receiving the water, carried it in its own pipes beyond the limits of the town. *Held*, that the bill would not lie; it not being brought to inquire into the rights conferred by the charter, but into defendant's conduct under the same.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 188.*]

2. WATERS AND WATER COURSES (§ 188*)—WHO MAY QUESTION ACTS.

Where a water company is supplying water in excess of the rights given by its franchise, the remedy is a proceeding at the instance of the commonwealth.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 188.*]

3. EMINENT DOMAIN (§ 274*)—COMPENSATION—REMEDIES OF OWNERS—INJUNCTION.

Where a riparian owner sued to enjoin defendant water company from improperly using the waters of a stream, and no bond had been approved securing to plaintiff payment of his damages, and no effort made to determine the compensation to be allowed him for taking the water, a restraining writ was properly issued and should have been continued until the water company secured to plaintiff the payment of his damages in the mode prescribed by Act April 29, 1874, § 41 (P. L. 104).

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 768; Dec. Dig. § 274.*]

4. EMINENT DOMAIN (§ 170*)—PROCEEDINGS—INABILITY TO AGREE WITH OWNER.

Where a bond to secure a riparian owner for waters taken by defendant from a stream has been filed and approved by the court, the approval of the bond is an adjudication that an attempt had been previously made by the company to settle with the landowner, which is a condition precedent to filing a bond.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 170.*]

Appeal from Court of Common Pleas, Blair County.

Bill by Fred Bland against the Tipton Water Company and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and STEWART, JJ.

A. V. Barker and W. I. Woodcock, for appellant. John G. Johnson and Neff, Riley & Hicks, for appellee Pennsylvania Railroad Company. O. H. Hewitt and H. B. Gill, for appellee Tipton Water Company.

BROWN, J. This bill, which was filed under Act June 19, 1871 (P. L. 1360), was properly dismissed by the court below. It was not necessary to determine what rights had been acquired by the Tipton Water Company from the Merivale Water Supply Company, or to discuss those possessed by the Pennsylvania Railroad Company under the acts of April 15, 1859 (P. L. 879), and April 22, 1905 (P. L. 264). The limit of the court's inquiry in this proceeding was to ascertain whether the Tipton Water Company, the real defendant, did, in fact, possess the right or fran-

chise to do the act through which the appellant alleges injuries resulted, and will result, to his private rights, and, in view of the undoubted franchise conferred upon it by its charter and the undisputed facts in the case, the learned chancellor ought not to have rested with the mere statement that there was some force in the contention that the plaintiff had no standing to complain under the act of 1871, but should have so distinctly ruled.

The Tipton Water Company was incorporated under act April 29, 1874 (P. L. 73), and its supplements, for the purpose, according to its charter, "of supplying water to the public in Antis township, Blair county, Pennsylvania, and to such persons, partnerships and corporations residing or located therein as may desire the same." It was incorporated February 11, 1803, and, by due and appropriate action, on November 21, 1904, appropriated perpetually the entire flow of the waters of Tipton run. The appellant is the owner in fee of a farm through which this run flows for a distance of 600 feet, emptying into the Juniata river, on which his lands also abut and border. He does not assail the water company's charter nor question its right to appropriate the waters of Tipton run for the purpose of supplying the same to the public in Antis township, but he would have it enjoined from taking the waters of the run, because, after it takes and conveys them into Antis township, it there metes out, sells, and delivers to the Pennsylvania Railroad Company, as one of its customers, large quantities of the same, which that company conveys out of the township for the supply of its engines, stations, and shops. After its appropriation of the waters of Tipton run, the Tipton Water Company laid a line of pipe leading from its impounding dam to the line of the right of way of the Pennsylvania Railroad Company at Tipton station, also in said township. Prior to the laying of this pipe, the Pennsylvania Railroad Company had laid and owned, on or near its right of way, running westwardly from Tipton station, a line of pipe through which it took water from Tipton run by pumping the same from a milldam. When the pipe laid by the Tipton Water Company was completed, it was connected with the said line of pipe owned by the Pennsylvania Railroad Company, and some of the water taken from Tipton run by the water company is conveyed by pressure from the reservoir of the water company through the line of pipe owned by the Pennsylvania Railroad Company, westwardly, outside of the township of Antis, to the railroad company's shops, in the township of Logan. On the line of the water company's pipe there is a meter by which it measures the water which it furnishes to the Pennsylvania Railroad Company. The water is all furnished within the township of Antis and amounts to 1,500,000 gallons daily. The

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

water company has no control over the disposition made by the Pennsylvania Railroad Company of the water beyond the point of delivery and owns no pipe or other means of delivering water beyond the termination of its line at Tipton station. The railroad company has established a water station at Tipton, where, on an average, 50 engines per day take water for steam purposes. The capacity of each engine's tank is 7,000 gallons, and the number of gallons thus taken daily is approximately 350,000. In addition to the pipe which the water company has laid and which connects with the pipe of the Pennsylvania Railroad Company running westwardly, it has laid another line of pipe leading from its dam or reservoir to the right of way of the railroad company at Tipton station, and that company has laid and owns a line of pipe on its right of way leading eastwardly, which has not yet been connected with the pipe of the water company, but it is the intention to connect these pipes, that additional waters, to be delivered by the Tipton Water Company to the railroad company, may be conveyed through said pipe of the railroad company eastwardly out of the township for the railroad company's use. A finding of fact, unchallenged by any of the 28 assignments of error, is that there is no agreement between the Tipton Water Company and the Pennsylvania Railroad Company relative to the use or disposition of the water or the place to which it is to be transported by the railroad company; the water company merely selling the water to the railroad company and delivering it at Tipton station, in the township of Antis. The findings of fact are numerous and somewhat confused, but the foregoing is an epitome of them, from which, without regard to the rights acquired by the water company from the Merivale Water Supply Company, or those alleged to be possessed by the Pennsylvania Railroad Company under the acts of 1859 and 1906, is to be determined the only question which the appellant can raise by his bill.

The right of the Tipton Water Company to take the waters of Tipton run for the purpose of supplying water to the public in Antis township is not questioned, and it was in the exercise of this right or franchise that the waters of the run were taken, resulting in what, in this proceeding, may be conceded to be an injury to the private rights of the complainant as a riparian owner. His complaint is not that the water company, after taking the water, refuses to supply it to any individual, partnership, or corporation within the township of Antis, the territory covered by its charter, but is that it there furnishes large quantities to the Pennsylvania Railroad Company, which that company, after the supply and delivery of the same to it in that township, takes elsewhere for its corporate purposes. This is not what injures him. The injury done to him is the taking of the waters of the run, but they are taken in the

exercise of a clear right or franchise to take them for the purpose of supplying water to the public in Antis township. In daily furnishing to the engines of the railroad company 350,000 gallons of water in that township, the water company is not exercising a mere right, but performing a duty, for the railroad company, in the operation of its road in said township, is to be regarded as a part of the public therein, within the purview of the act of 1874. How much of this water is actually converted into steam within the township is no more a question in this proceeding than would be the quantity of water remaining in stage horses, watered by the company in the township, after they had passed beyond its borders; and so, upon principle, this is equally true of the remaining 1,150,000 gallons measured, sold, and delivered to the Pennsylvania Railroad Company within the said township. The appellant's right to complain is concededly limited to a complaint that the water company, in taking the waters from the run to the injury of his private rights, is exercising a right or franchise which in fact it does not possess; but, as it has such undoubted right or franchise for the purpose of supplying water to the public in Antis township, it is none of his concern what its customers do with the water after it there delivers the same to them. Its right, under clause 2 of section 34 of the act of 1874, is to supply water to those asking for the same where it is located, and, if it be misbehaving itself in the exercise of that right, it is for the commonwealth alone to correct it. Failure to distinguish between an attempt to exercise a right or franchise which a corporation does not, in fact, possess, to the injury of the private rights of the complainant, and its mere misbehavior in the exercise of an undoubted right or franchise, are responsible for this fruitless litigation. The inquiry which the appellant would have had the court make under his bill was, not into the rights conferred by the charter of the water company, but into its conduct under the same. This can be done only at the instance of the commonwealth. *Windsor Glass Co. v. Carnegie Co.*, 204 Pa. 459, 54 Atl. 329.

It is urged that this case is identical with *Bly v. White Deer Mountain Water Company et al.*, 197 Pa. 80, 46 Atl. 929. This results from a misapprehension of what was decided in that case, for what was there enjoined would not be permitted here. Bly's complaint was that the White Deer Mountain Water Company, or the White Deer Creek Water Supply Company, or both of them, were proceeding to build a dam or reservoir across the White Deer creek, and were digging ditches and trenches and laying mains and pipes from the said reservoir into municipalities, boroughs, and townships other than White Deer and Kelly townships, for the purpose of supplying water to such municipalities, boroughs, and townships. Neither company had the right or franchise to

supply water in the territories into which the pipes were being laid, and the prayers of the bill were for an injunction to restrain each of them from taking any of the waters of White Deer creek for the purpose of supplying the same to the public in any municipality, borough, or township other than the townships of White Deer or Kelly. The injunction as to the White Deer Creek Water Supply Company ought manifestly to have been continued, for reasons appearing in the opinion, and as to the water company we said, through our Brother MESTREZAT: "The only questions, therefore, for consideration here are: (1) The right of the White Deer Mountain Water Company to appropriate the waters of White Deer creek for the purpose of supplying the same to the public in any municipality, borough, or township other than White Deer township, in Union county; and (2) the right of the plaintiff to have that question determined by a court of equity in a proceeding under the provisions of the act of June 19, 1871." What was enjoined was the taking of the waters of the creek for the purpose of directly supplying the same to the public in townships and municipalities other than the one in which the water company was authorized to supply the same. In the present case no pipe of the water company runs outside of Antis township, and it is not undertaking to deliver water to any one, much less to the public, at any point beyond the limits of that township. The supply and delivery of which the appellant complains are within the township, and to a single customer of the water company. If the pipe of this customer connecting with that of the water company should not extend beyond the lines of Antis township, it would hardly be pretended that the supply of the water would not be entirely lawful, and we can recognize no difference because, after the supply and delivery of the water to the railroad company are complete within the township, that company, under no arrangement between it and the water company, carries the water for its own corporate purposes beyond the line of the township.

At the time this bill was filed—February 14, 1906—a bond had not been approved by the court to secure to the appellant the payment of his damages, and the court found as a fact that no effort had been made to agree upon the amount of compensation to be allowed him for the taking and appropriation of the waters of the run. In view of this, he contends that the preliminary injunction should have been made perpetual. Though no bond had been approved at the time these proceedings were instituted, one had been tendered to the appellant in December, 1904, and, upon his refusal to accept it, notice was given to him that it would be presented to the court of common pleas of the county for approval on the 24th of that month. In pur-

suance of this notice, a bond was filed on that day, but was not approved because excepted to by the appellant. Subsequently, on May 16, 1906, another bond, in a larger amount, was substituted and approved by the court. As no bond had been approved at the time the appellant applied for the injunction, the restraining writ was properly issued and ought to have been continued until the water company secured to him the payment of his damages in the mode prescribed in section 41 of the act of April 29, 1874. This it did when its bond was approved by the court in May, 1906, and the injunction which, up to that time, had properly restrained all interference with the appellant's rights, ought then to have been dissolved. In the decree dissolving it and dismissing the bill the proper penalty for the attempt of the water company to take the waters of the run before legally authorized to do so was imposed upon it by directing it to pay the costs in the proceedings below.

As to the contention that, as there was no evidence of any attempt by the water company to agree with the appellant as to the amount of compensation he ought to receive for the damages he sustained, the tender and filing of the bond were unauthorized, we need only repeat what was said of a similar contention in *Wadhams v. Lackawanna & Bloomsburg Railroad Co.*, 42 Pa. 303: "It is next insisted that there was no evidence of any attempt by the defendants to settle with the plaintiff, and agree upon the damages before they entered upon his land and before they filed the bond given as a security. Hence it is inferred that the tender of the bond, and the filing of the same, was unauthorized by law, and that the defendants were not empowered to appropriate the land for the said road. Though the acts of assembly do not in terms require any attempt to make a settlement before a tender of a bond or filing it in the common pleas, it is perhaps a just inference from their language that there should be some evidence of inability of the parties to agree before the court should undertake to pass upon the security offered. But the very offer of a bond is an assertion by one of the parties that they cannot agree, and is in itself some proof of such inability, for without the consent of both such an agreement cannot be made. And if it were not so, the action of the court approving the sureties, and directing the bond to be filed, involves an adjudication that everything had been done which entitled the company to have the bond filed. If an attempt to settle was a prerequisite, the order of the court is conclusive that the attempt had been made. The decree of the court, like any other judgment, is final between the parties, as to all matters adjudicated therein directly, and to all facts which were essential to the adjudication." The act of 1874 does "not in terms require any

attempt to make a settlement before a tender of a bond or filing it in the common pleas."

All of the assignments of error are overruled, and the decree of the court below is affirmed; the costs on this appeal to be paid by the appellant.

(77 N. J. L. 39)

HERSHENSTEIN v. HAHN.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. EXECUTION (§ 359*)—PROCEEDINGS SUPPLEMENTAL TO EXECUTION—STATUTES—CONSTRUCTION.

The act of 1901 (P. L. p. 372), entitled a "further supplement to an act entitled 'An act respecting any execution,'" and authorizing proceedings supplemental to execution, is applicable to the district courts, though the district court act makes no provision for supplemental proceedings.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 359.*]

2. EXECUTION (§ 371*)—PROCEEDINGS SUPPLEMENTAL TO EXECUTION—DISCOVERY—AUTHORITY OF OFFICERS—"AFFIDAVIT"—"DEPOSITION."

Under the act of 1901 (P. L. p. 372), authorizing proceedings supplemental to execution, and directing that the discovery shall be before a judge or a Supreme Court commissioner, and Practice Act (P. L. 1903, p. 596) § 228, authorizing a Supreme Court examiner to take any "affidavit" that may be taken before a Supreme Court commissioner, a Supreme Court examiner may take the deposition of a judgment defendant under an order directing him to make discovery in proceedings supplemental to execution, though technically an "affidavit" is taken ex parte, and though a "deposition" is technically taken on notice, so that the testimony taken under an order for discovery is technically a "deposition," but the words "deposition" and "affidavit" may be synonymous.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 371.*]

For other definitions, see Words and Phrases, vol. 1, pp. 240-245; vol. 2, pp. 2000-2002; vol. 3, pp. 7563, 7634.]

3. EXECUTION (§ 398*)—PROCEEDINGS SUPPLEMENTAL TO EXECUTION—ORDERS—VALIDITY.

Where depositions in proceedings supplemental to execution, under the act of 1901 (P. L. p. 372), were presented to the judge before the making of the order directing the judgment defendant to make payments to plaintiff, the failure to file the depositions before the making of the order did not affect its validity.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 398.*]

4. EXECUTION (§ 398*)—PROCEEDINGS SUPPLEMENTAL TO EXECUTION—ORDERS—VALIDITY.

The failure of a judgment defendant in proceedings supplemental to execution under the act of 1901 (P. L. p. 372), to sign depositions taken under the order of discovery did not affect the validity of the order directing the making of payments to the judgment creditor.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 398.*]

5. EXECUTION (§ 398*)—PROCEEDINGS SUPPLEMENTAL TO EXECUTION—ORDERS—VALIDITY.

Where the testimony in proceedings supplemental to execution was treated by both parties as closed, and no effort was made by the judg-

ment defendant to take testimony on his part, the objection that there was no formal closing of the taking of evidence did not affect the validity of an order directing the judgment defendant to make payments to the judgment creditor.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 398.*]

6. EXECUTION (§ 418*)—SUPPLEMENTAL PROCEEDINGS—DISOBEDIENCE OF ORDERS—PROCEEDINGS TO PUNISH—ORDERS—EFFECT.

An order which adjudges a judgment debtor guilty of contempt for violating an order in proceedings supplemental to execution, and which orders a warrant which is not in the nature of an attachment on which interrogatories are intended to be served, is an adjudication of contempt, and is not a mere order for process.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 418.*]

7. EXECUTION (§ 418*)—SUPPLEMENTAL PROCEEDINGS—ORDERS—VIOLATION—EVIDENCE.

Where a judgment defendant, on order to show cause why he should not be punished for contempt for violating an order in proceedings supplemental to execution directing him to pay \$30 a month, showed that when the order was made he earned about \$150 per month, but that subsequently his income had been reduced to \$16 a week, which was not more than sufficient to support himself and wife and child, the court improperly adjudged him guilty of contempt; the statute not contemplating that a debtor shall devote all of his earnings to his creditors.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 418.*]

Certiorari to District Court of Jersey City.

Action by Solomon Hershenstein against George H. Hahn. There was an adjudication that the debtor was guilty of contempt for failure to obey an order in proceedings supplemental to execution requiring him to pay plaintiff a specified sum per month out of his earnings, and he brings certiorari. Judgment adjudging defendant guilty of contempt set aside.

Peter H. James, for plaintiff. Melosh & Morten, for defendant.

SWAYZE, J. The prosecutor seeks to set aside the proceedings of the Second district court of Jersey City, supplemental to execution, including an adjudication that the defendant was guilty of contempt, in failing to obey an order to pay \$30 a month out of his earnings to the plaintiff.

The first objection is that the act of 1901 (P. L. p. 372), under which the proceeding was taken, is not applicable to district courts, because the object is not stated in the title. This court has already held in *Spencer v. Morris*, 67 N. J. Law, 500, 51 Atl. 470, that the act is applicable to district courts. The particular objection now raised does not appear to have been raised in that case, but I think it is without force. The title of the act of 1901 is a further supplement to an act entitled "An act respecting any execution," and I see no reason why this should not be held to be broad enough to cover executions out of district courts. It is true the Legislature has made provision for supplemental

proceedings in the district court act itself, but I do not think that is sufficient to indicate that enactments relating to that subject-matter should always be repeated in the district court act, as well as in the executions act.

The second point is that the order of discovery directed the prosecutor to make discovery before a Supreme Court examiner. The act of 1901 directs that the discovery shall be before a judge or a Supreme Court commissioner; and the power of a Supreme Court examiner depends upon section 228 of the practice act (P. L. 1903, p. 596). This act gives the Supreme Court examiners the same power to administer an oath or take any deposition in any action for use in any court of law as a justice of the Supreme Court, and provides that any oath or affidavit that may be taken before a Supreme Court commissioner may be taken before a Supreme Court examiner. It is argued that the first clause does not empower the Supreme Court examiners to take depositions of this character, for the reason that there is no provision by which a justice of the Supreme Court can take them. Without passing upon this question, I think that the second clause, authorizing a Supreme Court examiner to take any oath or affidavit that may be taken before a Supreme Court commissioner, is sufficient authority. Strictly and technically, an affidavit is taken *ex parte*, and a deposition is taken upon notice, so that testimony taken under an order for discovery would be called a deposition with more technical propriety. But the use of the word "affidavit" with a similar meaning is not unprecedented in our reports. A curious illustration of the interchangeable way in which the words "depositions" and "affidavits" may be used appears in the old case of *Rogers v. Chadwick*, 10 N. J. Law, 59. Other illustrations may be found in *Den v. Geiger*, 9 N. J. Law, 225; *Scott v. Beatty*, 23 N. J. Law, 256, 260; *Warford v. Smith*, 25 N. J. Law, 212; *Parsell v. Mann*, 30 N. J. Law, 530, 550. The last cited case is in the Court of Errors and Appeals. I think, therefore, that a Supreme Court examiner was authorized to take this examination.

The third point urged is that the depositions were not filed until the 8th day of May, while the order directing defendant to pay was made on the 6th day of May. It appears in the case, and is not denied, that the depositions were presented to the judge on the 4th of May, although not filed with the clerk until the 8th. It is enough to say that the statute does not require the depositions to be filed before the order is made, but only that they should be returned to the judge. A similar question was presented to the Court of Errors and Appeals in *Stokes v. Hardy*, 71 N. J. Law, 549, 60 Atl. 403. Nor is it an insuperable objection that the depositions were not signed by the defendant. This practice may be very convenient by

way of verifying an examination of the judgment debtor, but it does not seem to be required by the statute; and, since the judgment debtor did actually sign the depositions, it does not seem material whether he signed them before or after they were presented to the judge, or after the order was made.

I see no force in the objection that there was no formal closing of the taking of testimony, since, in fact, the testimony was treated by both parties as having been closed, and no effort was made by the defendant to take testimony on his part, even if it be assumed that under an order of this kind he had a right so to do.

The fifth point raised by the prosecutor goes to the merits of the case, and involves the validity of the order made on the 4th day of March, 1908, adjudging the defendant guilty of contempt of court and ordering that a warrant issue to a constable commanding him to arrest the defendant and forthwith convey him before the judge. This probably, was made after an order of February 26, 1908, directing the defendant to show cause why he should not be adjudged guilty of contempt for not obeying the order for the payment of the judgment made on the 4th of May, 1907. Upon the return of this rule the defendant admitted, by his counsel, that he had not complied with the order to pay, and presented an affidavit showing that his circumstances had changed, so that, instead of earning \$6 a day, he was earning not more than \$15 or \$16 a week, and that that was not more than sufficient to supply the necessities of life for himself, his wife, and his child. In this affidavit he expressed his willingness to report to the plaintiff's attorney every week, advising him when and where he was employed, by whom, and the amount of money that he earned, in order that the court and the plaintiff's attorney might be satisfied as to his ability to comply with the requirements of the order to pay. No facts appear to contradict the statements of this affidavit, and no question seems to be raised now as to its truth. The order adjudging the prosecutor guilty of contempt is a very different order from that which was involved in *Doland's Case*, 69 N. J. Eq. 802, 64 Atl. 1091, for this distinctly adjudges the defendant to be guilty of contempt, and the warrant which it orders does not seem to be in the nature of an attachment upon which interrogatories were intended to be served. I think the order amounts to an adjudication of contempt, and is not a mere order for process. I do not think it necessary to consider whether the procedure adopted in this case was the proper procedure or not. If the procedure had been by way of interrogatories, and the defendant had answered them, the answers would probably have disclosed the same state of facts as is disclosed by his affidavits; and I shall, therefore, treat the case as if this affidavit had taken the form of answers to formal interrogatories. It

seems to me that it shows such a case that he should not have been adjudged guilty of contempt. As far as the case shows, he was, at the time the original order was made requiring him to pay \$30 a month, earning about \$150 a month; the court, therefore, seems to have thought that it was not unreasonable for him to use \$120 per month of his earnings for his living expenses. When his income shrank to not more than \$16 a week, his total income was a little more than half of that amount, and I see nothing to indicate that it is unreasonable for a man with a wife and child, living in Jersey City, to expend \$16 a week in living expenses. The statute does not contemplate that a man should devote all of his earnings to his creditors; to require that would, in substance, make him the slave of his creditors, and require the court to enforce the servitude. The case, so far as contempt of court is concerned, comes within the rule of *Walton v. Walton*, 54 N. J. Eq. 607, 35 Atl. 289, and the cases of *McClure v. Gulick*, 17 N. J. Law, 340, and *State v. Gulick*, 17 N. J. Law, 435, therein cited. I think the order adjudging the prosecutor guilty of contempt should be set aside. There was no suggestion that the original order directing him to pay \$30 a month was improper under the circumstances then before the court and that order should not be disturbed. No costs should be allowed to either party as against the other.

(77 N. J. L. 132)

MILEWSKI v. KURTZ.

(Supreme Court of New Jersey. Nov. 9, 1908.)

HUSBAND AND WIFE (§ 326*)—ALIENATION OF WIFE'S AFFECTION.

In an action by a husband for the alienation of his wife's affections, his consent to the acts constituting and contributing to the injury is a bar to recovery.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 326.*]

(Syllabus by the Court.)

Action by John Milewski against Joseph Kurtz. Verdict for plaintiff. Rule to show cause made absolute.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

William B. Mackay, Jr., for plaintiff.
Horace L. Allen, for defendant.

VOORHEES, J. This is a suit for the alienation of a wife's affections. At the circuit, a verdict for the plaintiff was rendered for \$750, whereupon this rule to show cause was allowed.

The testimony shows that the defendant was a frequent visitor at plaintiff's house, being often there in the daytime, and frequently remaining all night, when the husband was not at home; that, previous to

the coming of the defendant and his attentions to the wife, the relations existing between the husband and wife were friendly and affectionate; that the defendant, after introduction to the plaintiff by the wife, became friendly with the husband, so much so that the defendant often remained overnight with the plaintiff, and, according to the plaintiff's own testimony, more than once the defendant slept in the same bed with the plaintiff and his wife, upon plaintiff's invitation; that defendant took the wife out driving; that in the month of October, 1906, there arose a quarrel between the plaintiff and his wife and the defendant, after which plaintiff left his home and went to work, leaving his wife with the defendant, and when he returned home that night the wife and the defendant had departed. This happened on Friday, and on Monday she came back for her clothes and told the plaintiff that she was going to leave him, and when asked to give her reason for it said, "I am done with you; I won't tell you, but I am going to leave you;" that it was none of his business; then she left and has never been back to stay, but did return about a week afterwards with a police officer to get the rest of her clothes. Plaintiff subsequently went to the defendant's house in Hoboken. The wife was found working there and refused to go home with plaintiff, and told him that she was not going to live with him. Before this time the plaintiff, when working in Hoboken, where the defendant lived, had stayed at the defendant's house. He testifies that on Tuesdays he was never home, and afterwards found out that defendant had spent these Tuesdays with his wife. In addition to plaintiff's testimony, there were other witnesses who testified to the fact that defendant called at plaintiff's house when the wife was there and the husband away; that they went out walking together, he holding her by the hand or by the arm; that defendant and the wife sat on the stoop until nearly midnight. There was sufficient evidence in the case from which the jury might infer that the defendant had alienated the affections of the wife. It also appeared that many of the acts of the defendant and his wife were known to the plaintiff, and sufficiently so to indicate that the husband consented to the alienation.

The evidence of the defendant shows that he was a friend of the family of the wife before she married and frequently called at her house; that after her marriage she and her husband remained with her parents, the defendant still continuing to call there; that after two or three years the husband and wife started housekeeping, and the defendant, on the invitation of the husband, continued to visit them. The husband was during these visits sometimes at home, and sometimes he was not; but he was always

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

at home nights, and frequently invited the defendant to remain over night, and that he, at plaintiff's request, slept in the same room with plaintiff and his wife, and several times, at plaintiff's invitation, occupied the same bed with the husband and wife. Plaintiff said of the defendant, "He used him like a friend." That in April, 1907, the plaintiff started to work in Hoboken, making his home with the defendant and continued there until September following, during which time he visited his wife at her home in Hackensack, coming on Saturday and returning Monday. The wife testifies that her husband wanted her to go to Hoboken and earn her living; he wanted her to go to the defendant's home, where his mother was then living; that she went there and did the house-keeping for Mrs. Kurtz; then her husband got out of work and went back to Hackensack, but would not take her with him. About four months before this suit was brought the mother of Kurtz died, and plaintiff's wife had remained at defendant's home ever since, working for him at \$25 a month.

Whatever inferences may be drawn from the plaintiff's case as to the enticement of the wife to leave her husband is completely overthrown by the testimony of the defendant. The substance of the case is that the wife was taken to Hoboken by the husband and put to work by him in Mr. Kurtz's house, where he stayed with her; that she was earning there at first, while the husband remained, her living and clothing, and after the husband left and returned to Hackensack she was paid \$25 a month. The preponderance of evidence is in favor of the theory that the husband was perfectly willing that she should remain there and work.

The plaintiff, to sustain his case, is obliged to show by a preponderance of evidence that the defendant wrongfully and willfully attempted to alienate the affections of the consort and to deprive plaintiff of the consort's society, that such attempt was successful, and that the plaintiff was not a consenting party. *Van Olinda v. Hall*, 88 Hun, 452, 34 N. Y. Supp. 777; *Reading v. Gazzam*, 200 Pa. 70, 49 Atl. 839. In *Prettyman v. Williamson*, 1 Pennewill (Del.) 234, 39 Atl. 731, it was held that the consent of the husband to the act complained of is a bar for alienating the wife's affections, citing *Bunnell v. Greathead*, 49 Barb. (N. Y.) 106. In the latter case the court said: "The plaintiff had the power, and it was his duty as a husband, to interfere and prevent the debauching of his wife. It is a general rule of law that no one can maintain an action for a wrong when he has consented or contributed to the act which occasions his loss." See, also, as bearing on this subject, *Hedden v. Hedden*, 21 N. J. Eq. 74. The testimony of the plaintiff shows that he consented to the

very acts calculated to inflict upon him the injury for which he now seeks damages.

The rule to show cause must be made absolute.

(77 N. J. L. 32)

FODOR v. FUCHS.

(Supreme Court of New Jersey. Nov. 9, 1908.)

LIBEL AND SLANDER (§ 94*)—PLEADING—JUSTIFICATION.

In an action for libel, where the defamatory matter is general in its nature, a plea of justification must state specific facts showing in what instances and in what exact manner the plaintiff has misconducted himself or has done the things charged against him.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 221-225; Dec. Dig. § 94.*]

(Syllabus by the Court.)

Action by Francis M. Fodor against Armin Fuchs. Motion to strike out plea granted.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

Woodbridge & March, for plaintiff. George S. Silzer, for defendant.

TRENCHARD, J. This is a motion to strike out a plea of justification in a libel suit. The libel complained of in the declaration is that the defendant published the statement that the plaintiff, who is a banker in New Brunswick, in this state, was an escaped emigration agent (which the declaration alleges means that he was a fugitive from justice and an exile from his native land, to wit, Hungary); that he was a scoundrel, and associated with other scoundrels; that he was a wily and spurious banker; that he had raised the rent of houses which he owned, but which were not purchased with his own money, but with the moneys that Hungarians had carried to him for the purpose of saving or accumulating; that if as much as \$100,000 should be deposited with him, he, the plaintiff, who had already escaped from Budapest, would again escape (which the declaration alleges means that he would embezzle the moneys of his depositors); that he was a rascal; that he speculated on the stock market with the moneys of his depositors; and that he told lies.

The defendant's plea, which we are asked to strike out as lacking certainty, purports to be a justification. We think it must be stricken out. Where, as in this case, the defamatory charges are general in their nature, the plea of justification must state specific facts showing in what instances and in what exact manner the plaintiff has misconducted himself or has done the things charged against him. 1 Chitty on Pleading, 494; 25 Cyc. 461; 12 Enc. of Pld. & Prac.

82; 1 Starkie on Slander & L. 475; Townsend on Slander & L. 355.

The plea must give the particulars, giving time, place, and circumstances. *Billings v. Waller*, 28 How. Prac. (N. Y.) 97. The plea in question fails to set forth any particular facts showing in what instances and in what exact time, place, or manner the plaintiff has misconducted himself so as to justify the libelous matters charged against him. It merely reiterates the libelous imputations complained of in the declaration, in the words of the declaration, and says that they are true, and further avers that "the said plaintiff had been indicted for and convicted of illegal and false banking in the country of Hungary, and of and for conducting a banking business without the authorization or warrant of law therefor, and of dishonestly receiving and appropriating to his own use the moneys of persons intrusted to him as such banker." Under the rule stated, this plea is clearly bad as a justification of the charges that the plaintiff was an escaped emigration agent, a scoundrel, a rascal, a liar, an embezzler, and that he as a banker in New Brunswick was misusing or misappropriating his depositors' money, etc. A plea which merely reiterates such general charges and avers that they are true is insufficient. *Kerr v. Force*, 8 Cranch, C. C. 8, Fed. Cas. No. 7,730. As we have seen, the particular facts relied upon as justifying the imputation must be set forth specifically. This must be done by the pleader in order that the court may see whether the defendant was justified in the use of the words complained of, and in order that the plaintiff may know precisely what he has to meet and be prepared for it. 18 Enc. of Plead. & Prac. 82.

Nor is the plea sufficient as a justification of that part of the libelous article which charges that the plaintiff is a wily and spurious banker, etc. That part of the plea which avers that the plaintiff was indicted for and convicted of illegal and false banking in the country of Hungary, etc., is clearly insufficient for that purpose. It fails to set forth specifically the time and place, or the facts and circumstances, of the alleged conviction, and also fails to reveal whether the defendant means to say that his justification is because of the conviction of illegal and false banking in the country of Hungary, or whether it is because the plaintiff did actually there conduct an illegal and false banking business. The plea is therefore bad for uncertainty. That was formerly a ground for special demurrer. Since such a pleading is now abolished by our statute, the motion is properly made to strike out the plea. *Van Horn v. Central R. R. Co.*, 38 N. J. Law, 133.

The plea will be stricken out, with leave to amend or plead anew on payment of costs.

(77 N. J. L. 108)

STATE v. ANDREWS.

(Supreme Court of New Jersey. Nov. 9, 1908.)
CRIMINAL LAW (§ 789*)—INSTRUCTIONS—
"REASONABLE DOUBT."

An instruction that a "reasonable doubt" must be one founded upon some evidence that was presented in the case is erroneous, as it excludes all reasonable doubts that may arise from the lack or want of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1921; Dec. Dig. § 789.*

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

(Syllabus by the Court.)

Error to Court of Quarter Sessions, Atlantic County.

John T. Andrews was convicted for forgery, and brings error. Reversed.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

Thompson & Cole, for plaintiff in error.
J. E. P. Abbott and Eckard P. Budd, for the State.

TRENCHARD, J. The plaintiff in error was indicted for forgery and uttering, and on trial in the Atlantic quarter sessions was convicted. The record of conviction is now before this court, with assignments of error based upon exceptions taken at the trial. In the consideration of this case the court has not had the benefit of either a brief or of oral argument upon the part of the state.

The first exception requiring consideration relates to the response of the trial judge to the twelfth request to charge made on behalf of the defendant below. It appears that the defendant was a clerk in the office of Mr. Heston, the comptroller of Atlantic City. His duty was to inspect bills against the city and draw warrants to be signed by the comptroller. The forgery charged is the alteration, raising, and indorsing of a certain warrant after it was signed by Mr. Heston. If the defendant altered, raised, and indorsed the warrant before handing it to Mr. Heston to be signed, the offense charged in the indictment had not been committed. Accordingly the learned trial judge had charged that "if the jury find that the defendant altered the warrant, and signed the indorsement before handing it to Heston for his signature, there must be an acquittal." No one saw the defendant commit the alleged forgery. The testimony of Mr. Heston was undoubtedly sufficient to justify the jury in finding the fact that the alteration and indorsement occurred after he signed the warrant. On the other hand, the jury may lawfully have regarded his testimony, in view of what he said on cross-examination, as throwing no light upon that question. In this posture of the case, the defendant submitted to the trial judge the twelfth request to charge as fol-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lows: "If the jury have a reasonable doubt as to whether the defendant altered or indorsed the paper, or as to whether it was done before or after handing it to Heston, there must be an acquittal." To this request the court responded: "I so charge you, with the further remark that your reasonable doubt as to whether it was before or after must be founded upon some evidence that was presented in this cause, if there is a reasonable doubt." To this an exception was duly taken and sealed, and error assigned thereon.

We are constrained to think that this response of the court did not declare the rule of law which under the circumstances the defendant was entitled to have charged to the jury. The accused was entitled to be acquitted if the jury, because of the state of the proofs as to any fact necessary to conviction, had a reasonable doubt of the defendant's guilt. A doubt, to be reasonable, must arise out of the evidence, or want of evidence, after a full consideration by the jury of all the evidence in the case. 23 Amer. & Eng. Enc. of L. (2d Ed.) 966. As already shown, one fact necessary to be found was that the alleged acts were done before the paper was signed by Heston, and the jury may lawfully have considered that there was no evidence to establish that fact. Under these circumstances, the instruction that a reasonable doubt must be one founded upon some evidence that was presented in the case was erroneous, as it excluded all reasonable doubt that may have arisen from the lack or want of evidence. Mackey v. People, 2 Colo. 13; McElven v. State, 30 Ga. 869; Brown v. State, 105 Ind. 385, 5 N. E. 900; Wright v. State, 69 Ind. 163, 35 Am. Rep. 212; Densmore v. State, 87 Ind. 306, 33 Am. Rep. 96; State v. Case, 90 Iowa, 264, 65 N. W. 149; Hale v. State, 72 Miss. 140, 16 South. 387; Bray v. State, 41 Tex. 560; Bland v. State, 4 Tex. App. 15.

Upon the other assignments of error it is unnecessary to decide.

The judgment must be reversed, and a venire de novo awarded.

(77 N. J. L. 141)

NEWTON TRUST CO. v. ATWOOD.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. TAXATION (§ 335*)—ASSESSMENT—SECURITIES—VALUATION.

The values of property and securities contained in the sworn statement made by the president of a trust company, showing its capital stock and accumulated surplus, and the values of the securities exempt from taxation, submitted to a tax assessor, are not binding upon the assessor in making an assessment for taxes against such company.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 562; Dec. Dig. § 335.*]

2. TAXATION (§ 496*)—ASSESSMENT—COUNTY BOARD OF TAXATION—PRESUMPTIONS.

In the absence of evidence to the contrary, the presumption is that the county board of

taxation, in revising and correcting the tax lists and duplicates, and in increasing or decreasing the assessed value of any property pursuant to section 4 of a supplement to "An act for the assessment of taxes" (P. L. 1906, p. 210), acted properly and upon due proof. The burden of proving facts to decrease such assessment rests upon the taxpayer.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 496.*]

(Syllabus by the Court.)

Certiorari, on the prosecution of the Newton Trust Company, against Miles Atwood, collector of the town of Newton, to review an assessment. Assessment affirmed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Charles M. Woodruff, for prosecutor. Joseph Coult, Jr., for defendant.

VOORHEES, J. The contest in this case arises over the assessment for taxes for the year 1907 against the prosecutor. Taxation of trust companies is regulated by the general tax act (P. L. 1903, p. 405, § 18). They are assessed upon the full amount of capital and accumulated surplus. This act repeals so much of the "Act concerning trust companies" (P. L. 1899, p. 467, § 29) as relates to the taxation of these corporations. The method of ascertaining, for the purposes of taxation, the full amount of capital and accumulated surplus, has been pointed out in *Fidelity Trust Co. v. Board of Equalization of Taxes of New Jersey* (decided at the present term of this court) 71 Atl. 61. The plan seems to have been followed substantially in the case under consideration. It appears that the assessor adopted as the basis of his assessment a statement made by and under the oath of the president of the prosecutor, showing that the company had capital stock \$100,000, surplus \$40,000, and undivided profits \$18,000—total, \$158,000. It also showed in detail securities held by it exempt from taxation valued at \$93,554.10, which were deducted, leaving a balance of \$64,445.90. Among the assets so returned was real estate which cost \$22,000. This was deducted from the above, and the assessor fixed its taxable value at \$15,000, which reduced the above balance to \$57,445.90. The assessor then made the assessment at \$42,500 upon the personal property, and \$15,000 upon real estate—total, \$57,500. The county board of taxation, pursuant to the power conferred upon it "to increase or decrease the assessed value of any property not truly valued" (P. L. 1906, p. 214, § 4), revised the duplicate and added to the assessment of the personal property the sum of \$15,000, raising it to \$72,500. The contest is over this increase. The stipulation filed in the case admits "that the action of the board was legal in making such increase, and that such increase was as to the personal estate alone."

It is argued that this amount was arbitra-

ally added and was without warrant of law, because the prosecutor had submitted to the assessors the sworn statement above mentioned, which it insists must bind the assessor and control the values. To adopt this argument would allow the taxpayer to usurp the functions of the assessor and the county board. The law casts upon the assessor and the boards of taxation the duty to make and fix the valuations. The prosecutor further insists that the county board reduced the values of the exempt securities by the above amount, and by that process increased the assessment. The proceedings of the county board are not before us, and the testimony taken under this writ fails to disclose any proof or facts submitted to it. It may be remarked that if the exempt securities had been thus reduced it would be clearly illegal, unless a like reduction in value of these same securities had been made where they form part of the total assets, in which event the taxable balance would remain unchanged. In the absence of evidence to the contrary, the presumption is that the county board of taxation in revising and correcting the tax lists and duplicates, and in increasing or decreasing the assessed value of any property pursuant to section 4 of the supplement to "An act for the assessment and collection of taxes" (P. L. 1906, p. 210), acted properly and upon due proof. The burden of proving facts to decrease such assessment rests upon the taxpayer.

The assessment will be affirmed, with costs.

(77 N. J. L. 123)

STATE v. BAANS.

(Supreme Court of New Jersey. Nov. 9, 1908.)

DISORDERLY HOUSE (§ 16*)—EVIDENCE.

The defendant was indicted for keeping a disorderly house, and, upon the trial, proof was admitted of specific acts of immorality committed elsewhere by women who obtained admission to defendant's public house. *Held*, the testimony was inadmissible to establish the general reputation of the women.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. §§ 23, 24; Dec. Dig. § 16.*]

(Syllabus by the Court.)

Error to Court of Quarter Sessions, Hudson County.

Cornelius P. Baans was convicted of keeping a disorderly house, and brings error. Reversed.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

Weller & Lichtenstein, for plaintiff in error. Pierre P. Garvin, for the State.

MINTURN, J. The writ of error in this case brings up for review the conviction, on the verdict of a jury, of the defendant in

the Hudson quarter sessions, for keeping a disorderly house in the city of Hoboken.

The assignments of error are directed mainly to the rulings of the trial court upon questions of evidence. Burrone, a detective, was allowed to testify, over objection, concerning the arrest and conviction, for offenses committed elsewhere, of certain confessedly lewd women who were admitted to defendant's public house. Regarding one of these, the witness testified, in reply to the prosecutor's question, "She pleaded guilty in open court." Regarding another, he testified that he arrested her and "She had been fined and sent away." Regarding another, "She pleaded guilty, and was sentenced to fifteen days." And of still another he testified, "She was sentenced to thirty days, and the man was held for the grand jury."

It should suffice to say, for the purposes of this case, that the general reputation of these women, under the well-established rules of evidence, could not be shown by this method of proof. Evidence of specific acts of immorality are not competent to prove the general reputation of a witness in the community, so as to charge the defendant, in contemplation of law, with knowledge of such fact. Knowledge, actual or constructive, of the general immoral character of the habitués of a public place, forms the gravamen of the indictment; and specific acts of immorality are irrelevant and inadmissible upon that issue. Stephen's Digest, 303; Rice on Evidence, 1243; 16 Cyc. 1275, and cases; Bullock v. State, 65 N. J. Law, 557, 47 Atl. 62, 86 Am. St. Rep. 668.

We conceive that the admission of this testimony was prejudicial to the defendant, and, without considering the other assignments of error, we conclude that the judgment of conviction should be reversed.

(77 N. J. L. 97)

METTLER v. DELAWARE, L. & W. R. CO.
(Supreme Court of New Jersey. Nov. 14, 1908.)

CARRIERS (§ 314*)—INJURY TO PASSENGER—EVIDENCE.

A declaration averring, in effect, that the defendant, a common carrier of passengers, so negligently managed the operation of its railroad, and so failed in the exercise of reasonable precaution, that the plaintiff, a passenger, in a careless egress from the car, while it was at a standstill at a station, stepped upon a piece of loose, rounded iron that lay carelessly and negligently concealed upon the platform of the car, whereby he was thrown and injured, states facts raising a duty on the part of the defendant to use a high degree of care to keep the platform of its car safe for the proper use of passengers, and discloses a breach of that duty resulting in injury to the plaintiff, and is good on demurrer.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1275½; Dec. Dig. § 314.*]

(Syllabus by the Court.)

Action by James Mettler against the Delaware, Lackawanna & Western Railroad

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Company. Demurrer to declaration overruled.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

John Francis Cahill and John A. Bernhard for plaintiff. McCarter, Williamson & McCarter, for defendant.

TRENCHARD, J. The declaration in this case alleges in substance that the defendant owned and operated a steam railroad as a common carrier of passengers; that it received the plaintiff as a passenger on January, 2, 1905, and undertook to transport him from Hackettstown to Newark; and that it was the duty of the defendant to carry him on its railroad in safety, and with due and proper care. Then follows the allegations: "Yet the said defendant, by its servants and agents, so negligently, carelessly and unskillfully managed the operation of said railroad, and failed in the exercise of reasonable precaution, that the said plaintiff, while emerging from one car of said train and about to enter another thereto attached while said train was standing at a station, stepped from the interior of said car to and upon the platform thereof, and thereupon, while in a careful act of egress, stepped upon a piece of loose, rounded iron, which in the darkness, it being then after 7 o'clock in the evening of said day and year last aforesaid, lay carelessly and negligently concealed upon said platform, a menace to life and limb," whereupon the plaintiff was thrown from the platform of the car, and received the injuries for which he sues.

To this declaration the defendant has interposed a demurrer, and for grounds therefor, assigns and relies on the following: (1) That the declaration fails to state that the alleged injury received by the plaintiff was due to any negligence on the part of the defendant. (2) That it does not appear that the acts of negligence charged to the defendant in the declaration caused the injury.

The defendant does not dispute that the declaration sufficiently charges that the plaintiff was a passenger, nor is it denied that the company was under a duty to use a high degree of care to protect him from danger while upon its cars. *D. L. & W. R. R. Co. v. Dailey*, 37 N. J. Law, 526; *Whalen v. Consolidated Traction Co.*, 61 N. J. Law, 606, 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723. The sole contention is that the declaration fails to state any facts showing a breach of such duty, or which connect the injury with the omission. We think there is no merit in the contention. The declaration alleges, as we have seen, that the defendant so negligently managed the operation of its railroad, and so failed in the exercise of reasonable precaution, that the

plaintiff in a careful egress stepped upon a piece of loose, rounded iron carelessly and negligently concealed upon the platform of the car, whereby he was thrown and injured. This, we think, states facts showing a breach of the defendant's duty to use a high degree of care to keep its platform, provided for the egress of passengers, safe for such purpose. Of course, the declaration does not allege that an employé negligently left the iron upon the platform, or that an employé negligently failed to discover it. It was unnecessary so to do. It does state that the iron was lying there when the train was at a standstill at a station, at which time the platform is presumed to be safe. Whether or not the iron was there long enough to render the company liable for failure to discover it by inspection or observation (in case it did not place it there) is a matter of defense which the plaintiff need not aver, as that more properly comes from the defendant. The facts stated disclose the existence of a duty, and its breach, resulting in injury to the plaintiff, which is all that is essential. *Millville Gas Light Co. v. Sweeten* (N. J. Sup.) 68 Atl. 1067; *Breese v. Trenton Horse B. R. Co.*, 52 N. J. Law, 250, 19 Atl. 204.

The plaintiff is entitled to judgment on the demurrer.

(77 N. J. L. 113)

LOH v. BROADWAY REALTY CO.

(Supreme Court of New Jersey. Nov. 16, 1908.)

1. CONTRACTS (§ 323*)—ACTION—SUBSTANTIAL PERFORMANCE.

Whether, under the testimony, a building has been substantially completed so as to entitle the plaintiff to recover for the value of his work under the contract, is a question for the jury.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1547; Dec. Dig. § 323.*]

2. CORPORATIONS (§ 433*) — AGENTS — EVIDENCE.

Whether the president of defendant company, who was present during the progress of the work, directing and supervising, was there as the agent of the company, under the testimony, was a question of fact for the jury.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1744; Dec. Dig. § 433.*]

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by Frank Loh against the Broadway Realty Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

Frederick N. Eberhard, for plaintiff in error. J. Emil Walscheld, for defendant in error.

MINTURN, J. The plaintiff, a builder, and defendant corporation, entered into a contract in writing under seal, whereby the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

former agreed, for the sum of \$13,785, to erect a brick building upon the land of the defendant in the town of Union, in the county of Hudson, "according to certain plans and specifications," the latter of which contained the provision that all the work and material supplied should be to the entire satisfaction of the owner and architect. No architect was appointed to supervise the work, but it appears from the testimony that the president of the defendant company was at the building daily, "conferring with the plaintiff and the subcontractors," and exercising such authority as an architect generally exercises in directing the progress of the work, ordering extra work, and agreeing with the builder upon changes in the plans whenever it was considered necessary to make changes. The work in some numerous details was not completed; but plaintiff received from defendant the various payments due according to the terms of the contract, excepting a balance of \$2,915, and a bill for extra work of \$169, making a total claim of \$3,084, to recover which he instituted this suit. The trial of the case under the pleadings proceeded upon the theory that the only questions involved were, first, whether the defendant had accepted the work, and, secondly, if not accepted, whether it had been substantially completed. The court charged the jury that the answer to these inquiries would solve the question of defendant's liability under the contract; and the court's exposition of the law in that respect was correct under the authorities in this state. *Dyer v. Lintz* (N. J. Sup.) 68 Atl. 908; *Bozarth v. Dudley*, 44 N. J. Law, 304, 43 Am. Rep. 373; *Isetts v. Bliwise*, 72 N. J. Law, 102, 60 Atl. 200; *Feehey v. Bardsley*, 66 N. J. Law, 239, 49 Atl. 443.

The refusal of the court to grant a nonsuit, and its refusal to direct a verdict, are made the grounds upon exceptions for the main assignments of error. But we find no error in this respect, since it was entirely within the province of the jury to infer from the facts established by the testimony in the case, as well as from the admission at the trial of defendant's counsel, that Eastman's authority in the direction of the work was not to be questioned (case, p. 34); that Eastman was present daily during the progress of the work, conferring with the plaintiff, and the subcontractors, as to the progress and direction of the work, as the agent of the defendant. The jury under this testimony might properly infer that Eastman's failure to object to items of the work that defendant now finds objectionable was proof sufficient that such items were satisfactory to defendant at the time. In such event, if he was present in the status, not as president, but as agent of the defendant company, the defendant is now estopped from complaining, by his failure to object or complain at the

time. 16 Cyc. 765, and cases; *McKevitt v. Hoboken*, 45 N. J. Law, 482; 2 Rice on Evidence, and cases.

The same reasoning applies to the assignments of error relative to the extra work, for, under the testimony, it was for the jury to determine the question of Eastman's authority in the premises, so as to charge the defendant with the consequence of his acts under the contract. *Qui facit per alium, facit per se*.

Nor does the fact that the plaintiff entered the building, during the pendency of this suit, to protect the plumbing against the severity of the weather, militate against his rights under the contract. In view of the noncommittal attitude of the defendant, and its refusal to accept the house, it was plaintiff's right, if not his duty, to protect the property, and thus mitigate the damages. *Ramsey v. Perth Amboy Co.* (N. J. Ch.) 65 Atl. 46; *Hale on Damages*, p. 64, and cases; 18 Cyc. pp. 71-78, and cases.

The conception thus entertained of the legal principles applicable to this case renders unnecessary any discussion of the remaining assignments of error, which we conceive to be, in effect, but amplifications of the main contentions above determined.

The judgment will be affirmed.

(77 N. J. L. 121)

STETSON v. BALTIMORE & N. Y. RY. CO.
(Supreme Court of New Jersey. Nov. 16, 1908.)

RAILROADS (§ 348*)—ACCIDENT AT CROSSING.

The plaintiff at midnight drove his horse and covered wagon upon defendant's track, and was injured under circumstances from which it must be inferred that he could have seen and heard the train had he performed his legal duty. *Held*, that his negative testimony that he looked and listened, but did not see or hear the approaching train, will not support a verdict in his favor, when it is apparent in view of the great weight of the testimony and the circumstances, that if he had done so he must have seen and heard the train.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1146; Dec. Dig. § 348.*]

(Syllabus by the Court.)

Action by J. Egbert Stetson against the Baltimore & New York Railway Company. Verdict for plaintiff. Rule to show cause made absolute.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

John A. Bernhard, for plaintiff. Edw. Q. & Geo. M. Keasbey, for defendant.

MINTURN, J. The plaintiff, about midnight upon a stormy night, drove his horse and covered wagon upon defendant's track where it crossed St. George avenue, between the cities of Elizabeth and Rahway. The railroad consisted of a single track laid in the center of defendant's right of way. The

crossing was fully exposed to view by the light from an electric lamp in the immediate vicinity, and a warning or sign post to indicate the crossing was erected near by. The track was straight and was visible up the direction from which the train came for a distance of three-quarters of a mile from the crossing; the only obstruction to the view at all near the crossing being a growth of underbrush or bushes, which was located about 40 feet from the track in the direction from which the plaintiff came.

The plaintiff testifies that he pulled up his horse and looked and listened before entering on the crossing, and, seeing no light and hearing no bell or whistle, drove on and was struck, as it appears, by one of defendant's freight trains. The plaintiff's story was more or less supported by Barnes, a colored man who drove a horse and wagon a short distance behind the plaintiff, and by one Grother, who came up after the accident. The entire train crew were called for the defendant, and testified in support of the defendant's contention that none of the alleged elements of negligence complained of by the plaintiff existed to cause this accident. According to them, the headlight was lit as well as two classification lights upon the engine, and the whistle was blown 1,800 feet from the crossing, and the emergency whistle, 400 feet away; the bell was ringing continually. The engine driver, the conductor, and the engineer went to where the plaintiff was lying unconscious immediately after the accident, and heard Barnes, his witness, say to him, "Bert, Bert, I told you not to drive on." "I told him to look out; I said, 'Look out, Bert, because there is a train coming.'"

If the testimony of the train crew is to be believed, and no reason is apparent why it should not be, the defendant, upon the great weight of the evidence, failed to perform no duty imposed upon it by law. If Barnes, who was driving behind the plaintiff, could warn him of an approaching train and caution him not to drive on, it is difficult to perceive upon what theory the plaintiff can excuse his rashness. The verdict can be supported only upon the theory that the testimony of the defendant's witness must be false because of the plaintiff's inability to hear a whistle or a bell or to see a light, which indicated the approach of a train, which his own witness heard coming and cautioned him to avoid. We may entirely leave out of consideration the fact that the personal safety of the train crew demanded that the headlight should be lit for the safe and intelligent operation of the train, and we are still confronted with the fact that, if this plaintiff pulled up his horse and looked and listened before attempting to cross, the noise incident to a moving heavy freight train must have been sufficiently audible to enable him to conclude that the train was approaching. The failure of the

defendant, if it were conceded, to perform its statutory duty, will not excuse the plaintiff from performing the duty imposed upon him by law, and his failure in that respect is contributory negligence. *P. R. R. v. Righter*, 42 N. J. Law, 180; *Farese v. North Jersey St. Ry. Co.* (N. J. Sup.) 69 Atl. 959.

The great weight of the testimony, as well as the inherent improbability of the plaintiff's story under the conditions surrounding him, lead us to conclude that this rule should be made absolute.

(77 N. J. L. 115)

SCHAAF v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey. Nov. 9, 1908.)

EASEMENTS (§ 70*)—OBSTRUCTION—DAMAGES.

Upon proof of slight inconvenience only, and without any proof of substantial damage to plaintiff in the use of a right of way, a verdict for \$400 is set aside.

[Ed. Note.—For other cases, see *Easements*, Dec. Dig. § 70.*]

(Syllabus by the Court.)

Action by Catharine L. Schaaf against the Pennsylvania Railroad Company. Verdict for plaintiff. Rule to show cause made absolute.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

Alan H. Strong and Charles E. Gummere, for the rule. Vroom, Dickinson & Scammell, opposed.

MINTURN, J. The plaintiff obtained a verdict for \$400 at the Mercer circuit, as damages for the obstruction of a right of way which she claimed as appurtenant to a lot which she owned, and upon which lot stood a store and dwelling house. The lot is situated on the easterly side of Rose street, in the city of Trenton, to which the way in question led. The record shows that for many years the plaintiff's father, who was her predecessor in title, used this easement as a roadway. It adjoined the plaintiff's lot on the south, and ran parallel with the Delaware & Raritan Canal, and at right angles to Rose street. Between the way and the canal was a strip of land which has been used at times as part of the canal towpath until 1885, when the defendant company constructed a siding upon it, and the properties lay relatively in this condition until 1906, when the defendant company elevated its siding a distance of about two feet. The plaintiff then made the claim that the easement appurtenant to her property was interfered with by the new construction, and instituted this suit to recover damages for the alleged trespass. The plaintiff contended that the siding had been moved over toward her property, so that while the way could be used practically to the same extent and for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the same purposes as formerly, yet a loaded hay wagon could not be hauled to her premises, although a wagon with a small load of hay could be hauled there. Such, substantially, seems to be the extent of the trespass; while, opposed to this contention, was the testimony of the railroad engineer, that the siding remained substantially upon its old alignment, and that the only change made consisted in its elevation.

Testimony was offered by the plaintiff tending to show damage to plaintiff's business as a proximate result of the trespass, which testimony, although excluded by the court, we think was entirely relevant, as the measure of damages in trespass is compensation for the loss. *Outcalt v. Durling*, 25 N. J. Law, 448; 13 Cyc. pp. 57, 156, and cases.

We do not think, however, that the testimony now in the case presented as a basis for damages more than a question of nominal inconvenience to the plaintiff. The verdict established the right to the way as an easement appurtenant to her land; but our examination of the case discloses no testimony upon which the jury could award her more than nominal damages for a trespass purely technical in its character and results. *Phillips v. Phillips*, 34 N. J. Law, 209; *Albright v. Cortright*, 64 N. J. Law, 330, 45 Atl. 634, 48 L. R. A. 616, 81 Am. St. Rep. 504; 13 Cyc. p. 14, and cases.

The rule to show cause is made absolute.

(77 N. J. L. 57)

STATE MUT. BUILDING & LOAN ASS'N OF NEW JERSEY v. BATTERSON.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. JUDGMENT (§ 45*)—BY CONFESSION—WARRANT OR POWER OF ATTORNEY—REQUISITES AND SUFFICIENCY.

Where a bond and warrant of attorney to confess judgment is given to secure the payment of a sum of money, at such times, in such places, and in such installments as may be required by the Constitution, by-laws, and regulations of a building and loan association, with the provision that upon default the whole may become immediately due at the option of the obligee, judgment may be entered upon the bond and warrant, notwithstanding no definite date of payment is mentioned in the bond.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 62; Dec. Dig. § 45.*]

2. MORTGAGES (§ 497*)—FORECLOSURE—DECREE—CONCLUSIVENESS—MATTERS CONCLUDED.

Where a bond and mortgage are given for the same indebtedness, and a decree is had in favor of the mortgagee and obligee upon a bill to foreclose the mortgage, that decree is conclusive, in an action brought upon the bond for the deficiency, as to any defense that was available in the foreclosure suit.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1473; Dec. Dig. § 497.*]

(Syllabus by the Court.)

Motion by James G. Batterson to open a judgment entered against him by the State

Mutual Building & Loan Association of New Jersey upon a bond and warrant of attorney. Motion denied.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

Francis Scott, for the rule. Harvey F. Carr, opposed.

SWAYZE, J. This is a motion to open a judgment entered upon a bond and warrant of attorney. The bond was secured by a mortgage, which was foreclosed. The case is reported in 67 N. J. Eq. 595, 59 Atl. 469. It was there held that the mortgage did not secure the premiums, fines, and charges, for the payment of which, together with the principal and interest, the bond was conditioned. In every other respect the decree in favor of the complainant in the foreclosure suit was sustained. Judgment was then entered upon the bond, by virtue of the warrant of attorney, for the penalty of the bond; and it is this judgment which the defendant now seeks to set aside. This method of entering the judgment has been already sustained by this court. *Earl v. Jenkins*, 42 N. J. Law, 416, 58 Atl. 1086. It is urged, however, that the bond in the present case is not such a bond as is contemplated by the act directing the mode of entering judgment on bonds with warrants of attorney to confess judgments (Gen. St. 1905, p. 172), for the reason that section 5 limits the right of the obligee to apply for the entry of judgment pursuant to the warrant, to a time after the day of payment mentioned in the bond. The bond in this case provides for the payment of the moneys secured, at such time, in such places, and in such installments as now are, or may hereafter be, required by the Constitution, by-laws, and regulations of the obligee. It contains also a special provision that, if default is made in the payment of interest and principal, premiums, fines, charges, or tax, for the space of 30 days after the same shall first become payable then the whole principal debt shall, at the option of the obligee, become due and payable immediately; and payment of said principal debt, and all interest thereon, may be enforced, and recovered at once, anything contained in the bond to the contrary notwithstanding. It is not denied that there had been default, and that the 30 days had elapsed, so that the whole amount became due at the option of the obligee. If so, the date of payment had arrived when the judgment was entered, and it would be too narrow a construction to say that that day of payment was not mentioned in the bond, because it was not fixed by reference to the calendar, but by reference to a default of the obligor. The case is very different from the case of *Hildreth v. Harwood*, 24 N. J. Law, 51, where the bond, on its face, showed that

it was subject to the conditions of another agreement.

Most of the other questions sought to be raised were questions that might have been raised in the foreclosure suit, and were necessarily involved therein. As to these questions, the matter is *res adjudicata*. This covers the objection that the loan was made in New York, and was usurious under the New York statute, so that no recovery could be had therefor.

There seems, however, to have been an error in computing the fines. The fines should cease with the commencement of the foreclosure suit. *Manhattan & S. Savings & Loan Association v. Massarelli* (N. J. Ch.) 42 Atl. 284. This error, however, does not vitiate the judgment, which, in any event, would be entered for the penalty of the bond. If an execution has been issued, the indorsement thereon may be corrected.

The motion to open the judgment is denied, with costs.

(77 N. J. L. 138)

**NEW JERSEY SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS
et al. v. KNOLL.**

(Supreme Court of New Jersey. Nov. 9, 1908.)
FINES (§ 19*)—REVERSAL OF CONVICTION—RESTITUTION.

Where a fine and costs have been imposed on a conviction, under an act for the prevention of cruelty to animals, approved March 11, 1880 (P. L. p. 212), and the supplements thereto, instituted by the Society for the Prevention of Cruelty to Animals and an informer, and had been paid to the justice of the peace before whom such conviction was had, *held*, upon reversal of such conviction, that a writ of restitution would issue against the district society and the informer, requiring each to restore a moiety of such fine, and to repay the original costs of prosecution collectively.

[Ed. Note.—For other cases, see *Fines*, Cent. Dig. §§ 20-22; Dec. Dig. § 19.*]

(Syllabus by the Court.)

Anthony Knoll was convicted of cruelty to animals, and his fine was divided between the informer and the New Jersey Society for the Prevention of Cruelty to Animals. Conviction was reversed on appeal, and he applies for writ of restitution. Writ granted.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Coult, Howell & Smith, for prosecutor. Manning & Atkinson, for respondents.

VOORHEES, J. This is an application for a writ of restitution. Anthony Knoll, having been convicted before a justice of the peace on a charge of cruelty to animals, was fined \$20 and \$3.60 costs. Knoll, the prosecutor, carried the conviction to this court by writ of certiorari, and there the conviction was reversed, with costs, and the court adjudged that "the prosecutor in certiorari be restored to all things that he had lost by

reason of the said judgment." The prosecution was through the New Jersey Society for the Prevention of Cruelty to Animals. By section 5 of the act of incorporation of that society (1 Gen. St. 1895, p. 32) it is provided that one-half of the fines and forfeitures collected through the instrumentality of the society, its members or agents, shall accrue to the benefit of the society; and section 11, p. 32, provides that "of all fines, * * * collected * * * one-half shall be paid by the justice or by the clerk or other officer of the court receiving the same, to the informer, complainant, or prosecutor, and the other half to the district society if one is in existence, and if not, then to the New Jersey society." Section 15, p. 33, provides for the organization of district societies. Section 31, p. 37, provides substantially for the distribution of the fines in like manner. The record in this case before the justice of the peace is entitled, "Adolph E. Roede, Agent for the New Jersey Society, etc., Hudson County District v. Anthony Knoll, Defendant." The warrant, after reciting that "whereas Adolph E. Roede, an officer and agent of the New Jersey & Hudson County District Societies, etc., has made complaint," authorizes the apprehension of the defendant, "to answer the New Jersey Society for the Prevention of Cruelty to Animals, Adolph E. Roede, prosecutor." From this it would appear that there was a district society in the county of Hudson, and that Roede was the prosecutor or informer. Therefore, this fine having been levied, it was the duty of the magistrate to divide the money between the prosecutor and the district society. It would seem, therefore, that in order to issue a writ of restitution both the prosecutor and the district society which was entitled to the moiety of the fine should be before the court, and that because the whole of the fine never could legally be collected by or paid to the district society, it should be in no case liable for the whole amount, but only for the half, and the prosecutor for the other half. The case would be different if the money was all collectible by the society, and the society was authorized to distribute a share of it to the informer. The stipulation of facts shows that the entire fine was paid to the justice, and by him turned over to the district society. This was contrary to the statute. He ought to have divided it. The ordinary rule in a case of writ of restitution is clear. It will go for the whole amount of fine, as well as the costs, in order that the prosecutor in certiorari may be made whole (*Arrowsmith v. Van Arsdale*, 21 N. J. Law, 471), but it is not clear that it will issue against one of two persons for the whole amount of such fine or penalty, which must by law be distributed by the court as the agency of the law, as provided by the above-mentioned statute.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Where the law disposes of the proceeds of the litigation, in definite proportions by the hands of its own officer, the writ should go against those to whom the law gives such proceeds in like proportion.

An order will be made that the writ issue requiring the district society and the informer each to restore a moiety of the fine, and requiring them collectively to repay the costs which were paid to the justice of the peace on the original judgment. The writ will also include the costs of this proceeding, to be in like manner levied against the society and the informer.

(77 N. J. L. 117)

SHERWIN v. STERNBERG et al.

(Supreme Court of New Jersey. Nov. 9, 1908.)

MONEY RECEIVED (§ 6*)—RIGHT OF ACTION.

Defendants entered into a written agreement with plaintiff, wherein they agreed to incorporate as L. Sternberg & Co., upon the strength of which plaintiff contributed \$1,500 to defendants. The corporation was never formed, and in a suit by plaintiff to recover the amount paid, held that, the consideration having failed, the defendants were liable under the agreement as joint contractors in an action of assumpsit.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 27; Dec. Dig. § 6.*]

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by Anna Sherwin against Lazar Sternberg and Rose Sternberg. Judgment for plaintiff, and defendants bring error. Affirmed.

Argued June term, 1908, before the CHIEF JUSTICE, and TRENCHARD and MINTURN, JJ.

A. T. Dear and George O. Tennant, for defendant in error. Frank E. Bradner, for plaintiffs in error.

MINTURN, J. The plaintiff and defendants entered into a written contract, whereby they agreed, within five days from the date thereof, that the defendants would form a corporation, to be known as L. Sternberg & Co., in pursuance of which the plaintiff contributed to the defendants, one of whom, at least at that time, was conducting a department store business in Jersey City, the sum of \$1,500, for which the plaintiff was to receive stock and a position in the business. The defendants failed to form the corporation within the time limited, or at all, and the plaintiff brought suit upon the common counts to recover the amount paid. The trial court directed a verdict upon this testimony for the plaintiff, and this writ of error is intended to review the correctness of that direction.

The testimony demonstrated that the defendants received the money; that an ef-

fort was made to incorporate, but that the Secretary of State refused to allow the incorporating papers to be filed because of a similarity of title to that of an existing corporation. Defendant's contention that the filing of the incorporation certificate with the county clerk resulted in the formation of at least a de facto corporation is without merit, for the reason that the plaintiff's agreement was to contribute to the formation of a de jure corporation. Furthermore, that question was not raised by exception at the trial, and it cannot therefore be noticed here. *Associates v. Davison*, 29 N. J. Law, 415; *Potts v. Evans*, 58 N. J. Law, 384, 34 Atl. 4. The contention that the defendant Rose Sternberg occupied the status only of a surety is erroneous. Her status was fixed by the agreement in evidence in which she acknowledged herself to be a "party of the first part," and further acknowledged that the plaintiff had contributed \$1,500 for the purpose of the incorporation, "the receipt whereof is hereby acknowledged by the said parties of the first part." She is therefore estopped from denying that she had an interest in the business, or that she was benefited by the payment. 16 Cyc. 679, and cases; *State Bank v. Chetwood*, 8 N. J. Law, 1; L. R. 10 C. P. 315; 2 Rice on Ev. 708. The facts proved make it clear as a matter of law, that, under the terms of the agreement, the defendants were liable as joint contractors; and, upon the well-settled principles applicable to that status they became liable, in an action of assumpsit, upon failure of the consideration expressed in the agreement, to repay to the plaintiff the money advanced by her as quid pro quo for the performance of the defendant's agreement. 4 Cyc. 229, and cases; 1 Chitty, Pl. 99; 1 Parsons on Cont. 22; *Alpaugh v. Wood*, 58 N. J. Law, 638, 23 Atl. 261; *Cory v. Freeholders*, 47 N. J. Law, 181; *National Trust Company v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632.

Entertaining this view of the case, we find the remaining assignments of error without merit, and conclude that the judgment should be affirmed.

(77 N. J. L. 214)

LANG v. BERRIEN, Receiver of Taxes, et al.

(Supreme Court of New Jersey. Nov. 5, 1908.)

TAXATION (§ 40*)—PLACE OF TAXATION—ASSESSMENT—CLASSIFICATION—"IN SUCH PLACE."

Chapter 52 of the Laws of 1835 (P. L. p. 61) provides "that whenever any person, firm, or corporation shall, subsequently to the time fixed by law, for the completion of the annual valuation and assessment for local taxes in any taxing district in this state bring or send into such taxing district any stock of goods or merchandise to be sold or disposed of in a place of business temporarily occupied for their sale, without the intention of engaging in permanent

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

trade in such place," such stock shall be taxed at the general rate for the current year. *Held*, that the words "in such place" must be construed as referring to the "place of business"; and that, when so construed, the statute creates an unsubstantial and illusory classification of property for taxation, and is therefore unconstitutional.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 40.*]

(Syllabus by the Court.)

Certiorari on the prosecution of Morris Lang, against Andrew J. Berrien, receiver of taxes, and the inhabitants of the city of Trenton, to review an assessment. Tax set aside.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

A. S. Appleget, for prosecutor.

PARKER, J. This writ brings up for review an assessment of taxes assessed and levied against the prosecutor by the commissioners of assessment of the city of Trenton on January 31, 1908, for taxes of the year 1907 on personal property valued at \$5,500, none of which was brought into the city of Trenton until January 28, 1908. The tax was levied under, and by virtue of an act of the Legislature passed March 9, 1885 (P. L. p. 61; Gen. St. 1895, p. 3418), entitled "An act to provide for the taxation of the property of persons engaged temporarily in business in taxing districts subsequently to the completion of the annual assessments by the local assessors." Its first section reads as follows: "That whenever any person, firm or corporation shall, subsequently to the time fixed by law, for the completion of the annual valuation and assessment for local taxes in any taxing district in this state bring or send into such taxing district any stock of goods or merchandise to be sold or disposed of in a place of business temporarily occupied for their sale, without the intention of engaging in permanent trade in such place, the owner, consignee or person in charge of said goods or merchandise shall immediately notify the local assessor or board of assessors by whatever name such officer or board shall be designated; and thereupon the assessor or board of assessors, as the case may be, shall at once proceed to value the said stock of goods and merchandise at its true value, and upon such valuation the said owner, consignee or person in charge shall pay to the collector of taxes of the township, town, borough or city, as the case may be, a tax at the rate assessed for state, county and local purposes in the taxing district in the year then current; and it shall not be lawful to sell or dispose of any such goods or merchandise as aforesaid in such taxing district until the assessor or board of assessment shall have been so notified as aforesaid and the tax assessed thereon duly paid to the collector."

The second section provides that for failure to notify the taxing authorities as above required, or to pay the tax for selling any of the property before the tax is paid, the owner of the property shall forfeit twice the amount of the tax, to be recovered in an action of attachment. The prosecutor rented a temporary place of business in Trenton, and on January 28, 1908, had it stocked with goods for immediate sale, when he was notified by one of the city assessors to make report as required by section 1. He accordingly did so, and the commissioners, accepting his valuation, immediately imposed a tax at the current rate of 1907, and returned it to the receiver of taxes for collection.

The assessment is attacked by prosecutor on the ground that the act quoted violates the constitutional provision that "property shall be assessed for taxes under general laws and by uniform rules according to its true value" in that the first section lays down an illusory classification of the property taxable. In this we agree with him. A careful reading of section 1 discloses that the class of property made taxable embraces merely any stock of goods or merchandise brought or sent after the date of annual valuation and assessment into any taxing district, to be sold or disposed of in a place of business temporarily occupied for their sale without the intention of engaging in permanent trade in such place; i. e., such place of business. Whatever may be said as to the propriety of a classification embracing all property intended for sale in a temporary place of business without an intention on the part of the owner of engaging in permanent trade within the taxing district, all that need be said now is that no such classification is contained in the statute under discussion. An essential criterion of the class in question is the absence of intention on the part of the owner to engage in permanent trade in the place of business temporarily occupied by him. Under this act goods are taxable whose owners intend to engage in permanent trade in the taxing district, but only temporarily in the particular place of business therein, even though their occupancy becomes permanent; while in the case of an owner intending to engage in permanent trade in the identical place of business the goods are exempt until the next regular day for valuation and assessment, though such owner in fact vacate before that time and leaves the district, so that his occupancy is in fact temporary. Such a classification seems neither logical nor substantial. It may be that by the word "place" the draftsman of this act intended "taxing district"; but, if so he failed to express that intention. Under well-recognized rules of construction, the words "such place" must be considered as relating to the last

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"place" previously mentioned; i. e., the place of business.

For these reasons, we regard the act in question as unconstitutional and invalid. The tax brought up will therefore be set aside.

(77 N. J. L. 231)

BOWELL v. PUBLIC SERVICE CORP.
(Supreme Court of New Jersey. Nov. 16, 1908.)
NEW TRIAL (§ 72*)—WEIGHT OF EVIDENCE—NUMBER OF WITNESSES.

It does not follow that, because the number of defendant's witnesses exceed those of the plaintiff, a verdict for the latter will ipso facto be set aside.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 146; Dec. Dig. § 72.*]

(Syllabus by the Court.)

Action by Isaac Bowell against the Public Service Corporation. Verdict for plaintiff. Rule to show cause discharged.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

E. A. Armstrong, for the rule. John Boyd Avis, opposed.

PER CURIAM. There was no question made in this cause regarding the fact that the plaintiff was injured by having been thrown from his wagon, at about 7 o'clock in the evening, on Federal street, in the city of Camden, by the impact of a trolley car, which struck the plaintiff's wagon in the rear. The contention strenuously urged by defendant at the trial was that the car which caused the damage was not defendant's car, but that of the Camden & Trenton Railway Company, which was operating on the same track. This it will be perceived presented an issue of fact, which the court, upon the motion to nonsuit, and again at the close of the case upon a motion to direct a verdict, properly submitted to the jury. The verdict for the plaintiff upon this issue is now attacked by defendant, upon the ground that it is against the weight of evidence. The rule is fundamental, and the decisions are numerous in this court, that if there be any evidence which raises a debatable question upon the issue involved, a case is presented for the consideration of the jury. *Smith on Negligence*, p. 15; *P. R. R. v. Righter*, 42 N. J. Law, 180. Nor does it follow, as urged by defendant, that because the number of witnesses for the defendant predominates upon the issue formulated, the verdict must ipso facto be set aside as erroneous. *Cambell v. Del. & At. Tel. Co.*, 70 N. J. Law, 195, 56 Atl. 303; *Alexander Dyeworks v. Roufosse*, 57 N. J. Law, 700, 32 Atl. 373. The weight of the testimony and the credibility of the witnesses are the determining factors for the consideration of the jury, and into this consideration the number of witnesses pro and con properly enters in the determination of the issue. But

we cannot say upon the testimony in this case, even though our reasoning might lead us to a different result from that reached by the jury, that the testimony so far preponderates in favor of the defendant as to enable us to say that the verdict of the jury is necessarily erroneous. *Faux v. Willett*, 69 N. J. Law, 52, 54 Atl. 520; *Campbell v. Emslie*, 72 N. J. Law, 37, 59 Atl. 1030.

We find nothing of substance in the remaining reasons advanced by the defendant, and we, therefore, conclude that the rule to show cause should be discharged.

(77 N. J. L. 119)

SOMERS v. STEELMAN.

(Supreme Court of New Jersey. Nov. 16, 1908.)
ELECTIONS (§ 305*)—ELECTION CONTEST—FINDING OF FACTS—REVIEW.

The finding of the circuit court upon the facts in a contested election case is binding upon this court, under the provisions of Election Act 1898 (P. L. p. 315), if there be any evidence to support such finding.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 329; Dec. Dig. § 305.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Atlantic County.

Action by Curtis Somers against John C. Steelman. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

Bourgeois & Sooy, for appellee.

MINTURN, J. John C. Steelman, the incumbent, was declared elected mayor of Linwood in Atlantic county, at the election in November, 1907, by one majority. His opponent, the contestant here, filed a petition in the circuit court, seeking to avoid the election of Steelman, upon the ground of misconduct of the election board and the reception of sufficient illegal votes for Steelman to change the result; and upon this issue the circuit court decided in favor of the incumbent. We are asked, upon this petition of appeal, to reverse the result declared by that court, because three electors, Ireland, Steelman, and Elder, whose votes were cast for the incumbent, had no legal right to vote, while the incumbent insists to the contrary, and contends that the vote of one Steiger, which was cast for the contestant, should not be counted, for the reason that Steiger was not entitled to vote. Upon the argument of this appeal the contest regarding Steelman's vote (a person other than the incumbent) was abandoned, thus narrowing the question at issue to the legality of the votes of Elder and Ireland cast for the incumbent, and of Steiger cast for the contestant. The act under which this appeal is taken author-

izes an appeal "for error of law only." Section 175, Election Laws 1898 (P. L. p. 315). And the finding of the circuit court upon the facts, therefore, must be accepted by this court as final, if there be any evidence to support it. *Cleary v. Kendall*, 13 N. J. Law J. 134; *In re Election of Register Essex Co.*, 12 N. J. Law J. 271. We think there was such evidence. Elder's vote was challenged because he did not have a legal residence in Linwood. He seemed to be unsettled in his habits, and of a nomadic disposition; but the court found upon the testimony that, if he had a habitat at all, it was at Linwood, towards which place he possessed that animus revertendi which is the guiding test in such cases. *Stout v. Leonard*, 37 N. J. Law, 495; *Kugler v. Shreve*, 28 N. J. Law, 132. Under the limited power of review contained in the statute we must accept this finding as correct. Upon similar ground the court rejected the vote of Steiger, finding upon the evidence that he was not entitled to vote at Linwood. Ireland was an invalid, and his vote was taken outside of the election booth by one of the election officers, and carried by him to the box, and there deposited. This procedure seems to have been without warrant under the statute; but it is unnecessary for the purpose of this appeal to determine the question, because the rejection of Ireland's vote upon that ground would be counterbalanced by the rejection of Steiger's vote, and would leave the result as it was returned by the election board.

We conclude, therefore, that the judgment of the circuit court should be affirmed.

(77 N. J. L. 160)

KOKOLL v. BROHM & BUHL LUMBER CO.

(Supreme Court of New Jersey. Nov. 9, 1908.)

MUNICIPAL CORPORATIONS (§ 705*)—RUNAWAY TEAM—PRESUMPTION OF NEGLIGENCE.

The unexplained presence on a public highway of a team of runaway horses harnessed to a wagon, unattended by the owner or other person, raises a presumption of negligent management on the part of the owner; and, if they collide with another vehicle on the street because they were not under proper control, the owner will be liable for damages resulting therefrom.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1515; Dec. Dig. § 705; * *Highways*, Cent. Dig. § 468.]

(Syllabus by the Court.)

Appeal from District Court of Newark.

Action by Anton Kokoll against the Brohm & Buhl Lumber Company. Judgment for plaintiff in the district court, and defendant appeals. Affirmed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Frank Benjamin, for appellant. Henry H. Fryling, for appellee.

BERGEN, J. While the plaintiff was repairing a carriage which stood in the street near the curb in front of his workshop, defendant's runaway team, attached to a wagon, collided with and damaged plaintiff's carriage, for which he brought a suit and recovered the judgment now under review.

The testimony shows that plaintiff was a carriage maker, doing business in the city of Newark; that a customer had left for repair a carriage on the public street close to the curb in front of plaintiff's workshop; that while plaintiff was repairing the carriage on the street where it had been left, the collision occurred; that there was no one on defendant's wagon, the team being unattended, nor did any explanation appear for this unusual condition. We think the fact that a team of runaway horses are found dashing along a public highway, without the attendance of the owner or his servants, raises a presumption of negligence in their management and care which will render him liable, in the absence of explanation, for injuries caused by their unrestrained acts. *Unger v. Forty-Second Street R. R. Co.*, 51 N. Y. 500. The defendant offered no explanatory facts, but permitted the presumptive negligence, arising from the case stated, to stand unchallenged. The defense insisted upon is that plaintiff was a wrongdoer because the carriage he was repairing was an obstruction to the street, contrary to a municipal ordinance, and therefore he cannot recover. Whether the ordinance has any influence in this case we are not called upon to determine, because the only question raised on this branch of the case by the specifications is that "the weight of the evidence showed contributory negligence on the part of the plaintiff," and this court, on an appeal from the district court, will not consider the weight of evidence.

We find no error in the record brought up, and the judgment will be affirmed.

(77 N. J. L. 33)

READ v. BOARD OF EXCISE COMRS OF CITY OF CAMDEN et al. (two cases).

(Supreme Court of New Jersey. Nov. 17, 1908.)

INTOXICATING LIQUORS (§ 45*)—APPLICATION FOR LICENSE—RECOMMENDATION.

Section 42 of the inns and taverns act (2 Gen. St. 1895, p. 1794), which provides that the signers of a recommendation for a license shall not have recommended another application in the same township, city, or borough for the same year, is a subsisting and paramount regulation of the subject that is unaffected by "An act to establish an excise department in cities of this state" (P. L. 1902, p. 628), or by the creation of the administrative tribunals contemplated by that act, and that is unrepealed and irrepealable by the legislative acts of such bodies.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 45.*]

(Syllabus by the Court.)

Application for writ of certiorari by Charles C. Read to the Board of Excise Commissioners of the City of Camden and Thomas Madden, and by the same prosecutor to the Board of Excise Commissioners of the City of Camden and Joseph Goetsinger. Proceedings reversed, and licenses set aside.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

David H. Goff, John B. Kates, and Howard M. Cooper, for prosecutor.

GARRISON, J. The writs that have been argued together bring up licenses granted by the board of excise commissioners of the city of Camden, respectively, to Thomas Madden on January 8, 1908, and a similar license granted to Joseph Goetsinger. The first and second reasons filed by the prosecutor raise a single question that is common to both cases. These reasons are "(1) because the act of 1902 (P. L. p. 628), creating excise boards, did not confer upon said boards unlimited jurisdiction, but that said boards in the granting of licenses are bound by the law of the state regulating the sale of intoxicating liquors; (2) because the petition accompanying the application for said license did not contain the names of twelve freeholders who had not signed other applications within one year."

The state of fact upon which these reasons are predicated is established by the depositions taken under a rule of court. In case of Madden's recommendation on which there were 15 signers, all but one had signed recommendations for licenses granted on January 8, 1908, previously to the granting of Madden's license. In the case of Goetsinger out of 12 signers 7 had signed recommendations for licenses previously granted for the same year. This state of affairs, which is not in contravention of the ordinance of the excise board passed on January 5, 1903, is in direct contravention of the statute of this state, respecting inns and taverns (2 Gen. St. 1895, p. 1783), the forty-second section of which is as follows: "That the freeholders required to recommend to the court suitable persons for license to keep inns and taverns, shall be such as shall not have recommended any other application for a license under the second section of this act, in the same township, city or borough for the same year." The second section thus referred to is the one prescribing the character of the recommendation required by the inns and taverns act. The question that is thus presented is which is paramount, the ordinance of the excise board or the statute of the state, and this, in turn, depends upon the question whether the act of the Legislature that created these local boards conferred upon them unlimited and exclusive powers of legislation touching the granting of licenses to sell intoxicating liquors, or only a particular function and a qualified jurisdiction with respect thereto. The act in question is "An act to

establish an excise department in cities of this state" passed in 1902. P. L. p. 628. A mere reading of the enumeration of the powers conferred by this act upon the boards established under its provisions shows that such powers in so far as they are legislative in character are confined to the making, amending, and repealing of city ordinances and by-laws. There is nothing in the act that clothes such boards with power by their ordinances, either expressly or by implication, to repeal or override the general statute law of the state regulating an important subject-matter the local administration of which is committed to such boards; nor does the act purport to be a complete scheme covering the entire subject-matter. On the contrary, its clearly expressed purpose is the administration of excise laws, and not their abrogation or repeal. If any doubt could exist as to the soundness of this construction, it is removed as far as this court is concerned by judicial decisions that are directly in point. In *Miller v. Camden*, 63 N. J. Law, 501, 43 Atl. 1069, it was held that the power conferred upon boards of excise by the act of 1886 (P. L. p. 397) to prescribe penalties, although plenary in terms, was subordinate to the provisions of the city charter in so far as such ordinances were in contravention to such statute. Justice Gummere, delivering the opinion of this court in that case, said: "The Legislature had in granting its charter to Camden already declared what should be the maximum penalty for the violation of its municipal ordinances, and that maximum remained unchanged by the transfer from the city council to the excise board of the power to pass ordinances regulating the sale of liquor and to punish violations of such ordinances."

In *Peer v. Board of Excise of Newark*, 70 N. J. Law, 496, 57 Atl. 153, it was held that the powers of an excise board appointed under the act of 1903 (P. L. p. 369) although unlimited in terms as to the licensing of inns and taverns were to be exercised in subordination to the general act of 1889 regulating the sale of intoxicating liquors. In the very recent case of *Sexton v. Excise Commissioners of Asbury Park* (N. J. Sup.) 69 Atl. 470, in which the same act that is now under review was involved, it was held that the establishment of excise boards under that act did not extinguish the general limitations upon or regulations of the exercise of the licensing power contained in the inns and taverns act or other preceding act of general legislation. The precedent statute in that case was the act of March 3, 1870 (P. L. p. 397), which prohibited the granting of a liquor license within one mile of the outside limits of a camp meeting association. This provision it was held was a subsisting limitation upon the licensing powers conferred in general terms by the act of 1902 upon the board of excise of Asbury Park with respect to a license for an inn and tavern within one

mile of Ocean Grove. Justice Reed, delivering the opinion of this court, said: "The purpose of the act to establish boards of excise in cities in this state was to transfer the licensing function from the body which in the several cities then possessed the licensing power to the new board to be specially constituted. All the restrictions which controlled the old board in the exercise of its authority to license, whether existing in the charter of the city or in the general acts applicable to such city, remained to control the exercise of power by the new board. * * * That the transfer of the licensing power from the common council to the board of excise commissioners under the act of 1902 did not repeal the then restriction on the licensing power seems apparent."

The conclusion in the present case to which these decisions imperatively point is that the provision of the forty-fifth section of the inns and taverns act touching the qualifications of signers to recommendations for liquor licenses is a subsisting and paramount regulation of that matter that is unaffected by the erection of the administrative tribunals effected by the act of April 8, 1902, and that is unrepealed and irrepealable by the legislative acts of such bodies.

The proceedings brought up by these writs are reversed, and the licenses so granted vacated and set aside.

(77 N. J. L. 68)

KIRBY v. LEE.

(Supreme Court of New Jersey. Nov. 18, 1908.)

1. COUNTIES (§ 65*) — OFFICERS—VACANCIES—APPOINTMENT—ELECTION.

Under Const. art. 7, § 2, par. 6, and article 5, par. 12, providing that county clerks shall be elected at an annual election for members of the General Assembly and hold office for 5 years, and that when any vacancy occurs the Governor shall fill it until a successor is elected, and Act April 4, 1898 (P. L. pp. 237, 304, §§ 6, 139), providing that county clerks shall be elected at a general election once every five years, and that any vacancy in the office shall be supplied at the general election, unless the vacancy happens within 15 days preceding the election, a vacancy is created by the death of a county clerk, and where such death is more than 15 days before the general election it may be filled at such election, though the Governor has appointed one to fill the vacancy.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 65.*]

On information in the nature of a quo warranto by the state, on the relation of Samuel Kirby, against Edward S. Lee. Heard on demurrer to the information. Judgment for relator.

Argued November term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Joseph H. Gaskell, for relator. Bourgeois & Sooy, for respondent.

REED, J. The question raised by the pleadings rises from the following admitted facts: Lewis P. Scott was elected county clerk of Atlantic county at a general election for members of assembly held in November, 1905. Mr. Scott died in November, 1907. Edward S. Lee, the respondent, was appointed by Gov. Stokes on December 6, 1907, to fill the vacancy created by the death of Mr. Scott. At the last general election, Samuel Kirby was elected to the office of county clerk of Atlantic county, and has qualified as such. Mr. Lee refuses to surrender the office to Mr. Kirby. This writ is sued out to inquire by what right Mr. Lee still retains the office. The insistence of Mr. Lee is that his appointment was for the unexpired term of Mr. Scott, whose term would have expired in November, 1910, had he lived to that period.

So far as the situation is controlled by the statutes of this state, the solution of the question propounded is plain. The act to regulate elections (P. L. 1898, p. 238, § 6) enacts that the clerks, registrars of deeds, and surrogates of counties shall be elected by the people of their respective counties at a general election once in every five years. Section 139 of this statute (P. L. 1898, p. 304) enacts that: "Any vacancy happening in the office of * * * clerk * * * of any county, shall be supplied at the general election next succeeding the happening thereof, unless such vacancy shall happen within fifteen days next preceding such election, in which case such vacancy shall be supplied at the second succeeding general election." Mr. Scott having died more than 15 days before the last general election, the people of Atlantic county had the statutory right to elect a new clerk at that election.

It is insisted, however, that this statutory provision respecting the filling of vacancies in the office of county clerk is in contravention of our state Constitution. The constitutional provisions invoked in support of this contention are article 7, § 2, par. 6, and article 5, par. 12, of that instrument. The first of these clauses is this: "Clerks and surrogates of counties shall be elected by the people of their respective counties at an annual election for members of the General Assembly. They shall hold their office for five years." The second of these constitutional provisions is this: "When a vacancy happens in the office of a clerk or surrogate of any county, the Governor shall fill such vacancy, and the commission shall expire when a successor is elected and qualified." It is not perceived how these provisions antagonize the already quoted clauses in the election act. The Constitution does not say that there shall be an election for the office of county clerk once in every five years. The clause in the election act does use that language, but that clause is to be read in con-

nection with the clause providing for the filling of vacancies, which modified the language of the previous provision. The Constitution merely states how the clerks of counties are to be elected, and how long they shall hold office. It does not state that there shall be an election for clerks at certain general elections, which elections shall be separated by a period of five years. Nothing in the Constitution prevents the election of a clerk at any general election for members of assembly, save the fact that there will be no vacancy to which the candidate can be elected. When however, an incumbent dies, there is a vacancy; and another elected at any general election thereafter, so far as the language of the Constitution controls, is the de jure clerk. The exercise by the Governor of his constitutional power to fill this vacancy in no way impairs the right to elect at the ensuing general election, for the Constitution itself provides that the appointment shall expire when a successor is elected and qualified.

We are therefore of the opinion that there should be judgment for the relator.

(77 N. J. L. 10)

ZDANCEWICZ v. BURLINGTON COUNTY TRACTION CO.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. CONTRACTS (§ 28*)—REQUISITES—VALIDITY OF ASSENT.

One who enters into a written contract, without fraud or imposition being practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 28.*]

2. RELEASE (§ 34*)—REQUISITES—VALIDITY.

A release under seal of a claim for personal injuries is a bar to an action for such injuries, unless obtained by fraud or deceit.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 82; Dec. Dig. § 34.*]

3. RELEASE (§ 58*)—QUESTION FOR JURY—VALIDITY.

Evidence held insufficient to go to the jury on the question whether a release pleaded by defendant in an action for personal injuries was obtained by fraud and deceit.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 109-114; Dec. Dig. § 58.*]

Action by Joseph Zdanczewicz against the Burlington County Traction Company. Rule to show cause why a verdict directed for defendant should not be set aside. Rule discharged.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

George M. Bacon and G. Dore Cogswell, for plaintiff. Gaskill & Gaskill, for defendant.

GUMMERE, C. J. This action was brought to recover damages for injuries received by the plaintiff while upon one of the cars of

the defendant company, and which he averred were due to carelessness in the operation of the car. The defendant pleaded the general issue, and also a release under seal executed by the plaintiff. The plaintiff replied to the plea of a release, denying that he had executed such a writing, and, further, that the release had been obtained from him by fraud and covin. At the trial of the cause, after the plaintiff had put in his case, and the defendant had proved the execution of the release by the plaintiff, and the circumstances attending it, the court suspended the putting in of the defendant's proofs on the question of its alleged negligence, until after hearing the rebutting testimony of the plaintiff on the subject of the execution of the release. When that proof was in, the court advised counsel for the defendant that it was unnecessary to submit evidence on the question of negligence, as the release constituted a complete defense to the action, and thereupon directed a verdict for the defendant. The plaintiff now insists before us that, in taking the case from the jury, the trial court erred, and that, for this reason, the rule to show cause should be made absolute.

The plaintiff admitted the signing of the release. The proof offered by the defendant on the subject of its execution consisted of the testimony of Mr. Eckhard Budd, the attorney of the company, and that of Dr. Prickett, a surgeon at the hospital to which the plaintiff had been taken after the accident, and who was in attendance upon him. Mr. Budd's testimony was: That, as a result of instructions received by him from one of the officers of the company, he prepared a written release of all claim which the plaintiff might have against the company, in consideration of the payment of \$100 by the latter to the former; that he took the draft of the release and \$100 in cash to the hospital, and there had an interview with the plaintiff in the presence of Dr. Prickett. He thus states the interview: "The minute that I came into the room, and I sat at the foot of the bed, this man (i. e., the plaintiff) said, 'Who is that man?' Dr. Prickett spoke up and told him that I was the lawyer that represented the trolley company, and then I spoke up and said that I was the lawyer that represented the trolley company, that I had been told he wanted to settle any claim he had against the company for \$100, and I asked him if that was right, and he said it was. I then said I had a release which I would read, and I read this release through. When I got through, I said to him, 'Do you understand that release?' And he said—I don't remember whether he said no, or that he didn't know. I then handed the release to Dr. Prickett, and said, 'Doctor, you take that release and read it slowly to him, section by section, and ex-

plain it to him.' So the doctor took the release up and read it to him, and as he read it he told him what that meant in English, stripped of its legal verbiage, and when he got through he says, 'Do you understand it?' And he said, 'Yes.' Then he, of his own volition, made a remark, and I think I remember his exact words, because I was very careful about this, and because I wanted to have it all straight. He then said, when Dr. Prickett asked him, 'Do you understand this?' 'I want put in there they give me work.' The release had nothing in it about work. It was a straight release for so much money, and after Dr. Prickett had read the release to him, and asked him if he understood it, without any suggestion from Dr. Prickett, or from me, he said in answer to that question, immediately after the reading and explaining of the release, 'I want put in there they give me work.' Dr. Prickett then told him that the trolley company could not do that, and explained to him why, and then I told him that this trolley company might be sold some time, and that they could not have anything like that put in as a thing that would hang over them, and that if he signed this release he would get the \$100, but that I would not assure him he would get work. And he then—this right arm that was cut off, if I remember right, was bandaged up, and it was kind of sticking up—and kind of looking down toward this arm he made some remark about it, that he could not work with this arm off. I don't remember the exact sentence that he used in reference to that, and I told him that I was very sorry, but that the trolley company could not guarantee him work; that, as far as I was concerned individually, I would do what I could to have the trolley company employ him, but that if he signed this paper he would get the \$100, and that would be all he would ever get from the company for losing his arm. I then said to him 'Now, do you understand?' And he said, 'Yes.' And I held this \$100 up, and I said, 'if you sign this paper, you get the \$100, and you can never get any more from the trolley company.' He said, 'I understand.' He then made his mark, I think, to the paper." Mr. Budd is corroborated in every particular in his statement of what was said by himself, Dr. Prickett, and the plaintiff, on the occasion of the execution of the release, by the testimony of Dr. Prickett. Nor does the plaintiff, as I read his testimony, deny that Mr. Budd and Dr. Prickett made the statements and explanations to him which they testified to. His story was that he did not understand what was said by them, that he supposed the paper was a receipt for sick benefits which he was entitled to receive from a benevolent society of which he was a member, and that he signed it under that belief. He did not even deny that he made

the replies which Mr. Budd and Dr. Prickett testified to, except so far as his statement that he did not understand what was said to him by them is such a denial.

The rule of the common law that a party who enters into a contract in writing, without any fraud or imposition being practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect, is in full force in this state. Its application led the Court of Errors and Appeals, in the case of *Fivey v. Pennsylvania R. R. Co.*, 67 N. J. Law, 627, 52 Atl. 472, 91 Am. St. Rep. 445, to hold that a release similar in form to that in the present case constituted a complete bar to an action for personal injuries, unless obtained by fraud or deceit. Fully understanding that such was the law, plaintiff's counsel replied for his client denying the execution of the release, and also averring that it was obtained through fraud and covin. The signing of the release, as has already been stated, was admitted by the plaintiff at the trial. The only question, consequently, to be considered in the determination of this rule, is whether there is anything, in the proofs submitted, upon which fraud or deceit in obtaining the release may be predicated. The only persons who have any knowledge of the facts and circumstances attending its execution are the plaintiff, Mr. Budd, and Dr. Prickett. The testimony of the three makes it manifest that no fraud or deceit was practiced by the defendant, or any one representing it. The plaintiff's belief (which, in disposing of this rule, we assume he entertained) that the paper he signed was a sick benefit receipt was not induced by anything which was said to him on the occasion of his signing. He said nothing, either to Mr. Budd or to Dr. Prickett, to indicate that he did not fully understand the contents of the paper or its purpose. The case being barren of any evidence which tends to support the averment of the plaintiff's replication that the release pleaded by the defendant was obtained by fraud and covin, the trial court was justified in directing a verdict for the defendant. *Fivey v. Pennsylvania R. R. Co.*, supra.

The rule to show cause will be discharged.

(77 N. J. L. 195)

CORKRAN et al. v. TAYLOR.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. COURTS (§ 169*)—JURISDICTION—AMOUNT—SET-OFF.

In an action in the district court to recover \$204 for services performed, a notice of recoupment of damages to the amount of \$710 for defective work was properly stricken, as exceeding the jurisdiction of the court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 422; Dec. Dig. § 169.*]

2. EVIDENCE (§ 354*)—BOOK ACCOUNTS.

Books of account made up in the usual course of business from written reports of work

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

done and materials used are competent, with or without the reports themselves, to prove a claim for the labor and materials.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1457; Dec. Dig. § 354.*]

3. EVIDENCE (§ 376*)—BOOK ACCOUNTS—AUTHENTICATION.

In an action for labor and materials, it was error to permit items from plaintiffs' ledger to be read before it had been properly proved and marked in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1628-1647; Dec. Dig. § 376.*]

4. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—PREJUDICIAL EFFECT.

Error in reading in evidence items from plaintiffs' ledger, before it was properly proved, was harmless, where the ledger was afterwards proved and the items properly admitted in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4174; Dec. Dig. § 1052.*]

5. TRIAL (§ 413*)—CORRECTION OF ERROR—EXCLUSION OF EVIDENCE.

In an action for labor and materials, where the court refused to allow the cross-examination of a witness as to plaintiffs' system of book-keeping on the introductory part of the examination, but stated he might be examined later, and afterwards permitted a full examination, when the desired evidence was fully brought out, there was no error in refusing to allow the questions on the first part of the examination.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 978; Dec. Dig. § 413.*]

6. WITNESSES (§ 267*)—EXAMINATION—DISCRETION OF TRIAL COURT—SCOPE OF CROSS-EXAMINATION.

In an action for services in repairing defendant's automobile, the exclusion of a question as to the proper method of fitting the bearings, addressed to a witness called to prove plaintiffs' account books, and to testify generally to the manner of doing the work under his supervision, but not as an expert, was not an improper exercise of the trial court's discretion in limiting the scope of the cross-examination, though it might have been allowed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 923-930; Dec. Dig. § 267.*]

7. EVIDENCE (§ 242*)—ADMISSIONS BY AGENT—AUTHORITY TO MAKE.

In an action for services in repairing an automobile, a question to defendant as a witness as to what one of plaintiffs' employes had told him as to the compression of the machine was properly excluded; the nature of the employment of such employe not showing that he was employed to make statements for plaintiffs, so that his statements would not bind them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 893-907; Dec. Dig. § 242.*]

8. TRIAL (§ 296*)—INSTRUCTIONS—ERROR CURED BY SUBSEQUENT INSTRUCTIONS.

In an action for repairs to defendant's automobile, defendant claiming that the work was defective in part, an instruction calling attention to the evidence that a general overhauling had been given the machine, and that defendant conceded some work to have been done in addition to the defective work, and expressing the opinion that some value had been received by defendant for the repairs, though it might have been objectionable by itself, was cured by a subsequent instruction that whether any work was performed for defendant which should be paid for was for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

Appeal from District Court of Atlantic City.

Action by Henry W. Corkran and William Meloney, trading as Corkran & Maloney, against Samuel C. Taylor. From a judgment for plaintiffs, defendant appealed. Affirmed.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

Bourgeois & Sooy, for appellant. Eli H. Chandler, for appellees.

PARKER, J. The appellant, defendant below, employed the plaintiffs to give his automobile a general overhauling, and disputed their bill on the ground of defective work. Plaintiffs having sued in the district court to recover the amount of their bill, \$204, defendant filed a small set-off, which was allowed at the trial, and also a notice of recoupment of damages for alleged defective work, amounting to \$710.49, which was properly struck out as exceeding the jurisdiction of the court. *Klenzie v. Gardner*, 73 N. J. Law, 258, 63 Atl. 10. There was a verdict and judgment for plaintiffs, and defendant appeals.

Some 13 reasons are assigned for reversal, all of which, except the last, relate to questions of evidence. Several of these, which bear on the use of the plaintiffs' books of account as evidence, may be considered together. It appeared that besides the usual day book and ledger, which were offered in evidence, plaintiffs used a system of time slips on which the workmen made entries of work done, and of time consumed and materials used in doing it. The defendant objected to the books without the slips, and after some colloquy the court admitted the books and the slips also; defendant objecting to them all. The fifth and sixth reasons raise this point, which is fully disposed of in *Corkran v. Rutter* (N. J. Sup.) 69 Atl. 954, decided since the trial of this case, and in which the system used by these very plaintiffs was considered, and it was held that the books were admissible with or without the time slips. That the books with the slips were admissible had been previously settled in *Diamant v. Colloty*, 66 N. J. Law, 295, 49 Atl. 445, 808.

It is next objected that the court permitted items from the plaintiffs' ledger to be read to the jury, when said ledger had not been properly proved and had not been marked in evidence. This was undoubtedly a technical error; but as the ledger was afterwards proved and, as we have just held, properly admitted in evidence, and the items therein might then have been read to the jury, no harmful error was committed by anticipating the proper time to read them.

Another reason assigned is that the court refused to allow defendant's attorney to cross-examine witness Meloney as to plain-

tiffs' system of bookkeeping. The court did so refuse, on the introductory part of the examination, but expressly stated to counsel that he might do so later, and actually did permit full cross-examination afterwards. The point which defendant apparently desired to draw out was the use of a system of time slips, which appeared clearly, and which has already been considered. We think no error was committed, under the circumstances.

Three other reasons are based on the refusal of the court to allow witness Meloney to be asked whether he considered the use of emery a good method of fitting on brass bearings, and whether, if emery had been used, it would have been possible to clean it out afterwards except by scraping. Meloney had not been called as an expert. He was called to prove the shop books of the plaintiffs, of which he had charge, and also testified generally as to the doing of the work under his supervision. In this aspect, the court might in its discretion have allowed the questions; but we think they were fully within the discretion of the judge in limiting the scope of cross-examination, and that no complaint can be made because that discretion was exercised to their exclusion.

The court also overruled a question asked of defendant when sworn as a witness, by his attorney, as to what statement was made to him by a Mr. Thompson as to the compression of the machine. This question was properly overruled. Thompson was an employé of the plaintiffs, who had worked on the machine; but it was not made to appear that he was employed to make statements in their behalf, or that his employment was of such a character as to give rise to that inference. Hence his statements would not be binding on them. *Huebner v. Erie R. R.*, 69 N. J. Law, 327, 55 Atl. 273; *Hill v. Adams Express Co.*, 74 N. J. Law, 338, 68 Atl. 94.

Three other reasons based on rulings as to evidence are not pressed, and so will not be considered. The twelfth reason challenges the allowance by the court of a hypothetical question to the witness Smith, who was called as an expert mechanic. The ground of challenge is that the hypothesis embodied in the question was broader than the evidence warranted. We have examined the evidence and have come to the conclusion that it fairly warranted the framing of the question in form as put.

The last reason relates to an instruction by the judge to the jury, in effect, that some verdict for the plaintiffs must be returned. The court charged, and we think properly, that, as the recoupment had been struck out as exceeding its jurisdiction, all counterclaim by the defendant for damages by reason of defective work must be relegated to such new suit as defendant might bring in another court, and therefore should not be con-

sidered by the jury in abatement of whatever might be due plaintiffs for work properly performed on the machine and by which defendant benefited; and calling attention to the evidence that a general overhauling had been given to the machine by plaintiffs, and that defendant conceded certain work to have been done outside of the alleged defective work for which the counterclaim was made, expressed the opinion that some value had been received by the defendant for the repairs put on the machine by the plaintiffs. Taken by itself, this instruction might be objectionable, though we are inclined to think the evidence supported it; but in any case the court elsewhere left it distinctly to the jury to say "whether any service was performed by the plaintiffs for the defendant on his machine which was worthy of pay." Taken in connection with this instruction, the remark objected to appears to be mere comment and not prejudicial to the defendant.

Finding no error on the whole case, the judgment will be affirmed.

In re LEHIGH VALLEY R. CO.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. TAXATION (§ 47*)—RAILROADS—LOCAL TAXATION.

A local tax on railroad property used for railroad purposes must be canceled in a proceeding under the statute to determine whether the local assessment or the assessment of the State Board of Assessors is correct.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 108; Dec. Dig. § 47.*]

2. MUNICIPAL CORPORATIONS (§ 966*)—LOCAL TAXATION — PROPERTY SUBJECT—RAILROAD PROPERTY.

A pier of a railroad was used as a warehouse for freight discharged from cars, preparatory to being shipped by lighters and barges. Flour was about the only commodity put on the pier, and the flour delivered there was chiefly consigned to a single firm, who used the pier for the purpose of blending the flour consigned to them. They had no lease on the pier, but were charged for demurrage as other consignees, and were allowed to have the machinery of the pier without any charge therefor. *Held*, that the pier was used for other than railroad purposes, and was subject to local taxation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2065; Dec. Dig. § 966.*]

In the matter of the Lehigh Valley Railroad Company to review tax assessments on its property. Local taxes affirmed in part, and reversed in part.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

Collins & Corbin, for Lehigh Valley R. Co. James J. Murphy, for Jersey City.

PER CURIAM. This case is a case of double taxation for 1904-05, on railroad property in Jersey City. It has been taxed both by the State Board of Assessors and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the city assessors, and this proceeding is taken under the statute, before three justices, to determine which assessment is correct. For the year 1904, Pier E alone is involved. For 1905, Warehouse on Pier G and Pier I are also involved. But as to the two latter no contention was made by the city on the argument, and it appears to concede that this property was used for railroad purposes. The local tax thereon for 1905 should be canceled.

The only question now involved therefore is whether Pier E is used for railroad purposes, so that it is taxable by the State Board of Assessors, or whether it is not used for railroad purposes and is taxable by the city of Jersey City. The evidence shows that it is used as a warehouse pier for the handling of freight, which is discharged from cars, preparatory to being transhipped by lighters and barges to different points in New York Harbor. Flour is about the only commodity put on Pier E, and the flour delivered there is consigned to a single firm of consignees, who use the pier for the purpose of blending the flour that comes consigned to them. The consignees have no lease of the pier, but are charged for demurrage just as other consignees, and they are allowed to have machinery upon the pier without any charge therefor. Some flour for other parties also goes on this pier, but it is a small percentage. The original packages are sometimes emptied on the pier, no doubt, for the purpose of blending. We think that these facts indicate that the pier is used for other than railroad purposes, and that it is therefore subject to local taxation, and the case is governed by *In re Erie Railroad Company*, 65 N. J. Law, 608, 48 Atl. 601.

It was therefore assessable by Jersey City, and the assessment should be affirmed.

(76 N. J. L. 251)

ZIMMERMAN v. HUDSON & M. R. CO.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. EMINENT DOMAIN (§ 234*)—RAILROADS—ASSESSMENT OF DAMAGES—REPORT—CERTIORARI—GROUNDS.

Revised Railroad Act 1903 (P. L. p. 645) § 13, provides that proceedings to condemn shall be had pursuant to P. L. 1900, p. 79. Sections 5 and 6 whereof provide for the appointment of commissioners to examine the property and to make an equitable appraisal of its value, and an assessment of the amount to be paid for such land or other property, etc. *Held*, that the commissioners are simply to ascertain what sum is an equivalent for the whole right to be acquired, and the whole injury to be inflicted, leaving to other tribunals the distribution of the fund among the claimants of particular estates and interests, and hence certiorari by a lessee will not lie to review the action of commissioners on the ground that they reported the damages in a lump sum, instead of making separate awards to the lessee for his leasehold interest and to the owner of the fee.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 596, 597; Dec. Dig. § 234.*]

2. EMINENT DOMAIN (§ 264*)—PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION—REVIEW ON CERTIORARI.

Whether a tenant of lands sought to be acquired by a railroad corporation, organized under the act concerning railroads, is entitled to appeal from an award of commissioners in condemnation proceedings; whether mandamus will lie to a circuit court to compel it to frame an issue on appeal from the award; and, if it will, then whether such a writ ought to be allowed to an applicant for certiorari to review the action of commissioners on the ground that they failed to make a separate award to applicant for his leasehold interest—are questions which ought not to be determined on a preliminary application for certiorari, but on formal hearing and full argument.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 689; Dec. Dig. § 264.*]

Condemnation proceedings by the Hudson & Manhattan Railroad Company against Samuel Zimmerman. Application by defendant for certiorari to review the action of the commissioners, and for rule to show cause why mandamus should not issue to compel the framing of an issue. Certiorari denied, and rule to show cause allowed.

Argued February term, 1908, before GUMMERE, O. J., and BERGEN and MINTURN, JJ.

J. Merritt Lane, for the rule. Collins & Corbin, opposed.

GUMMERE, C. J. Zimmerman, the applicant in this matter, seeks a certiorari to review the action of commissioners appointed in a condemnation proceeding, instituted by the Hudson & Manhattan Railroad Company, to acquire a tract of land owned by one Hill and in the possession of the applicant under a lease which does not expire until 1910. The ground of the application is that the commissioners erred in reporting the value of the property taken, and the damages sustained by the taking, in a lump sum, instead of making a separate award of the moneys to be paid to the applicant for his leasehold interest, and of the amount to be paid to Hill, the owner of the fee.

The revised railroad act of 1903 (P. L. p. 645), under which the company exercised the right of eminent domain, provides in the thirteenth section that the proceedings to condemn shall be had pursuant to "an act to regulate the ascertainment and payment of compensation for property condemned or taken for public use." P. L. 1900, p. 79. The fifth and sixth sections of that act provide that commissioners shall be appointed "to examine and appraise the said lands or property and to assess the damages," and that they shall "proceed to view and examine the land, or other property, and make a just and equitable appraisal of the value of the same, and an assessment of the amount to be paid by the petitioner for such land, or other property, and damage aforesaid." This enactment is almost an exact transcript

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of the condemnation clause of the general railroad law (Gen. St. 1895, p. 2641, § 12), which provides that commissioners shall be appointed "to examine and appraise the said lands or materials, and to assess the damages," and that when appointed they "shall proceed to view and examine the said land or materials, and to make a just and equitable assessment, or appraisement, of the value of the same, and an assessment of damages to be paid by the company for such lands or materials and damages aforesaid." The method of procedure to be followed by the commissioners appointed under this section of the general railroad law was the subject of decision by this court in the case of *Pennsylvania Railroad Co. v. National Docks Railroad Co.*, 57 N. J. Law, 89, 30 Atl. 183, and it was there declared that the duty of the commissioners was simply to ascertain what sum of money is an equivalent for the whole right which the condemning company is to acquire, and the whole injury which it is to inflict, leaving to other tribunals the distribution of the fund among the claimants of particular estates and interests. In so holding we followed the decision of the Court of Errors and Appeals in *Bright v. Platt*, 32 N. J. Eq. 370, where the same view was expressed as to the effect to be given to a provision almost identical in its language, contained in the charter of the *New Egypt & Farmingdale Railroad Company*. The latter decision is binding upon this court. The commissioners in the present case followed the rule there laid down, and a certiorari to review their action must therefore be denied.

It appears from the facts laid down before us that, after the rendition of their award by the commissioners, Zimmerman and Hill

each appealed separately therefrom to the circuit court of the county of Hudson; that subsequently Hill dismissed his appeal; that Zimmerman duly applied to the circuit court (Judge Parker presiding) to frame the issue to be tried on his appeal; that his application was refused; that subsequently he renewed his application before Judge Vail, who was then presiding in the place of Judge Parker, the latter having in the meantime resigned; and that this second application was also refused, upon the ground that the statutory time within which an issue could be framed had then expired. Appreciating the probability that his application for a writ of certiorari would be denied, Zimmerman further petitions, in case of such denial, that he be allowed a rule to show cause why a writ of mandamus should not issue to the circuit court of Hudson county commanding it to frame an issue upon the appeal taken by him, and to proceed with the trial thereof. Whether a tenant, holding a lease upon lands sought to be acquired by a railroad corporation organized under "an act concerning railroads" is entitled to appeal from an award of commissioners made in a proceeding instituted to condemn such lands; whether mandamus will lie to a circuit court to compel it to frame an issue on an appeal taken from such an award; and, if it will, then whether such a writ ought to be allowed to the applicant under the facts of this case are questions which, in our judgment, ought not to be determined in a preliminary application of this kind, but upon formal hearing and full argument. We, therefore, express no opinion upon these questions, but allow the rule to show cause, reserving their consideration until the return of the rule.

(109 Md. 35)

DOWNING v. ROBINSON et al.

(Court of Appeals of Maryland. Nov. 12, 1908.)

PRINCIPAL AND SURETY (§ 9*)—EXISTENCE OF RELATION.

Defendants and M. contracted for purchase of lots. By arrangement between them title was taken in the name of M., who gave his individual bonds for the deferred payments, and executed to defendants an instrument declaring their interests in the property. *Held*, that M. was not surety for defendants for payment of the purchase money; so that the vendors had no remedy against them based on such a relation.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 19; Dec. Dig. § 9.*]

Appeal from Circuit Court, Harford County, in Equity; Frank I. Duncan, Judge.

Suit by Henry H. Downing, receiver, against Thomas H. Robinson and others. Decree for defendants. Plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

Osborne I. Yellott and E. P. Keech, Jr., for appellant. Thomas H. Robinson and William H. Harlan, for appellees.

SCHMUCKER, J. The bill in this case asserts and seeks to enforce the right of the appellant to the benefit of an alleged claim of the appellee Charles A. Macatee against his coappellees for a portion of the purchase money for certain building lots. The material circumstances which are asserted to have conferred on the appellant the right of subrogation or substitution to the claim of Macatee appear from the record to have been as follows: In the year 1890 a Virginia corporation known as the "Front Royal & Riverton Improvement Company," of which Henry A. Downing was president and Charles A. Macatee was a director, attempted to develop as an addition to the town of Front Royal a tract of farming land lying in its vicinity. For that purpose, the means then currently employed in exploiting town sites in the valley of Virginia were adopted. Engagements were secured from various educational, manufacturing, and industrial enterprises to establish themselves on the property. The land was platted and laid out in streets and blocks, and a prospectus was prepared and issued setting forth in glowing terms the present advantages and future prospects of the situation, and then building lots were offered for sale. The appellees other than Charles A. Macatee were residents of Maryland, and had no interest in the improvement company, but, their attention having been called to its enterprise, they visited Front Royal, and inspected the property to see whether it presented any opportunities for profitable investment. The fever of speculation then prevalent in that neighborhood proved sufficiently contagious to induce them to agree on October 20, 1890, to purchase

from the company 11 of its building lots, embracing in all about one acre of land, at prices aggregating \$8,100, to be paid one-third cash and the balance one half in one year and the other in two years after date. A short time thereafter it was agreed between the purchasers of the lots and Charles A. Macatee that he should assume one-seventh interest in the purchase, and that, as a matter of convenience, the title to the property should be taken and held in his name. The first installment of purchase money was paid by the 7 appellees in equal shares, and the 11 lots were conveyed by the company to Macatee, who gave to it his 22 individual bonds for the 2 deferred installments. He then as evidence of the nature of his holding of the title as between him and his coappellees executed and delivered to them the following declaration of trust: "This declaration of trust made this ——— day of November, in the year of eighteen hundred and ninety, by C. A. Macatee, of Front Royal, Virginia. Whereas the said C. A. Macatee has received from the Front Royal & Riverton Improvement Company of Front Royal, Va., deeds for the following lot in or near Front Royal, Va., viz.: Lots No. 23 & 24 in block 23, Sixth St. Lot 14 in block 18 Sixth St., lots 1 and 2 in block 17 Va. avenue, lots 1 and 2 block 15 Va. avenue, lots 9 & 10 block 21 Commerce avenue, and lots 1 and 2 block 33 Warren avenue as located on a plot of the property owned by said Front Royal & Riverton Improvement Company, and whereas the said C. A. Macatee has only a one-seventh interest in said lots, the other six-sevenths interest therein being owned equally by J. H. C. Watts, Martin L. Jarrett, Edwin H. Webster of Jno., William S. Forwood, Jr., Thomas H. Robinson and Frank B. Macatee, all of Harford county, in the state of Maryland, and whereas said parties have paid to the said Front Royal & Riverton Improvement Company one-third of the purchase money, each party paying one-seventh thereof (being \$350.58) at the execution of said deeds to C. A. Macatee; and whereas said lots were purchased as aforesaid for the purpose of conveying them to such purchaser or purchasers at such time and for such price as the parties interested therein may direct and to save inconvenience and delay in the execution of a conveyance it was agreed that the legal title to said lots should be put in the name of the said C. A. Macatee, now, therefore: The said C. A. Macatee does hereby declare that he has only a one-seventh interest in the aforesaid lots purchased from the Front Royal & Riverton Improvement Company and particularly described in the deed from said company to the said Macatee, the other six-sevenths interest therein being owned equally by the said J. H. C. Watts, Martin L. Jarrett, Edwin H. Webster of Jno., William S. For-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

wood, Jr., Thomas H. Robinson, and Frank B. Macatee, of Harford county, Maryland. Witness my hand and seal the day and year above mentioned. C. A. Macatee. [Seal.]” The second installment of purchase money for the lots was paid at or near its maturity by Charles A. Macatee to whom the other appellees each sent a check for his share of the installment, although the improvement company and its development scheme had already sunk into a languishing condition. When the third installment fell due, Charles A. Macatee paid his own one-seventh of it, but the other appellees, with the exception of J. H. C. Watts, never paid their shares of it. By that time the speculative boom in the valley had collapsed, and the improvement company and its projects had come to naught. Charles A. Macatee was financially ruined by the failure of the company, and he still remains in an insolvent condition. On the 28th of February, 1898, Henry H. Downing was appointed receiver of the improvement company by the circuit court of Warren county, Va., and directed to collect the assets of the corporation and to institute and maintain such suits as might be necessary for that purpose. On October 21, 1904, but 3 days less than 12 years after the maturity of the last installment of the purchase money for the lots purchased from the company by the appellees, Downing, as receiver, having first obtained leave of the court for that purpose, filed the present bill against them for the recovery of that installment, with interest. The theory of the bill is that, as the result of the relation existing between the appellees in reference to the purchase of the lots referred to, Charles A. Macatee stands in the attitude of surety for his coappellees, and in that situation is entitled to claim reimbursement from them to the extent of their respective portions of the unpaid balance of purchase money and interest, and that the appellant as the creditor of Macatee is entitled to the benefit of his claim against them. All of the appellees as defendants below answered the bill. Charles A. Macatee filed a separate answer, practically admitting all of the allegations of the bill, and consenting to the granting of the relief prayed for. The other appellees as defendants filed a joint answer, admitting the purchase of the lots and their conveyance to Charles A. Macatee and the execution by him of the declaration of trust in their favor, and the payment by them of two installments of the purchase money and the nonpayment of the third one by any of them except J. H. C. Watts, but denying the existence of any indebtedness or obligation on their part to Macatee or to the appellant or the corporation of which he claimed to be the receiver. Their answer further set up by way of defense that they had been induced to purchase the lots by the fraudulent representations of Downing and Macatee as president and director of the improvement company. They

also set up and relied upon the statute of limitations in their answer as a defense to the bill. The case was heard in due course in the court below, and the bill was dismissed by the decree from which this appeal was taken.

The appellant contends that in the state of facts to which we have adverted Charles A. Macatee should be in equity regarded as standing in the situation of surety for his coappellees for the payment of the purchase money for the 11 lots, and he invokes in behalf of the improvement company, under whose title he claims, the well-recognized equitable proposition that, when a principal debtor has given any security or other pledge to his surety, the creditor is entitled to the benefit of such security or pledge in the hands of the surety to be applied in payment of the debt. He also relies upon the other equitable doctrine, which has repeatedly been recognized by this court, that a surety, after the debt has become due, may maintain a bill to require the principal debtor to pay it, whether the surety has been sued for it or not. Both of these two equitable doctrines are supported on the appellant's brief by the citation of numerous decisions of this and other courts; and, if either of them were applicable to the facts disclosed by the record, it may be conceded that it would be conclusive of his right to recover. It is, however, fundamental to both of the propositions so relied on by the appellant, that Charles A. Macatee be determined to have been surety for his coappellees for the payment of the purchase money for the 11 lots; but we are unable to find in the record sufficient ground for holding him to have occupied that relation to them. He was not formally their surety, for the bonds which he gave to the company for the deferred payments were not their obligations on which he appeared as surety. They were his individual obligations for a debt for which both he and his coappellees had been originally liable. The arrangement in reference to the purchase and proposed sale of the lots into which the appellees entered, as evidenced by the declaration of trust executed by Macatee, created a tenancy in common, or, at most, copartnership as between them, but it did not involve a suretyship. A somewhat similar arrangement as to the purchase and sale of lands for account of several persons was held by us in *Morgart v. Smouse*, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367, to have constituted its participants copartners. The present case fails to fall within the operation of the first mentioned of the two equitable doctrines under discussion, for the further reason that the record does not show that the appellees, other than Macatee, ever placed in his hands any security or pledge which can be applied to the payment of the debt now sought to be recovered.

Nor is the appellant entitled to the benefit of the other proposition relied on in his

brief, and supported by the authorities therein cited, that, when a surety or even an agent has paid a debt of the principal debtor, he is entitled to recover from the latter the amount so paid for him, because Macatee, to whose right the appellant seeks to be subrogated, is not shown to have paid any debt for which his coappellees were liable, otherwise than with funds furnished to him by them for that purpose. The original liability of the appellees to pay for the lots purchased was so far as the record shows a simple contract obligation. If that obligation was not extinguished under the rulings of this court in *Davidson v. Kelly*, 1 Md. 492, by the giving and receipt of Macatee's individual bond for the debt, it has long been barred by the statute of limitations which was set up by the answer of the appellees as a defense to the present suit.

During the progress of the case below the appellees as defendants took a number of exceptions to the admission of testimony, but they were not passed upon by the circuit court for the reason doubtless that the appellant as plaintiff had not made out a case for relief in equity. Having come to the same conclusion as to the insufficiency of his case, we deem it unnecessary to notice those exceptions. We think it due to the appellant and to the appellee Charles A. Macatee to say that in our judgment the record does not sustain the charges made against them, in the answer of the other appellees, of fraudulent conduct in procuring or making the sale of the lots on behalf of the improvement company.

For the reasons stated in this opinion, the decree appealed from will be affirmed.

Decree affirmed, with costs.

(109 Md. 52)

UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE v. CORBIN.

(Court of Appeals of Maryland. Nov. 12, 1908.)

APPEAL AND ERROR (§ 439*) — EFFECT OF TRANSFER ON POWER OF TRIAL COURT — STRIKING OUT JUDGMENT.

The trial court has no power to strike out the judgment on a motion made after it was enrolled (in effect, at least, under Code Pub. Loc. Laws, art. 4, § 171, after the term), after an appeal had been taken, a bond given, the affidavit made to stay execution, and the transcript of the record transmitted to and received by the appellate court; the motion being founded on surprise, deceit, and fraud.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2197; Dec. Dig. § 439.*]

Appeal from Baltimore Court of Common Pleas; Henry D. Harlan, Judge.

Action by Rose Corbin, to use, etc., against the United Railways & Electric Company of Baltimore. From an order, on defendant's motion to strike out the judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRIS-

COE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

J. Pembroke Thom and Joseph O. France, for appellant. S. S. Field, for appellee.

BOYD, C. J. The appellee recovered a verdict against the appellant in the court of common pleas of Baltimore city for damages claimed to have been sustained by her by reason of the alleged negligence of the appellant. A motion for a new trial was made, which was overruled on April 8, 1908, and the same day a judgment was entered on the verdict. On that date an appeal was taken to this court, an appeal bond was filed, and the necessary affidavit made to stay execution. On July 7, 1908, the transcript of the record was transmitted to this court by registered mail, and received by the clerk the next day. On September 14th the defendant (appellant) filed a motion in the lower court to strike out the judgment, alleging surprise, deceit, and fraud, and making some specific allegations which need not be more particularly referred to. The court set the motion for hearing, whereupon the plaintiff (appellee) filed a petition alleging, amongst other things, that the court had no jurisdiction to entertain the motion to strike out the judgment pending the appeal in this court, and prayed that the order setting the case for hearing be rescinded, and that the hearing be postponed until such time after the decision by this court as might be reasonable. The court, after hearing the attorneys, granted the petition of the plaintiff, rescinded its order setting the motion for hearing, and ordered that it be "postponed until such time as may be set by this court after the decision by the Court of Appeals of the pending appeal in this case." The order recited that the court was of opinion that it had no jurisdiction to hear and decide the motion to strike out the judgment while the appeal was pending in this court. From that order this appeal was taken.

A motion to dismiss the appeal has been made on the ground that it is not a final order, but we will first determine whether the court had jurisdiction to entertain the motion to strike out the judgment. Under section 171, art. 4, Code Pub. Loc. Laws, judgments are to be treated as enrolled 30 days after they are entered in the courts of Baltimore city, as they were under the previous practice after the term at which they were entered, and any action taken or order passed in relation to any judgment entered by one of them after 30 days ("unless upon a motion or application made within that time") shall have the same effect and force as it would have had under such previous practice, if taken or passed after the expiration of said term, and no more." As this judgment was entered April 6th, and the motion

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to strike it out was not filed until September 14th, the statute is applicable. We are therefore to determine whether the lower court has the power to strike out a judgment on a motion made after it is enrolled, after an appeal has been taken, a bond given, and the necessary affidavit made to stay execution, and the transcript of the record has been transmitted to and received in this court; the motion being founded on allegations of surprise, deceit, and fraud. Whatever may be the power of the lower court over its judgment before an appeal is perfected, it seems clear to us that there was no reversible error in the action of the court of common pleas, under the circumstances stated above. Section 15, art. 4, of the Constitution, in referring to this court, provides that "all cases shall stand for hearing at the first term after the transmission of the record," and section 39, art. 5, Code 1904, provides that "upon the receipt of such transcript, the clerk of the Court of Appeals shall enter the case upon his docket as of the term next after the receipt of such transcript." The appeal from the judgment was therefore regularly placed upon the docket of the present (October) term of this court. If a motion to strike out the judgment, which was filed on September 14th, three weeks before this term began, could be entertained by the lower court, one filed after the beginning of the term could with equal propriety be heard, if the necessary allegations be made to account for the delay, etc. Such practice might result either in the time of this court being occupied in hearing and considering an appeal from a judgment which the lower court was, at the same time, considering the propriety of vacating, and might vacate; or it would require this court to postpone the hearing and decision of the appeal until the lower court determined whether it would vacate the judgment, although the question was not involved in the appeal in this court. Circumstances might delay action by the lower court for months, and in the meantime this court could not with propriety dispose of the appeal, although regularly before it, because of the proceedings taken in the court below, subsequent to the transcript being filed in this court. If such be the right of a party loosing a case, resort might be had to such a motion for the purpose of delay, or to annoy and harass the other party, for if the motion must be entertained by the lower court, it cannot always be speedily disposed of. We do not mean to intimate that such motives influenced the appellant in this case, as the standing of the attorneys representing it is such as to forbid such a suggestion, but we only speak of what might be possible if that practice be sanctioned.

But in addition to those reasons, which may be said to only affect the convenience of the court or the parties, or at most only to cause delay, which is not as of much importance as giving relief against fraud, the

practice might result in conflicting actions of the two courts, which would not only be injurious to the parties interested, but would reflect discredit upon the administration of justice. This court might, for example, affirm a judgment of the same day that the court below struck it out. The Constitution says that the judgments of this court "shall be final and conclusive," and there are statutes in force which would cause great confusion, to say the least, if the two courts were permitted to act in reference to the same judgment at the same time. Under section 22, art. 5, this court has power, whether a judgment be reversed or affirmed, to grant a new trial, if it be of the opinion it ought to be granted, and it might affirm a judgment and order a new trial, and the lower court might the same day pass an order refusing to strike out the judgment. Under section 23 of that article, if this court reverses a judgment, it can, on the statute being complied with, direct the clerk to transmit a copy of the record to the clerk of the court of some other county or city, with an order directing it to proceed with a new trial, while the lower court might strike out the judgment and order the case to be retried. Or the judgment might be affirmed in this court, and execution issued thereon, while the lower court might grant the motion to strike out the judgment on which the one in this court was based. The bond could be sued if the judgment is affirmed by this court, and other instances of confusion and injury might be given.

If it be said that it is not contended that the two courts can act concurrently, which is to have precedence? Is this court to wait until the lower court acts? If so, where is the authority for it? There is no statute authorizing such delay, and it would be a very questionable exercise of power for this court to continue a case pending here, at the instance of the appellant and against the will of the appellee, to await the action of the lower court on a motion made after the appeal was regularly docketed in this court. If, on the other hand, it be said that the lower court must wait until this court has acted, that is precisely what the order appealed from provided for. If the appellant desired such motion to be acted on by the lower court, it had the undoubted right to dismiss its appeal and thereby enable that court to act on the motion. We do not find any authorities contrary to the views we have indicated which would be binding upon us, or which we would be justified in following under our statutes and practice. In the case of *Rayner v. Jones*, 90 Cal. 81, 27 Pac. 24, cited by the appellant, the defendant filed a motion for a new trial after an appeal had been taken, but, as said in the opinion of the court, "in due season." The court held that the lower court was in error in proceeding on the theory that, as the judgment had been appealed from when the mo-

tion for a new trial came on for hearing, it had lost jurisdiction to determine it, and the appeal from the order of the lower court dismissing the motion was treated as an appeal from an order denying a new trial, which is appealable in California. In this state a final judgment cannot be entered until after the motion for a new trial is determined, if it is made within the time allowed for such motion (*Heiskell v. Rollins*, 81 Md. 397, 32 Atl. 249), and hence no such question can arise as there was in that case. In *People ex rel. Hoffman v. Board of Education*, 141 N. Y. 86, 35 N. E. 1087, there was a motion in the Court of Appeals for an order directing the former attorneys of the relator to deliver certain papers to her attorney afterwards employed. The court said that the application should be made to the lower court. The case of *Gale v. Nickerson*, 144 Mass. 415, 11 N. E. 714, does not aid us in reaching a proper conclusion, as it and the case therein cited show that in that state the practice is altogether different from ours.

On the other hand, there are many authorities to the effect that, "where an appeal has been perfected, the jurisdiction of the appellate court over the subject-matter and the parties attaches, and the trial court has no power to render any further decision affecting the rights of the parties in the cause until it is remanded." 2 Ency. of Pl. & Pr. 327, and cases cited in note. Or as said in 2 Cyc. 975: "So, after the appeal is taken, the judgment in the court below cannot be vacated and set aside, subject, however, to the power of courts over their own judgments during the term, notwithstanding steps taken to perfect an appeal." Of course, we do not mean to say that there can be no subsequent proceedings under any circumstances. If, for example, there be no bond or affidavit, as provided for by statute, and an execution is issued on a judgment, the lower court can entertain a motion to quash the execution, or to set aside the sale, notwithstanding an appeal from the judgment has been perfected, but such action would not conflict with what was before this court. So in *Rohrback v. Rohrback*, 75 Md. 317, 23 Atl. 610, it was held that the court could allow counsel fees to a wife after the appeal had been taken by the husband from a decree dismissing his bill for divorce. If that were not so, a wife might not be able to be represented in this court. See, also, *Chappell v. Chappell*, 86 Md. 532, 39 Atl. 984. In *Rice v. West*, 42 Md. 614, it was held that a case could not be removed after judgment by default had been entered, and, during the pendency of an appeal from an order, passed after the judgment by default, refusing to move the case, the court could extend the judgment and issue execution thereon, but there was no bond to stay the proceedings in that case. Other cases might be cited in which there were subsequent proceedings after an appeal had been taken, but there is no case in this state

sanctioning action by the lower court on the very subject-matter of the appeal, unless perhaps it be something done for the preservation or protection of the property involved, and then only when the rights of the parties cannot be affected by such action of the court.

In *Avirett v. State*, 76 Md. 510, 538, 25 Atl. 676, 987, judgment was entered on May 24, 1892, and on the next day a motion was made to strike it out. While that motion was pending the traverser, on July 15, 1892, entered an appeal from the judgment. A motion to dismiss the appeal was made by the Attorney General, on the ground that, as testimony was taken and a hearing had on the motion to strike out the judgment, the appeal taken on July 15th was waived, because the appeal operated to remove the record from the circuit court, and further proceedings on the motion to strike out the judgment could only have been taken on the assumption that the record was still there, and hence if still there, the appeal must have been abandoned. This court refused to adopt that view, and in considering the question said: "The appeal of itself neither stays execution nor necessarily suspends all other proceedings in the court below. Unless it does do this, the mere ordering of the appeal did not deprive the lower court of the jurisdiction to hear the motion; and, if the court had jurisdiction to decide the motion after the appeal had been prayed, the hearing of the motion could not be regarded as a constructive or an actual waiver of the appeal." After holding that the appeal was not waived, Judge McSherry added: "But if it be granted that after the entry of an appeal the lower court had no longer the jurisdiction to hear the motion, then, instead of the appeal being waived or abandoned by the hearing of the motion, the motion was prematurely and improvidently heard. In either view the motion to dismiss must be overruled." There was also a motion to dismiss the appeal taken from the refusal of the court to strike out the judgment, but the court said that, as it did not find it necessary to consider that appeal, the motion to dismiss it need not be passed on. It therefore did not determine the question which was more analogous to the one now under consideration than the others in the case. But that case wholly differs from this in several respects. In the first place the motion to strike out was made the day after the judgment was entered, and during the same term, and was determined before the transcript of the record was sent to this court. The ruling on it was contained in the same record as the other appeal. It does not therefore in any way help the appellant, and we do not want to be understood as intimating that merely entering an appeal from a judgment would prevent a motion to strike it out from being heard. If the transcript of the record has not been transmitted to this court, the appellant can dismiss

his appeal in the lower court, or that court may dismiss it if the transcript is not transmitted within the time required by law. Whether the lower court can vacate a judgment, or take other action, on a motion made before the transcript is transmitted, after it is transmitted, is not involved in this appeal.

It was not decided in *Maryland Steel Co. v. Marney*, 91 Md. 360, 46 Atl. 1077, that the lower court could not vacate a judgment, after affirmance by this court, if proper grounds were shown, but we did decline to concede that it could be done under the circumstances of that case. That judgment had not only been affirmed, but it had been superseded in this court. As a supersedeas of a judgment under our practice requires a confession of judgment by the defendant and his sureties, which in that case was recorded in this court, it is difficult to understand how the latter could be affected by a motion to strike out the original judgment in the lower court. It is perfectly certain that complete relief could not be given by the lower court vacating that judgment; and, in speaking of the question raised, whether a party could make a motion to strike out a judgment in the court where it was rendered, and at the same time file a bill in equity to have it set aside, we said: "Under the peculiar circumstances of this case, where there is a judgment in this court below, which was affirmed in this court and then superseded, a court of equity could undoubtedly afford more ample relief, if the appellant is entitled to it, than could be obtained in the court of common pleas, especially if it be necessary to enjoin the holders of the judgment from enforcing it, as this bill seeks to do." But we are of the opinion that an affirmance of a judgment at law by this court does preclude the court below from vacating the original judgment appealed from, unless it be a case which can be remanded after affirmance, and has been actually remanded for some further proceedings, if there be such case. Section 70, art. 5, of the Code, authorizes a writ of fieri facias or attachment to be issued upon any judgment of this court, directed to the sheriff of the county in which the original judgment appealed from was rendered, and also to other counties upon good cause shown, and section 71 makes provision for issuing such writs to Baltimore city. The statute requires a short copy of the judgment to be sent with the writ. It would be an anomalous condition of affairs if, after a judgment had been affirmed, and an execution or an attachment had been issued from this court, and there had been sent with it a copy of the judgment to the county or city from which the appeal was taken, the lower court could vacate the judgment on which the one in this court was based. A judgment of this court is a lien on all the lands of the defendant in

this state (2 Poe, 377), and it would seem to be clear that if the lower court had the power to vacate its own judgment, it could not disturb that of the appellate court. It would therefore be a useless proceeding to permit it to be done, and in the absence of some statute, we must hold that it cannot be done. This conclusion does not necessarily work an injustice upon a defendant, for we, in effect, held in *Marney's Case* that a court of equity could give relief when the facts justified it, and there are other decisions of this court to the same effect. Of course, in what we said above, we were speaking of an ordinary judgment at law, such as that in this case, and when there is an affirmance without other action of this court. Nor does what we have said apply to an equity case remanded to the lower court, with directions to it to enter a decree in conformity with the opinion of this court, or for further proceedings. As was done in *Safe Deposit Company v. Gittings*, 102 Md. 456, 62 Atl. 1030, 4 L. R. A. (N. S.) 865, a bill of review, upon the ground of material evidence discovered since the passage of the decree, may be filed upon leave granted by the lower court.

The lower court was justified in refusing to hear the motion to strike out the judgment while the appeal was pending in this court, and the appellant cannot complain of its postponement of the hearing. If the appeal from the judgment should for any cause be dismissed, the appellant may get the benefit of the motion pending. So, without considering the motion to dismiss this appeal, we will affirm the order.

Order affirmed; the appellant to pay the costs.

(104 Me. 70)

**FIRST NAT. BANK OF AUBURN v. MAN-
SER et al.**

(Supreme Judicial Court of Maine. March 6, 1908.)

EVIDENCE (§§ 397, 448*)—CHattel MORTGAGES (§ 110*)—PAROL EVIDENCE AFFECTING WRITINGS—CONTRACTS—LIABILITIES SECURED.

It is a well-settled and familiar rule of construction that a contract cannot be varied by parol evidence when its terms are clear, unambiguous, and complete.

It is also a well-settled rule when a contract is ambiguous or incomplete parol evidence may be admitted for the purpose only of correcting the ambiguity or supplying the deficiency.

In the case at bar a bill of sale dated November 10, 1899, for \$3,000, was given by White & Son to one Boothby "as security for his liability upon certain notes," indorsed by said Boothby for said White & Son, but did not state the amount of the notes to secure which it was given. The property included in the bill of sale was described as follows: "All the sawed lumber now in and around our mill in said Leeds and all lumber piled in our yard adjacent thereto together with all sawed or unsawed lumber in and around our said mill or in Dead river or Androscoggin Lake at any and all times until the said sum is paid to the said Boothby." Aft-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

er taking the bill of sale, said Boothby indorsed promissory notes signed and discounted by said White & Son at the plaintiff bank of the face value of \$4,330.05, and also notes similarly signed and indorsed were discounted at the Livermore Falls Trust & Banking Company, of the face value of \$1.190. On the 18th day of December, 1902, said Boothby, with the consent of said White & Son, took possession under his bill of sale of a certain quantity of lumber in and about the mill of said White & Son, and also with their consent appointed one Lothrop as agent to sell said lumber for the benefit of the holders of the notes indorsed by him. Said Lothrop, it was alleged, thereupon proceeded to convert the lumber into money and held the proceeds thereof. April 18, 1903, said White & Son were adjudicated bankrupts, and the defendant Manser was duly appointed and qualified as trustee, and thereafter as trustee aforesaid began an action against the plaintiff bank to recover for the value of certain lumber alleged to have been taken possession of by said Boothby under the bill of sale, and also began an action against said Lothrop to recover the proceeds from the sale of lumber made by him. It was admitted that the amount of promissory notes of said White & Son indorsed by said Boothby and outstanding at the date of the bill of sale was \$1,100, and that all these notes had been fully paid, and all the property described in the bill of sale disposed of before December 18, 1902. The plaintiff bank prayed, among other things, that the bill of sale be adjudged and decreed to be a valid mortgage upon the lumber taken possession of by said Boothby on December 18, 1902, and also that the plaintiff and the Livermore Falls Trust & Banking Company be subrogated to the rights of said Boothby in the security understood to be effected by the bill of sale.

Held: (1) That it was unnecessary to decide whether the terms of the bill of sale were sufficient to cover future acquired property. (2) That the bill of sale did not cover future liability for indorsements by Boothby. (3) That the bill of sale must be adjudged and decreed to be invalid and of no force and effect, and did not create any lien upon the lumber of White & Son taken possession of by Boothby on the 18th day of December, 1902. (4) That on the date of the plaintiff's bill Boothby had no rights under the bill of sale to which the plaintiff and the Livermore Falls Trust & Banking Company could be subrogated. (5) That Lothrop had no right or authority to take possession of and convert into money the lumber belonging to White & Son.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756-1765, 2071; Dec. Dig. §§ 397, 448; * Chattel Mortgages, Cent. Dig. § 192; Dec. Dig. § 110.*]

(Official.)

Report from Supreme Judicial Court, Androscoggin County, in Equity.

Bill by the First National Bank of Auburn against Harry Manser, trustee in bankruptcy, and others. Case reported to the law court for decision, and bill dismissed.

Bill in equity brought by the plaintiff bank against Harry Manser, trustee in bankruptcy of the partnership estate of Charles D. White and Howard C. White, late copartners in business as C. D. White & Son, Thomas H. Boothby, Ralph K. Lothrop, and the Livermore Falls Trust & Banking Company. The bill was taken pro confesso as to Thomas H. Boothby and the Livermore Falls Trust &

Banking Company. The other defendants answered. The Livermore Falls Trust & Banking Company was requested to join in the bill as a party plaintiff, but, not consenting, was joined as a party defendant. The gist of so much of the bill as is material to the issues raised is stated in the opinion.

Heard on bill, answers, and proof before a justice of the Supreme Judicial Court sitting as a court in equity. At the conclusion of the hearing, and by agreement of the parties, the case was reported to the law court for decision upon so much of the evidence as was legally admissible.

The case sufficiently appears in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

John A. Morrill, for plaintiff. Harry Manser and F. A. Morey, for defendant Manser. Newell & Skelton, for defendant Lothrop.

SPEAR, J. This is a bill in equity involving the construction of the following written instrument:

"Know all men by these presents

"That we, Charles D. White and Howard C. White of Leeds, county of Androscoggin, and state of Maine, copartners under the firm name of C. D. White & Son, in consideration of three thousand (\$3,000) paid by Thomas H. Boothby, of said Leeds, the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer, and deliver unto the said Thomas H. Boothby the following goods and chattels, namely: 'All the sawed lumber now in and around our mill in said Leeds and all lumber piled in our yard adjacent thereto, together with all sawed or unsawed lumber in and around our said mill or in Dead river or Androscoggin Lake at any and all times until the said sum is paid to the said Boothby.'

"Provided nevertheless that this lumber as above specified is sold and held by the said Boothby as security for his liability upon certain notes and that said lumber may be sold to pay said notes and in event of the payment of same and a release from said Boothby that all or any part of said lumber shall revert to and become the property of the said Charles D. White & Son.

"To have and to hold all and singular the said goods and chattels to the said Thomas H. Boothby, and his executors, administrators, and assigns, to their own use and behoof forever.

"And we hereby covenant with the said Thomas H. Boothby that we are the lawful owners of the said goods and chattels; that they are free from all incumbrances that we have good right to sell the same as aforesaid; and that we will warrant and defend the same unto him the said Thomas H. Boothby, his heirs, executors, administra-

tors, or assigns, against the lawful claims and demands of all persons."

The plaintiff bank in its bill in equity alleges that, after taking said bill of sale, said Boothby indorsed promissory notes signed and discounted by White & Son at the plaintiff bank of the face value of \$4,330.05; that notes similarly signed and indorsed were discounted at the Livermore Falls Trust & Banking Company of the face value of \$1,190; that in 1902 said Boothby, with the consent of White & Son, took possession under his bill of sale of certain lumber in and about the mill of said White & Son, and with their consent appointed Ralph K. Lothrop as agent to sell said lumber to the best advantage for the benefit of the holders of the notes indorsed by him; that said Lothrop thereupon proceeded to convert said lumber into money, and now holds the proceeds thereof; that on the 18th day of April, 1903, the said partnership of C. D. White & Son, and the individual members thereof, were adjudicated bankrupts under the laws of the United States, and that Harry Manser of Auburn, one of the defendants, was appointed and qualified as trustee in bankruptcy of said estates; that on the 18th day of August, 1903, said Manser, as said trustee, began an action against the plaintiff bank to recover the sum of \$3,312.61 for the value of certain lumber alleged to have been taken possession of by said Boothby under said bill of sale; that on the 29th day of August, 1903, said Manser as trustee also brought an action against said Lothrop to recover the proceeds held by said Lothrop from the sale of said lumber above described.

Under these allegations the plaintiff prays that said bill of sale dated November 10, 1899, may be adjudged and decreed to be a valid mortgage upon the property so taken possession of by said Boothby on the 18th day of December, 1902, and that the plaintiff and said Livermore Falls Trust & Banking Company may be subrogated to the rights of said Boothby in the security understood to be effected by said mortgage. The other requests are not essential to the decision of the case.

It is admitted that the amount of promissory notes of White & Son indorsed by Boothby, and outstanding at the date of the bill of sale, was \$1,100, and that all these notes had been fully paid, and all the property described in the bill of sale disposed of, before December 18, 1902.

Under this state of facts, the plaintiff contends that the bill of sale should be regarded as a mortgage and construed to extend a lien to after-acquired property and security to after-acquired liability of Boothby by indorsement. The instrument will not bear this construction. Whether its terms are sufficient to cover future acquired property it is unnecessary to decide, as it is very clear that they do not cover future liability for indorsements. The rule of construction that a contract, when its terms are clear, unam-

biguous, and complete, cannot be varied by parol is too familiar to require citation. Another rule, that, when a contract is ambiguous or incomplete, parol evidence may be admitted for the purpose only of correcting the ambiguity or supplying the deficiency, is equally well settled.

The second paragraph in the contract is specific and unambiguous, but incomplete in omitting to state the amount of the notes to secure which the bill of sale of lumber was given. If we supply the words in italics to indicate the amount of the notes, then this paragraph will read as follows: "Provided, nevertheless, that this lumber as above specified is sold and held by said Boothby as security for his liability upon certain notes, amounting to \$1,100, and that said lumber may be sold to pay said notes and in the event of payment of the same and a release from said Boothby that all or any part of said lumber shall revert to and become the property of said Charles D. White & Son." Reading into the contract the words "amounting to \$1,100" makes it complete. Now, it is evident, construing the contract in its complete form, that no interpretation can be invoked that makes this paragraph more lucid or specific than the language itself imports. In other words, it must be held to mean just what it says, that the lumber covered by the bill of sale should be held by Boothby as security for indorsement of notes to the amount of \$1,100 and no more, the amount of the indorsed notes outstanding at the date thereof.

It further provides for what, in the absence of any provision, the law would imply "that in the event of payment the same [notes] and a release from said Boothby that all or any part of said lumber shall revert to and become the property of the said Charles D. White & Son." This language needs no interpretation. When the notes amounting to \$1,100, indorsed by Boothby, were paid, all his rights under the bill of sale ceased and all the lumber was released, and by operation of law, independent of any agreement, reverted to the original owners. The latter part of this paragraph was simply confirmatory of the legal rights of the parties.

Our conclusion is that the instrument described and set forth in the plaintiff's bill, dated November 10, 1899, must be adjudged and decreed to be invalid and of no force and effect, and to create no lien upon any of the property of the said C. D. White & Son; that on the 18th day of December, 1902, the date when said Boothby is alleged to have taken possession of certain lumber of C. D. White & Son with their consent by virtue of the authority conferred upon him by said bill of sale, said Boothby had no lien upon any of the lumber so alleged to have been taken, or right to possession thereof, that at the date of the plaintiff's bill he had no rights under the alleged bill of sale to which

the plaintiff and the Livermore Falls Trust & Banking Company could be subrogated, and that said Ralph K. Lothrop had no lawful right or authority to take possession of, and convert into money, lumber and other property of said C. D. White & Son, as he is alleged to have done in the plaintiff's bill.

Bill dismissed, with costs to the defendant Manser only.

(104 Me. 65)

STROUT v. LEWIS.

(Supreme Judicial Court of Maine. March 4, 1908.)

1. CONTRACTS (§ 99*)—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF—FRAUD.

When, in an action on a written contract, the defendant alleges fraud in the inception and execution of the contract, the burden is on the defendant to establish the allegation of fraud by clear and convincing proof.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 448; Dec. Dig. § 99.*]

2. REFORMATION OF INSTRUMENTS (§ 45*)—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF—FRAUD.

When, in an action on a written contract, the defendant alleges fraud in the inception and execution of the contract, and the proceeding in effect involves the reformation of the contract on the ground of fraud, then, to enable a court in equity to exercise this power, proof of the fraud must be full, clear, and decisive, especially where the oral evidence comes mainly from the parties to the suit, and relief will not be granted where the evidence is loose, equivocal, or contradictory or in its texture is open to doubt or opposing presumptions.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 45.*]

3. BROKERS (§ 86*)—ACTIONS FOR COMPENSATION—EVIDENCE—SUFFICIENCY.

In the case at bar, *held* (1) that the proof fell far short of substantiating the fraud alleged by the defendant; (2) that the evidence showed good faith rather than fraud on the part of the plaintiff; (3) that the verdict was so glaringly wrong that it must be set aside.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

(Official.)

On Motion from Supreme Judicial Court, Sagadahoc County.

Assumpsit by E. A. Strout against Margaret M. Lewis, administratrix. Plaintiff moves to have a verdict in his favor set aside. Verdict set aside.

Assumpsit to recover a broker's commission on the sale of real estate based upon a written contract. Plea, the general issue, with brief statement as follows:

"And, for a brief statement of equitable matter of defense to be used under the general issue pleaded, the said defendant says that on the 27th day of June, 1904, the date of the alleged written agreement, and prior thereto, the plaintiff, by one Hutchins, his agent, and the defendant, agreed between themselves that if the defendant should place the real estate in question in the plaintiff's hands for sale by him, the said defendant

would pay to the said plaintiff the sum of \$20, which was the sum agreed upon to cover the plaintiff's expense in cataloguing and advertising said estate; that said sum of \$20 should be payable to the said plaintiff in any event, whether a sale was effected by him, and that there should be no other or further expense or charge to her, the said defendant, on any account or for any reason or purpose whatsoever; that upon these propositions the minds of the parties met and mutually agreed; that on said 27th day of June, 1904, the aforesaid agreement was intended to be reduced to writing, and that the said plaintiff's agent volunteered to so reduce it, and, in pursuance thereof, wrote in upon a printed form the written agreement which is herein declared on, and handed the same to the said defendant to be signed by her; that she then asked him what said paper was, and that he then and there represented to her that the same was merely a writing to show that the said real estate had actually been placed in the plaintiff's hands for sale, and also to provide for the payment of said \$20 in accordance with their agreement, and that, relying upon said representations, the defendant then and there signed the same.

"And the defendant further says that in truth and fact the statement and representations of the plaintiff's agent as to the nature and contents of said paper were false and fraudulent; that the said instrument did not embody the terms of the actual agreement between the parties; that the misrepresentations of the plaintiff's agent were affirmative statements of fact, made with the purpose of inducing the defendant to sign said instrument, and that in reliance thereon she was, in fact, induced to and did sign the same; that said affirmative statements were false in fact and known to be so by said plaintiff's agent; that they were material representations and that the defendant ever has been and now is ready and willing, and now offers, to pay to the plaintiff the \$20 due to him upon the original and only mutual agreement and contract between them."

Tried at the August term, 1907, of the Supreme Judicial Court, Sagadahoc county. Verdict for plaintiff for \$20, with interest from May 22, 1906. The plaintiff then filed a motion to have the verdict set aside for the following reasons: (1) "Because it is against law and the charge of the justice." (2) "Because it is against evidence." (3) "Because it is manifestly against the weight of evidence in the case." (4) "Because the damages assessed are insufficient."

The case is stated in the opinion.

Note.—Although the title of this case would indicate that the action was against the defendant in a representative capacity, yet the writ, declaration, and proceedings show that the suit was against her individually, and not as an administratrix.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

Williamson & Burleigh, for plaintiff. Staples & Glidden, for defendant.

CORNISH, J. This was an action of assumpsit to recover a broker's commission on the sale of real estate, based upon a written agreement dated June 27, 1904.

The defendant pleaded the general issue, together with an equitable brief statement, alleging fraud in the inception and execution of the written contract, and claiming that under the actual oral agreement, made between the parties she was to pay the plaintiff \$20 when the farm was sold, to cover the expense of cataloguing and advertising, whether the sale was made through the plaintiff's efforts or her own, and that there was to be no further charge against her of any kind.

By agreement of counsel, the case was submitted to the jury upon these pleadings, they to pass upon the question of fraud, and, if the defendant's contention were sustained, the jury were authorized to give the plaintiff a verdict of \$20 as if the contract itself had been reformed. This the jury did, their verdict being for \$20, with interest from the date of sale. The plaintiff on motion seeks to have this verdict set aside as against the evidence.

The vital question is the proof of deliberately planned and carefully executed fraud on the part of the plaintiff's agent, Hutchins; for on no other hypothesis can the verdict be sustained. The charge is a serious one, and the law imposes upon the defendant the burden of substantiating it by clear and convincing proof. "A stricter standard in some such phrase as 'clear and convincing proof' is commonly applied to measure the necessary persuasion for a charge of fraud." *Wigmore*, Ev. § 2498. It must be "clear, convincing, and satisfactory." *Liberty v. Haines*, Adm'r, 103 Me. 182, 68 Atl. 738.

In effect, the proceeding here involved the reforming of a written contract on the ground of fraud, and the law is well settled that, to enable a court in equity to exercise this power, proof of the fraud must be full, clear, and decisive, and relief will not be granted where the evidence is loose, equivocal, or contradictory or in its texture is open to doubt or opposing presumptions. *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Fessenden v. Ockington*, 74 Me. 123. This rule is especially enforced where the oral evidence comes mainly from the parties to the suit. *Parlin v. Small*, 68 Me. 289.

The proof in this case falls far short of this standard. The only evidence of fraud comes from the defendant herself, who, in mechanical and oft-repeated phrase, says that the agent told her "his terms were \$20 for advertising and so forth"; that "it would cost her \$20 whether he sold the place or she did"; that he gave her this contract to sign,

saying that "it was a document to show that she would pay him the \$20"; and that she did not read it or hear it read, but relied upon his statement as to its contents. This testimony is without corroboration. Against it was the clear and positive statement of Mr. Hutchins that the terms of the contract as written were precisely as agreed upon orally; that he read the agreement to the defendant and explained it fully; that she looked on while he was reading; and that she then signed it, after having ample opportunity to examine it further if she had desired. The inherent improbability of the defendant's version strikes one forcibly. She was a woman of mature years and of intelligence, and it is highly improbable that she would have signed a contract with a comparative stranger without first learning its contents either by reading it herself or having it read to her. It is equally inconceivable that Mr. Hutchins would have agreed to take property into his hands valued by her at \$1,200, and negotiate a sale for the paltry sum of \$20, a commission of 1% per cent. on the asking price, including expenses which might naturally consume a large portion if not the whole of that amount, when his usual rates were the same as expressed in the contract. He would be giving his services for nothing.

Nor is it easy to believe such deliberate fraud on the part of Mr. Hutchins, when we consider that he had no personal interest in the matter, but was acting for the plaintiff, and that this agency had sold more than 100 farms in this single county during the past few years. Such conduct would be more easily attributable to a transient promoter than to the proprietor of an established business, where experience teaches that honesty is the best policy.

It further appears that the property was finally sold through the efforts of the plaintiff's agent Mr. Morrill, who succeeded Mr. Hutchins in that locality. As the result of previous correspondence, a sister of the purchaser, with two others, went to Brunswick, and met Mr. Morrill by appointment. He procured a team with driver, and sent them to the defendant's farm with a note to Mr. Jaques, a relative and confidential adviser of the defendant. He quoted \$1,100 as the selling price; a reduction having been authorized from the original figure. The trade was closed that day between the parties themselves on the premises for \$1,050, although great care was taken to conceal the fact from Mr. Morrill by both the defendant and the purchaser, who during the negotiations asked the defendant the significant, and yet not unusual, question whether she could sell the place herself.

It was not until some weeks later, when the parties met in Brunswick to make the transfer, that Mr. Morrill accidentally learned of the sale, and he then asked for his commission in accordance with the contract. Under the established rule in this state, the

plaintiff had fulfilled his part of the agreement and was entitled to his compensation; but this seems to have been one of a class of cases, not too uncommon, where avarice weakens principle, and, after a purchaser has been found through the efforts of a broker, the owner, in closing the deal, is willing to make a reduction from the purchase price and stand his chances of avoiding the payment of commissions.

The evidence in this case shows good faith rather than fraud on the part of the plaintiff and his representatives, and the verdict of the jury is so glaringly wrong that it cannot be allowed to stand.

Verdict set aside.

(77 N. J. L. 186)

ANDERSON v. MYERS.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. QUO WARRANTO (§ 32*)—PROCEEDINGS—PARTIES PLAINTIFF—USE OF NAME OF STATE.

Quo warranto proceedings, instituted under Act April 8, 1903 (P. L. 1903, p. 377), on the relation of one claiming title to a municipal office against an alleged intruder, being a suit affecting the public interest, the state is, to a legal intent, a party, and its name should be made a part of the title.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 39; Dec. Dig. § 82.*]

2. PARTIES (§ 95*)—QUO WARRANTO—PARTIES PLAINTIFF—USE OF NAME OF STATE—DEMURRER.

The omission of the state from the title, in quo warranto proceedings instituted on the relation of one claiming title to a municipal office against an alleged intruder, is a formal defect, which is amendable, and is not ground of demurrer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 161; Dec. Dig. § 95.*]

3. MUNICIPAL CORPORATIONS (§ 149*)—LICENSING OFFICERS—QUALIFICATION.

The provision in P. L. 1901, p. 240, that the failure of a person, appointed to be a member of a board of excise commissioners, to qualify within 10 days shall cause a vacancy in the office refers to all appointments, original or otherwise, and an appointee's omission to take the required oath of office within 10 days after his second appointment cannot be cured by his later qualification.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 149.*]

4. MUNICIPAL CORPORATIONS (§ 149*)—EXCISE COMMISSIONERS—TITLE TO OFFICE.

A person appointed to succeed himself as a member of a board of excise commissioners, who fails to qualify by taking the prescribed oath of office within 10 days, as required by P. L. 1901, p. 240, declaring that such failure shall render the office vacant, acquires no title to the office as against one appointed to fill the vacancy, who, having legally qualified, can assert in the same suit the right to the public and his own right to the office.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 149.*]

Quo warranto on the relation of James D. Anderson against William S. Myers. Judgment for relator.

See, also, 67 Atl. 1036.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

Nelson B. Gaskill, Asst. Atty. Gen., for relator. Alan H. Strong, for respondent.

PARKER, J. This is an action of quo warranto, begun pursuant to section 4, Act April 8, 1903 (P. L. 1903, p. 377), which section was originally enacted in 1884 (P. L. p. 3207; Gen. St. 1895, p. 2633, § 4), and permits any citizen of this state, believing himself entitled to a municipal office or franchise, to file as relator an information in the nature of a quo warranto against an alleged intruder, and without obtaining the leave of this court to file such information in the name of the Attorney General, as was formerly necessary, and still is necessary when the relator is not a claimant. Under the act of 1884 as originally passed it was held that only the title of the respondent to the office could be inquired into. *Davis v. Davis*, 57 N. J. Law, 206, 31 Atl. 218. But in 1895 two further acts were passed, one approved February 18th (P. L. 1895, p. 82), providing that on a proper record this court might determine the title of the relator, as well as the respondent, and enforce its judgment by proper process, and another, approved March 19th (P. L. 1895, p. 344), providing that on a judgment of ouster and in favor of a relator the court may make appropriate orders regarding the surrender of the office and the transfer of its records. The effect of these various acts has been described obiter as turning the suit into a private controversy between the parties. *Manahan v. Watts*, 64 N. J. Law, 465, 470, 45 Atl. 813. We shall have occasion to touch on this point presently.

The record before us raises the issue: (1) Whether respondent usurps or intrudes into the office of member of the board of excise commissioners of the city of New Brunswick; and (2) if so, whether relator is entitled to hold said office. It consists of the information and demurrer thereto. The demurrer questions the sufficiency of the facts, pleaded in the information and admitted by the demurrer, to establish relator's title to the office, even if a vacancy exist; but this defense was not argued or briefed, and our examination of the case satisfies us that, if a vacancy existed on June 1, 1907, the date of relator's appointment to the office, relator is entitled to hold it. The real controversy relates to the title of respondent. It appears that under and by virtue of the act of 1901 for the establishment of an excise department in cities, the city of New Brunswick in 1905 passed an ordinance to create a board of excise commissioners, a copy of which was duly filed, as provided by law, and that the judge of the court of common pleas in due course appointed in September, 1905, the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

three members of the board for terms of one, two, and three years, respectively, the respondent Myers being appointed for one year; that at the expiration of his term, on September 11, 1906, he was again appointed by the court to succeed himself, but for a term of three years, but failed to qualify by taking the oath of office within 10 days, as required by the statute of 1901. It is also alleged that he failed to take certain other oaths provided by the city charter, and that he became further disqualified by removing his residence from New Brunswick, the act requiring members of the excise board to be residents and legal voters within their respective municipalities. These latter claims we have found it unnecessary to discuss.

Relator is met at the outset by the proposition that the state should be a party to this proceeding, but does not appear on the record as such. It is true that the state is not named in the title of the cause, nor is the Attorney General brought into the body of the information. The question then arises, Should the state be a party? and, if so, is it to a legal intent a party in this proceeding? We think both these questions should be answered in the affirmative. In *Davis v. Davis*, *ubi supra*, the state was a party in name and in fact, for the court, in awarding judgment of ouster in that case, imposed a substantial fine for the usurpation of the office. And Chief Justice Beasley, in discussing the effect of the act of 1884, was careful to assert a prerogative control of this court over the action, and to deny the competency of the Legislature to confine it by statutory enactment. It is true that this was before the Acts of 1895 were passed, but we cannot see that they have altered the situation in any way as affecting the presence of the state as a party to the suit. So far from abridging the powers of this court, they have enlarged them by enabling the court to adjudge the title of the claimant, and place him in possession. The remark of the late Justice Lipincott in *Manahan v. Watts*, 64 N. J. Law, at page 470, 45 Atl. at page 815, that "in this proceeding it is merely the private rights of the parties that are affected, and not a case affecting public interest, where the people are the real, as well as the nominal, prosecutor," was not in our estimation necessary to a decision of that case, and we cannot concur in it. Whatever the entitling of the suit, or the form of the record in such a case, the state is still a party so far as to give this court full control of the litigation in the public interest. To hold otherwise would be to paralyze the arm of this court, to disable it from inflicting punishment in a proper case upon a usurper, and to enable public offices to be transferred between private individuals by collusive suits. Relator's counsel, no doubt, omitted the name of the state from the title of the cause in deference to the rule of this court, adopted at November term, 1900, and appearing as part of rule 15, "the

name of the state shall not be used merely because of the nature of the writ or proceeding, but instead the name of the party in interest shall be used." Before the adoption of this rule came Act 1900, c. 48 (P. L. 1900, p. 73), section 2 of which is distinctly narrower in its scope. "The name of the state shall not be made a part of the title of any cause or proceeding merely because of the nature of the writ or other proceeding by which it is taken into court." The same course was pursued without criticism in *Hayter v. Benner*, 67 N. J. Law, 359, 52 Atl. 351, and *Decker v. Daudt* (N. J. Err. & App.) 67 Atl. 375, both cases under the fourth section of the act of 1903. But in our opinion the state is none the less a party because of the right conferred on a certain class of private relators to institute the suit, and a mere rule of practice neither has, nor was intended to have, the effect of eliminating it as such party. Even if the omission of the state from the title be a defect, it is merely a formal one, not the subject of general demurrer, and amendable. This ground of demurrer must therefore fail.

The question then arises whether respondent forfeited his office by failing to take the oath within 10 days after appointment. The provision of the statute (P. L. 1901, p. 240) on this point is as follows: Section 3 provides for the original appointment of members for one, two, and three years, the appointment of successors after expiration of terms, and the filling of vacancies for unexpired terms. Section 4, that within 10 days they shall meet and organize by electing a chairman and taking a prescribed oath; that the city or town clerk shall be ex officio clerk of the board, and then goes on to say, "should any person or persons appointed to be a member or members of any such board fail to qualify, as herein provided, within said ten days, such failure shall cause a vacancy or vacancies to exist in said board, which shall be filled as hereinbefore provided." It is argued that this clause does not refer to any but the original appointments, and hence that when Myers failed, as his demurrer admits he did, to take the oath within 10 days after his second appointment, it was an omission curable by his later qualification. We think, however, that the clause quoted was intended to refer to all appointments, original or otherwise, and therefore that by Myers' noncompliance a vacancy arose. Counsel for respondent again argues that no vacancy can exist until it is judicially declared, relying on *Clark v. Ennis*, 45 N. J. Law, 69. That case, however, related merely to the validity of process executed by a sheriff, who, though elected for three years, failed to renew his bond annually, as required by law, and was decided on the principle that, notwithstanding the statute provided that such failure should render the office vacant, he was still sheriff de facto until a new sheriff legally took his place. But in the

case at bar the oath is in our judgment a prerequisite to qualification; and, while respondent's acts as an officer de facto would be sustained on public grounds (Rosell v. Board of Education, 68 N. J. Law, 498, 53 Atl. 398; Rosell v. Avon by the Sea, 70 N. J. Law, 336, 57 Atl. 1132), the taking of the oath in form as required by law is as essential to his enjoyment of the office as the appointment itself. So it was held by this court in cases where the relator claiming the office had failed himself to qualify by taking the oath (Hayter v. Benner, 67 N. J. Law, 359, 52 Atl. 351; Manahan v. Watts, 64 N. J. Law, 465, 45 Atl. 818), and we conceive that the same principle must apply to the respondent whose title is attacked. There seems to be no valid reason why in such a case a legal appointment cannot be made to fill such vacancy, nor why the appointee having legally qualified, cannot assert in the same suit the right of the public to oust the intruder and his own right to take and hold the office. The statute seems to be framed to meet just such a contingency, and the public good is subserved by avoiding a hiatus in the tenure.

Our conclusion, therefore, is that the demurrer should be overruled, with costs, and judgment entered that the respondent should be ousted from the office of excise commissioner of New Brunswick, and that the relator is entitled thereto.

(75 N. J. E. 128)

MASON v. ROSS.

(Court of Chancery of New Jersey. Oct. 27, 1908.)

1. DEDICATION (§ 31*)—HIGHWAYS—ACCEPTANCE.

Dedication of a public highway may be made by the creation of an easement of way in a deed of conveyance describing the way as a street, and the dedication may be made in present, to be accepted and used in futuro. Until accepted by the public authorities, either formally or by being worked and repaired, it remains a private easement.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 64, 65; Dec. Dig. § 31.*]

2. HIGHWAYS (§ 79*)—NONUSER—EFFECT.

Nonuser of a public highway for more than 20 years will not operate to extinguish the public's right of easement.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 281; Dec. Dig. § 79.*]

3. EASEMENTS (§ 30*)—PRIVATE WAY—NON-USE.

Nonuser of a private way for more than 20 years will operate to extinguish an easement, if coupled with an adverse enjoyment.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77-79; Dec. Dig. § 30.*]

4. EASEMENTS (§ 80*)—ABANDONMENT—EXTINGUISHMENT.

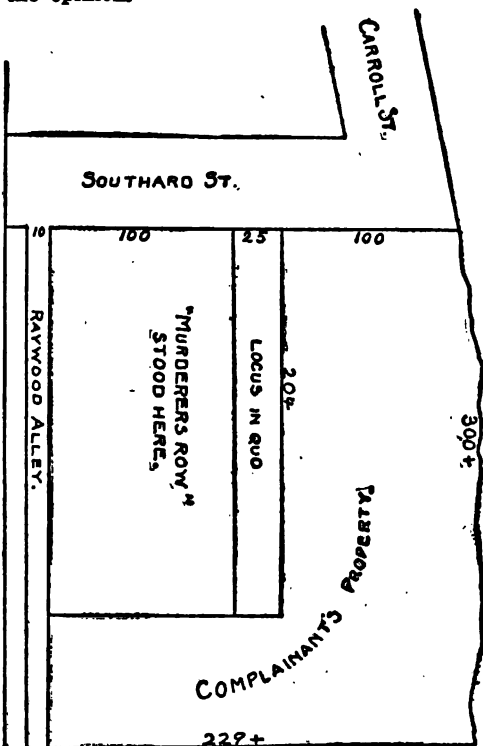
A right of way, either public or private, may be lost by abandonment; and it is not so much the duration of the cesser to use, but the nature of the acts done, which are material in determining whether or not the easement has been extinguished by an equitable estoppel arising out of matter in pais. The time of nonuser may be immaterial.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77-79; Dec. Dig. § 30.*]

(Syllabus by the Court.)

Bill by Mary L. Mason against James Ross for an injunction. Bill dismissed.

The accompanying diagram contains a sufficient number of the lines on the page of the City Atlas of Trenton, which was offered in evidence, to illustrate the references to boundary lines and dimensions set forth in the opinion.



John H. Backes, for complainant. William J. Walsh and Barton B. Hutchinson, for defendant.

WALKER, V. C. The defendant commenced the erection of a dwelling house upon a lot of land 25 feet in width and 204 feet in depth, fronting on the easterly side of Southard street, in the city of Trenton, and the progress of the work was arrested by an injunction of this court. The complainant claims that she has an easement over the lands on which the building stands, either as a way appurtenant to other lands of hers, binding upon the premises in question, or as one of the public by reason of a dedication of the way as a public way or street. It is conceded that Benjamin Albertson owned the locus in quo, including the lands of the complainant and other adjacent land in 1863, and in October, 1870, conveyed to John Tay-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lor part of those lands, beginning on the easterly side of Southard street and running by the northwesterly line of a proposed street 25 feet in width, 204 feet deep. This course is the southerly line of part of the complainant's land, which land came to her mediately from Benjamin Albertson, through sundry meane conveyances. At a later period, the time not being fixed, a row of houses was erected on the southerly side of this street, called and known as "murderers' row." Conveyances were made of houses in this row as being a certain distance easterly from Southard street, and on the southerly side of Carroll street, namely, the street in question. In the year 1895 Albertson, having disposed of all of the rest of the tract, conveyed his estate in that part of it sometimes called "Carroll street," and sometimes "East Carroll street," being the lot 25 by 204 feet, on which the defendant has commenced the erection of his building, to the Mechanics' Mutual Loan Association, describing the same by metes and bounds, but not calling it a street. In December, 1895, the loan association conveyed to the defendant and John G. Hess its lands at the site in question, and the defendant claims title by virtue of the conveyance from the loan association to himself and Hess, and says that by virtue thereof they entered into the full and absolute possession of the tract and held the same, and subsequently, in the same year, erected on the lands, about 100 feet easterly from Southard street, a garbage crematory, covering about 16 feet of the width of the land called a street, and used and operated the same for a number of years, without any objection or complaint on the part of the abutting owners, one of whom was a predecessor in title of the complainant; that the defendant and Hess filled up the lot with earth, and used it in connection with the crematory. It was necessary for them to fill the lot with earth to get access to it, because of the abutment wall of the Southard street bridge, which will be referred to subsequently. Hereafter the defendant will be referred to alone as the owner of the servient tenement. The complainant, as already said, was not an abutting owner at that time. Her title was derived by devise from her husband, whose will was proved August 19, 1898. His title was derived by conveyance dated December 10, 1897. In 1889 the county of Mercer built an elevated bridge across the railroad and canal on Southard street, north of the locus in quo, and raised the grade of Southard street, by way of approach to the bridge, to a height of about 17 feet across the tract or street in question, thus shutting off access to Southard street from East Carroll street, so called. Some time since, the houses known as "murderers' row" were demolished, whereupon all apparent traces of the street became obliterated. During the time the "row" was in existence there appears to have been a few trees set out, and some sort of path by way of

sidewalk seems to have existed from the "row" to Southard street. There apparently never was any clearly defined street at the point in question; the houses being built on what had the appearance of a small common. The intention of Albertson was undoubtedly to lay out and dedicate a street, to be called East Carroll street, leading from Southard street easterly. Not only did he and his successors in title make conveyances with reference to the locus in quo as a street, but the title to part at least of the land on the Albertson tract which has come to the defendant makes express mention of the street, and put him upon notice as to its locality, if in fact he did not know of its lines. Upon this score there is no difficulty.

It is conceded that the municipal authorities of Trenton, within whose corporate limits are the premises in question, never accepted the proposed street, or repaired or worked it, assuming the public to have gained an easement therein by dedication or user. Counsel for complainant relies largely upon *Booream v. North Hudson County R. R. Co.*, 40 N. J. Eq. 557, 5 Atl. 106, in which the Court of Errors and Appeals said: "When the language of a deed is sufficient to create an easement of a right of way over the premises conveyed as an appurtenant to the grantor's premises lying adjacent thereto, and words are added indicating a purpose to dedicate the way as a public street, held, that the creation of a public right, to be enjoyed in futuro whenever the public authorities might see fit to accept the dedication, was not inconsistent with the private easement, which inured to the grantor immediately from the grant, and that the latter was entitled to the use of the way, although the public had not accepted the dedication." No map or plat of the tract showing the street in question was ever filed, and the defendant lays great stress upon that fact, and claims that there is no evidence of a dedication. But I do not understand that a map or plat is necessary; for, as was said by Vice Chancellor Reed, in *Seibert v. Graff* (N. J. Ch.) 38 Atl. 970: "Although there may be no reference to a map, yet the fact that land is described in a deed as bounding upon a street, and there are marked, upon the grounds adjacent to the land sold, traces of the existence of a street, this condition of affairs will produce the same result." The complainant succeeds and the defendant fails on the question of dedication. The dedication was made by Albertson in presenti, to be accepted and used in futuro. See *Mayor of Jersey City v. Morris Canal Co.*, 12 N. J. Eq. 547, 563. Nevertheless, in my opinion, the decision of this case does not depend upon the question of dedication or no dedication, but upon the question of equitable estoppel. In other words, has there been such an abandonment and cesser of the use of this strip of land called a street as to disentitle the complainant to the re-

lief she seeks, namely, an injunction restraining the defendant from in any manner interfering with her use of the street, and compelling the defendant to remove so much of the building as he has erected upon its site? That there can be an abandonment of both public and private ways is supported by abundant authority. On the hearing an offer was made, on behalf of the defendant, to show that the Mechanics' Mutual Loan Association, while the owner of "murderers' row," sued the county of Mercer for closing up the street or way in question, and that Peter Dehe, while the owner of the tract now owned by the complainant, made a deed of release to the county for the damages which he had sustained by the building of the approach to the Southard street bridge, which shuts off access from the alleged street to Southard street. Undoubtedly it was these proceedings, and the obstruction of the street or way, which led Albertson in 1895 to make a conveyance of the street to the loan association. He and the association certainly believed that all rights in the way were extinguished, and the association unquestionably conveyed to Hess and Ross, upon the understanding of all parties, that the easement, public or private, had been extinguished. The offer of the testimony advertised to was excluded, and I think properly so, as to the suit for damages, but not so as to the release from Dehe, as will hereafter appear. Surely, if the grade of Southard street had not been raised and an embankment thereby erected across the entrance to East Carroll street, so called, the complainant's rights would not have been lost by the conveyance of the fee of the street by Albertson to the loan association, and by it to Hess and Ross, and by their obstruction of it with their crematory, and the defendant's present obstruction with his building. If the way were a public one, its being obstructed for over 20 years would not extinguish the public's right. If a private one, the right has not been lost by nonuser, because 20 years of nonuse has not continued, coupled with an adverse enjoyment. The easement of way, whether public or private, over the locus in quo has been lost to the complainant, if lost at all, by reason of the changed conditions of and concerning the whole tract originally owned by Albertson, and of which her lands are a part, and by reason of the operations of the defendant upon the tract in question, without protest from the complainant and her predecessors in title, whereby an equitable estoppel, precluding the complainant from asserting the right to use the locus in quo as a way or street, has arisen.

True it is, that when only the foundations of the house, now partly erected upon the tract, were built, the defendant was warned to desist, and in the face of warning he proceeded with his building operation until stopped by the injunction of this court; but, after all, access over the locus in quo to

Southard street had been cut off between 1889 and 1905, a period of six years, by the presence of the abutment wall, built across it on Southard street by way of approach to the Southard street bridge, which wall showed a perpendicular face of some 17 feet, and the defendant, after acquiring the land, built a garbage crematory on part of this way, and by filling in with earth made a way from the crematory out onto Southard street. He was not obliged to make this embankment for the benefit of abutting owners. He made it for the benefit of himself. He was not required to maintain it for the benefit of abutting owners, and he removed it, or at least that part of it where the cellar walls of the building whose erection he has commenced are placed. The annexed diagram shows the exact situation of the locus in quo with reference to the whole premises originally owned by Albertson, more than one-half of which he conveyed to Dehe, and which property (Dehe's) is now in the possession of the complainant. The strip of land which was the street or way in question is a trifle larger than two ordinary city building lots. It is 25 feet in width by 204 feet deep. It is a cul-de-sac, but that would not prevent its becoming a highway. *State v. Bishop*, 39 N. J. Law, 226, 228. The city of Trenton never accepted the dedication of this so-called street, or worked or repaired it, which is not to be wondered at, and, since the county of Mercer has raised the grade of Southard street, through which street it laid and built the abutment wall across this way to the height of some 17 feet to the bridge beyond, it is safe to say that the city of Trenton never will have anything to do with the locus in quo as a street or public way. To do so would be absurd. Since the demolition of "murderers' row" there is no occasion for the use of this street as a way appurtenant to the lands whereon the tenements which composed that row were erected. This property, where stood the row, as I understand it, is now in the defendant. However that may be, so far forth as the complainant is concerned, the situation is as though all the land on the tract, formerly of Albertson, excluding the tract owned by the complainant and excluding the street, is in the defendant; for the complainant does not claim a right to use the way for access to any premises save her own. Now as a matter of fact her premises are 100 feet front on Southard street, binding northerly on the way in question and running round the same to the rear, forming an L, the rear portion being 71 feet wide and extending down to and having a frontage of that width on Raywood alley, an alley 10 feet wide, which runs out into Southard street, 100 feet southerly from the southerly line of the way in question. The complainant not only has access to Southard street through this alley, but also has access to Southard street under the

bridge north of the locus in quo and north of the terminus of the abutment wall.

The defendant denies that the complainant has any easement in the premises, and claims title in himself, which title does not depend upon prescription, but upon his deeds and the fact of an abandonment of the easement, public or private, whereby the rights of way over the street in question were extinguished. In *Baldwin v. Trimble*, 85 Md. 396, at page 402, 37 Atl. 178 (36 L. R. A. 489), the court said: "Whilst an encroachment on a highway is conclusively settled in Maryland to be a public nuisance which can never grow by prescription into a private right, * * * yet it may be true and in perfect harmony and accord with that doctrine that cases concerning public streets can arise of such a character, and founded upon an actual and notorious abandonment of the highway by the public, that justice requires an equitable estoppel shall be asserted, even against the public, in favor of individuals. In that event such cases, as observed by Judge Dillon, 'will form a law unto themselves,' and will 'not fall within the legal operation of limitation enactments. * * * There is no danger,' he continues, 'in recognizing the principle of an estoppel in pais as applicable to such cases, as this leaves the court to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estoppel or not as right and justice may require.'" In this case (*Baldwin v. Trimble*) the court went on to review the facts which in its opinion created an equitable estoppel against the public. There was no evidence that the road was ever laid out by the municipal authorities, or that it was ever accepted by them or kept in repair at public expense, but, if ever claimed by the public at all, it was finally abandoned, not because encroached on by abutting proprietors (which in fact was the case), but because no longer needed by the public. Being no longer needed and no longer used, it was actually closed to travel, and permanent structures were built across its entire width for a distance of seven squares of its length. There seemed to have been no objection to the erection of buildings across the road, and the court remarked that it would be inequitable in the extreme to permit the public to reassert a claim to the bed of the road, after having actually abandoned it altogether, and to subject every individual who had innocently and in good faith expended money in the construction of buildings upon it, to an indictment for maintaining a public nuisance, and to the penalty of removing the buildings themselves, when there was no longer the slightest need for the road. The court further remarked, at page 404 of 85 Md., at page 178 of 37 Atl. (36 L. R. A. 489): "If ever there was a case where the doctrine of equitable estoppel ought to prevail against the public, it certainly is the case at bar; and we according-

ly hold—not that the appellant has acquired by prescription a right to that part of Lanvale road between his two lots—but, having title thereto under his deeds subject to an easement in the public, and the easement having been abandoned so that the public are equitably estopped to reclaim it, his title to the parcels of the road claimed by him, is merchantable." In the case just referred to (*Baldwin v. Trimble*) the abandonment of the road had existed for a period of 25 years, but I do not understand that the abandonment must be for such a period as would, under the statute of limitations, operate to defeat a private right of way. On the contrary, the rule is just the opposite, and every case in which an equitable estoppel is claimed depends upon its own particular facts. In *Pope v. Devereux*, 5 Gray 409, the Supreme Judicial Court of Massachusetts said, at page 412: "It is not the duration of the cesser to use the easement, but the nature of the act done by the owner of the easement, or of the adverse act acquiesced in by him, and the intention which the one or the other indicates, that is material. *Queen v. Chorley*, 12 Ad. El. N. R. 515. And a cesser of use for a less period than 20 years, accompanied by acts clearly indicating the intention to abandon the right, is sufficient."

Of course a private way may be extinguished by an adverse possession for the full period of 20 years. Such a possession will defeat the title to an easement by analogy to the statute of limitations. *Street v. Griffiths*, 50 N. J. Law, 656, 658, 14 Atl. 898. Nonuser, accompanied by acts on the part of either the owner of the dominant or the servient tenement which manifest an intention to abandon, and which destroy the object for which the way was created, or the means of its enjoyment, will effect an abandonment. *Am. & Eng. Ency. of Law* (2d Ed.) vol. 23, p. 42. In *Queen v. Chorley*, 12 Ad. & E. N. S., 513, Lord Chief Justice Denman remarked, at page 517: "The learned judge appears to have told the jury that no interruption by the public for a shorter period than 20 years would destroy the right [in a private way]. If this were laid down as a rule of law, or even as a conclusive presumption of fact, we think in the former case it was erroneous, and in the latter would be likely to mislead the jury, as turning their attention to a definite period of time as the ground for decision, when time might in truth be wholly immaterial, or only in part material. * * * The learned judge appears to have proceeded on the ground that, as 20 years' user in the absence of an express grant would have been necessary for the acquisition of the right, so 20 years cesser of the use, in the absence of any express release, was necessary for its loss. But we apprehend that, as an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act

clearly indicative of an intention to abandon the right, would have the same effect without any reference to time. For example, this being a right of way to the defendant's malt house, and the mode of user by driving carts and wagons to an entrance from the lane into the malt house yard, if the defendant had removed his malt house, turned the premises to some other use, and walled up the entrance, and then for any considerable period of time acquiesced in the unrestricted use by the public, we conceive the easement would have been entirely gone. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and what period may be sufficient in any particular case must depend on all the accompanying circumstances. This is the principle on which the judgments of all the members of this court proceeded in *Moore v. Rawson*, 3 B. & C. 332, and which was adopted in *Liggins v. Inge*, 7 Bing. 682, 683. It is true that those were cases between two individuals, and not between the public and one individual: But that can make no difference." The doctrine of *Queen v. Chorley* has been approved in this state. Said Mr. Justice Depue, speaking for the Supreme Court in *Horner v. Stillwell*, 35 N. J. Law, 307, at page 314: "Even where the cesser of use has not been for 20 years, adverse acts on the part of the owner of the servient tenement, which have been acquiesced in by the owner of the easement, are material for the consideration of the jury on the question of abandonment. *Queen v. Chorley*, 12 Q. B. 573. Under such circumstances abandonment arises out of the principles of an equitable estoppel." The same learned judge, speaking for the Court of Errors and Appeals in *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463, cited *Queen v. Chorley*, at page 480; where he said: "Abandonment is a question of intention. Nonuser is a fact in determining it. * * * Its weight must depend upon the intention to be drawn from its duration, character, and accompanying acts." In *Jordan v. City of Chenoa*, 166 Ill. 530, 47 N. E. 191, it was held: "While the statute of limitations does not run in favor of an individual against a municipality holding streets and alleys for the general public under acceptance of a dedication, yet the doctrine of equitable estoppel arising from abandonment and nonuser may be invoked against it." *City of Big Rapids v. Comstock*, 65 Mich. 78, 31 N. W. 811, was a case in which the city filed a bill to enjoin the erection of a building that encroached $4\frac{1}{2}$ inches on a street; and it was held that equity would not grant relief, it

being out of all proportion to the nature and extent of the injury done, or likely to be sustained, by the encroachment. In *Lyle v. Lesia*, 64 Mich. 16, 31 N. W. 23, it was said: "Where a highway was surveyed, and more or less work done thereon for some 10 years, when a new road was opened, and the old one abandoned by the public, there being for 12 years no travel over it, except by stragglers and lumbermen on foot, and the teams of persons owning the land, who used the old road for their convenience in working the premises, and 6 years after such abandonment the landowner fenced in the land, which remained undisputed for 6 years, when the commissioner of highways assumed to enter upon the premises to repair the old highway, held, that an injunction was properly granted to restrain such action; there being no principle of equity that will sanction or sustain such attempt to rehabilitate an extinct road with the life it may have once had by reason of its user before its abandonment. Where a highway commissioner altered and practically vacated a highway, which action was accepted, and treated for 12 years as valid by every one interested, and by the public generally, held, in a suit by the landowner to enjoin the public authorities from reopening said road, that they cannot defend by showing the illegality of the action of the commissioner in vacating the road for want of the required statutory notice to the landowners."

Now, as we have seen, cases of this character—that is, cases in which an easement is said to be extinguished by abandonment—form a law unto themselves; that is, each case depends upon its own particular facts as to whether or not there has been an abandonment, irrespective of any question of the operation of a statute of limitations. Abandonment depends upon the nature of the acts done or acquiesced in, with reference to the obstruction of the way. The time of the cesser of the use may be wholly immaterial, and the period of time in any given case must depend on all the accompanying circumstances. Now, further, the facts upon which an abandonment has been worked in this case are the building of the abutment wall, to a sheer height of some 17 feet, entirely across the way in question, thus completely obstructing it; the fact that it remained so obstructed for the six years between 1889 and 1905; that the complainant's predecessor in title, Dehe, or his devisee, had title to the premises during all that time; that the building of an embankment by the defendant from the top of the Southard street wall down to and past the crematory, which he erected partly on the strip in question, was a decided appropriation by him of the way to his own use. This he did during the holding of Dehe, whose rights in the way had become extinguished. Dehe and his devisee retained title until July, 1897, while the proofs show that the defend-

ant acquired title and built the crematory in 1895. These further facts are pertinent: The embankment has been removed at the abutment wall, at least to the depth of the cellar of the building which has been partly erected, say to a depth of 6 to 8 feet, and, if opened as a street, the complainant would, like her predecessors in title, be able only, in traversing the way, to go up against a stone wall. The complainant has ingress and egress to and from her lands into Southard street just north of the locus in quo, and on the south into Raywood alley, and therefore no necessity exists for use of the way by her. The truth is there was an absolute physical extinction of the way for all practical purposes by the building of the Southard street bridge, with its abutment wall reaching across and closing up the way. It must be presumed to have been done by proper municipal authority. Its closing may have been the taking of private property for public use, and for which persons having an easement of way in the so-called street were or are entitled to compensation for the damages sustained.

This brings me again to the offer of the defendant to show that Dehe gave a release to the county for the damages he had sustained by the obstruction of the way by the building of the abutment to the bridge. I am now satisfied that I erred in excluding the evidence. Although the giving of the release by Dehe, while the owner of an easement in the locus in quo, did not create an estoppel by deed between him and the owner of the servient tenement, it was nevertheless an act in pais, recognizing the practical extinguishment of the easement, and is evidence of his abandonment of all claim to have the way open for use. Upon familiar principles the acts and declarations of former owners, made during the existence of their title, bind their successors in title. *Horner v. Stillwell*, 35 N. J. Law, 307. See, also, *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463. However, the erroneous exclusion of the release is harmless to the defendant, because without the proof that it would make, I conclude that he should prevail. If I thought otherwise, and if proof of the release of Dehe to the county were in my judgment essential to the defendant's case, I would continue the hearing and permit him to make proof of it. *Whitehead v. Hamilton Rubber Co.*, 53 N. J. Eq. 456, 32 Atl. 377.

It would be stretching equity and good conscience too far, I think, to hold that this mere cul-de-sac, no bigger than a couple of city lots, should be opened by a mandatory injunction, so that the complainant could have the privilege of walking over it up against a stone wall, when, as seen, for six years it was absolutely obstructed by the wall, in consequence of which obstruction a row of houses, to which it was formerly tributary, were demolished because no longer accessible, when afterwards defendant on ac-

quiring title to the tract built his own embankment to give him access to Southard street for his own purposes, and afterwards removed the embankment, at least in part, and when the complainant has two places of ingress and egress to her premises, one of which is just north of the locus in quo. To paraphrase the language of one of the cases, there is no principle of equity that requires the court to rehabilitate this extinct way because of the life it once had, by reason of its user before abandonment.

The county of Mercer rendered absolutely useless, if it did not totally extinguish, this easement. The complainant's remedy, if any she has (and if the lapse of time and Dehe's release does not preclude her), is against the county for damages, rather than against the owner of the fee in the locus in quo, who is, under all the circumstances, an innocent purchaser for value, and who should not be required to keep the way open for the complainant's useless and purposeless enjoyment. I say the defendant is an innocent purchaser for value under the circumstances, and the circumstances justify the assertion. It must have been perfectly apparent to every one that by the building of the approach to the Southard street bridge the way in question, sometimes dignified by the name of a street, was effectually and permanently closed. It has been so acted upon. Of this there can be no doubt. The defendant acquired title for value in 1895, 13 years ago, and has been in undisputed possession till now. He built and operated a garbage crematory upon part of it, using an embankment, which he erected, as a way to the crematory over the lot in question. It was not when he removed part of the embankment, but when he commenced the erection of his building, that complaint was made. In my judgment he is entitled to remain in undisturbed possession.

It should not be forgotten that the complainant's deviser purchased from Dehe's devisee the premises, which have always surrounded the locus in quo on two sides. It does not appear when Dehe died, but he was alive during part, if not all, of the 6 years that the way was effectually obstructed by the abutment wall. When the complainant's deviser purchased of Dehe's devisee he saw, if he did not see before, the embankment built by the defendant, running down from the wall on Southard street to his (defendant's) crematory, which occupied 16 out of the 25 feet of the way in question. The complainant lays great stress upon the fact that her deed calls for a tract bounded upon the locus in quo, describing it as a street 25 feet wide and 204 feet deep. This "street" was so decidedly obstructed by the crematory, and was of such a peculiar character when her deviser took title, as to put him upon notice of all the antecedent facts and conditions which had obtained with reference to the locus in quo, and he was effect-

ally estopped by constructive notice, if he did not already have or then acquire actual notice, of the practical extinguishment of the easement. *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463, 478. Of course the complainant acquiring title by devise, took her lands in the exact situation in which her devisor left them.

The right the complainant claims cannot be for a way built by the defendant 17 feet high at Southard street, sloping down to the natural level of the ground some distance back, but a right to traverse a way on that level over its entire length. As already seen, the way was totally obstructed for all practical purposes, because ingress and egress to and from it to Southard street was extinguished by the presence of the wall, for 6 years, and for the 12 years thereafter, ending at the time of the filing of the bill; the way was not only obstructed, but appropriated by the defendant by his embankment and crematory. Therefore the obstruction, amounting to an extinction, of the way has continued for 17 years and upwards. In this obstruction and extinction the complainant's predecessors in title, and the complainant herself, have acquiesced. She cannot now be heard to say that the defendant's possession has not become an indefeasible right.

The complainant's bill must be dismissed, with costs.

M. REDGRAVE CO. et al. v. REDGRAVE.
(Court of Chancery of New Jersey. Oct. 24, 1908.)

1. CORPORATIONS (§ 36*)—DURATION.

A corporation engaged in manufacturing toys could, under the corporation law (Laws 1896, p. 277, c. 185), continue its existence indefinitely by proper proceedings.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 36.*]

2. JUDGMENT (§ 408*)—EQUITABLE RELIEF—EXISTENCE OF LEGAL REMEDY.

Whether complainants were entitled to a larger estate in defendant's premises, under an agreement with him, than a monthly tenancy, as adjudged by the district court, will not be determined in a suit to enjoin the enforcement of the judgment, since, if true, complainants have a legal remedy.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 772; Dec. Dig. § 408.*]

3. JUDGMENT (§ 414*)—EQUITABLE RELIEF—EQUITABLE NATURE OF GROUNDS.

Complainant corporation purchased defendant's business from him under his oral representations that complainant could use the building in the business as long as it chose, and thereafter asked him to sign a lease for the building at a stipulated rent, which he declined to do on the ground that they could use the building as long as they chose without it. Defendant afterward obtained a judgment of ouster, which decided that complainant held only by a monthly tenancy. The business could be carried on elsewhere as well as in defendant's building, and there was but little machinery

in the building, and that easily moved. Whatever damages complainants or the corporation sustained by breach of defendant's agreement were recoverable at law. *Held*, in a suit to restrain the enforcement of the judgment of ouster and protect complainants' rights under the oral agreement, that, since to grant the relief would be to enforce in perpetuity an oral lease without mutuality of obligation or a provision for rent, and in view of complainants' subsequent offer to pay rent, and all the other circumstances, the enforcement of the judgment would not be restrained.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 780; Dec. Dig. § 414.*]

Suit by the M. Redgrave Company and others against Montague Redgrave to enjoin the enforcement of a judgment, and for other relief. Injunction denied.

This is an application for a preliminary injunction to restrain the execution of a judgment of ouster or dispossession obtained in the district court of Jersey City by Montague Redgrave, the defendant, against the M. Redgrave Company, one of the complainants.

The bill charges: That Redgrave was engaged in the business of manufacturing games and toys at Nos. 9 and 11 Willow Court, Jersey City, N. J., a property owned by him; that he had been engaged in such business for 20 years preceding the incorporation of the complainant company, which took place on the 10th of September, 1906; that they purchased from him his business and patents, issuing stock to him therefor; that the individual complainants purchased their stock upon the understanding that the corporation could occupy the building occupied by Redgrave and there carry on its business and remain as long as it, the corporation, pleased; that they presented a lease to him for five years, which he said it was unnecessary to sign, because the company could remain as long as it pleased; that the building is fitted for the business there carried on; that in the month of January, 1908, it was discovered that Redgrave had retained in his possession moneys of the company approximating \$3,000, there being a dispute between him and the directors as to whether the sum was greater than \$2,300; that Redgrave was deposed from his position as president and manager, and thereafter communicated with customers of the company and ordered raw materials of the character theretofore ordered by the company to be delivered at the premises; that on the 29th of May, 1908, a notice terminating the tenancy on the 1st of July, 1908, was served by Redgrave upon the company, and on the 2d of July a summons in dispossession proceedings, returnable July 8, 1908, was issued out of the Second district court of Jersey City; that on the 15th of July, 1908, this case was tried, and judgment for possession given in favor of Redgrave against the company. It is charged in the bill that the judgment is erroneous and illegal, because the district

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court had no jurisdiction, and that it will appear that evidence offered by the complainant company was ruled out, and that no appeal or writ of certiorari can be taken to the action of the district court. There are other allegations that it was the purpose of Redgrave to enter into the same business as that carried on by the company, and that he intends unfairly to compete with them. The bill prays for an injunction forbidding Redgrave from infringing upon certain patents and carrying on under his own name, or any similar name, a business similar to that carried on by the complainant company, and from holding himself out as selling the same kind of goods as the complainant company under his name, or any similar name, and from prosecuting his dispossess action against the complainant company, and from taking advantage of any judgment ousting the complainant company from the premises; and also prays an accounting as between Redgrave and the company.

The proofs on behalf of the complainants tend to support the charges of the bill just stated. The proofs on behalf of the defendant dispute many of the important allegations of the complainants' case. The defendant directly and distinctly denies that he ever induced the individual complainants to purchase stock by statements that the company could carry on business in his building as long as it pleased, or that he ever made such statements to the individuals or to the representatives of the corporation. He sets forth that only one complainant paid anything for stock, and that was \$200. He asserts: That there is no machinery in the building, excepting two mitring machines run by foot power, which weigh less than 300 pounds each, and are easily portable; that the only fixtures are four or five wooden benches, made out of plain boards, and one plain wooden shelf; that all of the goods are sold by agents who go to the customers, and it is not the fact that customers come to the building to purchase. It is shown by the defendant that at a meeting of the board of directors of the complainant corporation in January, 1907, a motion was made and unanimously carried that the company pay Redgrave \$25 a month for the building. The defendant's statement concerning the company's money collected by him and retained by him is given, he justifying his action in that respect, and further facts concerning the trial in the district court and the application by the complainant corporation to the Supreme Court for a writ of certiorari are set forth.

Ziegner & Lane, for complainants. James A. Gordon, for defendant.

GARRISON, V. C. (after stating the facts as above). It will be observed that the bill of complaint prays for various kinds of relief: It calls for an accounting, for an in-

junction to restrain what may be termed unfair competition, to restrain infringement of patents, and to restrain the use by the defendant of a judgment obtained at law by him against the complainant corporation. It is objected by the defendant that the bill is multifarious, and that no preliminary injunction should therefore be granted based upon it. I do not propose to consider and determine whether this is so or not. The immediate question before the court is whether such a showing is made by the proofs on behalf of the complainants as to entitle them to a preliminary injunction restraining the defendant from using the judgment which he has obtained at law to oust them from the premises occupied by them which belong to him.

When the complainants' case is analyzed upon this point, it resolves itself into this: The individual incorporators were induced to go into the company because Redgrave, the owner of the business and the building, agreed to transfer the business and permit the company to occupy the building as long as it chose to do so. It is therefore inequitable for him now to take advantage of any legal right he may have to oust the company from the building. I do not think there is any proof before me of the length of time during which the life of this company might, under its charter, continue, but this is immaterial, because, under our corporation law (Laws 1896, p. 277, c. 185), it may by proper proceedings continue indefinitely; and the claim therefore practically is, on behalf of the complainant company, that it may occupy this building indefinitely. Since the original agreement, or whatever it may be called, as pleaded by them, did not include anything by way of compensation to the owner for rent or occupation, the claim therefore is that by what he said at that time he has, in effect, given to this company the right to occupy his building for all time free of rent. It is not necessary to cite the language of the statute of frauds or the numerous cases thereon to dispose of this contention. It certainly has never been held in any case called to my attention that an owner of real estate will be held to have conceded the right of possession of his property forever without any writing and without any provision for any compensation to himself.

Furthermore, the action of the corporation was not in keeping with what it is now attempted to be shown was the original understanding. A few months after the company takes possession of the building, a resolution is passed providing for rent, and rent is thereafter paid to the defendant, month by month; and at the same time, or shortly thereafter, a lease for a term of five years is prepared on behalf of the company and submitted to Redgrave for his signature, which he declines to make. It has been settled at law—and I will not disturb that finding—that the legal result of the relations between

the parties was to constitute a monthly tenancy. Whether, by reason of certain promises or inducements or representations made by Redgrave to the company or to the individual complainants, the company had a right to a larger estate in the lands of Redgrave, and he was under obligation to give it, I do not have to determine, because, if it is true, the failure upon his part is remedial at law.

The complainant urges upon the court that this is a case calling for the application of the doctrine of equitable estoppel. It is urged that the court should find that Redgrave is estopped to oust the complainant corporation because of the original statements or representations made by him of willingness that it should continue to occupy his building as long as it pleased. The result of giving this effect to the circumstances would be, as above stated, to create in the complainant company a perpetual right of occupancy without rent, or, at least, a perpetual right of occupancy, and this without any agreement satisfying the statute of frauds, and in the face of the action of the company in the matter of the resolution to pay rent and of the lease which it desired Redgrave to sign.

I have omitted to say anything about the lack of mutuality in the alleged contract or agreement, the fact that it is not pretended that the company was under any obligation to remain in the premises for any time, and also to the further important fact that in the original undertaking, as stated by the complainants, there is no suggestion of any consideration moving from the complainant company to Redgrave which would make the contract a binding one. So far as appears in this case, this business could be equally well carried on elsewhere. It is not shown that this building is peculiarly fitted for this business, or is specially fitted up for it. There is no machinery of any moment, and what there is is light in weight and easily moved. There are, in fact, no special circumstances shown which it can be argued would give equity jurisdiction if the existence of such special circumstances were otherwise efficient for that purpose.

I have not felt it necessary to go into the numerous cases cited by the complainants, because it seems to me that they are not applicable to the case, as I view it. There is no doubt about the availability of equitable estoppel in many cases, but I do not think that this is one of them. I think that the circumstances proven in this case do not warrant the court in restraining this owner of property from obtaining possession thereof under a judgment obtained at law authorizing him so to do. I find that whatever rights the corporation or the individual complainants may have can be obtained by proper actions at law for the damages accruing to

them by reason of the breach of any agreement they are able to prove.

To find with the complainants here would be, in effect, deciding that a contract without consideration and not in writing would be binding upon a landlord which cedes the possession of his property in perpetuity to another, without any obligation upon that other to either remain there subject to liability for quantum meruit, or at an agreed rent, and in the face of a legal determination by a court of competent jurisdiction that the legal relation between the parties as to renting has been terminated, and the landlord is entitled to possession.

I will advise an order refusing the application for preliminary injunction.

(77 N. J. L. 1)

BRACKNEY v. PUBLIC SERVICE CORP.
(Supreme Court of New Jersey. Nov. 9, 1908.)

1. CARRIERS (§ 320*)—INJURY TO PASSENGER—COLLISION WITH TEAM—NEGLIGENCE.

Whether a motorman, who, on a downgrade, shut off his power, and allowed the car to drift, and thus approached so close to a wagon traveling in front of him on the tracks that he was unable to prevent a collision, injuring a passenger, the wheels of the wagon skidding when the driver attempted to leave the track, was negligent in operating his car, is a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1323; Dec. Dig. § 320.*]

2. CARRIERS (§ 347*)—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

For a passenger to ride on the front platform of a street car is not such negligence, as matter of law, as will prevent recovery by him for injury from collision of the car with a wagon.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1376-1378; Dec. Dig. § 347.*]

3. CARRIERS (§ 331*)—INJURY TO PASSENGER—ASSUMPTION OF RISK.

A passenger, by standing on the front platform of a street car, assumes only such risks as are incident to the ordinary operation of the car, not those arising from causes ab extra.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1376-1378; Dec. Dig. § 331.*]

4. CARRIERS (§ 280*)—DUTY TO PROTECT PASSENGERS.

An instruction that, as to passengers, it is the duty of a carrier to use a high degree of care to protect them from danger while on its cars, is proper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1087; Dec. Dig. § 280.*]

Error to Circuit Court, Camden County.

Action by Leo B. Brackney against the Public Service Corporation. Judgment for plaintiff. Defendant brings error. Affirmed.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

E. A. Armstrong, for plaintiff in error. Matthew Jefferson and John W. Wescott, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

GUMMERE, C. J. The plaintiff in this case was a passenger upon one of the defendant company's cars. He was riding on the front platform, and was injured while there in a collision which occurred between the car and a wagon ahead of it which was partly upon the track. This action was brought to recover damages for those injuries and resulted in a verdict and judgment for the plaintiff. When the plaintiff rested, there was a motion to nonsuit, and at the close of the case a request was made for the direction of a verdict in favor of the defendant. The refusal of each of these applications is assigned for error.

The proofs showed that the accident occurred upon a downgrade, that at the top of the grade the motorman shut off his power and allowed the car to drift, that as he approached the wagon which was on the track in front of him he rang his bell, that the driver turned away from the tracks, but for some reason the rear wheels of the wagon skidded and did not leave the rails, that when the motorman discovered this condition of affairs he put on his brake, but did not reverse his power, as he was too close to the wagon to stop his car in that way, that the brake failed to bring the car to a stop in time, and a collision followed. The motions to nonsuit and direct a verdict were rested principally upon the ground that on these facts no negligence could be imputed to the defendant. We cannot concur in this view. It was clearly a question for the jury whether a motorman, who approaches a wagon traveling on the tracks in front of him so close that he will be unable to prevent a collision in case the wheels of the wagon skid when the driver attempts to leave the tracks, operates his car in a careless manner. The trial jury rightfully refused to take this question from the jury, and his action in doing so affords no ground for reversal.

It is further contended that the plaintiff's act in riding on the front platform of the car was such negligence as will bar him from recovery, and that a nonsuit should have been ordered, or a verdict directed, for this reason. No authority for this proposition is cited by counsel, and it is opposed to the doctrine of our earlier decisions. *North Hudson County Ry. Co. v. May*, 48 N. J. Law, 401, 5 Atl. 276; *City Ry. Co. v. Lee*, 50 N. J. Law, 435, 14 Atl. 883, 7 Am. St. Rep. 798; *Whalen v. Consolidated Traction Co.*, 61 N. J. Law, 606, 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723. Viewed in the most favorable light for the defendant, the question whether such conduct on the part of the plaintiff constituted negligence was for the jury.

It is further contended that these motions should have prevailed for the reason that the plaintiff, by taking up his position on the front platform, assumed all risk of injury from collision with another vehicle. This

contention is, in our judgment, unsound. A person, under such circumstances, assumes such risks as are incident to the ordinary operation of the car, but not risk of danger arising from causes *ab extra*. *N. Y., L. E. & W. R. R. Co. v. Ball*, 53 N. J. Law, 283, 21 Atl. 1052.

Error is also assigned upon the instruction of the court to the jury that, "as to passengers, it is the duty of the trolley company to use a high degree of care to protect them from danger while upon their cars." We are told, by counsel, that this instruction is, of course, erroneous. It is, nevertheless, justified by the decision of the Court of Errors and Appeals in *Whalen v. Consolidated Traction Co.*, *supra*, and by the numerous cases therein cited.

The judgment under review will be affirmed.

(77 N. J. L. 4)

HECK v. INTERNATIONAL SMOKELESS POWDER CO.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. MASTER AND SERVANT (§ 103*)—INJURIES TO SERVANT—DELEGATION OF DUTY BY MASTER.

A master cannot delegate the duty of furnishing servants safe appliances with which to work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 175; Dec. Dig. § 103.*]

2. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

Where it was the duty of a superintendent to select planks for skids, the master was liable for injuries to a servant resulting from the breaking of defective planks selected by the superintendent, though the master had furnished a sufficient number of sound planks to construct the skid.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 456; Dec. Dig. § 190.*]

3. APPEAL AND ERROR (§ 1062*)—HARMLESS ERROR.

Where a plaintiff, an employé, was injured by the breaking of a defective plank selected for the work by defendants' superintendent, an instruction leaving to the jury the question whether the superintendent was at the time acting as plaintiff's fellow servant or as defendant's alter ego was not prejudicial to defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1062.*]

4. DAMAGES (§ 133*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where plaintiff when injured was earning from \$1.50 to \$1.75 a day, and his injuries, though very serious and to some extent permanent, had not entirely incapacitated him from work, and it was not likely that such result would occur in the future, a verdict for \$7,500 was excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 386; Dec. Dig. § 133.*]

Action by Bernard Heck against the International Smokeless Powder Company. Heard on defendant's rule to show cause why verdict should not be set aside. Rule to be made absolute, unless plaintiff consent to reduce amount of award to \$4,000.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

Alan H. Strong, for the rule. Robert Adrain and Frederick M. P. Pearse, opposed.

GUMMERE, C. J. The plaintiff sues for an injury sustained by him while in the employ of the defendant company, by being caught under an armature, or dynamo drum, which was being moved by a gang of men, of which the plaintiff was one, at the works of the defendant company. The armature weighed between two and three tons. It was being unloaded from a wagon by means of a skid, formed by two planks 18 feet long, 10 inches wide, and 3 inches thick, laid from the floor of the wagon to the ground, and supported at intermediate points by heavy timbers. One of the planks broke under the weight of the armature, and it slid off and down upon the plaintiff, pinning him to the ground and seriously injuring him. The breaking of this plank was due to a crack, or leaf break, in it. The two planks which were used in constructing the skid were taken from a pile of lumber which lay within a few feet of the point where the wagon was standing, by the instruction of Mr. Martin, the superintendent, or manager, of the defendant company at its works. Just what instructions the superintendent gave to the plaintiff and his fellow workmen with relation to the taking of the planks is in dispute; the case upon the part of the plaintiff being that the two planks actually used were selected by the superintendent, and the proofs on the part of the defendant being to the effect that the superintendent instructed the plaintiff, and those that worked with him, to select such planks as they needed from the pile. It further appeared in the case that there was in the pile a sufficient number of sound planks from which to construct a safe skid. The trial of the case resulted in a verdict for the plaintiff.

The first ground upon which we are asked to set aside this verdict is that the selection of the defective plank is not chargeable to the master. The argument in support of this contention is that the master discharged his whole duty, as to using reasonable care to supply safe appliances, by furnishing a sufficient number of sound planks for the construction of a safe skid; but this argument assumes too much. The instruction of the court to the jury was that if the plaintiff, or any one of those who were engaged with him in the work of unloading the armature, selected the defective plank from out of the pile, there could be no recovery. The verdict of the jury, consequently, must rest upon a finding that the selection of the particular planks was made by Martin. This being so, the master did not furnish material

out of which the plaintiff was at liberty to select a safe appliance, for, in directing that two specific planks should be used, Martin was acting as the representative of the master. He was performing a duty which the master could not delegate to a fellow servant of the plaintiff. He was furnishing the particular appliance which the plaintiff was required to use in the performance of the work upon which he was engaged. The above principle, therefore, to which the defendant has appealed, has no application to the facts found.

The trial court, in its instruction to the jury, left it to them, in case they found the selection of the planks was made by Martin, to say whether, in so doing, he was acting as a fellow servant of the plaintiff, or as the alter ego of the master, and the defendant insists that this instruction was erroneous, and justifies a setting aside of the verdict. We concur with counsel in the view that this instruction was improper, but it does not justify a reversal of the verdict. The question whether Martin, in so doing, represented the master, was one of law to be determined by the court, and not of fact to be settled by the jury. The error, however, was harmful to the plaintiff, rather than to the defendant, for, as has already been stated, Martin, in making the selection, was performing a duty which the law cast upon the defendant, and which it could not delegate, and the court should have so advised the jury.

We find nothing in the conduct of the trial which would justify an interference with the verdict. The damages, however, we think are excessive. The verdict was for \$7,500. The plaintiff, at the time of his injury, was earning from \$1.50 to \$1.75 a day. His injuries, although very serious, and, to some extent, permanent, have not entirely incapacitated him from work, and it is not likely that such a result will occur in the future.

If he will consent to reduce the amount of the award to \$4,000, he may enter judgment for that amount; otherwise, the rule to show cause will be made absolute.

(77 N. J. L. 7)

STEWART v. JONES.

(Supreme Court of New Jersey. Nov. 9, 1908.)

MUNICIPAL CORPORATIONS (§ 129*)—FILLING VACANCY IN COMMON COUNCIL — "DULY FILLED."

A vacancy in the common council of a city of the third class, occurring after the primary election, so that it was too late to make nominations for the office except by petition, occurs at so short a period before the next annual election that the office cannot be "duly filled" at such election, within Act March 1, 1905 (P. L. p. 26), providing in such case for the filling of the vacancy by the common council.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 129.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Quo warranto on the relation of William H. Stewart against Fernando C. Jones. Heard on demurrer to the information. Judgment for respondent.

Argued June term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

John Boyd Avis, for relator. Gaskill & Gaskill, for respondent.

GUMMERE, C. J. The information in this case is filed by Stewart, the relator, against Jones, the respondent, to contest the right of the latter to hold the office of member of common council of the city of Millville, in the county of Cumberland; the relator contending that he, and not the respondent, is entitled to hold this office. The material facts set out in the information, and admitted by the demurrer, are: That one Walter M. Shropshire was, at the annual election in that city held on November 7, 1905, elected a member of its council from the First ward of the city for a term of three years, and his term of office commenced on the 1st day of January, 1906; that he continued as a member of the council until October 11, 1907, when he died; that his death caused a vacancy in the council from that ward; that on the Friday evening preceding the regular November election for 1907, the respondent was, by the common council of Millville, elected a member of that body to fill the vacancy caused by the decease of Mr. Shropshire; that the relator was nominated by petition, signed by at least 2 per cent. of the voters who voted at the last preceding general election residing in the First ward, to fill the vacancy caused by the death of Mr. Shropshire, and the petition was filed in the office of the clerk of Cumberland county on the 21st day of October, 1907; that at the general election held on November 5, 1907, the relator received a total of more than 300 votes, being more than any other person received for the said office; that he, subsequent to the said election, executed and caused to be filed his oath of office according to law, and endeavored to obtain recognition as a member of said council, but was refused such recognition upon the ground that the respondent had been elected by that body to fill the vacancy caused by the death of Mr. Shropshire, and was entitled to hold the office for the full unexpired term. The question presented by the demurrer to this information is whether, on the facts stated, the relator or the respondent is entitled to the office left vacant by the death of Mr. Shropshire.

Millville is a city of the third class, and the method of filling vacancies occurring in the common council of such cities is prescribed by chapter 18 of the Laws of 1905 (P. L. p. 26), entitled "An act concerning the filling of vacancies in elective offices in towns, and in cities of the third class." The

body of the act provides that in municipalities of the kind specified "the common council, or other governing body, shall have the power to fill vacancies in all elective offices, including any vacancy occurring or existing in any such common council or body, and such officer so appointed or chosen to fill any such vacancy shall hold office until the first day of January next succeeding the next local or charter election in such city; and such vacancy shall be regularly filled for the unexpired term thereof, if any remain, at the next local or charter election held in such city in the same manner as before the passage of this act; if such vacancy occur at so short a period of time before the next annual election that such office cannot be duly filled at such election, the Common Council or other governing body of such city may fill such vacancy in the same manner as though the same had occurred immediately after said election, and the said vacancy shall be regularly filled at the next subsequent local or charter election in such city held thereafter." It is apparent, from a reading of the above-cited statutory provision, that whether the relator or the respondent is entitled to hold the office of common councilman from the First ward depends upon the solution of this question: Did, or did not, the vacancy caused by the death of Mr. Shropshire occur at so short a period before the November election of 1907 that the office could not be duly filled at such election—for, if a sufficient time intervened after his death to duly fill the office at that election, then the relator is entitled to hold it; but, if not, then the respondent, by virtue of his election by council, is entitled to the office.

The method of electing members of council, as well as other municipal officers, in the cities of this state, is prescribed by the act to regulate elections (Revision 1898 [N. J. Election Law 1898, p. 1]) and the supplement to that act passed in 1903 (Laws 1903, p. 697), and generally known as the primary election law. This latter enactment (section 1) requires all candidates of political parties, for offices to be voted for at the general election by the voters of a single ward, to be nominated directly at primary election to be held in September on what is known as "first registry day." In addition to this method of nomination at primary elections, a candidate may be nominated by petition, signed by legally qualified voters residing within the ward, equal in number to at least 2 per cent. of the entire vote cast in the ward for members of the General Assembly at the last preceding general election. Election Law, § 41, p. 25. At the time of Mr. Shropshire's death, the date for holding primary elections in Millville had already passed. It was too late therefore for the several political parties to nominate a candidate to fill the office made vacant by his death to be voted for at the

next general election. Their right to choose a candidate for the office at a primary election was just as absolute as was the right of 2 per cent. of the voters in the district to nominate one by petition; and the Legislature, by providing in the act of 1905 (P. L. p. 28) that, when a vacancy in the common council should occur at so short a period of time before the next annual election that it could not be duly filled at such election, then the common council might fill such vacancy in the same manner as though it had occurred immediately after such election, recognized that right. The phrase "duly filled" means filled by the election of a candidate chosen from those nominated by the several political parties, as well as from those nominated by petition. Where the vacancy happens after the holding of the primary election, it occurs (in the language of the statute) "at so short a period of time before the next annual election that the office cannot be duly filled at such election."

We conclude therefore that the vacancy in the common council caused by the death of Mr. Shropshire was properly filled by that body, and that by their election the respondent is entitled to hold the office of councilman for the First ward until the 1st of January, 1909.

The respondent is entitled to judgment on the demurrer.

(77 N. J. L. 206)

GUENTHER v. MOFFETT et ux.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. HUSBAND AND WIFE (§ 25*)—JOINT CONTRACT—WAIVER OF PROVISION BY HUSBAND.

Where the contract of husband and wife for work provides that no extra work shall be done without a written order from them, she is not liable for extra work done without such order, and without her knowledge, or waiver of the provision, or evidence that her husband was authorized to waive it for her, though there was a waiver by him.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 148; Dec. Dig. § 25.*]

2. APPEAL AND ERROR (§ 1173*)—REVERSAL IN TOTO—JOINT JUDGMENT—ERROR AS TO ONE PARTY.

The judgment brought up by the appeal, being against defendants jointly, will be reversed in toto, there having been error as to one of them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4562; Dec. Dig. § 1173.*]

Appeal from District Court of Hoboken.

Action by Elizabeth J. Guenther against Edmund M. Moffett and wife. Judgment for plaintiff. Defendants appeal. Reversed.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

J. Phillip Dippel, for appellants. James O. Agnew, for appellee.

PARKER, J. The defendants in this case, husband and wife, seem to have made a con-

tract with the plaintiff for the erection of a house on their property by the latter. There was a provision in the contract that no alterations or extra work should be done without a written order from the owners approved by Frank C. Guenther, and an express agreement in writing as to the cost. Frank C. Guenther is the husband of the plaintiff.

There was testimony in the case tending to show that certain extra work had been done at the request of Edmund M. Moffett and under his supervision, and on an examination of the evidence it would appear that there was sufficient to justify the trial judge in inferring that the above-quoted clause in relating to extra work had been waived, and that there had been substantially a new contract between the parties by parol; but there is nothing in the evidence to show that Mary E. Moffett, the wife, had any knowledge of this work, or waived the provision in the contract relating to extra work, or that her husband had been authorized in any way to waive it for her. No valid claim, therefore, was made out against Mary E. Moffett, and as to her the judgment must be reversed. This leads to a reversal of the entire judgment. *Peterson v. Traction Company*, 71 N. J. Law, 298, 59 Atl. 456.

(74 N. J. E. 487)

BIGELOW v. OLD DOMINION COPPER MINING & SMELTING CO.

(Court of Chancery of New Jersey. Aug. 8, 1908.)

1. COURTS (§ 516*)—COURTS OF DIFFERENT STATES—INJUNCTION AGAINST PROCEEDINGS—COMITY.

The power of a court of equity in one state to restrain persons within the control of its process from the prosecution of suits in other states is clear, but upon grounds of comity it should be sparingly exercised.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1441; Dec. Dig. § 516.*]

2. COURTS (§ 514*)—CONCURRENT JURISDICTION.

The general rule is that, as between courts otherwise equally entitled to entertain jurisdiction, that court which first obtains possession of a controversy should be allowed to proceed and dispose of it without interference.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1434-1436; Dec. Dig. § 514.*]

3. COURTS (§ 516*)—COURTS OF DIFFERENT STATES—INJUNCTION AGAINST PROCEEDINGS.

This court will not enjoin a suitor from the prosecution of an equitable action already pending in a court of full equity jurisdiction in a sister state upon any theory that this court can better weigh evidence or more justly apply any general principle of law or of equity, nor upon the ground that this court recognizes different rules of law or equity from those which obtain in the sister state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1441, 1442; Dec. Dig. § 516.*]

4. COURTS (§ 516*)—COURTS OF DIFFERENT STATES—RESTRAINING PROCEEDINGS.

Where a party oppresses his adversary by suing him in a foreign jurisdiction for the pur-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pose of evading some established local policy of the jurisdiction where the parties are domiciled, equity will, in a proper case and upon proper terms, restrain the prosecution of such action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1441, 1442; Dec. Dig. § 516.*]

5. COURTS (§ 516*)—COURTS OF DIFFERENT STATES—RESTRAINING PROCEEDINGS.

Upon bill filed here by a citizen and resident of Massachusetts against a corporation organized under the law of New Jersey, seeking to restrain the company from further prosecuting certain equitable actions previously commenced against him in the Supreme Judicial Court of Massachusetts, a court of full equity jurisdiction, *held*, that the bill here cannot be sustained upon a mere showing (if it were shown) that the cause of action asserted in Massachusetts is unconscionable, or that the company is estopped from maintaining its actions there; the Massachusetts court being a court of conscience, and existing for the very purpose of passing upon the question whether claims and defenses are conscionable or unconscionable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1441, 1442; Dec. Dig. § 516.*]

6. CHAMPERTY AND MAINTENANCE (§ 6*)—ENGLISH STATUTES.

In this state the English statutes of champerty and maintenance are not in force.

[Ed. Note.—For other cases, see Champerty and Maintenance, Dec. Dig. § 6.*]

7. CHAMPERTY AND MAINTENANCE (§ 6*)—TRANSFER OF CLAIMS FOR PURPOSE OF LITIGATION.

The law of this state does not prohibit a corporation from assigning its right to recover moneys claimed to be due from promoters for undisclosed profits.

[Ed. Note.—For other cases, see Champerty and Maintenance, Dec. Dig. § 6.*]

8. ASSIGNMENTS (§ 9*)—INTERESTS ASSIGNABLE—CONTINGENT AND EXPECTANT INTERESTS.

In this state assignments of contingent and expectant interests are recognized in equity, provided they be made bona fide and for a valuable consideration.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 14-16; Dec. Dig. § 9.*]

9. CHAMPERTY AND MAINTENANCE (§ 4*)—AIDING LITIGANT—STOCKHOLDERS.

There is nothing in the law or policy of New Jersey to prevent stockholders from agreeing among themselves to aid their corporation in proper ways in its litigations against third parties, and to use their influence as stockholders to see that out of the proceeds of the litigation, if successful, the reasonable disbursements made by the stockholders in the company's behalf shall be refunded, and a special dividend made of the net proceeds if and when that can lawfully be done.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. § 4; Dec. Dig. § 4.*]

10. CHAMPERTY AND MAINTENANCE (§ 4*)—AIDING LITIGATION—EFFECT OF AGREEMENT AS TO THIRD PERSONS.

Such an agreement, even were it contrary to public policy, would not operate to discharge third parties from their existing liability to the company.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. § 17; Dec. Dig. § 4.*]

11. COURTS (§ 516*)—COURTS OF DIFFERENT STATES—RESTRAINING PROCEEDINGS.

The defendant, a corporation of New Jersey, having instituted equitable actions in the

Supreme Judicial Court of Massachusetts against complainant, a citizen and resident of that state, for the recovery of alleged undisclosed promoter's profits, complainant having answered there upon the merits, and the cause having proceeded to hearing and resulted in a finding of facts adverse to him, upon which money decrees were entered, and both parties having then appealed to the full bench of said court, which is the court of last resort in the commonwealth, the complainant in this juncture filed a bill against the corporation in this court alleging that in truth there was no undisclosed profit received by him in the transactions complained of in Massachusetts. *Held* (there being no suggestion that the Massachusetts court has not complete jurisdiction over his person and over the subject-matter, that it lacks the power to do full and complete justice in the premises, or that the company has obstructed him about producing his evidence), that complainant's plain remedy is to prosecute his appeal before the court of last resort of the commonwealth, and thus procure a reversal of the findings that have been unjustly rendered against him.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1441, 1442; Dec. Dig. § 516.*]

12. COURTS (§ 516*)—COMITY—ACTION IN OTHER STATE.

Equitable actions in Massachusetts having been commenced by defendant company against complainant more than five years before the filing of his bill of complaint herein, and he having there filed answers setting up, or having opportunity to set up, every matter of fact as to the transactions between him and the company that is alleged in his present bill, and having submitted to a hearing there upon the merits, and the facts having been found against him, and he coming thereafter to this court for an injunction against the further prosecution of the Massachusetts actions, *held*, complainant is estopped by delay and acquiescence from here setting up that the truth is contrary to the findings in Massachusetts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 516.*]

13. COURTS (§ 516*)—ACTION IN OTHER STATE.

Assuming the facts to be that promoters of a New Jersey corporation, while acting in a fiduciary capacity to the company, being in control of its board of directors, and owing to the company the duty of full disclosure, made over to it certain mining properties at an excessive valuation, receiving in exchange shares of its capital stock whose par value was largely in excess of the actual value of the property, whereby the promoters acquired a large secret profit for themselves, *held*, that there is nothing in the law or policy of New Jersey to prevent the company from maintaining an action in equity against one of the promoters in the state of his residence to recover the secret profit.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 516.*]

14. CORPORATIONS (§ 30*)—COURTS (§ 516*)—PROMOTERS—SECRET PROFIT—JOINT AND SEVERAL LIABILITY.

Where a secret profit was acquired jointly by two promoters as the result of a scheme in which they acted in concert, each doing his part to carry it out for the advantage of both; their control of the company from which the fiduciary duty arose being a joint control, exercised by each for the benefit of both, and where a proper disclosure of the facts by either would have frustrated the schemes of both—*held*, that there is nothing in the law or policy of the state of New Jersey to prevent the company from holding them liable jointly and severally, and recovering the entire secret profit from either promoter, the other being without the jurisdiction.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Loudenslager v. Woodbury Heights Land Co., 58 N. J. Eq. 556, 43 Atl. 671, distinguished.

Held, further, that if by the law of New Jersey, there could not be a recovery, of the entire secret profit from one of several joint promoters who acted in combination in acquiring the profit, if the action were brought in this state, it is yet not unconscionable for the company defrauded to insist in an equitable action brought in the home jurisdiction of one of the promoters that he is responsible for the entire loss; and, if the claim is unconscionable, it is for the court in which the action is brought to so decide.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 98; Dec. Dig. § 30; * *Courts*, Dec. Dig. § 516.*]

15. COURTS (§ 516*)—ACTION IN OTHER STATE.

The doctrine of promoter's liability for undisclosed profit arises from the application to special circumstances of the general principles of equity bearing upon relations of trust and confidence. There is nothing in the law or policy of New Jersey requiring that the liability of a promoter to a corporation organized under the laws of this state is to be determined by the law of this state rather than by the law of the state where the transaction occurred or where the action is tried.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 516.*]

16. CONSTITUTIONAL LAW (§ 81*)—COURTS (§ 511*)—JUDICIAL POWERS—COURTS OF DIFFERENT STATES—"PUBLIC POLICY"—COMITY.

The public policy of New Jersey is the creature not of the courts but of the Legislature; the courts have nothing to do with forming it, and can only recognize it like any other matter of public law. Where questions of New Jersey law are involved in actions pending in other states, it is proper for the litigant to set them up and prove them in the state where the action is pending.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 148; Dec. Dig. § 81; * *Courts*, Dec. Dig. § 511.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5813, 5814; vol. 8, p. 7773.]

17. CORPORATIONS (§ 503*)—ACTIONS—VENUE.

The general rule that a party seeking relief in the courts may choose his own forum in any jurisdiction where the defendant may be found is not limited to plaintiffs who are natural persons. The New Jersey corporation act of 1873 (Revision 1877, p. 175, § 1) conferred upon corporations organized thereunder the right to sue and complain in any court of law or equity.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 503.*]

18. COURTS (§ 516*)—COURTS OF DIFFERENT STATES—RESTRAINING PROCEEDINGS.

The fact that the federal courts entertain a different view upon the law pertinent to the controversy from that held by the courts of Massachusetts, where the controversy is pending, does not justify the Court of Chancery of New Jersey in restraining a corporation of this state from the prosecution of its actions in Massachusetts against a resident and citizen of that state.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 516.*]

19. CONTRIBUTION (§ 5*)—JOINT WRONGDOERS—TRUSTEES.

Equity does not recognize any right of contribution between joint trustees who are together guilty of intentional wrongdoing in respect of the trust.

[Ed. Note.—For other cases, see *Contribution*, Dec. Dig. § 5.*]

20. CONTRIBUTION (§ 5*)—JOINT WRONGDOERS—PROMOTERS.

Where the ground of the joint liability for which complainant is held answerable in *solido* in Massachusetts is that he and his fellow promoter together gained a secret profit from a New Jersey corporation, and it appears that as a part of the same transaction, and as the very means adopted to accomplish their common purpose, the promoter procured the issuance by the New Jersey Company of a large amount of its capital stock which had no value behind it, in violation of the letter and policy of the corporation act of this state, *held*, that the courts of New Jersey will not aid one of the joint promoters in recovering contribution from the estate of his fellow promoter.

[Ed. Note.—For other cases, see *Contribution*, Dec. Dig. § 5.*]

21. COURTS (§ 516*)—COURTS OF DIFFERENT STATES—RESTRAINING PROCEEDINGS—LACHES.

Defendant's actions against complainant in the Massachusetts court having been commenced more than five years before the filing of his bill of complaint in this court, and he having answered upon the merits in Massachusetts when he was in full possession (or with reasonable diligence might have been) of every fact and of every ground of argument upon which he relies in this court for an injunction to restrain the prosecution of the Massachusetts actions; and he having in the meantime acquiesced in the jurisdiction of the Massachusetts court and sought to take a benefit from it in the form of a decree there that, if it had proved to be favorable to him, would have concluded the company, and having come here only after a decision against him upon the merits, and there being no suggestion that his delay in coming to New Jersey for relief was due to accident or inadvertence—*held* that, by laches, acquiescence, and waiver, complainant has lost any right he might otherwise have had to obtain from this court an injunction to restrain the defendant from the further prosecution of the Massachusetts actions.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 516.*]

(Syllabus by the Court.)

Bill by Albert S. Bigelow against the Old Dominion Copper Mining & Smelting Company. Motion by defendant under rule 213 to dismiss. Motion granted.

Bennett Van Syckel, John Griffin, Charles H. Tyler, John C. Spooner, and James L. Bishop, for complainant. Gilbert Collins, Charles L. Corbin, William H. Corbin, Louis B. Brandeis, and Edward F. McClennen, for defendant.

PITNEY, C. This is a motion, made under rule 213, to strike out and dismiss the bill of complaint upon grounds that may be summarized thus: (a) Want of equity; (b) res adjudicata; (c) laches.

The general object of the bill is to restrain the defendant, a corporation of the state of New Jersey, from prosecuting two actions in equity heretofore brought by it against the complainant, a resident and citizen of Massachusetts, in the Supreme Judicial Court of that commonwealth, in which the complainant has answered and a hearing has been had upon the merits, resulting in certain find-

ings of fact upon which money decrees have been entered against him; and from these decrees both parties have appealed to the full bench of the Supreme Judicial Court, which is the court of last resort in the commonwealth.

Upon the filing of the present bill, and before the making of this motion, the bill, with accompanying affidavits, was presented to Vice Chancellor Walker upon an application for a temporary injunction. After hearing argument, the Vice Chancellor, without undertaking to decide the merits, but leaving the questions involved to be deliberately decided upon full hearing, held that a case was made which should move this court to grant a preliminary injunction, and thus preserve the status. The injunction accordingly issued.

The present motion is in effect a demurrer to the bill, and affords a proper opportunity to deliberately determine the merits. *Grey v. Greenville & Hudson Ry. Co.*, 59 N. J. Eq. 372, 377, 46 Atl. 638; *Stevenson v. Morgan*, 63 N. J. Eq. 707, 53 Atl. 78. Vice Chancellor Walker sat with me upon the argument, and has received and considered copies of the very elaborate and voluminous printed arguments that were submitted to me. I have had the benefit of conferences with him before reaching a conclusion, and he concurs in the result now reached, and in the grounds of decision.

Shortly stated, the object of the Massachusetts actions is to recover certain large profits (aggregating, with interest, about \$2,000,000) alleged to have been secretly and improperly acquired from the company by Mr. Bigelow, and one Leonard Lewisohn, since deceased, who resided in the state of New York, while they were jointly acting as promoters and fiduciary agents of the defendant company.

Manifestly, the only ground upon which this court can properly be asked to restrain these actions must be that the defendant is acting contrary to equity and good conscience in prosecuting them.

The present bill first sets forth what complainant avers to be the true history of the matters out of which the Massachusetts litigation arises. It then sets out the actions instituted against him by defendant company in Massachusetts, shows that afterwards similar actions were instituted against the executors of Lewisohn in the Circuit Court of the United States for the Southern district of New York, and gives the history of these litigations. Copies of the record in the Massachusetts suits are annexed to the bill as part thereof, and we are thus informed of the facts alleged by the present defendant against Bigelow, the findings of fact of Justice Sheldon, before whom the actions were tried, the decrees thereupon made against Bigelow, and the grounds of the appeals taken by the present defendant from those decrees to the court of last resort. The present

complainant has likewise appealed—upon what grounds does not appear.

It is clear that the fate of the present bill must depend not upon the question which party has the right of the controversy pending in Massachusetts, but upon the question whether there is any sufficient occasion for this court to interfere in that controversy. For this reason, in summarizing the historical statement contained in the bill, I shall endeavor to place in juxtaposition what the present defendant has alleged in the Massachusetts actions concerning the same transactions, and what Mr. Justice Sheldon has found the facts to be.

The present bill alleges: That in the spring and early summer of the year 1895 Mr. Bigelow, acting in conjunction with Leonard Lewisohn, of the city of New York, procured options, one from the Simpson Estate (of Boston), and one from a Mr. Keyser (of Baltimore), for the purchase of all the capital stock of a Maryland corporation known as the Old Dominion Copper Company of Baltimore City (otherwise referred to as the "Baltimore Company"). This company was the owner of mines and mining claims in Arizona. The par value of its stock was \$500,000; the purchase price was \$1,000,000. By agreement between Bigelow and Lewisohn, their interests in the several stock purchases were so arranged that, as between themselves, the former was to have $\frac{22}{42}$ and the latter $\frac{19}{42}$ of the benefit of the entire purchase. The purchase was completed on or about June 20th, and the control of the Baltimore Company was turned over to Bigelow and Lewisohn on that day, a new board of directors being chosen in their interest, of which they were members. Meanwhile, having ascertained that Keyser held the legal title to four mining claims and a certain parcel of land in Arizona (which may for convenience be called the "outside properties") in trust for the Baltimore Company, Bigelow and Lewisohn insisted that these properties should follow the ownership of the stock. This was assented to by Keyser, the Simpson executors, and the Baltimore Company, and for this purpose Keyser subsequently made a deed conveying the "outside properties" to Lewisohn (but, of course, in trust for the parties entitled to the stock of the Baltimore Company).

The narrative portion of the bill, without expressly alleging the fact, leaves it to be understood that the price of the Simpson and Keyser stock was paid by Bigelow and Lewisohn with their own funds, and that the purchase was made for their sole benefit.

In the Massachusetts suits, however, the present defendant averred in its bills of complaint that the purchase was made with moneys subscribed and contributed by a syndicate organized for the purpose by Bigelow, either alone or in conjunction with Lewisohn; that it was known as the "Old Dominion Syndicate," and contributed approximate

ly \$1,000,000 to purchase the Baltimore stock. Bigelow's answers in Massachusetts 'admit such a syndicate was formed about May 24, 1895, and afterwards enlarged; but aver that it was the understanding and agreement of all parties that Bigelow and Lewisohn, having purchased and paid for the shares of the Baltimore Company with the money thus subscribed, and holding them in their own names, should deal with them as to them should seem best; "and that the associates in the syndicate should receive so much only of the profit realized in the enterprise as Bigelow might deem it fair and proper to distribute among them, and that the remaining profit should be retained by Bigelow to his own use." This statement as to the understanding with the syndicate members is negated by the findings of Mr. Justice Sheldon, as will appear hereafter.

The bill herein avers that at the time they acquired the stock of the Baltimore Company, and obtained control of that company, Bigelow and Lewisohn had no definite plan with respect to the disposition thereof, and that it was not until afterwards that the formation of a new company was determined upon. (This is negated by the findings, as appears below.) That thereafter they determined to form a New Jersey corporation with a capitalization of \$3,750,000, divided into 150,000 shares of the par value of \$25 each, and convey to it all the property of the Baltimore Company and the "outside properties," and furnish \$500,000 for working capital, in return for all the capital stock of the new company. That the details of the organization and the carrying out of these plans were left to counsel, and resulted in the formation on July 8, 1895, of the New Jersey corporation, defendant herein. That this company held its first meeting on the following day and elected a board of directors, and two days later several of these resigned, and others (including the two promoters) were selected in their places. That thereafter it was agreed between the promoters and the defendant company that they should convey to it all the property of the Baltimore Company, including the "outside properties," and should furnish the new company with a working capital of \$500,000 in cash, in consideration whereof the new company should issue to them or their nominees, and to the nominees of the Baltimore Company (of which they owned the entire capital stock), the entire capital of the new company, consisting of 150,000 shares. That this was carried out in substance as a single transaction, although in form there were two transactions, one being the sale by the Baltimore Company of all its property, except cash assets, to the new company for 100,000 shares of the stock of the latter, and the other being in form a sale by Lewisohn to the new company of the "outside properties" for 30,000 shares of its stock. That the conveyances were subsequently made accordingly, and the

obligation to furnish \$500,000 of working capital having been performed, the defendant company issued 150,000 shares of its capital stock. That the stock was issued as follows: 100,000 shares to one Dumaresq, nominally on account of the property standing in the name of the Baltimore Company; 30,000 shares to Bigelow and Lewisohn, nominally on account of the "outside properties"; and 20,000 shares to one Nelson, nominally on account of the working capital of \$500,000, which sum, as the bill alleges, was actually procured by Bigelow and Lewisohn through the sale of stock to their friends.

In the Massachusetts actions it is charged by the company that the 20,000 shares that were placed in Nelson's name were sold to the public for working capital by the company itself, and not by the two promoters; and so Justice Sheldon finds:

The bill sets up that the property turned over to the new company (defendant herein) by the promoters and by the Baltimore Company (of which they were in full control) was worth fully as much as \$3,250,000, the par value of the 130,000 shares of stock of the new company taken in exchange therefor.

The bills filed by the present defendant in the Massachusetts actions charge, in effect, that the property that stood in the name of the Baltimore Company was worth no more than the price paid for the stock of that company by the promoters and their syndicate, and that the "outside properties" were worth not more than \$5,000. Justice Sheldon finds the intrinsic value of the property held in the name of the Baltimore Company was not more than \$1,000,000, but that its market value at the time of transfer to the new company was seemingly greater than this, "probably due in large part to the skillful manipulation of Bigelow and Lewisohn, and the ingenious manner in which they created a desire on the part of men interested in mines, as investors or speculators, to be allowed to join in the transaction they were carrying out. This market value, however, was less than \$2,000,000." He finds that the market value of the "outside properties" was not exceeding \$50,000.

The bill herein avers that the holders and owners of the entire authorized capital stock of defendant company procured and consented to the issue of its entire capital for the consideration above mentioned, and no person who was a stockholder at the time of the consummation of the transaction objected; that subsequent shareholders acquired their shares not from the company, but from Bigelow and Lewisohn.

As already observed, the Massachusetts bills allege, and Justice Sheldon finds, that 20,000 shares (par \$500,000) were sold for working capital by the company itself, and not by Bigelow and Lewisohn. Besides, these bills allege that during the entire course of the transactions in question Bigelow and Lewisohn were promoters of the defendant

company, and were in complete control of its organization, a large majority of the directors being interested with Bigelow in the transactions and receiving some share in the profits, and the remaining directors taking no active part in the management and being ignorant of the facts; and allege that no disclosure was at any time made of the promoters' profit. The bills allege further that the organization of the new company was determined upon as early as March, 1895, when the promoters began to acquire the stock of the Baltimore Company, it being a part of their plan that they should sell the property of that company to the new company at a large advance in price, to the injury of future stockholders therein, and that they should thereby secure for themselves as promoters and organizers a large secret profit, and that all the subsequent transactions were in pursuance of this plan; that the two promoters took for themselves the entire 30,000 shares issued for the outside properties, and that, of the 100,000 shares issued for the property standing in the name of the Baltimore Company, they divided among the members of the syndicate only 80,000 shares, par \$2,000,000, and took for themselves the remaining 20,000 shares, par \$500,000, ostensibly in payment for their expenses and services; that no disclosure was made to the members of the syndicate, other than themselves, of the profit acquired by Bigelow and Lewisohn; and that the company had no knowledge of any of the promoters' profits until the year 1902, shortly before the actions were brought.

Mr. Justice Sheldon's findings are substantially in accord with these contentions. He finds that Bigelow and Lewisohn were promoters of the new company and in full control of it during all the transactions in question, and dictated whatever was done by the company or in its behalf; that this control continued until April, 1902; that the company had no directors, representatives, or advisers other than the two promoters and their agents, and that they did not disclose to the company any of the pertinent facts; that they did not disclose to it that they had paid only \$1,000,000 for the stock representing all the mining property of the Baltimore Company, or that they procured the "outside properties" without any other consideration. Nor did they see that the new company had any independent advice before accepting the offers made to it, which were really made by themselves. On the contrary, they organized and promoted the new company for the purpose of having it accept, and they exercised their control over it to cause it to accept, said offers, and really through their own action and that of their employees themselves accepted said offers in the name of the company.

Justice Sheldon also finds that Bigelow did not act towards the members of his syndicate with good faith; that when the scheme

was formed it was the plan and avowed intention of the two promoters to form a new corporation with a capital stock of \$2,500,000, which should take the property of the Baltimore Company and the "outside properties" for \$2,000,000, and raise \$500,000 of working capital with the rest of its stock; this would give to Bigelow stock for the money raised and applied by him at the rate of just \$2 for \$1, and he expected and stated to the various members of the syndicate that he expected to give to each subscriber there-to cash to the full amount of his subscription and stock at par to the same amount the cash to be raised by selling the surplus stock, which would produce just that amount; the promoters proceeded, however, to organize the new company under the laws of New Jersey with a capital stock of \$3,750,000, being 150,000 shares of the par value of \$25 each; that the result of his and Lewisohn's transactions with the new company was that for the \$1,000,000 of their own and their associates' money which they invested, they received, subject to the payment of legitimate expenses not exceeding \$20,000, stock to the par value of \$3,250,000; that Bigelow gave to the members of his syndicate only \$2 for \$1, either wholly in stock, or half in cash and half in stock, as they elected, and that with a few individual exceptions he did not disclose the facts to them; that the great majority of the members of his syndicate did not become aware of the details of what was done by Bigelow and Lewisohn, but accepted the allotment of \$2 for \$1 in cash or in stock for the several investments that they had made, and contented themselves, in their ignorance, with the fact that they had doubled their money; that the residue of the gain received by Bigelow he dealt with as he chose. He distinctly finds that it was not the fact, as alleged by Bigelow in his answers, that it was the understanding among the associates in the syndicate that Bigelow and Lewisohn should deal with the shares as to them should seem best, and that the associates should receive so much only of the profit realized in the enterprise as Bigelow should deem it fair and proper to distribute among them, and that the remaining profit should be retained by Bigelow to his own use.

The learned justice further distinctly negatives the contention of Mr. Bigelow that it was the intention that he and Lewisohn should supply the new company with \$500,000 for working capital, that this was actually done, that Bigelow and Lewisohn themselves took the 20,000 shares which were to be used for raising the working capital, and that the parties who afterwards subscribed for and received these shares really took them from Bigelow and Lewisohn, and not from the new company; and that at the time of the transactions in question Bigelow and Lewisohn became and were the real owners of all the authorized capital stock of

the new company. The justice says: "There was some evidence in support of this contention, but I find that the real facts are as already stated."

The bill herein avers that the transactions concerning the purchase of the property in question by the company and the issuance of stock therefor were ratified by the stockholders at three different meetings held in the years 1899 and 1901, when neither Bigelow nor Lewisohn controlled the company or the action of its stockholders.

The company, in the Massachusetts actions, denied all knowledge on the part of the company until after April 4, 1902, until which time Bigelow and Lewisohn were in complete control. Justice Sheldon so finds, and further finds specifically the facts and circumstances respecting the so-called ratification by the stockholders' meetings, from which the inference is that the supposed ratifications were of no effect as against the company.

The bill then sets up that on October 7, 1902, the present defendant commenced two separate actions in equity against Mr. Bigelow in the Supreme Judicial Court of Suffolk county, in Massachusetts, one relating to the transaction in which 30,000 shares of stock were acquired by Bigelow and Lewisohn in exchange for the "outside properties," as to which rescission and return of the stock were prayed, and in the alternative that the damages sustained by the company should be ascertained and Bigelow required to pay them, and for other and general relief; and the other suit relating to the transaction in which 100,000 shares were issued in exchange for the properties standing in the name of the Baltimore Company, as to which the prayer was that Bigelow should be required to account for so many of these shares as were received by Bigelow and Lewisohn, or by any other person, as profit in connection with the promotion and organization of the company, or that the damages suffered by the company should be ascertained and Bigelow required to pay them, and for other and general relief.

The bill avers that Bigelow filed a demurrer in the 30,000-share suit, and answered in the 100,000-share suit. That the demurrer was overruled (*Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479), and Bigelow then answered in this suit. That the causes proceeded to trial, being heard together before Justice Sheldon of the Supreme Judicial Court; that he decided them in favor of the company and against Bigelow, rendering judgment in the 100,000-share suit for about \$800,000, principal and interest, and in the 30,000-share suit for about \$1,200,000. That decrees were accordingly entered, from which appeals were taken by both parties.

As already mentioned, copies of the bills and answers in the Massachusetts suits, and the other documents forming the record

thereof, including the findings, are annexed to the present bill as part thereof, and are referred to in the bill as thus annexed.

The bill sets up that, after the commencement of the Massachusetts suits against Bigelow, the defendant company began two suits in equity in the Circuit Court of the United States for the Southern district of New York against the executors of Leonard Lewisohn, who was then deceased. That the bills in these two suits were identical with those filed in Massachusetts, and were founded upon the same state of facts. That the executors demurred in one case, and answered in the other. That the demurrer to the bill in the 30,000-share suit was sustained by Judge Lacombe (*Old Dominion Copper Min. & Smelting Co. v. Lewisohn* [C. C.] 136 Fed. 915), and a final decree was entered dismissing the bill. From this decree the company appealed to the United States Circuit Court of Appeals, and that court affirmed the decree of the court below in sustaining the demurrer (148 Fed. 1020, 79 C. O. A. 534). That thereupon the company applied to the Supreme Court of the United States for a writ of certiorari to review this decision, and that such writ was allowed. So far as appears, the other Lewisohn suit is pending undetermined.

The bill contains certain further averments intended to show grounds for the intervention of this court in the Massachusetts litigation. Mention of these may be reserved until they are reached in their order for discussion.

To complete the recital, it should be shown at this point upon what basis Justice Sheldon made up the amounts for which he ordered decrees to be entered against Bigelow. He found that the stock which the promoters took as their profit "was then of fully its par value, due mainly to the skillful conduct and manipulation of Bigelow and Lewisohn, and continued to be so for some time, and until Bigelow had sold out substantially all the stock that he took for his own use." Having ascertained that out of the 100,000 shares (par \$2,500,000) that were issued in payment for the property standing in the name of the Baltimore Company, the promoters took for themselves 20,000 shares (par \$500,000), without disclosure either to the company or even to the syndicate associates, and that the market value of these shares was equivalent to par in the market created by the manipulations of the promoters, and having found also that in truth the property of the Baltimore Company was worth not more than \$2,000,000 (or 80,000 shares at par), which happens to be the exact price at which the associates in the syndicate understood that it was to be valued, Mr. Justice Sheldon charges the promoters, in one of the actions, with \$500,000 secret profit, less \$20,000 allowed for legitimate expenses of promotion, and for the difference, \$480,000, with interest from the time the pro-

moters received the stock, a decree was entered.

In the other action, wherein the company prayed primarily for rescission of the transaction that resulted in the issuance of 30,000 shares to Bigelow and Lewisohn for the "outside properties," Justice Sheldon held, in favor of Bigelow, that the situation of the parties had so far changed that rescission should not be granted, because, while the properties themselves were in the same condition as when conveyed to the company, Bigelow had disposed of his stock before the suit was brought, had not the 30,000 shares to surrender, and apparently could not procure them in the open market, and because, also, the company had, since the transaction in question, increased its capital stock and bought new and additional mines, whose value and profitableness was not shown. He therefore charged the promoters with \$750,000 the market value of the 30,000 shares at the time they received them and for some time thereafter, against which was credited \$50,000, the utmost value of the "outside properties," leaving \$700,000 and interest as the amount of this decree.

Upon the findings Bigelow would have been liable for only about $\frac{22}{43}$ of the award, had he been charged with only his share of the profit according to the division made between him and Lewisohn. But Justice Sheldon found that in the formation and execution of the scheme the two promoters were acting together and in concert, each doing his part to carry out a joint scheme for the advantage of both; that the control exercised by them over the company was a joint control, exercised by each for the benefit of both; that a proper disclosure of the real facts by either would have frustrated the schemes of both; and that the equitable tort complained of was the act of both, for which they must be held responsible both jointly and severally. He therefore held Bigelow liable in solido.

Appeals have been taken by both parties to the full bench of the Supreme Judicial Court of Massachusetts, the court of last resort in the commonwealth, which appeals, according to the averments of the bill, have the effect of not merely suspending but of vacating the decrees; but the findings of Justice Sheldon upon the facts will not be overruled by the full bench unless they are without support in the evidence or are clearly contrary to the weight of the evidence. The full bench has original as well as appellate jurisdiction, and may order a new trial or further proceedings at the bar of the court. The evidence that was before Justice Sheldon is not made a part of the present bill.

Enough has been said of this somewhat complicated transaction to introduce the discussion that follows. Other allegations and findings may be referred to as occasion requires.

I have not the least doubt or difficulty about the power of a court of equity in one state to restrain its own citizens, or other persons within the control of its process, from the prosecution of suits in other states or in foreign countries. The power proceeds from the undoubted authority that a court of equity possesses over persons within its jurisdiction to restrain them from doing anything that is contrary to equity and good conscience, to the wrong and injury of others, whether the threatened inequitable conduct consists in the prosecution of an action or whatever it may happen to be. The court of equity thus appealed to acts in personam, and it is immaterial whether the threatened inequitable conduct is to be carried on within or without the limits of the jurisdiction. 1 High on Injunc. § 103; Story's Eq. Jur. (12th Ed.) §§ 899, 900; *Margarum v. Moon*, 63 N. J. Eq. 586, 53 Atl. 179, and cases cited. But on general principles, equity will not interfere with the right of any person to bring an action for the redress of grievances—the right preservative of all rights—except for grave reasons; and on grounds of comity the power of one state to interfere with a litigant who is in due course pursuing his rights and remedies in the courts of another state ought to be sparingly exercised. The courts of New Jersey ought not to assume, directly or by indirection, any appellate jurisdiction over the courts of Massachusetts, nor proceed in giving judgment here upon the idea that the courts of the commonwealth are in the least degree incompetent or unwilling to do full and complete justice in all cases that are fairly within their jurisdiction.

It is averred in the bill that the actions now pending before the Supreme Judicial Court of Massachusetts are equitable actions; it is by implication admitted in the bill, and was most fully admitted in argument, that that court has the amplest equity powers; and it is equally clear that the causes there pending are, with respect both to subject-matter and to parties, within its jurisdiction. They must be very special circumstances that will justify this court in restraining the prosecution of an equitable action already pending in a court of such ample jurisdiction. I speak not of any limitation upon the power of this court, but upon the propriety of its exercise in the particular case. Its exercise is not to be properly based upon any theory that this court knows better how to do justice than the court of last resort of the commonwealth; that it can weigh evidence better, or more justly apply to the facts any general principle of law or of equity; nor upon the ground that this court recognizes different rules of law or of equity from those which obtain in the commonwealth. A condition precedent to an application to this court for relief in all ordinary cases is the absence of a full, adequate, and complete remedy elsewhere. And besides, there is the

general rule, essential to the orderly administration of justice, that, as between courts otherwise equally entitled to entertain jurisdiction, that court which first obtains possession of the controversy ought to be allowed to proceed and dispose of it without interference; a rule established, of course, primarily for the benefit of the suitor, rather than for the protection of the dignity of the court. It was applied by Chancellor Runyon in *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238, 241, where suit having first been commenced in this court for relief against certain policies of insurance alleged to have been fraudulently obtained from the complainant upon defendant's property in Illinois, and defendant having afterwards begun suit upon the policies in a court of that state, which suit had been removed to the federal court, the learned Chancellor allowed an injunction against the prosecution of this action, notwithstanding the insurance company might have had complete relief in the federal court, either at law or by recourse to its equity side. In his opinion he quoted with approval the remark of Grier, J., in *Peck v. Jenness*, 7 How. 625, 12 L. Ed. 841, to the effect that the rule giving exclusive jurisdiction to the court which first obtains possession of the controversy has its foundation not merely in comity, but in necessity: "For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other"—a remark reiterated by the Supreme Court of the United States in *Central Natl. Bank v. Stevens*, 169 U. S. 459, 18 Sup. Ct. 403, 42 L. Ed. 807.

In *Title Guarantee & Trust Co. v. Trenton Potteries Co.*, 56 N. J. Eq. 441, 38 Atl. 422, the Potteries Company having commenced an action at law in the New York Supreme Court upon a policy of insurance issued to it by the Title Company, the latter company afterwards filed its bill in this court alleging a mistake in the policy, and praying that it might be reformed, and that the Potteries Company might be restrained from further prosecuting the New York action, on the ground that, if it were permitted to do so before the policy was reformed in such manner as to set out the true agreement of the parties, a judgment would necessarily go against the Title Company. This court allowed a preliminary injunction, whereupon the Potteries Company filed its answer setting up that under New York law the Title Company was entitled to there plead its equitable defense. Upon this answer, and affidavits verifying it, the injunction was dissolved. Upon appeal, the Court of Errors and Appeals affirmed this decision, Mr. Justice Gummere (now Chief Justice) saying: "The respondent, having selected a court of the domicile of the appellant as the forum in which to try the matters in issue between them involved in the suit brought by it, is entitled to have those matters finally deter-

mined in that forum, provided the appellant can in its defense in that suit show the real agreement between the parties as fully as it would be permitted to do in its suit brought here for the reformation of the written contract."

In *Sweeny v. Williams* (36 N. J. Eq. 627, 629, Mr. Justice Magie (afterwards Chancellor), speaking for the Court of Errors and Appeals, said: "If there exist a concurrent jurisdiction in courts of law and courts of equity, the latter will decline to entertain jurisdiction after the jurisdiction of the courts of law has attached, unless the relief that the applying party is entitled to ask cannot be fully obtained in the court of law."

See, also, *N. J. Zinc Co. v. Franklin Iron Co.*, 29 N. J. Eq. 422, 430; *Minchin v. Second Natl. Bank*, 36 N. J. Eq. 436, 443; *Shaw v. Frey*, 69 N. J. Eq. 321, 523, 59 Atl. 811.

I am referred to *Dehon v. Foster*, 4 Allen (Mass.) 545; *Id.*, 7 Allen (Mass.) 57; and *Cunningham v. Butler*, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657; *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538. These decisions were based upon the ground of a threatened evasion of the essential features of a local insolvent law. They will be further mentioned in their proper order below. But in *Carson v. Dunham*, 149 Mass. 52, 20 N. E. 312, 3 L. R. A. 202, 14 Am. St. Rep. 397, it was held that their authority did not support an application for an injunction on the ground of conflicting decisions or diversity of law. The latter case was an application for an injunction to restrain the defendant, a citizen of Massachusetts, from prosecuting against another citizen of the same commonwealth a foreclosure suit in a South Carolina court concerning land situate in that state. It appeared that there was a difference of opinion between the Supreme Court of the United States and the Supreme Court of South Carolina upon the merits of the controversy. Chief Justice Morton said: (*Carson v. Dunham*, 149 Mass. 56, 20 N. E. 314): "We are then brought to the question whether the fact, if it be a fact, that the Supreme Court of South Carolina entertains views of the law which govern the rights of the parties differing from those held by the Supreme Court of the United States, justifies us in restraining Dunham from the further prosecution of the suit in the state court. The law gives the parties a choice of tribunals. Why is not Dunham's right to choose the South Carolina court as great as the right of Mrs. Carson to choose the United States court or the courts of this commonwealth? Reduced to its elements, the argument of the plaintiff is that we should interfere because there is danger that the Supreme Court of South Carolina will not rightly and justly decide the rights of the parties. We cannot yield to such an argument without a violation of every principle of interstate comity. As we have said, the general rule of comity is that the court first

acquiring jurisdiction shall retain it. In our judgment, it would be indefensible for the courts of this commonwealth to restrain the prosecution of a suit pending in the court of a sister state, which has jurisdiction of the subject-matter and of the parties, upon the ground that the decision of that court may differ from our own opinion, or from the decisions of other courts of equal authority. All the facts presented to us can be and are presented in the case pending in South Carolina, and it is presumed that the Supreme Court of that state will decide the case according to the law and the right."

The Court of Appeals of New York has even refused to interfere by injunction to restrain the transfer to a bona fide holder of an obligation held by the courts of that state to be invalid in the hands of such a holder, and this although such transferee might resort to the federal courts, where a different rule of law prevailed, and to which courts the present holder could not resort. *Town of Venice v. Woodruff*, 62 N. Y. 462, 463, 20 Am. Rep. 495. *Rappallo, J.*, said: "The real purpose of the litigation seems to be to prevent a resort to the courts of the United States for the collection of these bonds; and the question is whether it is the province of a court of equity in a state to interfere for the purpose of preventing a resort to the federal courts for the enforcement of obligations on the ground that they may be held in those courts to be valid, while according to the decisions of the state courts the same obligations are held to be void. I apprehend that the power of a court of equity to decree the surrender and cancellation of instruments has never before been appealed to or exercised for such a purpose."

As authority for the proposition that one court of equity may restrain an action pending in another court of equity, I am referred to *Erie R. R. Co. v. Ramsey*, 45 N. Y. 637. An examination of the case shows that it determined only the existence of the power, and not the propriety of its exercise under the circumstances presented. The case is a somewhat notorious one. The company had procured from Justice Barnard, of the Supreme Court, an injunction restraining Ramsey from proceeding further in an equitable action that he had previously brought in the same court against the company and certain of its directors. Ramsey, on advice of counsel, disobeyed the injunction on the ground that the court had no jurisdiction to stay his proceeding in another action in the same court. Thus the question was raised whether he was guilty of contempt. The Court of Appeals held that he was. In the opinion, the action of Justice Barnard in issuing the injunction is excused on the ground that upon the case as presented to him Ramsey was charged with a purpose to throw the vast property of the Erie Railroad Company into the hands of a receiver by fraudulent acts, including a fraudulent appearance for

the company and a consent to the receivership by an attorney acting in collusion with Ramsey and without authority from the company. The opinion plainly intimates that Justice Barnard erred in not requiring that the application to stay proceedings be made in the action already pending; the decision was, simply, that he acted within his jurisdiction, and that his injunction could not be ignored as void on its face. (See citations, *Daly v. Amberg*, 126 N. Y. 494, 27 N. E. 1038; *Cauffman v. Van Buren*, 136 N. Y. 265, 32 N. E. 775.)

In 22 Cyc. 810, the topic is treated as follows, with abundant citation of authorities: "It is a general rule that a party will not be restrained by injunction from proceeding with a suit in equity, because complainant's equitable rights can be fully protected in that suit. An order to stay such suit should be obtained by an application in that court itself. It follows that equity will not enjoin a suit to obtain an injunction, or an accounting or a receiver. Nor will a foreclosure suit be enjoined for the relief of one who might obtain full relief in that suit itself. However, a court of equity has 'power' to enjoin a party from proceeding with other equitable suits, and such an injunction, when issued, is not void and must be obeyed. But the power should be exercised only in extreme cases. The court first acquiring jurisdiction of a case will protect that jurisdiction by enjoining an action by the same parties on the same subject-matter in another court, even though that other court may also have equity jurisdiction. Wherever complainant's rights cannot be fully protected in the other suit it will be enjoined. An injunction will be granted in actions of interpleader against the further prosecution of suits against complainant, even though one of these suits may be in equity, because of the necessity of disposing of the whole matter in one action. And where equity has undertaken to administer the assets of an insolvent corporation, so far as they are within its jurisdiction, other equitable suits for the same purpose will be enjoined. So a bill of peace lies to prevent a multiplicity of suits, even though the suits may themselves be in courts of equity."

My examination of the authorities convinces me that the reported instances of interference by courts of equity in equitable actions already pending in other courts are all based upon exceptional circumstances, and may be classed within a very few groups. Without assuming to enumerate all of these groups, I may mention the following principal ones:

(1) In early times in England there was a controversy about jurisdiction between the chancery and the exchequer; the former holding that the latter was a sort of "private" court, its equitable as well as its legal jurisdiction being dependent upon the averment of *quo minus*, and resting upon

the effect of defendant's act in disabling the plaintiff to respond to the crown, and that the chancery was a court of superior and more general jurisdiction. See *Joanes v. Whitney* (1578) Cary, 161; 21 E. R. 60 (but this was an injunction out of chancery to restrain an action at law brought in the exchequer after the commencement of the chancery suit); *Vendall v. Harvey* (1632) Nels. 19; 21 E. R. 427; 1 Eq. Cas. Abr. 80, G. 2, and 134, D. 3; 21 E. R. 893 and 989; where the Lord Keeper (North) overruled a plea that set up the pendency of a prior equitable action in the exchequer as a bar to a suit in chancery, on the ground that "the chancery was the highest court of equity, and though the exchequer was an ancient court of equity, yet the same was but a private court, and its jurisdiction properly was only for getting in the King's revenue, and for the King's officers, and they ought to keep within their proper bounds." And see 6 Vin. Abr. "Court of Exchequer," Q. 2 (page 569).

(2) Interpleader suits are a recognized exception; and where a plaintiff is entitled to interplead defendants, and pays the money into court, other actions against them may be enjoined, whether these be legal or equitable. *Warington v. Wheatstone* (1821) Jac. 202; 4 Eng. Ch. 203; 37 E. R. 826. (Here one of the suits enjoined was legal, the other equitable; see 10 Sim. 480.) So in *Crawford v. Fisher* (1840) 10 Sim. 479; 59 E. R. 701; *Richards v. Salter*, 6 Johns. Ch. (N. Y.) 445; *Sieveling v. Beherns* (1837) 2 Myl. & Cr. 581, 592, 593; 40 E. R. 761, 765; *Prudential Assurance Co. v. Thomas* (1867) L. R. 3 Ch. App. 74; 2 Story, Eq. § 808.

(3) Creditors' suits against executors or administrators for the administration of the estate may be treated as an exception; where, after (but not before) decree, an injunction has frequently been issued to restrain other proceedings by creditors at law or in equity, the decree in the administration suit being considered to be in the nature of a judgment in favor of each and every creditor. 1 Story, Eq. § 549; 2 Id. § 890; *Jackson v. Leaf* (1820) 1 Jac. & Walk. 229, 231; 37 E. R. 362; *Beachamp v. Marquis of Huntley*, and *Clarke v. Earl of Ormonde* (1822) reported together in Jacob, 546; 37 E. R. 956; *Carron Iron Co. v. MacLaren* (1855) 5 H. L. Cas. 416; 10 E. R. 415, cited more fully hereafter.

(4) Prevention of multiplicity of suits. On this ground suits in equity may no doubt be enjoined, if necessary to do so, as well as suits at law. Probably *Beckford v. Kemble* (1822) 1 Sim. & Stu. 7, 57 E. R. 3, belongs in this category; there *Leach, V. C.*, stayed a foreclosure suit pending in the colonial court of chancery in Jamaica until an account could be taken in a suit for redemption in England, all the parties being in England, so that the accounts could be more conveniently taken there than in Jamaica.

(5) Where a party by fraud attempts to

produce an unjust result in a pending suit and consequent irreparable injury to his adversary, he may of course be enjoined. In this class lies the injunction granted by Justice Barnard in *Erie R. R. Co. v. Ramsey*, 45 N. Y. 637; the criticism being that he should have left the company to apply for a stay by motion in the suit already pending.

(6) Oppression amounting to fraud may be attempted by suing a debtor outside of his home jurisdiction in order to gain an unconscionable advantage over him, in which case equity may restrain the creditor upon proper terms. *Standard Roller Bearing Co. v. Crucible Steel Co.* (N. J. Ch.) 63 Atl. 546, decided by my predecessor, Chancellor Magie, was a case where both parties were corporations of the state of New Jersey. The defendant had a claim against the complainant of less than \$4,000, and notwithstanding it might sue the complainant in the courts of this state, or prosecute its claim by attachment upon a valuable property of the complainant in Pennsylvania (in either case the claim could be prosecuted and defended by proofs and witnesses at hand), the defendant brought three attachment suits simultaneously in Ohio, Michigan, and Wisconsin, wherein credits due to the complainant to an amount exceeding \$20,000 were garnished. The learned Chancellor held that these attachment suits in distant states were oppressive, and that their prosecution should be enjoined, upon terms, however, that complainant would submit to a speedy trial of the claim in this state, and would give bond, with security, in a penal sum double the amount of the claim conditioned for paying the amount ascertained to be due; ascertainment either to be made by this court or by any court of competent jurisdiction in this state, at the election of the defendant.

(7) Cases where a party oppresses his adversary by suing him in a foreign jurisdiction for the purpose of evading some established policy of the jurisdiction where the parties are domiciled.

Since complainant here relies upon certain decisions that, so far as they have any pertinency, belong in this category, they may well be examined at some length. In reading the opinions, care should be exercised in distinguishing that part of the reasoning which merely establishes the power, from that which vindicates its exercise in given cases.

Bushby v. Munday, Cloves & Cracroft (1821) 5 Mad. 297, 56 E. R. 908. *Bushby* had given to *Munday*, as trustee for *Cracroft*, a bond to secure a gambling debt, and *Munday* had assigned it to *Cloves*. The bond was given in England and was in English form, and was claimed to be void as a gambling debt under an act of Parliament. *Bushby* was a Scotchman and proprietor of real estate in Scotland, but resident abroad. *Cloves* brought an action in the Scotch court upon the bond, and thereby secured a lien (equivalent to our lien by foreign attachment) up-

on Bushby's estates. The latter thereupon filed a bill in the English Chancery for the purpose of having the bond delivered up to be canceled, and incidentally to restrain the prosecution of the action in Scotland. The grounds of the application for the injunction were that a bond was an English security, and a discharge from it abroad could not be pleaded in England; that the English Chancery might require the bond to be delivered up, while in Scotland no such relief was given; in England discovery could be had by sworn answer of Munday and Cracroft, whereas in Scotland such an answer would not be evidence; besides which it was urged that the invalidity of the bond arose out of an English act of Parliament, not in force in Scotland. Leach, V. C., allowed an injunction upon terms, saying (5 Madd. 308, 56 E. R. 913): "Mr. Bushby may succeed in his defense in Scotland, and still be exposed to future proceedings upon the bond; but if he establish his case here, the bond itself will be delivered up to be canceled, and he will be absolutely relieved from all future proceedings. This court is a more convenient jurisdiction for determining the question whether Cloves has by the law of England a right to recover upon the bond, than the Court of Session in Scotland. The proceeding there is less likely to elicit the truth of the case than the proceeding here, because there Bushby cannot have the benefit of Munday's admissions upon his oath, and because, Munday and Cracroft being both resident out of Scotland, he cannot compel their testimony as witnesses." The terms imposed were that Bushby should consent to judgment in Scotland so as to secure to Cloves a priority of lien upon the real estate, subject to the event of the suit in Chancery. I deem it plain that the remark of Sir John Leach about the English Chancery being "a more convenient jurisdiction" than the Scotch court for determining a question of English law was not intended to indicate that the injunction was to be allowed on this ground, but as showing that an injunction, allowed on the other grounds mentioned, would not work a hardship upon Cloves.

Talleyrand v. Boulanger (1797) 3 Ves. 447, 30 E. R. 1099. A personal bond was given when obligors and obligee were citizens and residents of France. By the law of France there was no liability to arrest on civil process for such an obligation. Afterwards the parties to the cause emigrated to England, and their property was confiscated. One of the plaintiffs was an obligor in this bond, as surety, and, being about to sail on an expedition which went from England to the coast of Brittany, was arrested at suit of the defendant, and in order to procure his release made a cash payment and gave two bills of exchange payable in a short time, and executed a new bond payable six months after peace should be concluded between France and England. At this time the other plaintiff

first became a surety by joining in these securities. One of the bills of exchange having been paid, the plaintiffs, under advice of counsel, refused to make any more payments, and were thereupon arrested and held to bail by the defendant in four actions, whereupon a bill was filed for an injunction, and the Lord Chancellor (Lord Loughborough) granted it on the ground "that the proceeding on the part of the defendant has been extremely oppressive and immoral. I am not prepared to say how far this court will finally give redress; but I will not allow the defendant to avail himself of an advantage got by duress, which is the sole cause of the new engagement." This case was manifestly decided upon the ground of apparent hardship, and in disregard of the rule that the *lex fori* governs actions for the enforcement of a contract although made in another jurisdiction. Like the case of *Melan v. Fitzjames*, 1 Bos. & Pul. 138, decided by the Court of Common Pleas in the same year, it is a plainly erroneous decision, outcome of the troublous times. Although Lord Brougham cited both these cases with apparent approval in the House of Lords 40 years later, yet the decision then made was to the effect that the law of the country where a contract is to be enforced must govern its enforcement. *Don. v. Lippmann* (1837) 5 Cl. & Fin. 1, 18; 7 E. R. 303, 309. And in *Liverpool Marine Credit Co. v. Hunter* (1868) L. R. 3 Ch. App. 479, 486, *Talleyrand v. Boulanger* was severely criticised. *Melan v. Fitzjames* was distinctly overruled and the doctrine of the dissenting opinion affirmed in *De La Vega v. Vianna* (1830) 1 Barn. & Ad. 284. And so, little (if anything) remains of authority in *Talleyrand v. Boulanger*.

Lord Portarlington v. Soulbey (1834) 3 Myl. & K. 104, 40 E. R. 40. An injunction was allowed to restrain defendants from suing in Ireland upon a bill of exchange given by plaintiff for a gambling debt. The ground of the injunction, however, was that the court in which the action was brought was a court of common law, and had no jurisdiction to stop the proceeding on the ground that it was founded upon a gaming transaction.

Carron Iron Co. v. MacLaren (1855) 5 H. L. Cas. 416, 10 E. R. 415, rather bears against the complainant. The company was a Scotch corporation, having its manufacturing works in Scotland and an important sales agency in London. A suit for administration of the estate of one Stainton, deceased, had been instituted in the English Court of Chancery, and a decree made for an accounting. Afterwards the company, a large creditor of the decedent, instituted an action in the Scotch Court of Session, in which process was issued (equivalent to our writ of attachment) securing a lien upon real and personal estate of the decedent in Scotland. An injunction was allowed to restrain this proceeding, but on appeal to the House of Lords it was dissolved, on the ground that the company was a

foreign creditor resident abroad, suing for his debt in the courts of his own country.

The following cases are typical of the group, and appear to be the principal authorities upon the question of enjoining foreign actions brought to evade the home policy:

In *Margarum v. Moon*, 63 N. J. Eq. 586, 53 Atl. 179, creditor and debtor were both citizens and residents of New Jersey, and the debtor under the laws of this state was entitled to \$200 exemption from process, and had not personal property of that value. He had a claim for wages against the Pennsylvania Railroad Company, and his creditor assigned his claim against the debtor to a nonresident, who, in attachment proceedings in the courts of West Virginia, garnished the wages due to the debtor from the railroad company. This court allowed an injunction on the ground that the resident creditor was endeavoring to deprive his debtor of the benefit of the exemption provided by the law of their common domicile.

Dehon v. Foster, 4 Allen (Mass.) 545; *Id.*, 7 Allen (Mass.) 57. A resident of Massachusetts being insolvent under the laws of the commonwealth, and proceedings in insolvency having been commenced there, an injunction was allowed to restrain one of the creditors, who likewise was a citizen of Massachusetts, from proceeding by attachment in another state to divert property from the assignees in insolvency and thereby secure a preference for himself, contrary to the policy of the insolvent law of Massachusetts.

To the same effect is *Cunningham v. Butler*, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657. This case was carried to the Supreme Court of the United States, upon the ground that such an injunction was a violation of the "full faith and credit" clause of the federal Constitution. The decree was affirmed, *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. R. A. 538.

Wilson v. Joseph, 107 Ind. 490, 8 N. E. 616. Injunction granted to restrain a resident of Indiana from prosecuting an attachment proceeding against another resident in the courts of another state in violation of an Indiana statute which made it an offense to send a claim against a debtor out of the state for collection in order to evade the local exemption laws.

Sandage v. Studebaker Bros. Co. (1895) 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165, held that a citizen of one state may be enjoined from prosecuting an action against another citizen of the same state in a foreign jurisdiction for the purpose of evading the laws of his own state.

Miller v. Gittings, 85 Md. 601, 37 Atl. 372, 87 L. R. A. 654, 60 Am. St. Rep. 352. The transactions out of which an alleged debt arose occurred in Maryland, and were within the statute prohibiting gambling; both parties were citizens and residents of that state. Held, that a court of equity in Mary-

land should restrain the creditor from proceeding against the debtor in another state to which the creditor had resorted to evade the Maryland laws prohibiting imprisonment for debt, where the foreign court must through imperfect methods of proof ascertain the statute on which the debtor relied to avoid the transactions, and where there must be difficulty and expense in obtaining evidence.

It will be observed that in all of these cases (with the single exception of *Bushby v. Munday*, where other special circumstances appeared), the party against whom the injunction was issued had either gone himself to a foreign jurisdiction, or had sent his claim there for prosecution by his assignee, in order to evade some distinct prohibition of the local law of the common domicile. (In most of them, the suit whose prosecution was restrained was an action at law; but I assume that in such a case it would make no difference whether the foreign action was an action at law or an action in equity.) But it is important to observe that the public policy, whose attempted evasion was deemed sufficient ground for injunction, was in each instance somewhat akin to a police regulation, being designed to maintain a certain standard in the social, moral, or commercial life of the state adopting it; such as a prohibition against gambling, against preferences in insolvency, against imprisoning the honest debtor or depriving him by civil process of the last comforts of life. There is, it seems to me, a noticeable difference between that sort of local policy and the alleged grounds of public policy that are asserted in the present case.

Besides, this case lacks two of the elements that were treated as essential in the cases just referred to; there was no common domicile of the parties in this state, and the defendant company did not choose the Massachusetts jurisdiction for the purpose of evading any law, policy, or doctrine peculiarly cognizable by the courts of New Jersey, but for the very simple reason that Massachusetts had jurisdiction over the person of Mr. Bigelow, while this state had not. Mr. Bigelow is sued in personam in his home jurisdiction, in equitable actions, and in a court of full equity jurisdiction. He tests the sense of that court upon the law by a demurrer, and being overruled he answers upon the merits, submits to a hearing upon the merits, a finding of facts is made, and upon it final decrees are made against him. The litigation in that court continues for more than five years. After all this, and pending appeals taken by him and by his adversary to the court of last resort, he comes into the state of New Jersey to have his adversary restrained from further prosecuting the actions in Massachusetts. He proposes no waiver of his appeals there taken. He offers no security that he will abide by any decree that may here be made against him, either

here or there. He avers, it is true, that in the Massachusetts actions he "gave a surety bond or bonds, in the sum of \$500,000, to indemnify the company"; but there is nothing to show that such bonds could be enforced by this court, nor do the specific conditions thereof appear; besides which, the amount of them is manifestly inadequate to cover the company's claims. He alleges no fraud, mistake, surprise, or adventitious circumstances beyond his control that prevent the Massachusetts court from doing full justice. He alleges no suppression of evidence, no obstruction by the present defendant of any effort of his to get justice in Massachusetts. And he alleges no excuse for failing to set up in the Massachusetts litigation the special matters that he here relies upon, nor for waiting until five years have gone by, and a decision has been rendered against him there, before setting up, his special matters here. Ostensibly his appeal is to the public policy of New Jersey, in certain respects presently to be mentioned. But a large part of the efforts of his counsel have been addressed to convincing me that the Supreme Judicial Court of Massachusetts, and Justice Sheldon, the trial judge, have improperly determined the questions of law and of fact presented to them. The arguments to this effect are not in the least convincing; but if they were, I take it that I have no legitimate concern with the merits of the controversy as joined in Massachusetts. The notion is intolerable that this court should, directly or by indirection, assume any supervisory jurisdiction over the courts of Massachusetts.

Upon the questions of alleged state policy the query at once arises whether Mr. Bigelow, a citizen and resident of the commonwealth of Massachusetts, is entitled to invoke in his protection any rule of public policy that is local to New Jersey. See *Bentley v. Whittemore*, 19 N. J. Eq. 462, 469, 470, 97 Am. Dec. 671; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 225, 48 Am. Rep. 308; *Recvr. of State Bank v. First Nat. Bank*, 34 N. J. Eq. 450, 454; *Moore v. Bonnell*, 31 N. J. Law, 90; *Barnett v. Kinney*, 147 U. S. 476, 483, 13 Sup. Ct. 403, 37 L. Ed. 247. I have not considered the point, preferring to rest my decision upon a broader ground.

The first grounds of supposed public policy that are appealed to are, that the conduct of the suits in Massachusetts and in New York by the Old Dominion Copper Mining & Smelting Company is a speculation in a lawsuit, and that those suits are being conducted by what is called a "voting trust." The argument to this effect is rested upon certain averments in the bill not as yet adverted to. The bill alleges that, since the Massachusetts actions were begun, the owners of about 100,000 out of the total 150,000 shares of stock of the New Jersey company caused a Maine corporation to be formed known as the Old Dominion Copper Company, and caus-

ed at first about 100,000 shares, and afterwards about 40,000 additional shares, of the New Jersey company to be transferred to the Maine company, whereupon an agreement was entered into (as is alleged in the body of the present bill) between the New Jersey company and the Maine company and two men named Smith and Hoar, providing that the Maine company, as the majority shareholder of the New Jersey company, should cause the latter company to realize upon the suits against Bigelow and the Lewisohn estate, and distribute the proceeds thereof as in the agreement provided; that Smith and Hoar declared themselves to be trustees of any fund obtained by virtue of this agreement, and issued certificates of interest known as trust receipts, which are sold upon the public markets, the holders thereof not being in any substantial part the holders of shares of the Maine company or holders of shares of the New Jersey company. Complainant alleges that the holders of these trust receipts are the persons ultimately entitled to the moneys to be paid by the Maine company to Smith and Hoar as trustees, and that the prosecution of the suits in question is not being had for the purpose of benefiting the New Jersey Company, but for the purpose of realizing the largest sum possible on the trust certificates; that the buying and selling of such certificates constitutes the trading in a lawsuit, and that the proceeds of any recovery in the actions will not go to any persons who were originally interested in the New Jersey company, nor, so far as 14/15ths are concerned will they go to the New Jersey company, but will go to strangers to the transaction who have purchased the trust receipts. Annexed to the bill, and by reference made a part of it, are a copy of the agreement referred to, and a copy of one of the trust receipts. Where these differ from the construction placed upon them in the bill, the documents themselves must of course control. It thus appears that the New Jersey company is not at all a party to these transactions. The agreement is dated January 15, 1904, and is made between the Maine company, as a stockholder in the New Jersey company, and Smith and Hoar, as trustees. It pledges the Maine company to cause the New Jersey company to actively prosecute the claims against Bigelow and Lewisohn in such manner as the trustees may request, and upon like request to make settlement and adjustment of the claims; to cause the New Jersey company, if and so far as any moneys are realized from the claims, to pay the expenses of the litigation, including advances made by the trustees, and, after providing for certain other disbursements, to distribute the surplus as a dividend among its stockholders (that is, the stockholders of the New Jersey Company), if it may lawfully do so, and, if it cannot then lawfully make such dividend, to make the same as soon thereafter as legal impediment is re-

moved. The Maine company agrees in other respects to use its reasonable efforts as a stockholder of the New Jersey company to carry out the agreement according to its true intent and purpose, and that if it ceases to be a majority stockholder in the New Jersey company it will make arrangements to bind the holders of a majority of the stock of the New Jersey company to carry out what the Maine company has by this agreement undertaken to do. The trust certificate simply certifies that the holder thereof is entitled to certain shares in the trust and to all the rights and benefits of a shareholder therein.

Plainly, therefore, what has happened is that, after the present defendant company began its actions against Mr. Bigelow in Massachusetts, another company, a corporation of Maine, being the holder of a large majority of the stock of the present company, made an agreement with trustees by which they undertook to sell, or to place in form to be sold, any dividend that may hereafter be declared by the defendant to its stockholders out of the proceeds of the suits against Bigelow and the Lewisohn estate. It is alleged in the bill that Mr. Bigelow is informed and believes that the voting power on the stock of the New Jersey company held by the Maine company has been (as to the matters referred to in the agreement between the Maine company and Smith and Hoar) transferred to Smith and Hoar; but this does not amount to an averment that such is the fact (even if the fact were material), and nothing of that kind appears from the agreement.

To the argument of complainant's counsel, based upon the situation thus disclosed, there are several replies:

First. The trust agreement was made January 15, 1904, more than four years before the filing of the bill of complaint herein, and nearly four years before the filing by Mr. Bigelow of his final answers in the Massachusetts suits; it is not suggested that his knowledge of this agreement and of the situation resulting therefrom is newly acquired; nor is any reason given why, if it is of any concern in the controversy between Bigelow and the New Jersey company, it should not have been set up and relied upon in the Massachusetts suits.

Second. The New Jersey company is not a party to the agreement, either in a legal or in an equitable sense.

Third. The agreement was made not only after the New Jersey company's cause of action against Bigelow and Lewisohn arose, but after suits thereon were commenced, and so cannot amount to a bar of the causes of action.

Fourth. Neither the law nor the policy of New Jersey prohibits what complainant is pleased to call a speculation in a lawsuit. In this state we have not adopted the English statutes of champerty and maintenance.

Schomp v. Schenck, 40 N. J. Law, 195, 29 Am. Rep. 219; Bouvier v. Baltimore, etc., Ry. Co., 67 N. J. Law, 231, 201, 51 Atl. 781, 60 L. R. A. 750. And with us the assignment of choses in action has from an early day been encouraged. Sullivan v. Visconti, 68 N. J. Law, 543, 549, 53 Atl. 598; Id., 69 N. J. Law, 452, 55 Atl. 1133. An exception being the right of action for personal injuries. Weller v. Jersey City, etc., St. Ry. Co., 68 N. J. Eq. 659, 662, 61 Atl. 459. Our law, therefore, would not prohibit the present defendant from thus assigning its right to recover from Bigelow and Lewisohn the moneys claimed to be due from them for breach of trust. And supposing this does not carry with it the right of individual stockholders to thus sell their anticipated participation in the moneys to be recovered, because such participation is contingent upon the declaration of a dividend out of the proceeds, yet in this state we recognize, in equity, assignments of contingent and expectant interests, provided they be made bona fide and for a valuable consideration (Bacon v. Bonham, 33 N. J. Eq. 614; Terney v. Wilson, 45 N. J. Law, 282, 285); an attempted assignment of an allowance of alimony to be paid in futuro being an exception, based on special grounds (Lynde v. Lynde, 64 N. J. Eq. 736, 750, 757, 52 Atl. 694, 58 L. R. A. 471, 97 Am. St. Rep. 692).

Fifth. In view of the nonadoption in this state of the laws against champerty and maintenance, and of the absence from our corporation act of any prohibition, I am unaware of anything in the policy of this state to prevent stockholders from agreeing among themselves to aid the company in proper ways in its litigations against third parties, and to use their influence as stockholders to see that out of the proceeds of the litigation, if successful, the reasonable disbursements made by the stockholders in the company's behalf shall be refunded, and a special dividend made of the net proceeds, if and when that can lawfully be done.

Sixth. But if the New Jersey company (the present defendant) were a party to the Smith and Hoar agreement, and if that agreement were contrary to public policy. I do not see how that benefits the present complainant. The proper result is that it ought to be nullified, not that the company should go without remedy against a third party who defrauded it before the void agreement was made.

Seventh. If Mr. Bigelow desires to uphold the supposed public policy of New Jersey, in the respect that this agreement violates it, he can easily do so by paying to the New Jersey Company what he owes to it, disregarding the claims of the holders of the trust certificates.

Eighth. There is nothing in the nature of a voting trust. Our corporation act recognizes that corporate stock may be placed in pledge, and that pledgor and pledgee may

agree between themselves as to how it shall be voted. Act April 21, 1896 (P. L. 1896, p. 280, § 37).

I am referred to what I said in the Court of Errors and Appeals (speaking for myself and one other judge) in *Warren v. Pim*, 66 N. J. Eq. 353, 363, 59 Atl. 773, upon the subject of voting trusts; but at page 380 of 66 N. J. Eq., and page 783 of 59 Atl., I spoke of the right to dividends, the substantial fruit of stock ownership, as a property right and as a different thing from the right to vote as stockholder; of the one as being assignable separate from the stock itself, the other not.

The other matters of supposed public policy to which appeal is made by complainant have reference to the question of his liability, or the extent of his liability, to the defendant company. In dealing with them it is important to first determine upon what basis of fact we are to proceed.

Notwithstanding the findings against him in Massachusetts, I concede that upon this motion, equivalent as it is to a demurrer to his bill of complaint, the complainant is entitled (saving laches or acquiescence) to have his account of the transactions, as given in his bill, treated as strictly true. Now, this statement is to the effect that he was entirely blameless in his transactions with the company; that the property which he and his fellow promoter made over to the company in exchange for \$3,250,000 of its stock was in truth worth at least as much as that sum; that full disclosure was made to the owners of every share of the authorized capital stock, not only of the \$1,000 that appears to have been actually issued and outstanding when the votes were taken, but also to all members of his syndicate who with him and Lewisohn received the distribution of \$2,000,000 of the stock, and also to the owners of the remaining \$500,000 of stock issued for working capital, because, as he says, he and Lewisohn themselves furnished this working capital and were entitled to this stock; and he says the syndicate members acquiesced in the withdrawal by himself and Lewisohn of the \$1,250,000 worth of stock as a profit. Taking all this as true, I am unable to perceive the least ground of appeal to this court, for on that basis of fact there is not only no matter of New Jersey state policy involved, but no ground of liability is suggested against him by the present defendant in its Massachusetts actions. What the company alleges and relies upon there is an entirely different state of facts. And complainant's counsel do not pretend that he is in any danger from the courts of Massachusetts if they accept his view of the facts. And so we have Mr. Bigelow coming to New Jersey with this complaint: "I am entirely free from blame in the transaction, but the defendant company, notwithstanding this, has sought me out in my home jurisdiction, brought actions against me there charging

me with wrongdoing, and has actually proved a case against me to the satisfaction of the trial judge." There being no suggestion that the Massachusetts court has not complete jurisdiction over his person or over the subject-matter, or that it lacks the power to do full and complete justice in the premises, nor that his adversary has obstructed him in the least about producing his evidence, Mr. Bigelow's plain remedy is to prosecute his appeal before the court of last resort of the commonwealth and procure a reversal of the findings that have been unjustly rendered against him. There is neither reason nor authority for the interference of this court in the premises, if the facts be as complainant alleges them to be. The books, I believe, may be searched in vain for a case where a court of equity has enjoined a proceeding in another court of equity (perhaps I might say, or of common law) on the ground that the court in which the proceeding is pending has made, or may probably make, an erroneous determination of a mere matter of fact.

Perhaps the decision upon the topics remaining to be discussed might be rested here, and the bill dismissed, because Mr. Bigelow's complaint is merely that the trial justice in Massachusetts has mistaken the facts, and that there is danger the appellate tribunal there may make the like mistake—an inadmissible ground upon which to rest a prayer for injunction. I will not, however, rest here, but will consider how Mr. Bigelow's Case will stand if we assume Justice Sheldon's findings to be true. Indeed, it seems to me that in a suit like the present, brought for the sole purpose of removing the controversy out of the Massachusetts jurisdiction and bringing it into this court for determination, on the ground that New Jersey is the exclusive forum for the settlement of the legal questions involved, Mr. Bigelow is now estopped from here setting up that the facts are otherwise than as found by Justice Sheldon. The Massachusetts actions were commenced on October 7, 1902; Mr. Bigelow filed his answers therein, setting up, or at least having the opportunity to set up, every matter of fact as to the transactions between him and the company that is alleged in his present bill. He submitted to a hearing upon the merits, and it is only after the court there has found the facts against him that he comes to this court, more than five years after the actions there were commenced, with a prayer that their further prosecution be restrained. It is, I think, inequitable to permit a litigant to thus speculate upon the outcome in a court that has full jurisdiction over the subject-matter and the parties, and when defeated there to go to another jurisdiction praying that his adversary may be restrained. I will endeavor to show later the effect of this estoppel as to the legal questions now attempted to be raised by complainant. As to the

matters of fact, the estoppel is, I think, especially clear. Mr. Bigelow has not merely delayed; he has acquiesced, has in effect ratified and confirmed (if need there were), the authority of Justice Sheldon to ascertain and determine the facts. He has had his "day in court," and the verdict is against him; his adversary, I think, is entitled to the benefit of that verdict. The appeals taken in Massachusetts do not alter this; for although the decrees are vacated, the findings of fact are not to be overruled on appeal unless they are without support in the evidence or are clearly contrary to the weight of evidence. The bill herein does not aver that the Sheldon findings are not fully sustained by the evidence, nor does it show what the evidence was. The company could not bring Mr. Bigelow into a New Jersey court against his will. If he had "won the verdict" before Mr. Justice Sheldon, this court could not have set it aside. To allow him to here dispute the adverse findings puts the matter in this position; that the company must win two concurring verdicts in order to ultimately succeed; while he succeeds if he wins either one of two. Assuming the probability of success in a single trial to be equal as between the parties, Mr. Bigelow's plan would leave to his adversary one-half of one-half a "chance" (or one "chance" out of four), and he would reserve all remaining "chances" (three out of four) for himself—a plain violation of that equality that is said to be synonymous with equity.

I will therefore discuss the arguments of complainant's counsel on the basis of the facts as found by Justice Sheldon; accepting these as true, not absolutely (for the bill avers a contrary state of facts), but *sub modo*, either (a) because with the facts as he asserts them there is no ground upon which this court can properly aid him, or (b) because he is estopped from denying the findings.

Justice Sheldon finds that there was no proper disclosure either to the company or to the stockholders thereof, aside from Bigelow and Lewisohn and their immediate agents and representatives; that \$500,000 worth of stock was sold by the company (and not by Bigelow and Lewisohn) to the innocent public for working capital; that even the subscribers to Mr. Bigelow's syndicate were not made aware of the profit that he and Lewisohn were making out of the transaction above such as was shared in by the syndicate members themselves. He finds that the property for which 100,000 shares (par \$2,500,000) were issued was not worth in excess of \$2,000,000, and that the property for which 30,000 shares (par \$750,000) were issued was not worth in excess of \$50,000; that Bigelow and Lewisohn were acting in a fiduciary capacity as promoters of the company, so that they owed to it the duty of full disclosure; that there was no disclosure; that they acquired all

the shares in excess of the actual value of the property as a secret profit derived at the expense of their cestui que trust; that in the entire matter they acted in concert, each doing his part to carry out a general scheme for the advantage of both; that the control exercised by them over the company was a joint control, exercised by each for the benefit of both; that a proper disclosure of the facts by either would have frustrated the schemes of both; that the wrong complained of was the act of both, for which they must both be held responsible, both jointly and severally; and he therefore holds Mr. Bigelow liable for the entire loss to the company. Upon this state of facts, what ground can properly be urged for an injunction out of this court to restrain the due prosecution of the pending Massachusetts actions?

It is claimed that under New Jersey law Mr. Bigelow is not liable to the company for the amount ascertained by Justice Sheldon, nor in any amount. But certainly he would be liable as a promoter acting in a fiduciary capacity, if we take Justice Sheldon's findings as true. The liability of promoters is fully recognized in this state. *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219, 230, 27 Atl. 1094; *Woodbury Heights Land Co. v. Loudenslager*, 55 N. J. Eq. 78, 35 Atl. 436; *Loudenslager v. Woodbury Heights Co.*, 58 N. J. Eq. 556, 43 Atl. 671 (the decree in this case was affirmed as to liability, and reversed only with respect to the amount chargeable against Loudenslager); *Arnold v. Searing* (N. J. Ch.) 67 Atl. 831. The case of *See v. Heppenheimer*, 55 N. J. Eq. 240, 36 Atl. 966, 56 N. J. Eq. 453, 41 Atl. 1116, and 69 N. J. Eq. 36, 61 Atl. 843, was a receiver's action against stockholders for unpaid subscriptions, but the doctrine of promoter's liability entered into the decision.

But it is further argued that, conceding Messrs. Bigelow and Lewisohn are liable for the undisclosed profits, yet Bigelow is himself liable, according to New Jersey law, for no more than the profit that he personally realized in the transaction. This argument is rested upon the decision of our Court of Errors and Appeals in the case of *Loudenslager v. Woodbury Heights Land Co.*, 58 N. J. Eq. 556, 43 Atl. 671, reversing *s. c.*, 55 N. J. Eq. 78, 35 Atl. 436. In that case a Dr. Roe was concerned in selling land to the company at a profit to himself. Roe alone held the options and obtained for the company the title to the lands purchased, and received from it the purchase price. Loudenslager was a party solely because of his agreement with Roe that Roe should pay him half of the profit as a compensation (see the essential facts recited in the opinion of Mr. Justice Garrison, at page 559 of 58 N. J. Eq., and page 672 of 43 Atl.). The suit was against Loudenslager alone, and this court held him liable to the company, for Roe's profit as well as his own. The Court of Errors and Appeals held that Loudens-

lager was not to be held beyond the profit that he himself made, Mr. Justice Garrison saying (at page 561 of 58 N. J. Eq., and page 673 of 43 Atl.): "I am strongly impressed with the idea that the erroneous decree was reached because of two circumstances, neither of which should have had any influence upon the decision of the case. These are: First, the failure of the complainant to make Roe a party to the suit, whereby the entire complexion of the suit was confused, if not changed; and second, the circumstances that Loudenslager, acting in an alien capacity, manually received the purchase money, whereas in fact and in equity he received only that moiety that under his agreement with Roe was his. That Loudenslager in this tradition of title was a mere conduit is not only found as a fact by the Vice Chancellor, but that the complainant knew that it was dealing with Roe is also clearly established by the proofs." Whether the evidence in that case would have justified the conclusion that Roe and Loudenslager were joint promoters, acting in concert in the acquisition of a common profit which by agreement was divided between them, is a question with which I am not concerned. As I understand the decision of the Court of Errors and Appeals, it rests upon the view that in fact Roe and Loudenslager stood in separate and distinct relations to the company; and that the profit which Roe derived passed through Loudenslager's hands, not in his capacity as trustee for the company, but "in an alien capacity." That the court took this view of the facts is, I think, further manifest from the reliance it placed upon the leading case of *Tyrrell v. Bank of London*, 10 H. L. Cas. 26, 11 E. R. 934. In that case one Read, as well as Tyrrell, was concerned in selling property to the bank at a profit. Tyrrell was solicitor for the bank, but Read, as held by the Master of the Rolls, was a stranger, and from this part of the decree there was no appeal. The House of Lords held Tyrrell responsible only for the profit that he had gained from the sale of the property to the bank. The pith of the decision is, I think, expressed by Lord Cranworth on page 50 of the report, as follows: "Throughout the whole of the dealing and the negotiations for this purchase, Tyrrell represented to his clients, the company, that Read was the sole owner of this property. To that representation the respondents are entitled to hold him bound; and that being so, the only question is what was the sum of money which actually came from their pockets or coffers to Read. For all that passed through Tyrrell in its progress from the respondents to Read, but which never came to Read's hands, but was retained by Tyrrell, was so much money which he fraudulently abstracted from his clients." This case, therefore, was not a case of joint trustees, and the question determined was mere-

ly the extent of the responsibility of a sole trustee.

If the Court of Errors and Appeals in the Loudenslager Case had intended to declare that when trustees acting in combination reap a common profit out of a fraudulent transaction with their cestui que trust, and then divide the profit between themselves in a proportion previously or subsequently agreed upon between them, each one is responsible to the injured party only for that which eventually came to him as his personal share, I think some attention would have been paid in the reasoning of the court to the numerous decisions which hold that, if joint trustees be guilty of an intentional breach of trust, they are liable jointly and severally, and each one liable in solido, and that it is not necessary to bring them all into court as a condition precedent to relief.

But finally, if I am wrong in my understanding of the decision of our court of last resort in the Loudenslager Case, if that decision means that where two joint trustees are jointly guilty of a breach of trust and together derive therefrom an illicit profit of \$2,000,000 and then divide this between themselves, either one of them can in this jurisdiction be held answerable only for his own share of the profit, it still does not seem to me to be unconscionable for the party defrauded to insist, in an equitable action brought in the home jurisdiction of one of the guilty parties, that he is responsible for the entire loss. If the claim is unfounded in equity, it is for the court in which the action is brought to so decide.

At this point I may conveniently deal with certain questions raised by complainant's counsel, that while, in my view of the case, not necessary to be passed upon, yet have a tendency to confuse the issue unless set in a proper light.

(1) It is contended that either upon the basis of Justice Sheldon's findings, or upon the averments of the bills in the Massachusetts suits, the company was not damaged by the transactions in question. The bills there aver that the shares of the new company issued to the promoters in payment for the properties "were at the time of a fair market value of \$25 each, and continued for a long time thereafter to be of such or greater value." This averment, however, is shown by the context to have been intended to demonstrate the profit made by the promoters out of the transaction with the company, and, taken in connection with the other averments of the Massachusetts bills respecting the value of the property made over by the promoters to the company, it ought not, I think, to be construed as meaning that the market value of the shares was fairly representative of the value of the property. At least, if I am wrong in this, it is not unconscionable for the company to insist in the Massachusetts litigation that the construction

I suggest is the true construction, or that otherwise an amendment of the pleadings should be permitted. Justice Sheldon finds that the market value of the shares was fully as great as their par value, at the time they were received by the promoters and for a considerable time thereafter; but he distinctly finds that this market value was due mainly to the manipulation of the promoters, and so his statement cannot be taken as meaning that the property that passed to the company was worth as much as the stock that was issued for it, in the face of his express finding to the contrary on this point. His findings must be taken as a whole. He was dealing with the market value of the shares solely for the purpose of determining the actual profit that accrued to the promoters out of the undisclosed allotment of shares to them. Finding that they received the shares under such circumstances that they were not entitled to hold them as against the company, he naturally held that the sales made by them, although made at an enhanced value by reason of their own manipulation of the market, accrued to the benefit of the company and not of the promoters. Moreover, common experience tells us that the sale value of corporate shares in the market has only an indirect and sometimes a remote relation to the fair market value of the property that forms the assets of the corporation. It is easy to see, for instance, how when men of standing in the financial world promote a company, make over to it mining properties, and cause the shares to be placed upon the market, the confidence of purchasers of the shares in the standing and good faith of the promoters may enter largely into the competition for the shares, and thus affect their market value. Such purchasers may reasonably believe that the property was sold to the company by the promoters at a fair and open price; they may reasonably rely upon the liability of promoters to refund to the company any secret profit taken; if the promoters are solvent, this liability may stand in the minds of purchasers of the shares as an asset of the company to make good any deficiency in the value of the property; and, if the secret and forbidden profit of the promoters were taken in the form of shares, the liability to refund would be precisely equivalent to the inflation of the shares. So, likewise, the circumstance that the company was incorporated under the laws of New Jersey, which require in effect that the stock shall be represented by money or money's worth, may be deemed to have some effect upon the minds of purchasers of the shares. I do not mean to say that the individual buyer thinks these matters out in detail; but it is quite easy to see that they may have a general influence upon the market for shares.

(2) But even were the property that was made over to the company in fact fairly worth as much as the par of the shares is-

sued against it, this would not be conclusive against the existence of a liability on the part of the promoters, for reasons that will presently appear.

(3) A very considerable part of the argument for complainant is addressed to a discussion of the law of promoter's liability as applied to the circumstances of this case; not, indeed, upon the basis of the correctness of Justice Sheldon's findings, but rather upon the supposition that Mr. Bigelow's account of the transactions is to be taken as true. I do not feel that I am called upon to definitely pass upon the questions thus raised, nor to examine them any further than to determine whether there is any question at issue that is beyond the proper cognizance of the Supreme Judicial Court of Massachusetts. Even were I to reach the conclusion that the company's case against Mr. Bigelow is unconscionable, yet if the questions raised are merely questions of equity, free from any element of law peculiar to New Jersey, of which Mr. Bigelow may not have the benefit in the Massachusetts jurisdiction, I could not properly entertain his bill. Much effort is expended by his counsel in the endeavor to persuade me that the case turns upon the New Jersey law of stockholder's liability for unpaid subscriptions, and that this is a question exclusively for the cognizance of New Jersey courts.

The extraordinary character of the arguments leads me to speak about the law of promoter's liability to such extent as may be necessary for explaining why I do not think the questions in dispute are of such a character that the court of last resort in the state where the controversy is now pending is unfit to be trusted with their solution. I give my impressions upon the topic without intending to be precise, but with sufficient accuracy, I trust, to show the ground of my decision upon the only point that I decide. The term "promoter" is a term, not of law, but of business. A promoter is one who seeks opportunities for making advantageous purchases and profitable investments in industrial or other enterprises, who interests men of means in such a project when found, organizes them into a corporation for the purpose of "taking over" the project, and attends upon the newly formed company until it is fully launched in business. He may be stockholder, director, officer, or none of these. His services begin before the company is formed, and ordinarily are not concluded until some time after its formation. For what he does and for what he spends in seeking out and bringing together property or opportunity, on the one hand, and men with capital, on the other, he is entitled to reasonable compensation and reimbursement by the new company. But it so often happens that promoters desire to make a profit exceeding mere compensation for their time and legitimate expenses that what they thus get from the company has come to be call-

ed "promoter's profits." No rule of law or of equity prohibits such profits, provided they be allowed as the result of a fair agreement amongst all parties concerned. But promoters quite often desire to take their profit immediately upon the formation of the company, while, in a practical sense, it is in the formative period, with directors and officers who are the mere employes and figureheads of the promoter. Equity recognizes that in such a state of affairs the company as a corporation cannot make a binding bargain with the promoter, because he in his control of the directors is acting as a fiduciary agent for the company, and is himself in that capacity making a bargain with himself in his individual capacity. Hence the rule that the burden of sustaining such a bargain is upon the promoter, and that it cannot stand unless he has seen to it that the company is equipped with an independent board of directors to represent the general body of shareholders as against the interest of the promoter himself, and that full disclosure is made to such board. Or, if there be not an independent board, there must be unanimous consent of all the shareholders, given after full disclosure.

Fraud or misrepresentation is not required to be shown, in order to disentitle the promoter to the secret profit. Some courts take the practical view that the body of shareholders who are entitled to be consulted, and to whom disclosure should be made, comprises not only those who are nominally shareholders at the time, but all others who in pursuance of the original scheme of the promoter thereafter become shareholders. Thus, in *Arnold v. Searing* (N. J. Ch.) 67 Atl. 881, Vice Chancellor Leaming held that the subscribers to a syndicate organized for the purpose of taking stock in a new company to be formed were essentially of the body of stockholders entitled to be consulted, although the technical relation of stockholder in the company had not yet arisen. Other courts have sometimes taken the more technical view that the bargain for promoter's profit is well made if assented to by those who are strictly shareholders at the time.

Saving the question of overvaluation, Messrs. Bigelow and Lewisohn would doubtless have been safe if they had received the assent of all the members of the syndicate to the profit, and if they had sold no stock to the public except under a plan of subscription that would have given to all purchasers fair notice of the circumstances, disclosing the profits that the promoters were making. Or they might have waited for the profit until their fiduciary relation to the company had entirely ceased. Of course, if such measures as these are to be adopted, it may render difficult the feat of buying property for \$1,000,000 and selling the same property shortly afterwards to the public for \$3,000,000; but that is a different matter.

Where a promoter's profit is taken in the form of shares that represent no investment in money or in property, and exceed the reasonable services and legitimate expenses of the promoter, the shares are not deemed fully paid within the meaning of a statute that requires money or money's worth equivalent to the par value of the shares to be contributed by subscribers. And in such event the same promoter who takes such shares by way of secret and undisclosed profit while he is acting in a fiduciary capacity to the company, while liable to refund the shares or the proceeds of sale of them to the company on this account, will be also liable under the statute as for unpaid subscriptions. Of course, however, it is not a double liability. If he refunds the undisclosed profit, and thereby in effect satisfies his stock subscription, he cannot be held liable afterwards in an action upon the statute, and vice versa. On the other hand, the promoter who takes shares as an undisclosed profit may be liable as promoter, but under no liability for unpaid stock subscription. This might happen if he sold property to the company for no more than it was worth, but sold it at a price higher than his fiduciary duty to the company permitted; that is to say, at a secret profit to himself.

In many cases promoters, in anticipation of the formation of the company, themselves buy property in order to make it over to the company upon formation. Whether the company in such cases is entitled to claim the benefit of the bargain made by the promoter is often a question of fact, and may depend upon whether the promoter buys the property with his own money, or with money that is in effect subscribed for the share capital. It may be thus in effect subscribed before the formation of the company, as is the case with many syndicates, in which event the promoter may be a trustee with respect to the property for the company, thereafter to be formed, on the theory that the property was bought for the company.

Now, one of the fallacies, as I take it, of the argument for the complainant lies in dealing with Messrs. Bigelow and Lewisohn as if they themselves bought the stock of the Baltimore company and were entitled to do with it as they pleased. If it appears that they made the purchase with the money of the syndicate (and so Justice Sheldon finds), it is, I think, at least not unconscionable for the company to claim that the members of the syndicate were but prospective stockholders in the company, and that the company when formed was entitled to treat as a profit any value received by the promoters over and above what was paid for the Baltimore stock. I am aware that the Supreme Judicial Court of Massachusetts, upon consideration of *Mr. Bigelow's demurrer*, said (*Old Dominion Copper Co. v. Bigelow*, 188 Mass. 321, 74 N. E. 653, 108 Am. St. Rep. 479) that Bigelow and Lewisohn were the absolute

owners of the outside properties so far as the case was concerned, because the rights of the syndicate were not in question, and that the company was not entitled to the benefit of the purchase. That may have been because the bill in one place charged that the outside properties were acquired for the common benefit of Bigelow and Lewisohn, without mentioning the syndicate; and where mention was made of the syndicate it was not perhaps clearly shown that the members thereof were prospective members of the company. Justice Sheldon, however, evidently accepted the view expressed by the court on demurrer, for he did not give to the company the benefit of the purchase of the Baltimore stock, but, on the contrary, credited it to the promoters upon the basis of the quantum valebat. Whether he should have given them credit for the inflated value of the properties of the Baltimore company, which was caused, as he says, by "the skillful manipulation of Bigelow and Lewisohn and the ingenious manner in which they created a desire on the part of men interested to be allowed to join in the transaction," is another question. So it may be a question whether he should have allowed any credit for the value of the "outside properties," or should rather have treated them as a part of the value of the Baltimore stock. I have nothing to do with the merits of these questions, and am not expressing a definitive opinion about them; I am only endeavoring to determine whether there is any question of law or equity involved that is peculiar to New Jersey.

In the argument before me stress was laid upon the fact (averred in the bill) that the stock of the new company has been sold in the market at \$100, and even as high as \$106, per share, more than four times its par value. These were recent sales, made after the control of a large majority of the stock had been acquired by the Maine company, and perhaps after the New Jersey Company had increased its capital and taken in additional properties as above mentioned. But supposing the stock from the beginning had never sold at less than par, my view is that it does not at all follow from this that the company has not been damnified by the subtraction of a secret promoter's profit. Because an individual who buys shares at \$25 per share, and afterwards sells them out at that price or at a higher price, does not individually sustain a loss, it does not follow that the company, as company, has sustained no loss in the premises. The error in the reasoning, as I take it, arises from considering corporate shares solely in respect of their secondary and derived function as counters in a speculative game, rather than in their original and legal significance as a right to permanently participate in the business enterprises of the company. In order to discover whether the company has been damnified, it is safer to take the case of the individual stockholder who becomes such at the begin-

ning and remains such until the expiration of the charter, and who participates in the distribution of assets on dissolution. Such a man would of course bear his share in the impairment of the assets of the company. The man who buys to sell again, buys a property right, including a right to participate in all the assets of the company, including its claims against faithless trustees; when he sells, he passes that same right on to his vendee.

It is, I think, erroneous to deal with the question of nondisclosure or of profits as if it affected only those stockholders who did not know the facts. The duty of faithfully executing the trust is a duty owing to the company; the duty of disclosure is owing to the company. If there be a competent and independent board of directors, disclosure to them is disclosure to the company. But when the promoter stands on both sides of the bargain, by virtue of his control of the board of directors, there is in equity no disclosure to the company, and the profit cannot be retained unless there be unanimous consent of the shareholders. It is like any other irregular transaction affecting the interest of the company, which so far as not prohibited by law or not affecting the rights of creditors may be sanctioned by unanimous vote of all the stockholders. *Breslin v. Fries-Breslin Co.*, 70 N. J. Law, 274, 282, 58 Atl. 313. It is, as I take it, likewise erroneous to treat the nonassenting stockholders as if they were damnified in their individual capacity merely, rather than in their property rights; and equally erroneous to say that, because no member of the syndicate and no original or subsequent stockholder is here complaining about any injury to their rights, the transaction is not open to question. Their successors in property interest are here, in the form of the company; the former stockholders may have recouped their individual damage, or even turned it to a profit, by selling out their stock in the market that Mr. Bigelow created. See the remarks of James, L. J., in the *Erlanger Case*, L. R. 5 Ch. D. 121, 122.

So much for my impressions of the law of promoter's liability with respect to the questions raised in the present case. All I decide is that it is not a department of the law that is peculiar to New Jersey.

The doctrine of promoter's liability is not the creature of statute; it is "judge-made" law, in the sense that courts of equity everywhere, recognizing the obligations arising from the fiduciary relation, have applied to it the same principles of equity that obtain in all cases of trust. As stated by Lord Penzance in *Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218, 1230, 6 Eng. Rul. Cas. 777, 788: "The principles of equity to which I refer have been illustrated in a variety of relations, none of them, perhaps, precisely similar to that of the present parties, but all resting on the same basis,

and one which is strictly applicable to the present case. The relations of principal and agent, trustee and cestui que trust, parent and child, guardian and ward, priest and penitent, all furnish instances in which the courts of equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift." In this state the same general doctrine has been applied in every variety of confidential relation, whether the cestui que trust be individual or corporation; as, for instance, in the case of executors (*Marshall v. Carson*, 38 N. J. Eq. 250, 252, 253, 48 Am. Rep. 319); director of a company (*Stewart v. Lehigh Valley R. R. Co.* 38 N. J. Law, 505, 522, 523; *Marr v. Marr* [recently decided by our Court of Errors and Appeals and not yet officially reported] 70 Atl. 374); attorney and solicitor (see cases cited in *Lynde v. Lynde*, 64 N. J. Eq. at page 749, 52 Atl. 684, 58 L. R. A. 471, 97 Am. St. Rep. 692); donor and donee, where a confidential relation exists (*Slack v. Rees*, 66 N. J. Eq. 447, 449, 59 Atl. 466, 69 L. R. A. 393).

No reported decision has been cited to me, and I have been unable to find any, holding that the liability of a promoter is to be determined by the law of the state where the corporation is created, rather than by the law of the state where the transaction occurred or where the action is tried.

But this entire discussion, as it seems to me, is aside from the question. It is all very well to say that the transactions between these parties ought to be governed by the law of New Jersey; a more pertinent question would be, by what law is Mr. Bigelow to be governed? Government acts in personam, and ordinarily in invitum. The real question in the case is whether the company has acted unconscionably in pursuing Mr. Bigelow in the courts of Massachusetts; that question is to be determined primarily by the conditions existing at the time its actions were commenced. It could subject him to process in the commonwealth of Massachusetts; it does not appear that it could have reached him elsewhere. If New Jersey law is involved, it ought to have been, or ought now to be, set up in the Massachusetts actions. It is said that the Massachusetts court is under no obligation to apply what it may conceive to be the public policy of another state. This may be admitted arguendo, and yet it should be presumed that the courts of Massachusetts would not in comity refuse to recognize the law or policy of another state. Certainly it comes with poor grace for a citizen of Massachusetts to say that the highest court in his state will refuse to recognize the law of a sister state, when he has preferred no request to the court that it be recognized. It is argued, indeed, that it is impossible to introduce evidence in one state of what is the public policy of another state;

that in the absence of reported decision it rests in the mind of the court. Our courts, however, have repeatedly declared that the public policy of the state is not the creature of the courts, but of the Legislature (*Dimick v. Metropolitan Life Ins. Co.*, 69 N. J. Law, 384, 389, 55 Atl. 291, 62 L. R. A. 774; and many other cases); that the courts have nothing to do with forming it, and can only recognize it like any other matter of public law. The truth is that the public policy of New Jersey is not occult or mysterious, nor are its sources far to seek. Subject to the federal Constitution and a written Constitution of our own, the people of this state have adopted in the main the common law and equity system of England, and this obtains here subject to modification by the Legislature. Add to these that New Jersey expects all persons and corporations subject to her jurisdiction to observe the law or abide by the consequences, and we have the public policy of New Jersey in a nutshell.

Mr. Bigelow, in his answers in the Massachusetts actions, not only raised no question of the applicability of New Jersey law or policy, but on the contrary averred that "the transactions, matters, and contracts complained of in the plaintiff's bill took place and were made in the state of New York, by the laws whereof said transactions, matters, and contracts are valid and cannot be complained of." Upon this issue, among others, he went to hearing and submitted his evidence to the trial justice, who found that the directors' meeting of July 11, 1895 (which Bigelow claimed was governed by the law of New York) was held in New York City, and that the proposals were made and accepted there; that the company was a New Jersey corporation, and was to have places of business also in Arizona, New York, and Massachusetts; that it was the intention of the parties that the agreements should be carried out and consummated by the delivery of the deeds and the issue of certificates of stock in Boston, Mass., where it was intended that the offices of the company should be, and where they were established, and where in fact the agreements were so carried out; that it was intended that the business of the company, aside from actual mining and smelting operations, which were to be conducted in Arizona, should be carried on in Massachusetts, and that this was done. And he ruled, upon these findings, that the agreements in question were governed by the laws of Massachusetts.

Some of complainant's arguments proceed upon the theory that the Massachusetts actions are based upon the statutory liability for unpaid stock subscriptions, in which case, of course, the liability would be governed by the New Jersey statute. They are not of this character. If they were, the New Jersey law could be shown by proof there. Actions upon the stockholder's liability must perforce be brought where defendant resides or can be

served with process. An instance in our own courts is *Grosse Isle Hotel Co. v. l'Anson*, 42 N. J. Law, 10; *Id.*, 43 N. J. Law, 442. The fact that the promoters' share certificates were stamped "issued for property purchased" is not controlling in an action against a participant in an intentional inflation of capital, where there was no independent board of trustees and no bona fide appraisal of the property. *Donald v. American Smelting, etc., Co.*, 62 N. J. Eq. 729, 48 Atl. 771, 1116; *Volney v. Nixon*, 68 N. J. Eq. 605, 609, 60 Atl. 189; *Easton Natl. Bank v. American Brick & Tile Co.*, 70 N. J. Eq. 722, 728, 64 Atl. 1095.

It is contended that the general rule that a party seeking relief in the courts may choose his own forum, in any jurisdiction where the defendant may be found, does not extend to corporations; that these creatures of the law should pursue their rights according to the law of the state of their origin. This is a sufficiently startling proposition, and is, I believe, entirely novel; certainly no authority has been found for its support. It is conceded that there is no statutory prohibition, but it is seriously contended that the supposed limitation of liability laid down in the *Loudenslager* decision enters so deeply into the policy of this state that, to use the words of counsel, "New Jersey is bound to protect those organized under its corporation laws according to the laws of the state." How the legitimate interests of those organized under the corporation laws of New Jersey are to be protected by forbidding to our corporations as ample a remedy against fraudulent promoters and trustees as the corporations of another state would have, or as individual citizens of this state if in like manner aggrieved would have I confess I cannot understand. The principal object of our corporation laws is to endow organizations of men and capital incorporated thereunder with the capacity to do business in any part of the world in competition with natural persons and with corporations organized under other laws. For this purpose they require of course, as ample remedies against their trustees for breach of trust as other persons and corporations would have in similar circumstances. The act under which the present defendant was incorporated (Revision 1877, p. 175, § 1) conferred upon it, in terms, the right to sue and complain "in any court of law or equity."

The proposed limitation of this right would give to the wrongdoer, not to the party injured, the choice of jurisdictions; and the option would be exercised always to the disadvantage of the company. Delinquent trustees who happened, like Mr. Bigelow, to reside in a jurisdiction whose courts (upon the hypothesis) extend a more ample relief to the company than is extended by the courts of New Jersey, would come to this state for a limitation of their responsibility; while those who, like the *Lewisohn* executors, happened to reside in a jurisdiction where the courts

are (supposedly) more lenient to the delinquent trustee than the courts of New Jersey, would find sanctuary at home. If the proposed doctrine is to be applied to promoters, it must, I presume, be applied to other kinds of trustees who may defraud the company, and thus we should have the New Jersey corporation in a substantial measure left defenseless against its most dangerous enemies. And this novel doctrine is based upon what, after all, is but a fiction of the law—that a corporation organized under the laws of this state, although its actual business is carried on in other states, remains at all times a "resident" of New Jersey. The doctrine, it seems to me, is as unfounded in reason as it is unsupported by authority.

Nor do I find any greater merit in the argument that this court ought to intervene because the decisions of the federal courts in the *Lewisohn* Case are in conflict with the decisions in Massachusetts in the *Bigelow* suits. This conflict, by the way, turns upon a point that apparently does not reach the merits, if we accept Justice Sheldon's findings as true. The conflicting decisions were upon demurrer in both cases. The pleader seems to have made a slip in averring that the company, when incorporated July 8, 1895, had an authorized capital of only \$1,000, which was afterwards increased to \$3,750,000; and in averring that the purchase by the new company of the properties in question, the taking possession thereof, and the delivery of deeds, were all consummated prior to July 18th, on which date it was resolved to issue the 20,000 shares to the public for working capital. On this basis of facts the federal courts held that there was disclosure to all stockholders who were such at the consummation of the purchase; apparently referring to the holders of the original amount of \$1,000 of stock, who were either the promoters themselves or their dummies. The Massachusetts court held that disclosure should have been made, and was not made, to the corporation as organized with a capital of \$3,750,000. But the bill herein avers that the corporation was originally capitalized at \$3,750,000, and Justice Sheldon's findings show that the purchase of the property was not consummated, nor the stock issued to the promoters, until after the sale of stock to the public for working capital; that the promoters' stock was issued to them on September 18 and 19, 1895, the deeds delivered to the company in the following December or January, while the issuance of the 20,000 shares to the public for working capital was done "in the summer or fall of 1895."

But even if the decisions in Massachusetts and in the federal courts were irreconcilably contradictory upon matters that are dispositive of the case, I cannot see how that raises the least equity for the complainant in this jurisdiction. It is not pretended that the courts of Massachusetts are, in such a controversy, subordinate to the federal courts;

and, if they were so, Mr. Bigelow's plain remedy would be to apply to the Massachusetts courts or to the federal courts for relief in the premises. It is certainly a novel suggestion that the Court of Chancery of New Jersey should stretch forth its strong arm and require a litigant in Massachusetts to abandon his claim there because in another action the Supreme Court of the United States has expressed a different view upon the matters in controversy. Upon this point I approve of the decision in *Carson v. Dunham*, 149 Mass. 52, 20 N. E. 312, 3 L. R. A. 202, 14 Am. St. Rep. 397, above cited.

But further it is strenuously argued that Mr. Bigelow, if held liable to the defendant company in solido, is entitled to contribution from the estate of Lewisohn; that he will be barred of this right by the failure of the defendant to make good its action against Lewisohn in the federal courts; and that hence the Massachusetts actions should be enjoined and the company required to proceed in this court, with the Lewisohn executors joined as parties. This argument strikes me as little less than absurd. Upon the face of it, the supposed bar is to arise not because defendant company is endeavoring to recover against Bigelow in Massachusetts, but because, notwithstanding its best endeavors, it seems liable to fall of recovery against the Lewisohn Estate. How the company can be held responsible for this result I am at a loss to perceive. Certainly Mr. Bigelow has no apparent right to complain because of the nonsuccess in the Lewisohn suit, for his bill does not allege that he made any offer to aid the company therein, and it is not to be presumed that his assistance would have been declined.

Mr. Bigelow does not join the Lewisohn executors as parties to the present bill, nor show how this court or any other court of this state can get jurisdiction over them, they residing in New York. The bill alleges that the estate of Lewisohn "owns a large amount of property within the state of New Jersey," but there is no averment of its value, nor suggestion that it is by any means adequate to secure even one-half of the moneys claimed by the company. But besides, equity does not recognize any right of contribution between joint tort-feasors, the reason being that such contribution must be sought, if at all, by action brought by one against the other, and the actor therein is barred by the maxim *in pari delicto*. Pom. Ed. Jur. § 1081, and cases cited in notes. And surely one of several wrongdoers will not be given a better right against the injured party than he has against his fellows; else, what becomes of the doctrine of clean hands? Conceding the general rule to be so, counsel insist that it does not apply to joint trustees who "have merely mistaken their legal rights and have not been guilty of intentional wrongdoing"; and it is gravely argued that the fact that company promoters have derived a profit im-

properly from their dealings with the corporation "is not inconsistent with the supposition that they have acted in entire good faith." Whether the latter remark can be true in any case of wrongful promoter's profit, I need not stop to consider, because it certainly cannot be true in Mr. Bigelow's case, upon the basis of Justice Sheldon's findings.

Accepting those findings as true, or at least as judicially established—and we must accept them, else the question of contribution is not raised—the case stands thus: Messrs. Bigelow and Lewisohn buy certain corporate stock for \$1,000,000, with the very purpose of causing the property represented thereby "to be transferred to a new corporation which they should procure to be organized with a much larger capital, for a much increased price." This property—the property of the Baltimore company—"was not of the intrinsic value of more than \$1,000,000. But its market value at the time of its transfer to the (new) company seems to have been greater than this, probably due in large part to the skillful manipulation of Bigelow and Lewisohn, and the ingenious manner in which they created a desire on the part of men interested in mines, as investors or speculators, to be allowed to join in the transaction they were carrying out." They lead their associates in the syndicate—the men who unite with them in raising the \$1,000,000—to believe that the new company is to have a capital of only \$2,500,000, taking the property of the Baltimore company and the "outside properties" for \$2,000,000, and raising \$500,000 with the rest of its stock. In order to carry out their real scheme, they make the nominal capital of the new company \$3,750,000, sell \$500,000 worth at par to the innocent public, turn in the property for the balance of the stock, account to the syndicate members for only \$2,000,000 of this, and retain \$1,250,000 of it for their individual benefit, subject to the payment of legitimate expenses not exceeding \$20,000. Mr. Bigelow "did not act towards the members of his syndicate with the good faith which they had a right to expect. * * * With a few individual exceptions, he did not disclose the facts to them." Thus Bigelow and Lewisohn get (in stock certificates made out in manifest evasion of the New Jersey corporation law) an undisclosed profit of at least \$1,230,000. And then, in order to convert their illicit gains into money, they proceed (or, at least, Bigelow does) to unload their fraudulent stock upon the credulous public. For the finding is that "the stock which they thus took was then of fully its par value, this being due mainly to the skillful conduct and manipulation of Bigelow and Lewisohn, and continued to be so for some time, and until Bigelow had sold out substantially all the stock that he took for his own use."

Stripped of all disguises, the transaction to be dealt with is this: Of the entire au-

thorized capital, \$1,000,000 represents the cost of the Baltimore property; \$1,000,000 is "water," representing the manipulated increase in the value of that property due to the stirring up, by Bigelow and Lewisohn, of a desire on the part of investors and speculators to join them in their scheme; and \$1,250,000 (less \$20,000 for legitimate expenses) represents nothing more substantial than "wind." And this latter large block of stock the promoters proceed to sell to the unsuspecting public, in a market manipulated by them, at fully its par value. Besides this, they cause the company to sell \$500,000 to the public for working capital. When men who are implicitly trusted, by all persons concerned, to fairly organize a new corporation and launch it upon its business career, make use of their temporary control to lift from its treasury, for their own use, upwards of a million dollars, in par value, of its shares, without mentioning the circumstance to others who in fact and in law are their business associates and cestuis que trust, it requires more hardihood than I possess to declare there is no intentional moral obliquity in the transaction. The moral obligation was perhaps more immediately and evidently owing to the syndicate members than to the purchasers of working-capital shares; but it existed equally in both cases. But the taking of the secret profit in the form of shares was of course but the means to an end; the ultimate purpose being to get a fortune for nothing, and to get it at the expense of their fellow men, by selling these shares to the public as if they had honest value behind them (for they were stamped "Issued for property purchased," as the bill avers), when, according to Justice Sheldon's findings, they represented a deliberate and intentional overvaluation of the property. I do not speak of the sales of the promoter's stock to the public as the basis of their liability to refund the undisclosed profit to the company, except as those sales go to measure the amount of the liability. I speak now of the moral quality of their acts—the question of intentional wrongdoing—liability having been assumed as the hypothesis. Upon this question, the fraud upon the public is not to be ignored.

The only element of "mistake" that I can discern is that the promoters assumed that all this wrong could be made unassailable in law, if only they should cause "dummy" directors to go through the form of placing a fictitious valuation upon the property; whereas the law required real value. Act May 9, 1889 (P. L. 1889, p. 414, § 4); Act March 21, 1893 (P. L. 1893, p. 444, § 2). I am unable to see how such a transaction could be accompanied with an honest belief on the part of the promoters that it was either lawful or right.

Besides, irrespective of wrongful intent, this plain violation of the letter and policy of our own corporation act, done for the

very purpose of acquiring the secret profit that is the basis of the liability to the company, debars either of the participants from resorting to the courts of New Jersey for assistance in recovering contribution from his fellow. In *Volney v. Nixon*, 68 N. J. Eq. 605, 60 Atl. 189, our court of last resort held that a contract between two persons that in exchange for their joint property one of them shall procure from a corporation of this state an issue of stock to an amount known by all parties to be in excess of the value of the property, and shall divide the stock thus procured with the other person, is illegal, and the courts of this state will not aid in its enforcement, even though the objectionable feature has been accomplished by the actual issue of the stock. The principle of this decision was again affirmed by the same court in *Easton Natl. Bank v. American Brick, etc., Co.*, 70 N. J. Eq. 722, 728, 64 Atl. 1095. If our courts will not lend their aid to the enforcement of a contract made for such a purpose by one of the parties against the other, they certainly will not lend aid to one of two promoters who jointly work a fraud upon the company, as well as a fraud upon the law, in order to accomplish a scheme for issuing stock of a New Jersey company having no value behind it. Still less will they aid the wrongdoer in his action against the company.

But, finally, this whole question of contribution, if there be any sort of question about it, belongs in the Massachusetts court, and Mr. Bigelow should apply there for his remedy. The company is already in court, and, if equity requires that its actions be stayed, the Massachusetts court will of course stay them.

It is further argued that either the decision of the federal courts in the *Lewisohn Case*, if affirmed by the Supreme Court of the United States (and I assume the presumption was when the present bill was filed that there would be such affirmance, as in truth there has been [210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025]), works an estoppel against the company (defendant herein) in favor of Mr. Bigelow; or else that this court should restrain the defendant from further proceeding in the Massachusetts court until a final decision is reached in the *Lewisohn Case* such as can be availed of by him as estoppel. The argument made to show the alleged estoppel is elaborate, voluminous, and ingenious. It is rested upon the circumstance that the so-called "outside properties" which were transferred to the new company in exchange for 30,000 shares of its stock were held in legal title by Lewisohn, but (as is argued) in trust for himself and Bigelow; that Lewisohn was authorized by Bigelow and the syndicate members to do what he did with the property; that the decision in the federal courts in favor of Lewisohn, the trustee, inures to the benefit of Bigelow as cestui que trust, and, since it has been determined in an action against him that the transfer to

the company was not open to question by the company, it must necessarily follow that no part of the transaction as to which Bigelow was interested is open to like question by the company. If I were called upon to pass upon the merits of this argument, I fear I should be constrained to declare it palpably unsound. The theory is that the actions brought by the company have to do only with the title to trust property; that the beneficiaries and parties ultimately entitled to the benefit of the property are not necessary parties; that the trustee represents the whole interest, and that the determination is binding upon the cestui que trust. But the actions are in personam, to recover back property wrongfully acquired by the company's trustees from the company. The circumstance that so far as any consideration passed to the company in the exchange it was conveyed to it by Lewisohn, acting as trustee for himself and Bigelow, is of no consequence, since they get credit for its value in the accounting. And how Mr. Bigelow can escape personal responsibility to the company by a decision favorable to Lewisohn in the federal actions, when a decision against Lewisohn in those actions would have imposed no personal responsibility upon Mr. Bigelow, I confess I am unable to perceive.

But it is not for me to determine these questions. The whole controversy belongs in Massachusetts, and not in New Jersey. If the decision in the federal courts is an estoppel, it should be so alleged in the Massachusetts actions. If it is not as yet a complete estoppel, and equity requires that the company should stay its actions against Bigelow until the final determination of the Lewisohn suits, Mr. Bigelow's proper course is to apply to the Massachusetts court for a stay. Mr. Bigelow's bill here cannot, in my judgment, be sustained upon a mere showing (if it were shown) that the cause of action asserted against him in Massachusetts is unconscionable, or that the company is estopped or for any other reason ought to be debarred from its action there. The Supreme Judicial Court of Massachusetts is a court of conscience, and exists for the very purpose of passing upon the question whether claims and defenses are conscionable or unconscionable. In that court the controversy is pending, and to it Mr. Bigelow should make application for the relief that he asserts himself entitled to.

Various other points are raised in support of the bill. Some of them turn upon mere matters of practice or procedure. Others clearly are to be determined according to rules or principles of equity that are prevalent generally where courts of equitable jurisdiction are established, subject only to such variances as are inevitable between the courts of different states. With respect to each and every one of them, so far as they may be well founded, complainant may readily obtain relief upon application to the original or appellate jurisdiction of the Mas-

sachusetts court. They require no special mention.

But finally, it seems to me that the laches and acquiescence of Mr. Bigelow not only estop him in the respects already indicated, but that he is for the same reason foreclosed from practically every ground on which he invokes the jurisdiction of this court. As already mentioned, the actions there were begun on October 7, 1902. His final amended answers were filed as recently as November 6, 1907. There is nothing to show that he was not then in full possession (or with reasonable diligence might have been) of every fact and of every suggestion of argument upon which he now relies. Upon this point I cannot do better than to quote from the brief of counsel for the defendant: "If the law of New Jersey is the law by which the original merits of the case should be decided, this has been true since the beginning of the suits against Bigelow in 1902. If the pendency of the suits against Lewisohn has a bearing upon the suits against Bigelow, their pendency has been a fact since 1903. If the decisions in the Lewisohn suits have affected Bigelow's rights, the fact has been in existence since February 24, 1905, and December 4, 1906, respectively. If the conflict in the decisions on demurrer between the circuit court and the Massachusetts court is important, it has been so since June 19, 1905. If there is a difference between the law of New Jersey and the law of Massachusetts, it has been apparent at least since June 19, 1905. If a multiplicity of suits can be avoided by this proceeding in New Jersey, this has been true since 1902. If the agreement of the Maine company regarding the disposition of any dividends coming to it is of importance, the fact has existed since January, 1904. If the recovery against Bigelow in Massachusetts would be unconscionable in view of the foregoing things, this has been apparent since the respective dates."

It is argued by counsel for the complainant that mere delay, in the absence of detriment accruing therefrom, need not be deemed as a bar to an otherwise equitable claim. I do not think, however, that in such a case as is here presented any substantial detriment to the defendant need be shown. Mr. Bigelow has not merely delayed for a long and unreasonable time before raising the points that he now urges; he has in the mean time acquiesced in the jurisdiction of the Massachusetts court, and has sought to take a benefit from it in the form of a decree there that, if it had proved to be in his favor, would have been conclusive against the company. With full knowledge of the facts, he has deliberately consented to the jurisdiction of the Massachusetts court, has submitted his case to it upon the merits, and it is only after he is defeated upon the merits that he comes to this court for relief. In *Smith v. Colloty*, 69 N. J. Law, 365, 375, 55 Atl. 805, 808, it was declared by our Court of Errors and Ap-

peals that "the rule that defects in the form of process and the manner of its service are waived by making appearance and defense upon the merits is not a technical rule or a rule of mere practice or convenience; it is a rule of jurisprudence, grounded upon the fundamental idea that courts of justice exist for the purpose of hearing and conclusively determining disputes between litigants, from which it results that he who voluntarily comes (whether as plaintiff or defendant) before a court of competent jurisdiction over the subject-matter, and there submits to a trial and determination of the merits of his controversy, is bound by the determination that he has thus invoked."

Nor was Mr. Bigelow's delay in coming here due to accident or inadvertence. Not only does his bill make no such pretence, but his counsel in their printed brief present his attitude as follows: "The complainant conceives that it was his duty to defend himself as best he might before the Massachusetts court, and thus if possible avoid any necessity for invoking the jurisdiction of the Court of Chancery in New Jersey. This he did at much expense of both time and money; and it was not until the findings of the single justice in November, 1907, that the cases in Massachusetts reached a stage when it became apparent that this complainant's defenses in Massachusetts would be unavailing and the situation presented the equities upon which this application is based and the necessity for invoking the aid of this court." Since he could not be brought to New Jersey in invitum, his attitude, frankly avowed, is that he reserved to himself two chances of gaining the better of his adversary, whereas his adversary was to have but one. The company must succeed in two litigations before it could enforce restitution if its right thereto was proved; while he was to be ultimately successful if he could succeed in winning either one of two litigations. His position is plainly that of one who speculates on the outcome in the court of original jurisdiction before going into another jurisdiction to have the original action restrained. Even if there were substance in the points that he raises here, I do not see how at this late date he could under the circumstances equitably ask for any consideration of them at the hands of this court.

Having considered with patience the voluminous arguments, my conclusions upon the whole matter are:

First. That the controversy between the parties is properly cognizable in the Massachusetts court, where prior actions are already pending.

Secondly. That the substantial controversy is about matters of fact, and not of law or of equity.

Thirdly. That, so far as controversy exists about questions of law or of equity, they are

questions that are within the cognizance of the Massachusetts court.

Fourthly. That the bill herein does not show that the defendant is acting unconscionably in prosecuting the Massachusetts actions, and therefore complainant is not entitled to have them enjoined.

Fifthly. That the complainant, by laches, acquiescence, and waiver, has lost any right he might otherwise have had to invoke the jurisdiction of this court in the premises.

These matters appearing plainly upon the face of the bill, the motion for its dismissal will be granted, with costs.

EWALD v. ORTNYSKY et al.

(Court of Chancery of New Jersey. Oct. 27, 1908.)

1. FRAUDULENT CONVEYANCES (§ 211*)—ATTACK BY ASSIGNEE OF CLAIMS.

The assignment of choses in action being authorized by statute, the assignee under his judgment on the claims may, in a suit to reach property to satisfy the judgment, assert all rights which his assignors could have asserted under judgments procured by them on their several claims.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 648; Dec. Dig. § 211.*]

2. FRAUDULENT CONVEYANCES (§ 263*)—ATTACK—AVERRING DATES OF CLAIMS.

The assignee of several claims seeking under his judgment thereon to reach property to satisfy it, asserting that the judgment debtor corporation, through the acts of persons wrongfully in charge of its affairs, has been stripped of its real estate without consideration moving to it, and without affirmation by it, in an effort by its members and officers to avoid judgment of the claims, should show when each claim entering into the judgment originated, that its status as to the acts complained of may appear; and it is not enough to aver that the claims arose between two dates, the bill showing that relief may be claimed against acts occurring before the later date.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 771-781; Dec. Dig. § 263.*]

3. FRAUDULENT CONVEYANCES (§ 263*)—ATTACK—AVERRING VALUE OF PROPERTY.

An averment of the value of the property, in the bill of a judgment creditor to reach property on the ground that the judgment debtor corporation has been stripped thereof without consideration, through an effort of its members and officers to avoid payment of the indebtedness, is not immaterial; such fact almost necessarily bearing on the question of fraud.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 771-781; Dec. Dig. § 263.*]

4. FRAUDULENT CONVEYANCES (§ 259*)—ATTACK—LACHES.

A bill seeking relief because of the stripping, without consideration, of the judgment debtor of its property, does not disclose laches, it asserting that the matters were unknown to complainant's assignors of the claims on which his judgment is based, and that the assignment was less than a year before the suit.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 259.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Suit by George Ewald against Sotor Stephen Ortnysky and others. Heard on bill and demurrer thereto of defendant the Little Russian Greek Catholic St. Peter and Paul Church of Jersey City. Demurrer sustained in part.

Harry B. Brockhurst, for demurrant. Herbert Clark Gibson, for defendants.

LEAMING, V. C. 1. Our statute authorizes the assignment of choses in action, and complainant, under his judgment, may assert all rights which his assignors could have asserted under judgments procured by them on their several claims. But, as a several creditor in a suit of this nature would be compelled to show when his claim originated in order that its status touching the acts complained of could be accurately ascertained, it seems manifest that the assignee of several claims should, for a like reason, show when each claim which forms a part of his judgment originated. The averment that the claims of complainant's several assignors arose between April 30, 1900, and December 18, 1905, without a disclosure as to when and for what amount each claim arose, fails to afford defendant an opportunity to take issue on material facts. Defendant should be privileged to admit the validity of some of the claims of complainant's assignors and to contest the validity of others, and the averments of the bill should be sufficiently definite and specific to afford that privilege. The fact that it appears by the bill that relief may be claimed against some acts which occurred prior to December 18, 1905, evidences the necessity of specific averments of the nature suggested. The demurrer must be sustained so far as it relates to this objection to the bill.

2. The objection to the third paragraph of the bill—asserted by the second ground of demurrer—cannot be sustained. The rule is, as stated in *Kirkpatrick v. Cornig*, 40 N. J. Eq. 241, that, to determine whether a given averment of a bill is immaterial, it is necessary to consider whether the alleged objectionable part has a tendency to show, or would be admissible in evidence to show, the truth of any allegation in the bill that is material with reference to the relief sought. The averment here complained of is in its essence an averment of the value of the property in controversy, which value is by the bill asserted to be \$30,000 and upwards subject to a mortgage of \$12,000. This fact may be said to almost necessarily have important bearing upon the ascertainment of the fraud averred by the bill as a primary basis of the relief sought.

3. The rule is well settled that a defendant is entitled to a concise statement of the facts on which a complainant bases his relief, and any fraud relied upon should be specifically disclosed by the bill; but I think that the

averments of paragraphs 5 to 15, inclusive, of the bill, when considered together, disclose the existence of conditions which entitle complainant to relief. The averments, summarized, may be said to be that defendant corporation, through the acts of persons wrongfully in charge of its affairs, has been stripped of its real estate without consideration moving to it (see paragraph 15), and without lawful affirmative action upon its part, as the result of an effort upon the part of its members and officers to avoid the payment of the indebtedness due to complainant's assignors. While the averments of the bill could probably be made more specific, I think them sufficient in the respect named.

4. I do not think that the bill discloses laches which will operate as a bar. Paragraph 15 of the bill asserts that the several matters averred were unknown to complainant's assignors, and paragraph 4 asserts that the assignment to complainant was made in 1908.

I will advise that the demurrer be sustained, and that complainant be allowed 20 days in which to file an amended bill.

(29 R. I. 333)

ADAMS v. LORRAINE MFG. CO.

(Supreme Court of Rhode Island. Dec. 4, 1908.)

1. PLEADING (§ 74*)—VARIANCE BETWEEN WRIT AND DECLARATION—STATUTES.

Under Court and Practice Act 1905, § 246, authorizing a plaintiff to bring either trespass or trespass on the case, and join therein counts in trespass or trespass on the case, and requiring defendant to plead to the several counts according to the practice at common law, etc., a writ in trespass on the case may be followed by a declaration in trespass.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 148; Dec. Dig. § 74.*]

2. TRESPASS (§ 45*)—CARRYING AWAY PERSONAL PROPERTY—EVIDENCE—ADMISSIBILITY.

Where, in trespass for carrying away sand of plaintiff, the evidence showed that plaintiff had placed the sand on land of others with their consent, and that he had pointed out to an engineer the location of the lots on which the sand had been piled, a plat of the lots, made by the engineer, indicating their locations as pointed out by plaintiff, was properly received in evidence.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 116; Dec. Dig. § 45.*]

3. ALTERATION OF INSTRUMENTS (§ 24*)—PLATS—ADMISSIBILITY—MUTILATION.

A plat, otherwise admissible in evidence, is properly received in evidence, notwithstanding a mutilation thereof, consisting in cutting off some figures on the edge thereof, which formed no part of it and which had been placed there after the plat was made.

[Ed. Note.—For other cases, see Alteration of Instruments, Dec. Dig. § 24.*]

4. TRESPASS (§ 57*)—CARRYING AWAY PERSONALTY—LIABILITY.

Where defendant, with knowledge of the rights of plaintiff, carried away sand of plaintiff, and there was a conflict in the evidence as to the amount and quality taken, the jury were

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

justified in taking the view that the larger quantity and the better quality was taken.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 136; Dec. Dig. § 57.*]

5. DAMAGES (§ 91*)—PUNITIVE DAMAGES—WHEN AUTHORIZED.

To justify punitive damages, it must appear that the act of the party complained of was done with such recklessness as amounted to criminality.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 194; Dec. Dig. § 91.*]

6. TRESPASS (§ 56*)—PUNITIVE DAMAGES—WHEN AUTHORIZED.

Where a purchaser of land, on which a third person had piled sand with the consent of the vendor, removed the sand, but it did not appear that he had any notice at the time of the purchase of the lots that the vendor had given the third person permission to store sand thereon, punitive damages for his taking of the sand could not be awarded.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 144; Dec. Dig. § 53.*]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Action by Napoleon E. Adams against the Lorraine Manufacturing Company. There was a verdict for plaintiff, and defendant brings exceptions. Remitted for new trial, unless plaintiff file a remittitur of part of his recovery.

Hugh J. Carroll, for plaintiff. Edwards & Angell (Frank H. Swan, of counsel), for defendant.

JOHNSON, J. This is an action on the case, brought in the superior court in Providence county; the writ being dated November 20, 1905. The declaration contains a single count in trespass for taking and carrying away sand and gravel of the plaintiff, and alleges that at Pawtucket, during the autumn and winter of the year 1903 and the years 1904 and 1905, the plaintiff had large quantities of sand and gravel stored on premises near the works of the defendant, for use in the plaintiff's business, and that the defendant, by its servants and agents, took and carried away said sand and gravel, and used the same for the benefit of said defendant, and by reason of so doing the plaintiff lost said sand and gravel, and also lost several large contracts which he was unable to perform by reason of the loss of said sand and gravel, and lost several opportunities to bid upon other large contracts in his business, etc. The defendant demurred to said declaration on the ground of variance between the writ and declaration. Said demurrer was overruled, and the defendant duly excepted. The case was tried on its merits in the superior court, March 24, 25, and 26, 1908, and a verdict was rendered for the plaintiff for \$2,653.40. The defendant moved for a new trial on the grounds: (1) That the verdict is against the law. (2) That the verdict is against the evi-

dence and the weight thereof. (3) That the damages assessed therein are excessive. The motion for a new trial was denied, and the defendant excepted. The case is now before us on the defendant's bill of exceptions.

The exceptions argued by the defendant are the following, which we have numbered in the order of our consideration thereof:

1. To the decision of the superior court overruling the defendant's demurrer to the declaration on the ground of variance between the writ and declaration.

By section 246, Court and Practice Act 1905, when a plaintiff "has reason to doubt whether the action should be trespass or trespass on the case, he may bring either action and join therein counts in trespass and trespass on the case, or either of them, and the defendant in all such cases shall plead to the several counts according to the practice at common law, and judgment may be entered upon the counts under which the plaintiff may be entitled to recover." The defendant's contention that under the statute a writ in trespass on the case can be followed only by a declaration in trespass on the case, and not by a declaration in trespass, amounts merely to a denial of the plain language of the statute, the clear intention of which is to do away with the distinction between actions of trespass and trespass on the case, so far as the adequacy of the writ to support counts in either trespass or trespass on the case is concerned. The statute construes itself. It permits the bringing of either action and the joining of "counts in trespass and trespass on the case, or either of them"—provides that the defendant shall plead to the several counts according to the practice at common law, and that judgment may be entered upon the counts under which the plaintiff may be entitled to recover. The decision of the superior court overruling the demurrer was correct.

2. To the admission of the engineer's plat in evidence.

The witness Havens, a civil engineer, went upon the lots of land in question, and the plaintiff pointed out to him the location where, as he claimed, gravel and sand had been piled. Havens made a plat of the lots, and indicated thereon the locations pointed out by the plaintiff, with the dimensions of the same. He testified that there was practically no sand or gravel there at the time the plat was made, and the plat indicated, as to said locations, only their length and width. The plat tended to prove nothing as to the amount of sand and gravel. The plaintiff could have marked out the locations and measured them, and then have testified to the same at the trial. We see no objection to his having the locations marked on the plat of the lots by the engineer, under his direction. The defendant complained of the mutilation of the plat; but the mutilation, accord-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing to the evidence, consisted simply in cutting off some figures on the edge of the plat, which formed no part of the plat, but had been placed there after the plat was made. The plat was properly admitted.

3. To the following portion of the charge to the jury: "If there is a dispute as to the amount of sand and of gravel that was taken away, and you find that this company knew—had full knowledge—of the rights of the plaintiff, if they were acting in violation of his rights, taking this property in defiance of his rights, and using it in their own use, and there is a dispute here in the matter of testimony as to the amount that was taken and the quality that was taken, in that case the law would justify you in taking the view that the larger quantity and the better quality was taken, by reason of the fact that the defendant company was guilty of wrongful conduct, because the law does not look upon the act of a spoliator with any favor, but the presumption is against a spoliator, if that be the case."

The instruction stated the law correctly. It was given hypothetically, and the jury could apply it to the facts as it found them.

4. To the decision of the superior court denying its motion for a new trial.

From the testimony for the plaintiff it appeared that he had placed several piles of sand and gravel on certain lots of land belonging to the Providence County Savings Bank and also on certain lots belonging to one Pierson, by permission of the owners of said lots;—that, after said sand and gravel had been placed on the lots, certain of the lots were conveyed by said bank to the defendant. The plaintiff testified that he was forbidden, by the agents of the defendant, to remove said sand and gravel; said agents claiming that the piles of sand and gravel belonged to the defendant, as it had bought the land with all that was on it. He testified that all the sand and gravel was removed from the lots where he had stored it. He also testified to the removal of some sand from the Pierson lots by teams of the defendant. On the plat introduced in evidence the locations of the piles were indicated by letters. The plaintiff's testimony was given as to the piles of sand and gravel so indicated. From his testimony it appears that pile A, situated on defendant's land, contained 52 yards 4 feet of roofing gravel, worth \$1.50 per yard. This would amount to \$78.22. Pile B, also on defendant's land, contained, according to his testimony, 122 yards of screened gravel, worth, as shown by his testimony in cross-examination, \$1.25 per yard. This would amount to \$152.50. Pile C, also on defendant's land, contained 6 yards 10 feet of sand, worth, as shown by plaintiff's cross-examination, 75 cents per yard. This would amount to \$4.77. As to the contents of pile D no testimony was given. Piles E and F were on land belonging to Pierson. It was not claimed that the defendant exer-

cised any dominion over these piles on the Pierson land or prevented the plaintiff from taking the same. The plaintiff testified to seeing some gravel taken by teams of the defendant from the piles on the Pierson land, amounting, according to his testimony, to about $1\frac{1}{2}$ yards. This, at \$1.25 per yard, amounts to \$1.66. The value, therefore, of the amount of sand and gravel piled on defendant's land, by the plaintiff's own testimony, amounts to \$235.49. Therefore, if the defendant carried it all away, said sum would constitute all the plaintiff's damage as to those piles. Adding the value of $1\frac{1}{2}$ yards, taken from the piles on the Pierson land, valued at \$1.66, the total actual value of the sand and gravel for which the plaintiff could recover would be \$237.15. Interest on that amount, which the jury could well have allowed, would amount to approximately \$40.20. This would bring said amount up to \$277.35.

As the plaintiff in his direct testimony stated the value of the sand and gravel taken and converted to its use by the defendant to be \$559, it is evident that the balance necessary to make up the verdict of \$2,653.40 must have consisted of punitive damages, except so far as said sum was made up by the allowance of interest on the value of the sand and gravel. It appears, therefore, that the punitive damages awarded must have amounted to practically \$2,000. We do not think that the evidence in the case is such as to justify the assessment of punitive damages. In *Hagan v. Providence & Worcester R. R. Co.*, 3 R. I. 88, 62 Am. Dec. 377, the court said: "In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such willfulness, recklessness, or wickedness, on the part of the party at fault, as amounted to criminality, which, for the good of society and warning to the individual, ought to be punished." We do not find evidence of any such willfulness, recklessness, or wickedness in this case. It is not shown, or attempted to be shown, that the defendant had any notice, at the time it bought the lots, that the bank had given the plaintiff permission to store sand and gravel thereon. If the defendant believed that it owned the gravel, it was not willful, reckless, or wicked to the point of criminality for it to forbid its removal. In *Herreshoff v. Tripp, City Treas.*, 15 R. I. 92, 23 Atl. 104, this court said: "The fact that the city prevented the plaintiffs from taking possession by its police does not show malice or bad faith, any more than if it had done so by any other agent or servant. It was precisely what the city would do, if it believed itself the rightful owner."

The defendant's exception to the decision of the superior court, denying its motion for a new trial on the ground that the damages awarded by the verdict are excessive, is sustained. The defendant's other exceptions are overruled, and the case is remitted

to the superior court for a new trial, unless the plaintiff shall, on or before December 21, 1908, enter his remittitur of so much of said verdict as is in excess of \$277.35; and, in case of such remittitur, judgment shall be entered for said sum of \$277.35.

PODRAT v. NARRAGANSETT PIER R. CO.

(Supreme Court of Rhode Island. Dec. 4, 1908.)

Exceptions from Superior Court, Washington County; Charles C. Mumford, Judge.

Action by William Podrat against the Narragansett Pier Railroad Company. There was a directed verdict for defendant, and plaintiff excepts. Exceptions sustained, and case remitted for a new trial.

Frederick C. Olney, for plaintiff. Cyrus M. Van Slyck, Frederick A. Jones, and Benjamin W. Case, for defendant.

PER CURIAM. The evidence in the case is so conflicting that it should have been submitted to the jury for determination.

The plaintiff's exceptions are sustained, and the case is remitted to the superior court for a new trial.

EATON v. THRIFT.

(Supreme Court of Rhode Island. Dec. 4, 1908.)

Action by Alice F. Eaton against Frederick W. Thrift. On defendant's motion for new trial under Court and Practice Act 1905, § 472, and for leave to file in the superior court a motion for a new trial for newly discovered evidence under section 473. Motion granted on latter ground.

See, also, 69 Atl. 764.

James C. Collins, Jr., for plaintiff. Frank L. Hanley, for defendant.

PER CURIAM. So much of the petition as is founded upon Court and Practice Act 1905, § 473, is granted, on condition that a motion for a new trial on the ground of newly discovered evidence be filed by the defendant within 30 days.

FREEMAN v. INDUSTRIAL TRUST CO.

(Supreme Court of Rhode Island. Nov. 30, 1908.)

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Action by Eliza A. Freeman against the Industrial Trust Company. Judgment for plaintiff, and defendant brings exceptions. Overruled.

Edward W. Blodgett, for plaintiff. Cyrus M. Van Slyck and Frederick A. Jones, for defendant.

PER CURIAM. The decision of the superior court is sustained by the evidence. The defendant's exceptions are overruled, and the case is remitted to the superior court for judgment on the decision.

McELROY v. McCARVILLE.

(Supreme Court of Rhode Island. Dec. 2, 1908.)

Action by Ellen McElroy against Michael McCarville. On respondent's motion for leave to amend answer. Denied.

Harry C. Curtis, Walter J. Ladd, and Edward G. Carr, for complainant. Charles E. Gorman, Dennis H. Sheahan, and James M. Gillrain, for respondent.

PER CURIAM. After full consideration of the respondent's motion to amend his answer, the same is hereby denied.

(223 Pa. 341)

WILSON v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

MASTER AND SERVANT (§ 217*)—INJURY TO EMPLOYE—ASSUMPTION OF RISK.

Where a brakeman had worked for several weeks on an engine intended for line service in the yard not equipped with a footboard and grab-iron, he assumes the risk in the absence of these appliances, and cannot recover for injuries received.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 578, 588; Dec. Dig. § 217.*]

Appeal from Court of Common Pleas, Cambria County.

Action by Robert J. Wilson against the New York Central & Hudson River Railroad Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

The following is the charge of O'Connor, P. J., in the court below:

"The plaintiff in this case seeks to recover from the defendant, the New York Central & Hudson River Railroad Company, for an injury sustained by him, resulting in the loss of his right leg, some time during the month of November, 1905. The evidence develops the fact that he was in the employ of the defendant company in its railroad yards at Patton, in this county, and that while endeavoring to uncouple a car from the engine of the defendant company, under the direction of the engineer in charge of that engine, his hand and foot slipped, causing him to fall on the track, and the engine passed over a portion of his body. The ground upon which he seeks to recover from his employer is that the employer failed to provide suitable instrumentalities for the work the plaintiff was required to perform in that the engine from which plaintiff was directed to uncouple or sever the cars was built and intended for services upon the main line of railroad and not for special use in yards for shifting or switching purposes, and the defect complained of was the failure on part of employer to have a footboard and grab-iron upon the engine, which if there, as alleged by plaintiff, would have enabled him to avoid the

injury which befell him and from which he suffered. It is admitted that the engine was properly constructed for the service for which it was intended, but that switching engines, or yard engines, are differently constructed, in that they have no pilot, or what is commonly known as a 'cowcatcher,' and, instead thereof, have a footboard and grab-iron, which are calculated and intended to make them more nearly safe for the employes when engaged in the coupling and uncoupling of cars from the engine. The testimony further shows that the plaintiff in the case was engaged in this sort of work for about six weeks on this particular engine, or on or about it, and that he was familiar with the fact that it did not have a footboard nor a grab-iron, that it was an engine constructed for service on the railroad proper, and was not of the kind especially constructed or in common use in railway yards. At the close of plaintiff's testimony, counsel for defendant company moved the court to direct a compulsory nonsuit and assigned six reasons in support thereof, among which it is alleged that the plaintiff is not entitled to recover because the danger was obvious and that he did not complain to his superiors or those servants of the railroad company in charge of the work of the danger to which he was subjected, and that because he made no complaint, having knowledge of the defect upon which he now rests his action, he is not entitled to recover under the law.

"The rule is that the employer is bound to furnish safe instrumentalities for the work which he desires accomplished, and that the employé takes the risk of his employment. To this rule there are a number of exceptions. Where the employer knows of a latent defect in any instrumentality employed for certain work, it is his duty to inform the employé, and, if the employé is of tender years, or if the work is of such nature as would render him ignorant of the particular danger, it is the duty of the employer to inform him; but where the defect is patent—that is, where proper instruments are not employed or the instrument is defective, and the defect be patent, obvious, so that the employé can observe it and is familiar with its dangerous character—unless he complains to the employer and obtains a promise that the defects will be removed, he is not excused from liability for injury if he attempts to recover from his employer. Therefore he is not excused from liability to perform his duty, and his duty is to quit the employment if he does not care to take further risks, and, if he sees fit to continue in the employment without complaint, or without some promise to repair, he takes the risk of that employment, and does not come within any exception to the general rule. In this case counsel for plaintiff admits, and rightly admits, that the plaintiff knew there was no footboard upon this engine and no

grab-iron, and also knew that it was not intended for ward purposes, and knew that there was more or less danger connected with the act of uncoupling or separating any cars from the engine when it was in motion. This much the plaintiff himself has admitted.

"Since the adjournment we have examined all the authorities cited, and we discover that those authorities which seemingly support the contention that this is an exception to the rule which provides that the employé takes the risk of his employment were cases, with one exception, where the employé had complained and had obtained a promise from his employer or superior having charge of the matter that the defect would be remedied or removed, and in the other case the person was of tender years—14 years of age—and was not of ordinary capacity for one of those years, and in that case it was held that it was the duty of the employer to supply practically what the employé lacks; in other words, considering his ability to understand, or rather his lack of ability to understand, the danger, the employer was held to the highest liability for having such a one in his service. So, after a full examination of these authorities, we have come to the conclusion that the plaintiff in this case must be held to have taken the risk of that employment when he knew of the danger and continued in the employment of the defendant company without complaint. We believe, if we should take any other action than that of sustaining this motion at this time, we would be guilty of reversible error. We sympathize with the plaintiff as much as his counsel or the members of the jury, and a duty of this kind is always more or less painful to the court. Nevertheless it is a duty that we must perform when we are convinced that it is the proper course to pursue. We have said this much to you for the reason that in sustaining the motion you will be relieved from further duties in this cause, and we felt it was due to you to give you the reason for not submitting the case to you.

"We sustain the motion of counsel for defendant company for a compulsory nonsuit, direct the same to be entered, and grant to counsel for plaintiff leave to move to strike off the same within 30 days."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas H. Greevy, John J. Reardon, W. A. McGuire, and E. G. Brotherlin, for appellant. Thomas H. Murray, M. D. Kittell, Jas. P. O'Laughlin, and Hazard Alex. Murray, for appellee.

PER CURIAM. The judgment is affirmed on the charge of the learned judge sustaining motion for nonsuit.

(221 Pa. 334)

In re MILLER'S ESTATE.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

EXECUTORS AND ADMINISTRATORS (§ 206*)—CLAIMS AGAINST ESTATE—SERVICES TO DECEDENT.

A claim of a niece will not be allowed for clerical and housekeeping services for a number of years rendered her deceased uncle, where the evidence as to a contract for such services is based on indefinite declarations of the decedent, and the evidence as to the services rendered shows them to be trifling.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 733; Dec. Dig. § 206.*]

Appeal from Orphans' Court, Armstrong County.

In the matter of the estate of Robert Miller, deceased. From a decree sustaining exceptions to the auditor's report, Martha A. Shirley appeals. Affirmed.

The following is the opinion of Patton, P. J., of the court below:

"The exceptions all go to the allowance by the auditor of \$1,728 to Mrs. Martha Shirley for services rendered to the decedent. As the auditor admitted a large amount of irrelevant testimony, and heard incompetent witnesses, we labor under great difficulty to separate the wheat from the chaff, but believe that justice can be reached, and this tedious litigation ended, by undertaking to do so, rather than refer the matter back again to the auditor. There can be no doubt that Martha Shirley, the claimant, was incompetent to testify against the estate of the deceased, and that her husband, John T. Shirley, on account of the identity of interest of husband and wife, when one of them was incompetent to testify because of interest, was also incompetent. Therefore their testimony should have been refused by the auditor, and not considered by him. The undisputed facts are that Robert Miller died July 7, 1904, being about 78 or 79 years old, unmarried, and without issue, leaving to survive him only collateral heirs, no closer than nephews and nieces. For many years prior to his death he had lived with a sister, who died in May, 1904. The testator was one of a type found in every community, poor in his youth, and, through close economy during his entire life, had acquired a competency, but at the same time had acquired habits that caused mental pain, equal almost to physical suffering, when compelled to part with a dollar. The testimony shows that he was exceedingly careful in contracting obligations, and equally careful in promptly discharging them.

"Thus viewing the decedent and his surroundings, we will consider the claim of Mrs. Shirley. It seems to have been first presented before the auditor on February 17, 1908, and reads as follows: 'Robert Miller

to Mrs. Martha A. Shirley, Dr., July 7, 1904. To services as clerk and assistant housekeeper for and during the past six years, at the rate of \$20 per month, \$1,440.00.' The important and material testimony to support the contract, is substantially as follows: Miss Lizzie Moorhead: 'I am a sister of Mrs. Shirley. In June, 1895, my uncle asked Mrs. Shirley if she would accept money and be paid for services of doing his writing, and looking after him and his sister in general. He wanted to feel at all times at liberty to come and ask her anything, and have her do anything for him, and if she would accept money he would be at liberty to do it; that she should put her bill into his estate; that he wanted her to get this money in a lump; that it would be more good to her that way. He wanted her to be paid, and well paid, and to put her bill in big enough, and she agreed to do it. I heard this altogether half a dozen times. The last time two weeks before his death. He said he wanted her to be paid and her bill to be put in big enough. The day he took sick he said he never paid her anything. He said he wanted to hold her to her contract.' Witness also testified to the claimant writing letters for the deceased, and doing some housework for him, and that her services would be worth \$25 per month. She wrote to Mr. Maher, the lawyer at Indiana, and about the phosphate business, and to his relatives. Mrs. Harriet Updegraph testified that she saw Mrs. Shirley read and write letters, and do household work for Mr. Miller. J. T. Drake: 'Miller told me, about 1½ years before he died, that Mrs. Shirley did all his writing for him.' Mrs. Harvey Holmes: 'Am assistant postmistress. As far as I know, Mrs. Shirley did his correspondence for him; saw her write for him once, and knew her handwriting on the envelopes.' Mrs. Isabella Woods: 'Am a sister of Mrs. Shirley. He told me he had made an arrangement with her to put in a bill after his death for the pay for writing she did; that he never paid her anything, and that he was a great trouble to her; that he wanted her to put it in big enough; that he wanted her well paid. She was to attend to him and do his writing, and attend to him in case of sickness. She wrote letters for him most every day. He said he had cut her out of his will, but he would put her in again.' She is to put in a bill for her services. "I want her paid, and well paid, for all she has done for me." This was in June before his death. One dollar per day would be small compensation. She was there almost every day. She brought home curtains, household clothes, tablecloths, etc., and washed them.' Mrs. H. S. Gephart: 'I came to Miller's house first week in March, 1904; heard Robert tell his sister that Mrs. Shirley ought to be paid; that "her and I have made an agree-

ment that we are going to wait until after my death, and she is going to put in a bill after my death." He spoke about that frequently. I know of Mrs. Shirley writing letters for him. On the first day of July he said, "Martha, have you put that down? I want you to be paid, and well paid, for all the trouble I have given you, or may hereafter give you."

"The testimony on the part of the defense was entirely to show that the claimant did not render the services claimed for. A. G. Williams, one of the parties to whom it was alleged letters were written by the claimant for the deceased, testified that, in the 10 years immediately prior to the death of Miller, he had received but three letters from him; one in his own handwriting, two in the handwriting of a lady. Charles Wilcox, secretary of the Keystone Building & Loan Association, produced all the letters written by Miller to it from 1898 to 1904. None of them were in the handwriting of Mrs. Shirley. E. S. Ralston testified that he wrote a number of letters for Miller from August, 1896, to the fall of 1899. Harry Miller testified that he wrote letters for Robert Miller—business letters and letters to friends. Daniel Singer says he wrote letters for Miller during 5 or 6 years before his death. 'He came to my house to get me to write letters; wrote about the phosphate business. Sometimes he paid me for writing them.' A. M. Johnston testified that he wrote letters for Mr. Miller. Mrs. Eddinger testified that she wrote letters for Mr. Miller in 1899; also received letters from him. They were not in the handwriting of Mrs. Shirley. These letters were from 1899 up until nearly the time of his death, oftener than every two or three months. George M. Hill, Esq., testifies he wrote letters for Miller, that Mrs. Shirley was jointly interested with Mr. Miller in the property, in regard to which letters were written to Jack & Taylor and Mr. Maher, and that his (Miller's) business was such that it did not require much letter writing.

"On the conclusion of the testimony, to wit, May 1, 1908, Mrs. Shirley amended her claim to run from July, 1895, to the date of the death of Robert Miller, thereby increasing the amount of her claim from \$1,440 to \$2,160. The auditor allowed her to recover, at the rate of \$16 per month, from July 7, 1895, to July 7, 1904, \$1,728.

"A careful reading and consideration of the testimony convinces us that the claim of Mrs. Shirley is wholly without merit, and falls within the class of cases the Supreme Court have repeatedly said that courts should hold with a tight rein. We search the record in vain for any substantial service rendered by the claimant. It is true she wrote some letters for her uncle when he was too old to write them for himself, and that she washed some curtains and napkins, and did some trifling household duties for him and

her aged aunt. But this was only what is done every day by relatives, without any hope or desire of pay, but through affection, sympathy, or an effort to secure compensation by a legacy. As to the latter, the efforts of Mrs. Shirley were not without success. She was not mentioned in the will of February 16, 1894, but by the codicil of January 31, 1899, she was given a legacy of \$500, and by the codicil of February 18, 1899, to the heirs of Mary J. Moorhead, the auditor awarded her \$441.00. The testimony on the part of the estate shows conclusively that she wrote but few letters for the deceased; that the ones that were written were short, and would take but a few moments of time, and some of them in regard to matters in which she was jointly interested with Robert Miller.

"As to work done as 'assistant housekeeper,' there is no evidence of anything done by her that would justify compensation. Her sisters are very willing witnesses, and we search in vain their testimony to show any substantial service rendered. Mrs. Gephart was there from May 5, 1904, to July 7, 1904, the time these old people were in dire distress, and during a period for which Mrs. Shirley is awarded compensation, and when, if ever, she should have gone to their assistance. Mrs. Gephart says: 'I did all the work, from feeding the horse to cleaning up Mr. Miller. I did everything that was to be done, taking care of him, feeding him, washed his clothes. There was no other nurse or domestic there. Mr. Ralston would come down, but would go right out again. One day I had to ask Mrs. Shirley to come up to help to change him.' Mrs. Gephart is called as a witness for Mrs. Shirley, and is asked what services she rendered. The only one narrated is that she wrote some letters. Nor are we satisfied that the alleged contract will stand the legal test so often applied to cases of this character, although there can be no doubt that, if we take as verity the testimony of all the witnesses in regard to it, and disregard the circumstances surrounding it, it is established. 'But in civil cases, as well as criminal, a verdict may well be founded on circumstances alone, and these often lead to a conclusion more satisfactory than direct evidence.' 1 Greenleaf on Evidence (15th Ed.) § 14.

"We must also bear in mind that the claimant's case, as to a face to face contract, rests upon the recollection of a witness as to a contract alleged to have been made 14 years before she gave her testimony; that she was not particularly interested in it, and also, allowing for the danger of mistake, the misapprehension of the witness, her interest and bias, the improbability of her story, the liability of Miller to misuse words, or not express his meaning clearly, the rule of law that admissions should be received with great caution, and are not of that substantial character upon which should be based

the rights of property. Claims against the estates of decedents, resting upon oral testimony of declarations and admissions, are very dangerous, and not to be favored by the courts. *Pollock v. Ray*, 85 Pa. 428. Claims of this nature against dead men's estates, resting entirely in parol, based largely upon loose declarations presented years after the service was rendered, and when the lips of the party principally interested are closed in death, require the closest and most careful scrutiny to prevent injustice from being done. We cannot too often repeat the cautions we have so frequently uttered upon this subject. *Wall's Appeal*, 111 Pa. 460, 5 Atl. 220, 56 Am. Rep. 238. The contract, as related by the witnesses, is so improbable, and so much in variance with the actions and conduct of the deceased during his entire lifetime, we cannot help but conclude that they (the witnesses) either did not understand him, or else have forgotten important facts of his declarations. That a man so painfully close as Robert Miller, and so prompt in the discharge of his debts, however small, would declare that he wanted Mrs. Shirley to, 'put in a bill big enough,' that he wanted 'her well paid,' and then to allow that bill to accumulate to an amount exceeding \$2,000, is inconceivable.

"Hence, we are constrained to find that the decedent did not enter into such a contract with the claimant as she can legally enforce, and that she did not render any services, except those rendered through affection, sympathy, or hopes of a legacy, and her claim is disallowed."

Error assigned was decree sustaining exceptions to auditor's report.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. L. Golden and R. A. McCullough, for appellant. R. L. Ralston and Calvin Rayburn, for appellee.

PER CURIAM. The decree is affirmed on the opinion of the court below on the exceptions to the report of the auditor.

(222 Pa. 330)

TOWNSEND v. LACOCK.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

EVIDENCE (§ 433*)—PAROL EVIDENCE—CONSIDERATION OF CONTRACT.

The covenants in previous articles of sale are not merged in the deed so as to be within the rule that a merger of a preliminary contract debars the grantor from alleging the true consideration of the sale, and from proving that, through mistake, various covenants to be performed by the grantee, were wholly omitted.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1993; Dec. Dig. § 433.*]

Appeal from Court of Common Pleas, Armstrong County.

Bill by A. K. Townsend against George S. Lacock, guardian of George W. Townsend. Decree for plaintiff, and defendant appeals. Affirmed.

Patton, P. J., in the court below, filed an opinion which concluded as follows:

"Conclusion of Law.

"The conditions and stipulations of the article of agreement of June 4, 1898, as to giving of grain, amount of land to be farmed, and the payment of purchase money were not merged by the deeds of December 10, 1901.

"Discussion.

"On June 4, 1898, A. K. Townsend entered into an agreement with his son, G. W. Townsend, to convey to him certain land. This agreement was followed by deeds dated December 10, 1901, between the same parties, for the same property. In the article of agreement it was agreed that the vendee should perform certain covenants, viz.: (1) Pay \$10 per acre for the land on the death of the vendor and his wife. (2) Give A. K. Townsend one-third of all the grain raised during his life in lieu of interest on the consideration money. (3) Farm at least 30 acres per year. (4) Keep open a certain road through the farm. The deeds did not contain any of these covenants, but were plain general warranty deeds, with receipts for the purchase money in full.

"In our opinion the important question in the case is: Were the terms and conditions of the agreement so merged in the deed that they cannot be enforced? In our opinion the authorities are clear that they were not. That the vendee or his successor, the guardian, has not complied with his covenants since 1904, is not disputed, except that there are receipts on the deeds for the consideration money. But is that conclusive, or does it estop the plaintiff from showing the truth? Certainly not. In *Hamilton v. McGuire*, 3 Serg. & R. 355, it is said: 'That such a receipt and acknowledgment were not a bar in pleading, or in evidence conclusive; but they are evidence of the lowest order. That it is everyday practice to have a receipt on the back of a deed, when perhaps nine times in ten there was not a shilling paid.' In *Eshelman's Estate*, 143 Pa. 24, 21 Atl. 905, are collected a number of cases holding 'that the presumption of actual payment arising from the receipts contained in the deed, and from the release, is not a conclusive presumption, but may be rebutted by parol proof.' 'But it is perfectly well-settled law that receipts, whether contained in deeds or elsewhere, are not conclusive of the payment of money, but only prima facie proof, and always open to explanation.' *Nichols v.*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Nichols, 133 Pa. 438, 19 Atl. 422. The authorities are numerous that, when the deed is only the fulfillment in part of the article, the covenants are not merged in the deed, though it is executed, delivered, and accepted. Neither any rule of evidence nor the rule as to a merger of a preliminary contract in the deed of conveyance debars the plaintiff from alleging and procuring the true consideration for the sale, and that through mistake the consideration was incorrectly stated in the deed. *Wilson v. Pearl*, 12 Pa. Super. Ct. 66. It is admissible to prove the true contract, and that part of it was omitted from the writing by mistake. And this can be proved by the scrivener, and by the admissions and declarations of the vendee, deceased at the time of the trial. *Schotte v. Meredith*, 192 Pa. 159, 43 Atl. 952. In 19 *Pepper & Lewis' Digest of Decisions*, column 82,573, can be found many cases that are exceptions to the general rule that the execution and acceptance of a deed of conveyance, is a consummation of all previous agreements between the parties, and the articles of agreement may be given in evidence to show that their conditions have not been complied with. In *Byers v. Mullen*, 9 Watts, 266, there was a deed and a receipt in full for the consideration money. The article of agreement showed that the vendee had agreed to pay off a certain judgment. It was offered in evidence, but rejected by the court because merged in the deed. Held to be error, and that the vendee could show notwithstanding the deed that the vendor had not complied with the article of agreement. In *Harbold v. Kuster*, 44 Pa. 392, the article of agreement contained a reservation of the grain in the ground, but the deed subsequently given contained no mention of such reservation. It was held that there was no merger, and that the agreement could be enforced.

"Taking the facts of this case and applying the law as we find it, we are convinced that the article and deed are not contradictory, and that both can stand, one the fulfillment of the other. It would have been better to have included all the covenants of the article in the deed, but by the mistake of the scrivener they were left out. This was unfortunate, but should be allowed to overthrow the true agreement between the parties."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Joseph A. Langfitt, W. A. McAdoo, and H. W. McIntosh, for appellant. M. F. Leason and C. E. Harrington, for appellee.

PER CURIAM. The judgment is affirmed on the discussion and conclusion of law by the court below.

PLOOF v. PUTNAM.

(81 Vt. 471)

(Supreme Court of Vermont. Chittenden. Oct. 2, 1908.)

1. TORTS (§ 3*)—OBLIGATION VIOLATED.

While plaintiff and his wife and children were sailing, a violent tempest arose, whereby the boat and occupants were placed in great danger, and, to save them, plaintiff was compelled to moor the boat to defendant's dock. Defendant, by his servant, unmoored the boat, whereupon it was driven on shore by the tempest without plaintiff's fault, and destroyed, and plaintiff and his wife and children were cast into the water and upon the shore, and injured. Held, that plaintiff was entitled to recover.

[Ed. Note.—For other cases, see Torts, Dec. Dig. § 3.*]

2. TORTS (§ 26*)—PLEADING—DESCRIPTION OF WRONG.

A complaint alleging these facts stated a good cause of action, though it did not negative the existence of natural objects to which plaintiff could have moored with equal safety; the details of the situation creating the necessity of mooring to the dock being matters of proof which it was unnecessary to allege.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 33; Dec. Dig. § 20.*]

3. MASTER AND SERVANT (§ 329*)—MASTER'S LIABILITY FOR INJURIES TO THIRD PERSONS—ACTS OF SERVANT—SCOPE OF EMPLOYMENT.

The declaration having alleged in one count that defendant, by his servant who was in charge of the dock, willfully and designedly unmoored the boat, and in the other that defendant by his servant negligently, carelessly, and wrongfully unmoored it, sufficiently showed that the servant was acting within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1269; Dec. Dig. § 329.*]

Exceptions from Chittenden County Court; Seneca Haselton, Judge.

Action by Sylvester A. Ploof against Henry W. Putnam. Heard on demurrer to declaration. Demurrer overruled, and declaration adjudged sufficient, and defendant excepted. Judgment affirmed, and cause remanded.

Martin S. Vilas and Cowles & Moulton, for plaintiff. Batchelder & Bates, for defendant.

MUNSON, J. It is alleged as the ground of recovery that on the 13th day of November, 1904, the defendant was the owner of a certain island in Lake Champlain, and of a certain dock attached thereto, which island and dock were then in charge of the defendant's servant; that the plaintiff was then possessed of and sailing upon said lake a certain loaded sloop, on which were the plaintiff and his wife and two minor children; that there then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction; that, to save these from destruction or injury, the plaintiff was compelled to, and did, moor the sloop to defendant's dock; that the defendant, by his servant, unmoored the sloop, whereupon

It was driven upon the shore by the tempest, without the plaintiff's fault; and that the sloop and its contents were thereby destroyed, and the plaintiff and his wife and children cast into the lake and upon the shore, receiving injuries. This claim is set forth in two counts—one in trespass, charging that the defendant by his servant with force and arms willfully and designedly unmoored the sloop; the other in case, alleging that it was the duty of the defendant by his servant to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest, but that the defendant by his servant, in disregard of this duty, negligently, carelessly, and wrongfully unmoored the sloop. Both counts are demurred to generally.

There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been trespasses. A reference to a few of these will be sufficient to illustrate the doctrine. In *Miller v. Fandrye*, Poph. 161, trespass was brought for chasing sheep, and the defendant pleaded that the sheep were trespassing upon his land, and that he with a little dog chased them out, and that, as soon as the sheep were off his land, he called in the dog. It was argued that, although the defendant might lawfully drive the sheep from his own ground with a dog, he had no right to pursue them into the next ground; but the court considered that the defendant might drive the sheep from his land with a dog, and that the nature of a dog is such that he cannot be withdrawn in an instant, and that, as the defendant had done his best to recall the dog, trespass would not lie. In trespass of cattle taken in A., defendant pleaded that he was seised of C. and found the cattle there damage feasant, and chased them towards the pound, and they escaped from him and went into A., and he presently retook them; and this was held a good plea. 21 Edw. IV, 64; Vin. Ab. Trespass, H. a, 4, pl. 19. If one have a way over the land of another for his beasts to pass, and the beasts, being properly driven, feed the grass by morsels in passing, or run out of the way and are promptly pursued and brought back, trespass will not lie. See Vin. Ab. Trespass, K. a, pl. 1. A traveler on a highway who finds it obstructed from a sudden and temporary cause may pass upon the adjoining land without becoming a trespasser because of the necessity. *Henn's Case*, W. Jones, 296; *Campbell v. Race*, 7 Cush. (Mass.) 408, 64 Am. Dec. 728; *Hyde v. Jamaica*, 27 Vt. 443 (459); *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811. An entry upon land to save goods which are in danger of being lost or destroyed by water or fire is not a trespass. 21 Hen. VII, 27; Vin. Ab. Trespass, H. a, 4, pl. 24, K. a, pl. 3. In *Proctor v.*

Adams, 113 Mass. 376, 18 Am. Rep. 500, the defendant went upon the plaintiff's beach for the purpose of saving and restoring to the lawful owner a boat which had been driven ashore, and was in danger of being carried off by the sea; and it was held no trespass. See, also, *Dunwich v. Sterry*, 1 B. & Ad. 831.

This doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape from his assailant. 37 Hen. VII, pl. 28. One may sacrifice the personal property of another to save his life or the lives of his fellows. In *Mouse's Case*, 12 Co. 63, the defendant was sued for taking and carrying away the plaintiff's casket and its contents. It appeared that the ferryman of Gravesend took 47 passengers into his barge to pass to London, among whom were the plaintiff and defendant; and the barge being upon the water a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger of being lost if certain ponderous things were not cast out, and the defendant thereupon cast out the plaintiff's casket. It was resolved that in case of necessity, to save the lives of the passengers, it was lawful for the defendant, being a passenger, to cast the plaintiff's casket out of the barge; that, if the ferryman surcharge the barge, the owner shall have his remedy upon the surcharge against the ferryman, but that if there be no surcharge, and the danger accrue only by the act of God, as by tempest, without fault of the ferryman, every one ought to bear his loss to safeguard the life of a man.

It is clear that an entry upon the land of another may be justified by necessity, and that the declaration before us discloses a necessity for mooring the sloop. But the defendant questions the sufficiency of the counts because they do not negative the existence of natural objects to which the plaintiff could have moored with equal safety. The allegations are, in substance, that the stress of a sudden and violent tempest compelled the plaintiff to moor to defendant's dock to save his sloop and the people in it. The averment of necessity is complete, for it covers not only the necessity of mooring, but the necessity of mooring to the dock; and the details of the situation which created this necessity, whatever the legal requirements regarding them, are matters of proof, and need not be alleged. It is certain that the rule suggested cannot be held applicable irrespective of circumstance, and the question must be left for adjudication upon proceedings had with reference to the evidence or the charge.

The defendant insists that the counts are defective, in that they fail to show that the servant in casting off the rope was acting within the scope of his employment. It is said that the allegation that the island and dock were in charge of the servant does not

imply authority to do an unlawful act, and that the allegations as a whole fairly indicate that the servant unmoored the sloop for a wrongful purpose of his own, and not by virtue of any general authority or special instruction received from the defendant. But we think the counts are sufficient in this respect. The allegation is that the defendant did this by his servant. The words "willfully, and designedly" in one count, and "negligently, carelessly, and wrongfully" in the other, are not applied to the servant, but to the defendant acting through the servant. The necessary implication is that the servant was acting within the scope of his employment. 13 Ency. P. & Pr. 922; Voegell v. Pickel Marble, etc., Co., 49 Mo. App. 643; Wabash Ry. Co. v. Savage, 110 Ind. 156, 9 N. E. 85. See, also, Palmer v. St. Albans, 60 Vt. 427, 13 Atl. 569, 6 Am. St. Rep. 125.

Judgment affirmed and cause remanded.

(1 Vt. 506)

In re BAKER'S ESTATE.

(Supreme Court of Vermont. Washington. Nov. 17, 1908.)

WILLS (§ 788*)—ELECTION—SUFFICIENCY OF WAIVER BY SURVIVING HUSBAND—"AS A WIDOW MAY WAIVE PROVISIONS OF WILL."

Pub. St. § 2935, provides that a husband may waive the provisions of his wife's will when she dies without issue "as a widow may waive the provisions of her husband's will." Section 2925 (3) requires that the widow shall notify the court in writing of her election under her husband's will within eight months after the will is proved, or after letters of administration have been granted. *Held*, that a verbal notification of waiver made to the probate court by the attorney for the husband where the will was presented for probate was insufficient, where it was not followed by the filing of a written waiver within the time allowed by the statute.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 788.*]

Appeal from Probate Court, Washington County; Alfred A. Hall, Judge.

Petition by Sarah J. Baker's administrator to the probate court to determine the validity of the election of William A. Baker, surviving husband of decedent, to waive the provisions of decedent's will. From a judgment of the county court affirming a judgment of the probate court sustaining such waiver, Muncie Gregg and another, heirs of decedent, appeal. Reversed and rendered.

R. W. Hurlburt, for appellants. Geo. W. Wing, for appellee.

TYLER, J. The county court by agreement of parties, heard the case upon the facts found by the probate court, and affirmed its decree. The probate court heard and decided the case upon the facts set forth in the petition of the administrator of Wm. A. Baker's estate made to that court in November, 1905, and upon the evidence produced in its support. The petition alleges, in substance, that

Mrs. Sarah J. Baker died in February, 1904, leaving a will in which certain provisions were made for her husband Wm. A. Baker, who survived her; that, when the will was presented for probate, the husband, by his attorney, gave notice of his intention to waive the provisions of the will made in his behalf and take his statutory rights in lieu thereof; that, the said Wm. A. being sick and unable to attend court, his attorney, at his request, drew a formal waiver for him to sign; that he duly executed it and sent it by mail to the attorney to be filed in the probate court; that the attorney received it, and took it to the probate court at the time he filed an application by the husband for the appointment of an administrator upon his wife's estate, and supposed the waiver was filed with that paper until after the husband's death which occurred in April, 1904, when he learned that it had never been filed. The probate court found the fact that the waiver was never filed in that court, and that it never came to the knowledge of the court. It also found that its loss had been duly proved, and held that the husband intended to waive the will and did waive it, and made a decree accordingly.

Section 2935, Pub. St., provides that a husband may waive the provisions of his wife's will when she dies leaving no issue, "as a widow may waive the provisions of her husband's will." But section 2925 (3) Pub. St., requires that the widow shall notify the court in writing of her election to make such waiver, and that the waiver shall be made within eight months after the will is proved, or after letters of administration have been granted upon his estate, or in such other time as the court in its discretion allows. It was held in *Re Peck's Estate*, 80 Vt. 469, 68 Atl. 433, that the words, "as a widow may waive the provisions," means "in the same manner." That case is also decisive that notice of such election must be given to the probate court within eight months unless the time is extended by the court. In the present case, as the waiver was not filed in said court nor brought to its knowledge, and no extension of time was granted or prayed for, the statute was not complied with, and there was in law no waiver. An intent to waive the provision of the will made known only by signing the paper was not sufficient. The acts of the husband and his attorney did not constitute an election, as a matter in pais, to waive the provisions of the will. In *re Peck's Appeal*, 80 Vt. 487, 68 Atl. 433.

The parol notice by the husband to the probate court at the time he presented the will for probate of his intention to waive the will can have no force; for, if for no other reason, the time when a waiver could be made had not then arrived.

Judgment reversed, and judgment that there was no waiver by William A. Baker in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

his lifetime of the provision of the will of his wife, Sarah J. Baker, and that her estate be distributed according to the provision of the will.

(81 Vt. 498)

COWLES v. COWLES' ADM'R.

(Supreme Court of Vermont. Addison. Nov. 17, 1908.)

1. WITNESSES (§ 181*)—COMPETENCY—TRANSACTIONS WITH DECEASED PERSON—WAIVER OF OBJECTION.

An administrator may waive the provisions of P. S. § 1590, that, when an administrator is a party, the other party shall not testify in his own favor except in certain cases, and permit the adverse party to testify.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 727, 728; Dec. Dig. § 181.*]

2. WITNESSES (§ 181*)—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS—WAIVER OF OBJECTION.

Evidence held to support a finding that an administrator waived the incompetency of plaintiff to testify in his own behalf respecting his claim against the estate before the commissioners thereon.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 727, 728; Dec. Dig. § 181.*]

3. WITNESSES (§ 181*)—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS—WAIVER OF OBJECTION.

The waiver of plaintiff's incompetency as a witness before the commissioners bound the administrator on appeal to the county court.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 727, 728; Dec. Dig. § 181.*]

4. EXECUTORS AND ADMINISTRATORS (§ 451*)—ACTIONS—DIRECTION OF VERDICT.

In an action by decedent's son against the administrator to recover for services rendered decedent, where there was evidence that the son returned to the home farm to carry it on, and care for his father, upon a mutual understanding between them that the son was to be paid for his services, a directed verdict for the administrator was properly refused.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1879; Dec. Dig. § 451.*]

5. WITNESSES (§ 268*)—CROSS-EXAMINATION.

In an action against an administrator by decedent's son for board and services rendered decedent, where plaintiff claimed that there were mutual transactions between himself and decedent, and had stated an annual account, crediting decedent each year with supplies furnished which were deducted from plaintiff's annual charge for decedent's board, and plaintiff's wife testified that decedent had furnished certain things towards his board, it was error to refuse to allow her to be asked on cross-examination whether she had ever seen any book upon which those things were charged or credited to ascertain the source and extent of her knowledge of the matter about which she had testified.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 932; Dec. Dig. § 268.*]

Exceptions from Addison County Court; Willard W. Miles, Judge.

Proceedings for settlement of the estate of Josiah Cowles. From the allowance by the commissioners thereon of a claim of J. E. Cowles, the administrator appealed to the

county court, where there was judgment for claimant, and the administrator excepted. Reversed and remanded.

J. B. Donoway and J. E. Cushman, for plaintiff. Davis & Russell, for defendant.

TYLER, J. This is an appeal by the administrator of Josiah Cowles' estate from the allowance by the commissioners thereon of a claim in favor of the plaintiff. Assumpsit in the common counts. Pleas, the general issue and statute of limitations.

1. At the trial in the county court the plaintiff offered himself as a witness to prove the items in his specification. He did not claim that he was a competent witness under any exception to P. S. 1590, but he did claim that the defendant had waived the provisions of the statute by calling him as a witness at the hearing before the commissioners. The defendant objected to his testifying upon the ground that he was barred by the statute, and he testified under the defendant's exception. It was competent for the administrator to waive the statute, and permit the plaintiff to testify. *Ainsworth v. Stone*, 73 Vt. 101, 50 Atl. 805. In *Paine v. McDowell*, 71 Vt. 28, 41 Atl. 1042, theatrix called the defendant as a witness, and proved by him the making of the contract, in controversy with a party who had deceased. Held that she thereby waived her right to object to him for incompetency when he was subsequently called by the other side. See *Linsley v. Lovely*, 26 Vt. 123. If there was a waiver and the plaintiff became a competent witness, it was by reason of the following facts that the evidence tended to show: The firm of Davis & Russell, attorneys, had been employed by two of the four heirs to the estate to appear at the hearing before the commissioners. Russell appeared in that capacity, but was not employed by the administrator. The plaintiff having stated his claim and the arrangement and understanding that existed between him and the intestate, Russell requested that he be sworn, which was done, when Russell examined him generally as to the nature and extent of his claim and as to the understanding and arrangement claimed by him to have existed. It appeared that the administrator was present when the plaintiff was sworn and heard him testify; that he made no objection; that the plaintiff's testimony was generally about his account; that the administrator made no inquiries and directed none to be made of the plaintiff with reference to his claim; that he did not employ Russell until after the hearing and then about taking an appeal; that the appeal was taken at the instance of the two heirs whom Russell represented. The court found that the plaintiff was used as a witness before the commissioners at the

request of the defendant, and held that the statutory bar to his testifying was waived, and that he was therefore competent to testify as a witness in his own favor. Mr. Russell represented the interests of two of the four heirs. The administrator represented the interest of all the heirs therefore to an extent the attorney and the administrator represented the same interests. They were alike interested to resist the plaintiff's claim; for, if it were allowed, the distributive shares of the heirs would be diminished. The apparent purpose of Russell's examination of the plaintiff was to gain information concerning his claim, so that the estate might be prepared to defend against it. In this the administrator and Russell had a common interest. By the common-law rule a married woman was incompetent to testify for or against her husband in a civil action, but it is laid down in *Wig. on Ev.* § 2242 (3), that a failure to object upon the calling of the wife to the stand is equivalent to consent. In *Benson v. Morgan*, 50 Mich. 77, 14 N. W. 705, a married woman had sued a firm in which her husband was concerned and called him as a witness in her favor. Held that consent was implied from the defendant's presence in court and failure to object. As was said by the court in *Ainsworth v. Stone*, supra: "The statute is for the benefit of the representatives of the deceased party, and only prohibits a party from being a witness in his own behalf when the other party to the contract or cause of action in issue and on trial is dead. It does not prohibit the representative of the deceased party from waiving the statute, and calling the other party to the contract to testify in his favor." There was no error in the finding that the administrator consented to the plaintiff's testifying before the commissioners; for there was evidence tending to support it.

2. The waiver of the incompetency of the plaintiff as a witness in proceedings before the commissioners bound the defendant in the hearing on appeal. *Green v. Crapo*, 181 Mass. 55, 62 N. E. 956, is authority on this point. There the plaintiff testified without objection in the probate court to a privileged communication between himself and the defendant. In the trial in the superior court objection was raised to the plaintiff's testifying in his own behalf, but the court ruled that the objection had been waived, and the testimony was admitted. The Supreme Court sustained the ruling, saying in the opinion: "The privacy for the sake of which

the privilege was created was gone by the appellant's own consent. * * *

3. There was evidence tending to show that the plaintiff returned to the home farm to carry it on and take care of his father, the intestate, upon a mutual understanding between them that the plaintiff was to be paid for his services. Therefore the defendant's motion for a verdict was properly overruled. *Robinson v. Larabee*, 58 Vt. 652, 5 Atl. 512.

4. The plaintiff introduced his wife as a witness, and she testified that certain things were furnished by the intestate towards his board, which the plaintiff claimed were included in the transactions between himself and the intestate, and which he claimed should go into the adjustment of the accounts between them. The witness testified that in the six years prior to the death of the intestate he turned in one pig, half a beef, and tea and coffee towards his support. She was not inquired of in her direct examination whether these items were made the subject of a book account, nor whether any account or memoranda of the several items and transactions were kept by the parties. On cross-examination the defendant inquired of her whether she had ever seen any book upon which these items were charged or credited. The question was objected to by the plaintiff, and excluded by the court upon the defendant's refusal to inform the court of the purpose of the inquiry. The plaintiff claimed that there were mutual transactions between himself and the intestate. In his specification, which is referred to in the exceptions, he states an annual account and credits the intestate each year with potatoes, pork, beef, tea, and coffee to the amount of \$24.50, aggregating in the six years—1901 to 1906, inclusive—\$195.56, which he deducts from the amount of his annual charges for the same time for boarding the intestate, keeping and use of his horse, and work performed, \$1,512.49. The answer given by the plaintiff's wife in her direct examination related to the items claimed by the plaintiff to have been furnished by the intestate and tended to establish the plaintiff's claim of mutual transactions. The question asked her by the defendant's counsel and excluded was in the line of proper cross-examination for the purpose of ascertaining the source and extent of her knowledge of the matter about which she had before testified.

For the error in denying the right to cross-examine, the judgment must be reversed and cause remanded.

(in Vt. 489)

STATE v. CENTRAL VERMONT R. CO.

Supreme Court of Vermont. Washington. Oct. 30, 1908.)

1. STATUTES (§ 236*)—CONSTRUCTION—REMEDIAL STATUTES.

A remedial statute must be construed liberally to effectuate its purpose.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 817; Dec. Dig. § 236.*]

2. STATUTES (§ 222*)—CONSTRUCTION—CONSIDERATION OF COMMON-LAW PRINCIPLES.

A statute capable of more than one construction must be examined in the light of common-law principles.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 301; Dec. Dig. § 222.*]

3. WORDS AND PHRASES—"AGGRIEVED PARTY."

The phrase "aggrieved party" is not a technical one, and the words therein must be given their natural meaning, and, when used with reference to legal remedies, the words mean one who is injured in a legal sense, and a person aggrieved is one whose pecuniary interest is directly affected by the adjudication.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 273-278; vol. 8, pp. 7569, 7570.]

4. CARRIERS (§ 202*)—CARRIAGE OF FREIGHT—OVERCHARGES—RECOVERY—PERSONS ENTITLED TO SUE—"PARTY AGGRIEVED."

V. S. 3901, authorizing the party aggrieved to recover from a carrier an overcharge for freight, does not permit a buyer to sue a carrier for an overcharge collected from the seller for transporting the goods and included by the seller in the price and paid to him by the buyer; the words "party aggrieved" in their natural sense being the one from whom the overcharge is collected.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906, 909; Dec. Dig. § 202.*]

5. STATUTES (§ 181*)—CONSTRUCTION.

A statute will not be given a construction at variance with established rules of procedure unless the intention of the Legislature is apparent, and the rules of the common law will not be changed by doubtful implication, nor overturned except by clear and unambiguous language.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

Exceptions from Washington County Court; Eleazer L. Waterman, Judge.

Action by the state against the Central Vermont Railroad Company. Declaration adjudged sufficient on demurrer, which was overruled, and defendant excepts. Reversed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Clarke C. Flitts, Atty. Gen., for the State. C. W. Witters and H. H. Powers, for defendant.

MUNSON, J. It is provided by V. S. 3901, that "a railroad corporation whose railroad is located in the state, shall not charge a larger sum for freight, merchandise, or passengers thereon for a less distance, to or from a way station on said road, than is charged for a greater distance," and that, "in case of a violation of the provision, the excess

so charged may be recovered from said corporation, by the party aggrieved, in an action for money had and received, with costs." The state, the plaintiff in the case, supplied its asylum in Waterbury with coal bought of the George Hall Coal Company, and shipped by that company from Alburgh to Waterbury over the defendant's line. The defendant charged and collected from the George Hall Company a larger sum for freight on coal shipped from Alburgh to Waterbury than it charged for hauling coal from Alburgh through Waterbury to Montpelier. This excess of freight charge was added by the George Hall Company to the price of its coal, and was paid by the state to the George Hall Company as a part of the purchase price of the coal. The excess so charged the state now seeks to recover as money had and received by the defendant for the use of the plaintiff.

The question is whether the plaintiff is an aggrieved party. The statute is clearly remedial, and remedial statutes are to be construed liberally to effectuate their purpose. But all statutes capable of more than one construction are to be examined in the light of common-law principles. The expression "aggrieved party" is not a technical one, and the words are to be given their natural meaning. *Robinson v. Curry*, 7 Q. B. D. 465, 470. But, when used with reference to legal remedies, they must be taken to mean one who is injured in a legal sense. *Green v. Blackwell*, 32 N. J. Eq. 768, 772. The cases are generally those involving the right of appeal. It is said with reference to this right that a person aggrieved is one whose pecuniary interest is directly affected by the adjudication. *Andress v. Andress*, 46 N. J. Eq. 528, 22 Atl. 124; *Wiggin v. Swett*, 6 Metc. (Mass.) 194, 39 Am. Dec. 716. It is said in this state, with reference to probate proceedings, that the persons entitled to appeal as aggrieved or interested persons are those who have some legal interest that may be enlarged or diminished by the decree. *Hemmenway v. Corey*, 16 Vt. 225; *Woodward v. Spear*, 10 Vt. 420. There are a few cases where the term has been construed as used in statutes providing for the recovery of penalties or damages. See 1 Words and Phrases, 273. Under statutes imposing a penalty for selling liquor to minors, it is held that the person aggrieved is the father or mother of the minor, or the person standing in loco parentis. *Peavy v. Goss*, 90 Tex. 89, 37 S. W. 317; *Qualls v. Sayles*, 18 Tex. Civ. App. 400, 45 S. W. 839. Where a statute made the unlawful furnisher of intoxicating drinks liable for any injury to person or property resulting from a furnishing in terms treated as sufficiently broad to cover losses from expenditures of money and time, and provided for the recovery of damages by any one aggrieved, it was held that the father of an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

unmarried adult son, who had ceased to live with him and was not his servant, could not recover for money and time spent in curing the son when made helpless by an accident which resulted from the drinking of liquor unlawfully furnished. *Veon v. Creation*, 138 Pa. 48, 20 Atl. 865, 9 L. R. A. 814. Where an early statute required telegraph companies to transmit messages with impartiality and good faith, and in the order in which they were received, and provided a penalty to be recovered by the person whose dispatch was neglected or postponed, and a later statute, covering the same subject-matter, gave a like penalty to any party aggrieved, the court considered this language insufficient to extend the remedy as determined by its decisions under the earlier statute, and held that the sender of the message was the only one who could recover the penalty. *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 15 N. E. 845.

The question here is regarding the right to sue. The right to recover an overcharge is given to the party aggrieved. The party aggrieved in the natural sense is the one from whom the overcharge is demanded and collected. Does the fact that this person refrains from asserting his remedy, and recoups himself by an adjustment of prices based on the charges exacted, make each one of his purchasers a party aggrieved within the meaning of the statute? The parties thus aggrieved have no relations with the railroad company, and suffer but indirectly from the action of the company through the ordinary operation of the laws of trade. This plaintiff is injuriously affected as every member of the community is injuriously affected who purchases an article of merchandise at an increased price because of the payment by the dealer of an excess of freight charges. If such a payment of freight charges in the form of purchase price entitles the payor to recover from the railroad company, different persons, affected by the action of the company in different ways, are entitled to sue it for the same money. It can hardly be denied that a provision for the recovery of an overpayment points to the parties in whose dealings the overpayment was made, and to the payor therein as the party aggrieved. The loss of the plaintiff flows directly from the action of its vendor, and only indirectly from the defendant's overcharge. It may be substantially injured, but it cannot be brought within the remedy without holding that the right to sue follows the transfer of the property wherever it may be sold with the freight charges transformed into purchase price. A statute is not to be given a construction at variance with established rules of procedure unless the intention of the Legislature is apparent. "The rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unam-

biguous language." *Dewey v. St. Albans Trust Co.*, 57 Vt. 332.

Judgment reversed, demurrer sustained, declaration adjudged insufficient, and cause remanded.

(31 Vt. 468)

STATE v. CENTRAL VERMONT RY. CO.

(Supreme Court of Vermont. Washington.

Oct. 31, 1908.)

1. CARRIERS (§ 199*)—CARRIAGE OF FREIGHT—OBLIGATION TO SHIPPERS.

At common law a carrier of freight is not bound to treat all shippers alike. It must carry for every shipper at a reasonable rate. It may favor any particular shipper or class, where the circumstances warrant a distinction, subject to the limitation that the discrimination must be reasonable. A carrier cannot be charged with allowing undue preferences to a class, where the character of the shipments justify a distinction.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 902; Dec. Dig. § 199.*]

2. CARRIERS (§ 12*)—FREIGHT—CHARGES—LEGISLATIVE CONTROL.

The legislative department, the State Legislature as to commerce within the state, and Congress as to interstate commerce, may prescribe rates to be charged by carriers, subject to the limitation that the rates fixed shall not require services without reasonable compensation.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 7-11; Dec. Dig. § 12.*]

3. STATUTES (§ 205*)—CONSTRUCTION—LEGISLATIVE INTENT.

The court in construing a statute must consider every part of it.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 282; Dec. Dig. § 205.*]

4. STATUTES (§ 225*)—CONSTRUCTION—CONNECTION WITH OTHER STATUTES.

A statute must be construed in connection with other acts in pari materia.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 303; Dec. Dig. § 225.*]

5. CARRIERS (§ 13*)—REGULATION OF CHARGES—STATUTES—CONSTRUCTION—"REASONABLE AND EQUAL TERMS, FACILITIES, AND ACCOMMODATIONS."

Acts 1882, p. 47, No. 36 (V. S. 3902-3904), requiring railroads to give all persons "reasonable and equal terms * * * facilities and accommodations" for the transportation of freight, etc., must be construed in the light of Acts 1882, p. 47, No. 37 (V. S. 3896), authorizing a railroad corporation to establish rates, etc., and, when so done, it requires a railroad corporation to make rates reasonable and equal as required by the common law, and it is but declaratory of the common law defining the rights and obligations of carriers; the words "facilities and accommodations" relating to the incidents of transportation, the word "terms" signifying rates.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 13.*]

For other definitions, see *Words and Phrases*, vol. 3, p. 2637; vol. 7, p. 5976; vol. 8, pp. 6922, 6923.]

6. WORDS AND PHRASES—"ON REASONABLE TERMS."

The phrase "on reasonable terms" in common parlance means the charges for services rendered or the price of goods sold and delivered.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. CARRIERS (§ 19*) — REASONABLE RATES — EQUALITY—QUESTION FOR JURY.

What is reasonable equality in the rates for the carriage of merchandise of the same description between the same points is a question of fact.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 19.*]

8. CARRIERS (§ 13*)—CARRIAGE OF FREIGHT—UNJUST DISCRIMINATION—STATUTES.

The mere fact that a carrier discriminated in favor of a shipper of coal by carrying coal for it between designated points at 50 cents less per ton than it granted to any other shipper does not show a violation of Acts 1882, p. 47, No. 36 (V. S. 3902-3904), requiring carriers to give all persons reasonable and equal terms and accommodations, for the rates charged may have been reasonable and equal within the law, though less in amount.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 13.*]

9. CARRIERS (§ 19*)—DISCRIMINATION—"PARTY AGGRIEVED."

One suffering a loss of 50 cents per ton on coal purchased by it by reason of the fact that a carrier transporting the coal charged him 50 cents per ton more than he charged another shipper is a "party aggrieved" within V. S. 3904, making a carrier liable to the party aggrieved for overcharges, in violation of section 3902.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 19.*]

For other definitions, see Words and Phrases, vol. 1, pp. 273-278; vol. 8, pp. 7569, 7570.]

Exceptions from Washington County Court; *E. L. Waterman*, Judge.

Action by the State against the Central Vermont Railway Company for damages under V. S. 3902-3904. A demurrer to the declaration was overruled, and defendant excepts. Reversed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

C. W. Wilters and H. H. Powers, for plaintiff. Clarke C. Fitts, Atty. Gen., for the State.

TYLER, J. This is an action on the case brought by the state of Vermont to recover of the defendant the damage that the plaintiff claims to have sustained by reason of the defendant's alleged violation of sections 3902 and 3904 of the Vermont Statutes. Section 3902 reads: "A person or corporation operating a railroad shall give to all persons reasonable and equal terms, benefits, facilities and accommodations for the transportation of themselves, their agents and servants, and of merchandise and other property upon such railroad; and for the use of the depots, buildings and grounds thereof; and, at any point where such railroad connects with another railroad, reasonable and equal facilities of interchange." Section 3904 provides that a person or corporation violating these provisions shall be liable to the party aggrieved for all damages sustained by reason of such violation in an action on the case. The amended declaration alleges that ever

since August 1, 1900, the defendant has owned and operated a railroad from Alburgh to Waterbury, in this state; that the plaintiff has been obliged to buy and consume large quantities of coal for its Asylum for the Insane at Waterbury, which coal had to be shipped over said railroad from Alburgh, as that was a distributing point; that it was the defendant's duty to grant to all persons, including the plaintiff, equal terms and rates of freight for the carrying and shipment of coal over its road between said points; that, in violation of its duty, the defendant had granted to George Hall Coal Company, a corporation of Ogdensburg, N. Y., secret, lower, and unequal terms for the carrying and shipment of coal over its road, between said points, than it had given to the plaintiff or to any other person or corporation, to wit, 50 cents per ton less, and that during all that time it had carried coal from Alburgh to Waterbury for said company at said preferred rates; that the plaintiff's only means of obtaining coal was by said railroad; that by means of said preference the George Hall Coal Company was able to, and did, crush out and prevent competition in the business of selling and delivering coal at Waterbury, and the plaintiff has been compelled to and has bought all its coal of said coal company at 50 cents more per ton, and has thus been aggrieved by the defendant's violation of the law, and by its failure to grant to the plaintiff and others equal terms and rates of freight for carrying coal, and that an action has thereby accrued to the plaintiff under said statute. The defendant having demurred to the amended declaration, the question is whether its allegations set out a cause of action under the statute.

At common law a common carrier of freight was not bound to treat all shippers alike. It was only bound to carry for every shipper at a reasonable rate. It might favor any particular shipper or class of shippers where the circumstances of the case warranted a distinction, as where the preferred shipper or class offered goods in larger quantities or under such conditions that they could be transported at less expense. But there is always the limitation that the discrimination or preferences must be reasonable, and the terms must not be unreasonably unequal. It is equally well settled that it is within the power of a state Legislature, with reference to commerce within the state, and of Congress, with reference to interstate commerce, to prescribe the rates to be charged by public carriers for their services, so long as the charges fixed do not require that the services rendered shall be without reasonable compensation. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. But it is held that, though the power of the Legislature to prescribe the charges of a railroad company is beyond question, it is not an unlimited

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

power. It is not a power to destroy or to compel the doing of a service without reward, or to take private property for public use without just compensation or without due process of law. *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247. See numerous cases cited in the opinion in *Smyth v. Ames*, 169 U. S. 523-525, 18 Sup. Ct. 424, 42 L. Ed. 841; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377; *Cleveland, C., C. & St. L. R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593; *Louisville & N. R. Co. v. Commonwealth*, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457. What was the legislative intent in this case? In arriving at the intent of the Legislature, not only must the statute in every part be considered, but, when there are several statutes in pari materia, they must all be considered together. The Legislature at the session of 1882 passed an Act No. 37 (Laws 1882, p. 47), which provides that: "A railroad corporation may establish for their sole benefit a toll upon all passengers and property carried on their railroad at such rates as are determined by the directors of the corporation, and may regulate such conveyance and transportation, the weight of loads, and other things in relation to the use of the road as the directors determine." This section provides, however, that the Supreme Court may, upon petition and hearing, alter or reduce the toll of any railroad operated in this state. This act was approved November 28, 1882, took effect February 1, 1883, and gave the directors authority to fix the toll upon all property carried on their road. It now constitutes section 3896, V. S. Act No. 36 of that year, which is embodied in sections 3902, 3903, and 3904, was approved on the following day, and took effect upon its passage. These two statutes passed at the same session and so nearly contemporaneous must be construed together, or rather the later one must be construed in the light of the earlier one, which needs no construction. No. 36 is entitled, "An act to prevent unjust discrimination by railroad corporations." By its express terms it relates to discrimination in the transportation of persons, merchandise, and other property by railroads. The words, "facilities and accommodations," obviously relate to the shipping, care, and delivery of merchandise; in short, to all the incidents of transportation. If, as the defendant claims, the word "terms" is inapt to signify rates or charges, in common parlance it may have the same meaning in the sense in which people speak of the terms of a contract, meaning the things to be done and the compensation for doing them. "On reasonable terms" is a common expression, meaning the charges for services rendered or the price of goods sold and delivered. From the position of the word in the section, and the adequacy of the other words to provide for the incidents

of transportation, it is difficult to understand what other purpose the Legislature could have had in using it than the regulation of freight charges. That this was the purpose is further indicated by the language of the second section: "Two or more corporations whose roads connect shall not charge or receive for the transportation of freight to any station on the road of either of them a greater sum," etc. The second section further provides that: "In the construction of this section the sum charged or received for the transportation of freight shall include all terminal charges," etc. The regulation of charges for the transportation of persons and property seems to have been one purpose of the act, whether the transportation is over one line or connecting lines of road. That the word "terms" used in section 3902, providing that a person or corporation operating a railroad shall give to all persons reasonable and equal terms, benefits, etc., includes rates, is conclusively shown by section 3904, providing that section 3902 shall not be construed so as to prevent the issuing of excursion, mileage, and commutation tickets, for the issuing of such tickets is certainly the fixing of rates for transportation. The conclusion is therefore inevitable that the word "terms" in Act No. 36, V. S. 3902, includes charges for transportation. The requirements of that act are not in conflict with those of No. 37, which gives directors authority to fix rates subject to revision by this court. Manifestly No. 36 was passed to enforce upon directors the obligation to make rates reasonable and equal, as required by the common law. In considering these acts it must be observed that No. 36 contains the word "reasonable" as well as "equal." It reads: "Every person or corporation operating a railroad shall give to all persons reasonable and equal terms," etc. Therefore the act must be construed so as to give force and effect to both words, if possible.

The General Statutes of New Hampshire of 1870 (chapter 149, § 2) contains a provision essentially like the statute upon which this action is brought. In *McDuffee v. P. & R. R. Co.*, 52 N. H. 430, 13 Am. Rep. 72, an action brought upon that statute, it was held that the statute was declaratory of the common law, and not in derogation of it. The court said in the course of an elaborate opinion: "The common and equal right is to reasonable transportation service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable because it is unequal in a certain narrow, strict, and literal sense; but it is not a reasonable service, or a reasonable price, which is unreasonably unequal." The court said in *Concord & Portsmouth R. v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181: "Absolute equality in the price rate per ton for the carriage of all merchandise of the same description, over equal distances, is not required, but a

price rate which shall be reasonably equal for all. By enacting that 'the rates shall be the same for all persons, and for like descriptions of freight between the same points,' the Legislature could not have intended an equality that is absolute, fixed, and unvarying, if such equality is unreasonable." The court proceeded to say that the whole section must be considered in order to find the true construction; that the first clause, requiring that the rates shall be the same, is explained by the second clause, requiring that "all persons shall have reasonable and equal terms"; that, "taken together, it is plain that no arbitrary rule of absolute equality, but one of reasonable and just equality, was intended." The court further said that custom in all branches of business always has been to move a large amount of a given commodity, in one parcel or in a given time, at a less price per pound, yard, or ton than a smaller quantity of the same commodity delivered in smaller parcels at different times; that the expense of handling, carrying, and storing the smaller amount is greater pro rata than that of the same operations upon the larger amount in one body, and that a discrimination in favor of the larger dealers is not inequality, but reasonable equality.

In *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712, the court laid down the broad rule that, when the conditions and circumstances are identical, the charges to all shippers for the same service must be equal; but it was further held that a carrier may lawfully depart from the standard or usual rates if such rates are reasonable, and the deviation is in favor of particular customers for special reasons not applicable to the whole public. That court went to the extent of holding that a carrier may give reduced rates to customers stipulating to give it all their business and refuse those rates to others who are not able or willing to so stipulate, provided the charges exacted from those not joining in the stipulation are not excessive or unreasonable; but it is not necessary to carry the rule to that extent in the present case. In *Fitchburg R. Co. v. Gage*, 12 Gray (Mass.) 399, the court laid down the rule of reasonable compensation, and said that if, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief. It was decided in *Concord & Portsmouth Railroad v. Forsaith*, supra, that a railroad company is not bound to carry large and small quantities of the same kind of merchandise between the same points at the same price. The same rule is stated in *Avinger*

v. So. Car. Ry. Co., 29 S. C. 265, 7 S. E. 498, 13 Am. St. Rep. 716. See *Root v. L. I. R. Co.*, 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. Rep. 643, cited in 11 Am. & Eng. Ency. 643, where in the notes the rule is stated that a railway company may discriminate in favor of companies shipping large quantities of freight, that all discriminations are not necessarily unreasonable or unjust, and that only those that are unreasonable or unjust are unlawful. In the main case there was a discrimination in carrying coal, and it was held that it could not be determined as matter of law that the discrimination was unjust. In 6 Cyc. 498 the rule is given that there may be a discrimination in rates when founded on a reasonable difference in the conditions attending the different shipments. The rule is recognized in *Sargent v. B. & L. R. Co.*, 115 Mass. 416, under a statute containing the same requirements as our Act No. 36. It may be considered a well-established rule of the common law that the carrier cannot be charged with allowing undue preferences to a class of customers where the character of their shipments justifies a distinction, and it is equally well settled that what is reasonable equality in the rates for the carriage of merchandise of the same description between the same points, and whether the rates are reasonably equal are questions of fact. Upon the authorities it must be held that V. S. 3902, Act No. 36, is declaratory of the common law. The only averment in the declaration of a violation of the statute is that the defendant discriminated in favor of the George Hall Coal Company by shipping coal for it between certain points on the defendant's road at 50 cents less per ton than it granted to any other person or corporation or to the state of Vermont. The fact that the rates charged in this case were less than those charged to others does not entitle the plaintiff to a judgment; for, as has been shown, the rates charged may have been reasonable and equal within the meaning of the law, though less in amount. The demurrer admits the allegation that the plaintiff suffered a loss of 50 cents per ton on coal purchased by it, which brings it within the definition of "aggrieved person"—one whose rights have been injuriously affected.

Judgment reversed, demurrer sustained, declaration adjudged insufficient, and cause remanded.

(81 Vt. 506)

STATE v. RUTLAND R. CO.

SAME v. CENTRAL VERMONT RY. CO.
(Supreme Court of Vermont. Grand Isle. Nov. 21, 1903.)

1. STATUTES (§ 217*)—CONSTRUCTION—LEGISLATIVE HISTORY—CONTEMPORANEOUS PRACTICAL CONSTRUCTION.

The court in construing a statute, the meaning of which is in doubt, will consult the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

legislative history of the statute and any contemporaneous practical construction given by officers charged with its application and enforcement.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 217.*]

2. EVIDENCE (§ 29*)—JUDICIAL NOTICE.

The court will take judicial notice of the legislative history of a statute and contemporaneous practical construction given by officers charged with its enforcement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 37; Dec. Dig. § 29.*]

3. STATUTES (§ 167*)—REPEAL BY REVISION.

A statute which is a revision of prior statutes on the subject, and which is intended as a substitute for the prior statutes, and which declares that the liability accruing under the prior statutes before a designated date shall not be affected, repeals the prior statutes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 242; Dec. Dig. § 167.*]

4. STATUTES (§ 218*)—CONSTRUCTION—CONTEMPORANEOUS PRACTICAL CONSTRUCTION.

Where the language of a statute is ambiguous and susceptible of two reasonable interpretations, weight will be given to the doctrine of contemporaneous practical construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 294; Dec. Dig. § 218.*]

5. STATUTES (§ 212*)—CONSTRUCTION—PRESUMPTIONS.

It is presumed that the Legislature, in adopting a statute, knew of the prior law on the subject, and of the practical construction it had received.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 289; Dec. Dig. § 212.*]

6. STATUTES (§ 206*)—CONSTRUCTION—EFFECT OF WORDS.

Effect must be given, if possible, to every word, clause, or sentence of a statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. § 206.*]

7. TAXATION (§ 393*)—RAILROADS—STATUTES—CONSTRUCTION.

P. S. 713, 714, 717, imposing a tax for each fiscal year on the appraised value of corporate franchises, etc., payable semiannually, providing that for each fiscal year a railroad corporation may in lieu thereof, at its option, pay a graduated gross earnings tax, and requiring returns of the gross earnings for semiannual periods, etc., when considered in the light of the legislative history of railroad taxation and the contemporaneous construction given by administrative officers, and when considered in connection with sections 694 and 695, providing for the imposition of additional taxes and the refunding of excessive taxes, require that the rate of the gross earnings tax shall be determined on the gross earnings during the fiscal year for which the tax is to be paid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 657; Dec. Dig. § 393.*]

8. TAXATION (§ 840*)—RAILROADS—AD VALOREM TAX—GROSS EARNINGS TAX—OPTION.

A railroad company exercising its option to pay the gross earnings tax imposed by P. S. 714, in lieu of the ad valorem tax imposed by section 713, which erroneously computed the amount of the gross earnings tax, and which did not pay the full amount of the tax computed, is not liable for the ad valorem tax, since section 694 provides a remedy by imposing an additional tax for which the corporation is liable, and for nonpayment of which it is sub-

ject to the same penalties as for neglecting annual or semiannual taxes.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 840.*]

Exceptions from Grand Isle County Court; Seneca Haselton, Judge.

Actions by the State against the Rutland Railroad Company and against the Central Vermont Railway Company. There were judgments for the state in each action rendered on an agreed statement, and defendant in each action excepts. Judgment in each case reversed.

Argued before ROWELL, C. J., and MUNSON and WATSON, JJ., and MILES, Superior Judge.

C. W. Witters, for Central Vermont Ry. Co. H. Henry Powers, for Rutland Railroad Co. Clarke C. Fitts, Atty. Gen., and Hale K. Darling, for the State.

WATSON, J. By P. S. 713, for each fiscal year beginning with the 1st day of January, a tax is assessed upon the property and corporate franchise of each person or corporation owning or operating a railroad located in whole or in part within this state at the rate of 1 per cent. of the appraised value thereof, payable semiannually. By section 714 for each such year a person or corporation thus owning or operating a railroad so located may, in lieu of the tax assessed in the preceding section, pay to the state in the manner and at the times specified in the third following section (717) 2½ per cent. of such part of the entire gross earnings derived from all sources as does not exceed \$2,000 per mile of the roadbed of such railroad located within this state with provisions for graduated rates according to specified increase in the gross earnings per mile. And by section 717 such person or corporation accepting the provisions of section 714 shall make returns of the gross earnings of such railroad for semiannual periods specified, and shall within 30 days thereafter pay to the state treasurer the percentage of such gross earnings provided in the section last named.

One question is whether under section 714 the tax is to be rated according to the gross earnings per mile for the full fiscal year, or only for the semiannual period on which the particular payment is to be based. The meaning of the statute in this respect being in doubt, we consult the legislative history of the law taxing railroads in this state during the last quarter of a century, and any contemporaneous practical construction given by the officers charged with the application and enforcement of its provisions—all of judicial notice—as aids in arriving at the true intention of the statute under consideration. The first enactment of a similar nature that has come to our attention is Act No. 1, p. 6, Laws 1882, of which section 11

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

provided that every corporation, person, or persons owning or operating a railroad in this state should pay a tax on the entire gross earnings of such railroad if situated wholly within this state; and, if situated partly within and partly without the state, the tax should be upon such proportion of the entire gross earnings as the mileage of the trains run in the state bore to the mileage of all trains run on the entire line of road. By section 12 the tax was to be rated according to the earnings per mile of road in this state, and assessed at the rate of two per cent on the first \$2,000 a mile of total earnings if less than that sum, and at a graduated rate on the gross earnings above that sum, in this respect essentially like the law now in force. And by section 13 the tax was payable one-half semiannually, and to be based upon the gross earnings during the six months terminating at times specified. The law of section 12 was re-enacted with some additions as a part of Act No. 5, p. 7, Laws 1884. However, as far as material here, the law continued the same. The tax thereunder was not in terms characterized as either annual or semiannual, yet from the time of its original enactment until the fall of 1890, when the law so far as it sought to tax earnings derived from interstate commerce was declared unconstitutional (*Vermont & Can. R. R. Co. v. Cen. Vt. R. R. Co.*, 63 Vt. 1, 21 Atl. 362, 731, 10 L. R. A. 562; s. c. 159 U. S. 630, 16 Sup. Ct. 113, 40 L. Ed. 234), the successive commissioners of state taxes construed the statute as laying a semi-annual tax and acted upon this construction in its execution. Act No. 3, p. 5, Laws 1890, entitled "An act to provide a revenue for the payment of state expenses," was approved November 26th and took effect from its passage. That act was a revision of the whole subject-matter of taxation for the purpose named in the title, and was intended as a substitute for the law of 1882 and amendments and additions thereto; and the latter law, as far as it related to taxes on the gross earnings of railroads—beyond this we have no occasion to speak—was by implication repealed thereby (*Barton National Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176), except that by section 46 of the new act the liabilities of companies and persons to pay to the state taxes which accrued prior to July 1, 1890, under the law then existing were not to be affected. That the Legislature intended such a repeal of the previous law is clearly shown by thus expressly continuing it in force as to the liabilities for taxes imposed under it. By the act of 1890 provision was made for the assessment of a tax upon the appraisal of the property, taking into consideration the corporation franchise of a railroad in this state, payable semiannually (section 14), with the further provision that, in lieu of the tax thus assessed, the owner or operator of such railroad might "annually" pay to the state a named arbitrary percentage on the gross earn-

ings thereof. Section 17. And, if the provisions of this optional privilege were accepted, semiannual returns of the gross earnings were required, and within a time limited thereafter the percentage paid for the period covered by said returns. Section 18. The law of these sections became sections 19, 20, 21, Act No. 20, p. 20, Laws 1902, without change material here, except that in section 19 the tax on the appraisal was in terms also to be "annually" assessed. Nor so far as material here was the law of 1902 changed by Act No. 29, p. 30, Laws 1904, except that, instead of the provision being as before that such optional tax might be paid "annually," it was "for the fiscal year beginning with the first day of January, 1905, and for each year thereafter;" and, if such option for the first six months of the year was not accepted, it could not be for the rest of the year. Section 5. In 1906 the statute was amended to read as it now does with some immaterial change of language in the general revision. Laws 1906, p. 35, No. 37, § 1; P. S. 714. The phrase, "for the fiscal year," etc., was retained, and an optional privilege was given to pay graduated rates on the gross earnings in principle like the law of 1882 and 1884, in lieu of the regular tax assessed on the appraisal with the further provision, which was first contained in the Act of 1904, in effect limiting the right of option to its exercise for the entire year.

It is well settled that, where the language of a statute is ambiguous and susceptible of two reasonable interpretations, weight is given to the doctrine of contemporaneous practical construction. In *re National Guard*, 71 Vt. 493, 45 Atl. 1051; *State v. Stimpson*, 78 Vt. 124, 62 Atl. 14, 1 L. R. A. (N. S.) 1153; *Houghton v. Payne*, 194 U. S. 88, 24 Sup. Ct. 590, 48 L. Ed. 888; *Whittemore v. People*, 227 Ill. 453, 81 N. E. 427. Under this doctrine the practical construction given to the law of 1882 and 1884 by the administrative officers whose duty it was to carry it into execution for the length of time before stated would be entitled to great respect, and perhaps would be controlling in the interpretation of the statute here under consideration, did not the latter, viewed in the light of legislative history and the practical construction given to the earlier law, contain indicia of an intention by the Legislature to give it a different meaning. As before observed, the law of 1882 and 1884 was without terms expressly characterizing the tax assessed thereby as either annual or semiannual as distinguished from the other, and the language in this respect may well be said to have been of doubtful import. It is presumed that the Legislature was informed of this law and of the practical construction it had received, giving the tax a semiannual character, when the subsequent acts were passed. *Suth. Stat. Const.* (2d Ed.) §§ 403, 499. In the light of this information it enacted the law of 1890, expressly providing

that payment of an arbitrary percentage on the gross earnings might "annually" be made in lieu of the tax on the appraisal, and the same language was used in the act of 1902. In the amendment of 1904 the language was changed from the word "annually" to "for the fiscal year beginning," etc., words equally or more definite, with a further provision declaring that no right to exercise such option in the second half of the year should exist except that it had been exercised in the first. Thus by the two provisions an intention is indicated to make the optional tax an annual one rather than semiannual. The same provisions were carried forward into the law of 1906, which changed the previously existing optional right, "for the fiscal year beginning," etc., to pay an arbitrary rate per cent. on the gross earnings, to the same right "for the fiscal year beginning," etc., to pay graduated rates on the gross earnings in lieu of the regular tax on the appraisal, also for the fiscal year. In view of the law of 1882 and 1884 and its known practical construction, the insertion of the two above-named provisions in the subsequent acts, as before noticed, can reasonably be accounted for only as an intention by the lawmakers to make the tax an annual one instead of semiannual, as by the earlier law under the construction given. To hold that such was not the effect would be to render the words so inserted without force, a holding not in harmony with the elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. And, the tax being for the fiscal year, to make the provision therefor effectual, the rate, by implication, is to be determined by the gross earnings during the same period. The phrase "in the manner and at the times specified in the third following section" (P. S. 717) does not indicate otherwise; for that section provides only for returns of the gross earnings on which to base the semiannual payments, and specifies the times within which such payments shall be made. We hold, therefore, that the rate is to be determined upon the gross earnings during the fiscal year for which the tax is to be paid.

It is said, however, that as a practical fact the gross earnings of a railroad are not uniformly the same between the two six-months periods of the year, consequently under the above construction there might be an excess over the true amount by law to be paid at the end of the first semiannual period; that it is hardly probable that the Legislature has passed a law taking more of the taxpayer's money than it ought for the sake of returning it at the end of the year; and that, on the other hand, if the rate is determined by the gross receipts for each six-months period, there can be no such thing as an overpayment during the fiscal year. It is true that, if the rate is determined by the gross earnings for semiannual periods, the exact amount required by law to be paid can al-

ways be ascertained, while under the construction given there may be an overpayment at the end of the first half of the year, or the amount paid may be too small. Yet the force of this argument is in support of the construction here given, since by making provision for the refunding of any excess paid (P. S. 693), and for an additional tax in case the Commissioner finds that owing to the incorrectness of a return, or any other cause, a tax paid is too small (P. S. 694), manifestly the Legislature contemplated that there might be such a condition of things as to make the law of these sections applicable.

The facts of record show that the defendant in each case duly and seasonably elected to accept the provisions of section 714, and that the Rutland Railroad Company paid to the state the amount of the tax computed with the rate determined by the gross earnings of the respective semiannual periods on which the several payments were based, instead of the amount computed with the rate determined by the gross earnings for the full fiscal year, as required by the statute under the construction here given; that the Central Vermont Railway Company computed the tax with the rates determined in the same way, and paid to the state the major part, but not the full amount, of the tax so computed. The state contends that, since in each case the payments made were based upon an erroneous method of computation, the defendants have not legally availed themselves of the option, and that consequently they are liable for taxes on the appraisal of their property and corporate franchises under section 713. In support of this position, it is argued that section 714 creates no legal liability on the defendants' part to pay the sum therein provided for in lieu of the tax on the appraisal, that a payment thereof is purely voluntary, and that no method is provided whereby the state may enforce it. But the fact that payment upon the gross earnings was optional did not in itself make the payments so made voluntary. The defendants were by statute obliged to pay a tax, and it would be on the appraisal unless they accepted the option given them also by statute to pay on the gross earnings. The payment of the percentage specified was none the less mandatory under the optional provision when accepted than was the tax on the appraisal had the option not been exercised. In either form money paid is a tax.

In principle the effect of this optional right is not unlike that under consideration in *Baker v. Sherman*, 77 Vt. 167, 59 Atl. 167. There in a former suit between the same parties, upon the same cause of action, the defendants after verdict moved in arrest of judgment, which motion was finally sustained in this court, and the declaration held bad. The court granted leave to amend and a new trial on terms imposed, and ordered that, if a new trial was not wanted on the terms imposed, judgment should be arrested. The

case being remanded to the county court, the plaintiffs elected to submit to an arrest of judgment rather than to amend the writ and proceed to a new trial on the terms imposed. A new suit was then brought for the same cause of action, and by the plea of the statute of limitations and pleadings subsequent thereto the question whether the plaintiffs voluntarily abandoned the former suit was put in issue. The defendants contended that the election between the two courses made the election to submit to an arrest of judgment a voluntary abandonment of the suit. In holding to the contrary the court said: "But it is to be observed that this was not a case in which the plaintiffs could do either or neither of two things. They sought to hold the verdict which they had obtained, but were compelled to abandon it and to take one of two courses, both of which were against their will. Under such circumstances the taking of one course rather than the other does not make the course taken voluntary in any proper sense. * * * In submitting to an arrest of judgment when in a dilemma not of their own seeking but forced upon them, the plaintiffs were acting under judicial compulsion." Section 694 of the statute, to which reference has already been made, provides ample remedy by requiring the commissioner in case he finds that owing to the incorrectness of a return, or any other cause, a tax paid is too small, to assess an additional tax sufficient to cover the deficit, and, if the additional assessment is not paid within the time therein specified, the person or corporation against whom it is assessed becomes liable to the same penalties as for neglect to pay annual or semiannual taxes.

It follows that on the agreed cases the state is not entitled to recover in either suit.

In each case judgment reversed, and judgment for the defendant, without costs.

(11 Vt. 420)

E. D. KEYES & CO. v. UNION PAC. TEA CO.

(Supreme Court of Vermont. Rutland. Oct. 8, 1908.)

1. PRINCIPAL AND AGENT (§ 103*)—POWERS OF AGENT—CONTRACT OF AGENCY—CONSTRUCTION.

Defendant's branch store was in charge of a manager, who conducted the business under a contract providing that he should have general charge of the sale of defendant's merchandise, should sell only the merchandise intrusted to him, and authorizing him to incur expenses for salaries of employes, commissions of salesmen for goods, the hire of horses and wagons for delivering merchandise, etc., and other petty items necessary to maintain the store and prosecute the business, and further providing that he should have no authority to subject defendant to any liability, except as thereinbefore expressly declared, and that expenses and disbursements not named therein should be incurred only by express authority from defendant.

Held, that the manager was not authorized to purchase goods to replenish the stock.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 278; Dec. Dig. § 103.*]

2. PRINCIPAL AND AGENT (§ 103*)—POWERS OF AGENT—PURCHASES, SALES, AND CONVEYANCES—IMPLIED AUTHORITY.

Authority of an agent to buy cannot properly be inferred from an authority to sell.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 278; Dec. Dig. § 103.*]

3. PRINCIPAL AND AGENT (§ 124*)—POWERS OF AGENT—IMPLIED AUTHORITY—CONDUCT OF PRINCIPAL—QUESTIONS FOR JURY.

Whether defendant's agent had so conducted the business by permission of defendant as to authorize him to purchase certain goods of plaintiff *held*, under the evidence, a question for the jury.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 724; Dec. Dig. § 124.*]

4. PRINCIPAL AND AGENT (§ 170*)—AUTHORITY OF AGENT—UNAUTHORIZED ACTS—RATIFICATION.

A principal who, with knowledge that his agent, in violation of his authority, is purchasing goods for use in the principal's business, fails to dissent and notify the seller thereof in a reasonable time, will be taken as assenting to the agent's acts.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 638; Dec. Dig. § 170.*]

5. PRINCIPAL AND AGENT (§ 170*)—POWERS OF AGENT—PURCHASES, SALES, AND CONVEYANCES—IMPLIED AND APPARENT AUTHORITY—EVIDENCE.

Where a principal with knowledge that his agent, in violation of his authority, is purchasing goods for use in the principal's business fails to dissent and notify the seller within a reasonable time, such silence is evidence of authority on the agent's part to make like purchases in the future, and before notice of want of authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 638; Dec. Dig. § 170.*]

6. PRINCIPAL AND AGENT (§ 14*)—IMPLIED AGENCY.

It is the prior conduct of the principal that affords ground to infer the continuance of the agency in the particular business.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 27½; Dec. Dig. § 14.*]

7. PRINCIPAL AND AGENT (§ 137*)—POWERS OF AGENT—ESTOPPEL OF PRINCIPAL TO DENY AUTHORITY OF AGENT.

The authority of an agent is enlarged by implication as to third persons, if the principal allows him to act as his agent, beyond his authority, without objection, and in such case the principal is bound by estoppel to those dealing with the agent as such, within the apparent scope of his authority, without knowledge of want of authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 492; Dec. Dig. § 137.*]

Exceptions from Rutland County Court; Eleazer L. Waterman, Judge.

Assumpsit by E. D. Keyes & Co. against the Union Pacific Tea Company. Judgment for plaintiff, and defendant excepted. Reversed and remanded.

Lawrence & Lawrence and B. L. Stafford, for plaintiff. Butler & Moloney, for defendant.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ROWELL, C. J. This is assumpsit for goods sold and delivered, from time to time, from July 25, 1905, to January 19, 1906, consisting of a chest of tea and nine barrels of sugar.

The plaintiffs are wholesale grocers, residing and doing business in the city of Rutland. The defendant is a New York corporation, having its principal office and place of business in the city of New York, and is an importer, and a retail dealer in teas, coffees, and spices, and a wholesale and retail dealer in sugar, having a branch store in the city of Rutland, which it claims was for the sale of its own merchandise only. This branch store was in charge of one Moore as manager, and had been, most of the time, for 15 or 20 years, who conducted the business thereof under a written contract with the defendant. The plaintiff claimed to have sold and delivered said goods to Moore as the defendant's agent. But the defendant claimed that under its contract with Moore he had no authority to buy goods for said store, neither for cash nor on credit, and no authority to buy the goods in question, and none to pledge the defendant's credit therefor. The plaintiff's evidence tended to show that the goods were ordered by Moore for said branch store, and were delivered there, put in with the other goods in the store, and a large part of them taken out and distributed to customers of the store by the defendant's canvassing agents; that the money received therefor was turned over to Moore at the store, mingled with other money received thereat for goods sold, and by him sent to the defendant in New York; that when the goods were bought, there was a shortage of such articles in the store; and that they were needed to fill orders that had been taken by the canvassing agents, and temporarily to supply customers at the store, which shortage was occasioned by delay in transit of goods ordered by Moore of the defendant's New York store, or because he did not seasonably place his orders. The plaintiff's evidence further tended to show that Moore as such manager had, from time to time, for about 16 years, bought similar goods of them for said branch store, which were delivered and paid for in the usual course of business and sold, and the avails thereof accounted for by Moore, as aforesaid.

The written contract between Moore and the defendant provided, among other things, that Moore was to have the general charge and management of the sale of the defendant's merchandise at said branch store, and such other authority as was therein specifically conferred; was to engage such clerks and other employes as the defendant should deem necessary for the due prosecution of its business at said store, appoint their duties, and see to it that they faithfully performed them; was to have the custody of all the defendant's property contained in said store or used in the business thereat, includ-

ing money, merchandise, checks, presents, horses, wagons, harness, and fixtures, and to be responsible to the defendant therefor; and was to sell only that merchandise and property of the company which should be intrusted to him for that purpose. The contract authorized Moore to incur expenses, and to make disbursements for account of the defendant from the proceeds of sales, for the following purposes: "The salary of himself and the salaries of other employes in said store; commissions of salesmen for selling goods, when paid by him in accordance with written instructions of the company; gas, electric light or power, coal, advertising to secure salesmen; strictly temporary wagon or harness repairs; feed and shoeing of horses used on delivery wagon connected with said store; freight and cartage; express; the hire of horses and wagons for making deliveries of merchandise therefrom; veterinary surgeon's services for emergencies; and other petty small items necessary for the maintenance of the store or the prosecution of the business thereat." The section of the contract containing this authority closed by saying that the manager should have no authority to subject the company to any liability, except as thereinbefore expressly declared.

The plaintiffs claimed that in the authority thus conferred upon Moore to incur expense, the clause "and other petty small items necessary for the maintenance of the store or the prosecution of the business thereat" authorized him to buy the goods in question. The defendant claimed the contrary. The court submitted the clause to the jury for its consideration, saying that its construction was plain, as far as the court had to say about it, and authorized Moore to make purchases only of petty or small character or amount necessary for the maintenance of the store and the transaction of the business, and that the only question for the jury on that clause was whether these were petty or small purchases, and whether they were necessary for the maintenance of the store and the transaction of the business, considering its character and extent; that it was for the jury to say whether the clause applied to this particular class of goods, or was intended to apply to any such amounts, and whether they were necessary for the maintenance of the store and the transaction of the business. This was error. The court should have ruled the question for the defendant as matter of law under the *ejusdem generis* rule, for the contract discloses nothing to make that rule inapplicable, as it does not appear therefrom that the parties intended that those general words should include, not only things of the same kind as those specifically enumerated, but also goods to replenish the stock, which were things of a very different kind; but quite the contrary appears, for the contract expressly provided that Moore was to make disbursements from

the proceeds of sales, and to sell only the merchandise and property that the defendant intrusted to him for that purpose, which we interpret to mean, not the same in kind merely, but the same in identity as well. This construction of that clause is favored by the principle that an authority to buy cannot properly be inferred from an authority to sell. The acts are so distinct in nature, and not dependent upon nor incidents of each other. Story, Agency (7th Ed.) §§ 88, 89. The contract further provided that expenses and disbursements not named therein should be incurred and made only by express authority from the defendant, or by requisition duly made and approved according to its rules, and that passing and confirming an account rendered by the manager, showing expenses or disbursements not authorized by the contract, should not be evidence of express authority to make the same in the particular instance specified in the account, nor in any way modify nor affect the contract, nor be deemed to authorize the making of such nor similar disbursements at any time thereafter. Thus provision was made for enlarging the manager's authority by further express agreement, and for guarding against its enlargement by implication, and a purpose thus to guard pervades the whole contract.

The only other ground of recovery claimed below was, according to the charge, that Moore had so conducted the business, by permission of the defendant, that he was thereby authorized to make the purchases in question; and the court submitted the case on that ground also. This the defendant says was error, because there was no evidence tending to show an enlargement of Moore's authority in that way. But the case shows otherwise. The contract provided for an inspection by the defendant's representative, when required, both of the goods and other property in the manager's hands, and of the books and papers relating to the business; and such inspection was made from time to time during Moore's management. The defendant's evidence showed that in May or June, 1901, when Moore was out of the business for a few months, and one Mastin was in charge, a statement of the plaintiffs' then account against the defendant came into the store by mail, and was examined by Mastin, who then informed the plaintiffs that Moore had no authority to purchase goods for the store, nor to pledge the defendant's credit therefor, and that the defendant did not allow Moore, nor any of its agents nor managers, to buy goods locally. The defendant's evidence further showed that at about that time one Lyons, a superintending agent of the defendant, was at Rutland investigating the business, and that he twice called the plaintiffs' attention to the matter by telephone, and notified them that Moore had no authority under his contract to make such purchases. The plaintiffs' evidence denied that they received any such notices from Mastin

and Lyons, or either of them, or from any of the defendant's agents or officers prior to the sale of the goods in question, or prior to Moore's death in April, 1906, and showed that they did not know from any source that Moore had no authority to buy goods of them as he did, but believed that he had, and sold accordingly.

The debit side of the account that thus came to the knowledge of Mastin and Lyons commenced, we take it, from a statement of account in the case, on September 23, 1895, and ended on February 16, 1901, and showed sales to the amount of about \$650, and credits, from February 27, 1893, to February 2, 1901, certainly, of about \$500. The statement in the case shows that the account continued in the same way to and including the times of the sales of the goods in question, and that the debit side amounted to more than \$1,500. Knowledge that Moore was thus buying goods of the plaintiffs having come home to the defendant—for Lyons' knowledge, certainly, if not Mastin's, was its knowledge—if it did not want to be bound thereby, it should have dissented, and given notice thereof in a reasonable time, otherwise it would be taken as assenting. 2 Kent Com. *616; Walsh v. Pierce, 12 Vt. 130, 138; Cairnes v. Bleecker, 12 Johns. (N. Y.) 300; Insurance Co. v. McCain, 96 U. S. 84, 24 L. Ed. 653. And not only that, but its silence would be evidence of authority to make like purchases in the future, and before notice of want of authority; and here like purchases were continued to and including the purchases in question without such notice, unless given as the defendant claimed, which was denied. It is the prior conduct of the principal that affords ground to infer the continuance of the agency in the particular business. 2 Kent Com. *615. Thus a man sent his servant to a shopkeeper for goods on credit, and paid afterwards. He sent the same servant a second time with ready money, who received the goods, but did not pay for them. It was held that sending him on trust the first time and paying afterwards was giving him credit so as to charge the master the second time. Hazard v. Tweadwell, 1 Str. 507. So where an agent was in the habit of drawing bills on his principals, authority was implied from the fact that they had paid them, and therefore they were held bound by a repetition of such acts, there being no proof of notice of a revocation of the authority, nor of collusion with the agent. Hooe v. Oxley, 1 Wash. (Va.) 19, 1 Am. Dec. 425; 2 Kent Com. *615.

It is a general rule that the authority of an agent is enlarged by implication as to third persons if the principal allows him to act as his agent beyond his authority, without objection. In that case the principal is bound by estoppel to those who deal with the agent as such within the apparent scope of his authority, and are not aware of any want of authority in the matter. Hanover Nat. Bank

v. American Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721.

Judgment reversed and cause remanded.

(81 Vt. 477)

BROWN v. PEOPLE'S GASLIGHT CO.

(Supreme Court of Vermont. Rutland. Oct. 30, 1908.)

1. MASTER AND SERVANT (§ 93*)—INJURIES TO SERVANT—DELEGATIONS OF DUTIES OF MASTER.

The rule that a master cannot delegate to others his duty to provide and maintain a reasonably safe place for work does not require him to supervise the merely executive details of the work as it progresses.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 93.*]

2. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—FELLOW SERVANTS—PERFORMANCE OF DUTIES OF MASTER.

The supervision of the merely executive details of the work may be delegated by the master to a fellow servant, and the master will not be liable for his negligence, and, where a gaslight company provided its servants with suitable materials to support the sides of a ditch which it was digging under the supervision of a competent foreman, it was not liable for the negligence of the foreman in failing to use such materials, whereby the soil caved in and injured a servant working in the ditch.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 456, 459; Dec. Dig. § 190.*]

3. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—FELLOW SERVANTS—WARNING SERVANT.

Where the danger arising from a crack in the soil at the side of a ditch in which plaintiff was working was obvious to a competent foreman in charge of the work, the negligence of such foreman in failing to warn plaintiff of such danger was the negligence of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 471; Dec. Dig. § 190.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action by a servant for injuries, an instruction that it was the duty of plaintiff to examine the sides of a ditch in which he was working to discover indications of danger was inapplicable where the evidence showed that an examination would not have disclosed such indications.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 598-612; Dec. Dig. § 252.*]

Exceptions from Rutland County Court; Loveland Munson, Judge.

Action by Charles A. Brown against the People's Gaslight Company. From a judgment for plaintiff, defendant brings exceptions. Reversed and rendered.

E. H. O'Brien and O. M. Barber, for plaintiff. Butler & Maloney, for defendant.

POWERS, J. Among the nondelegable duties which a master owes his servant is that of providing and maintaining a reasonably safe place in which to work. But this rule does not require the master to supervise the merely executive details of the work as it goes along. These are acts of service, and

are within the proper range of the servant's duties. They may be delegated to a competent co-servant, and, when so delegated, negligence therein, though resulting in injury, will not support an action against the master. And it matters not whether the offending servant be a foreman, overseer, superintendent, or a mere fellow workman; the result is precisely the same—the master is not legally responsible—for it is the character of the act in question which determines. So it is that when a master provides his servant with suitable materials and instrumentalities to make safe the place, and a competent foreman to use and apply them, he fully discharges his legal duty, and the negligence of the foreman in the manner in which the appliances are used, or in failing to make use of them at all, will not establish liability on the part of the master. Many cases support this rule and illustrate its application. Thus in *Davis v. So. Pac. Co.*, 98 Cal. 19, 32 Pac. 708, 35 Am. St. Rep. 133, the plaintiff's intestate was a sectionman on the defendant's railroad, and was acting under a foreman named Bresnahan. By direction of the latter he ran a hand car onto a siding to clear the main line for an approaching train; Bresnahan setting the switch for that purpose. Bresnahan having failed to close the switch, the train took the siding, collided with the hand car, and killed the intestate, who was at work under the car making some unimportant repairs. It was held that it was the duty of the company to provide a suitable switch, and competent servants to operate it, and that, when it had done so, its duty toward the intestate was fully performed; that the duty violated did not relate to the place of work, but to the negligent use of an appliance or instrumentality which was proper and suitable for the purpose for which it was furnished; and that such use of it was simply a detail of the work or management of the business, and that Bresnahan was a fellow servant. A recovery against the company was denied. Again, in *Kelly v. New Haven Steamboat Co.*, 74 Conn. 343, 50 Atl. 871, 57 L. R. A. 494, 92 Am. St. Rep. 220, it was held that a shipowner who had furnished a proper fender to be used, when necessary, in making the boat fast to the wharf, was not liable to one of the crew for the negligence of the mate in failing to use the fender, whereby he was injured, and that it was not a personal duty of the company to see to it that the fender was actually made use of. The same rule was applied in *Tilley v. Light & Power Co.*, 74 N. H. 316, 67 Atl. 946. There the plaintiff was engaged in cleaning out a gas main under the direction of a foreman who had charge of the defendant's gas department. The main was provided with valves which, if closed, would cut off the flow of gas through the main. Through the neglect of the foreman to close

these valves, an explosion occurred which injured the plaintiff. It was held that the operation of the valves was an act of service purely, and the negligence that of a fellow servant. The court says: "The defendant, having provided proper appliances for securing safety to their employes, was not chargeable with the nondelegable duty of properly operating them. They were at liberty to intrust the operation of the appliances to any one of their employes, provided only they exercised ordinary care in selecting the employé; and it is not contended that they failed in this respect in this instance. At best, so far as appears by the testimony, the acts required to secure safety of the place were mere acts of service which the defendants might properly delegate to their employes. The plaintiff's position is not strengthened to any degree by attributing his injury to want of safety in the place, for such course leads to the same result, namely, that the negligence was that of a co-employé of the plaintiff, for which the defendants are not responsible."

Cases much like the one in hand are not wanting. In *Zeigler v. Day*, 123 Mass. 152, the defendant was a contractor engaged in the construction of a sewer through the streets of Cambridge. The plaintiff was at work for him excavating a trench through soil more or less sandy, under the direction of one Winning, who had charge of the work as superintendent, and whose skill and competency were admitted. For the safety of the men in the trench it was necessary in some places to shore up the sides. The necessity for this, as well as the proper mode of applying the safeguards was from the nature of the case left to be determined by the superintendent as the work progressed. There was no evidence that the defendant failed to furnish sufficient and suitable material for the construction of the required safeguards, or that he was chargeable with any specific personal neglect or knew of the cause of this injury, though he was occasionally present as the work went on. In granting a nonsuit, the court said: "In the case at bar the work was committed to the supervision of a skillful and competent superintendent. It required for the protection of the men the frequent use of temporary structures, the location and erection of which, as the digging progressed, was a part of the work in which the superintendent and the men under him were alike employed, and for the preparation of which, as in case of the scaffold of the mason or the carpenter, the master is not liable, unless there is something to show that he assumed it as a duty independent of the servant's employment." In *Floyd v. Sugden*, 134 Mass. 563, the plaintiff was engaged in uncovering a penstock belonging to the defendant under the direction of one Gilman, who had full charge and control of the premises and the work. A trench had been opened up to get at the

penstock, and while at work therein, at the bottom of the trench and on the top of the penstock, the latter gave way, and the sides of the trench caved in upon him, and caused the injuries complained of. It appeared that the trench was dug in very sandy soil, and the evidence tended to show that the sides ought to have been shored up. No shoring was used, and none specifically furnished. But the evidence tended to show that there was an abundance of suitable materials belonging to the defendant within a few rods of the place of the accident, though this was contested. "If the defendant," says the court, "furnished the materials, the appliances, for doing this (shoring the trench), the use and application of them, according to the exigencies of the work, was the duty of the servants engaged in the work, unless specially assumed by the master. Gilman, as superintendent of the work, and the plaintiff, as a laborer upon the work, were fellow servants, and the duty of Gilman in using the means and appliances provided for safely and properly carrying on the work was that of a servant engaged in the same business with the plaintiff, even if he had acted as a representative of the master in furnishing such means and appliances." In *Dube v. Lewiston*, 83 Me. 211, 22 Atl. 112, the plaintiff was engaged with others in digging a trench for a sewer. No shoring was used to support the sides of the trench, and it caved in and injured the plaintiff. The construction of the sewer was under the general supervision of the street commissioner, but the crew in which the plaintiff was at work at the time of his injury was under the immediate direction of one Cloutier, as foreman; the street commissioner incidentally inspecting the work from time to time as it progressed. Thirty rods away was deposited a quantity of lumber designed to be used for shoring, which was suitable and available for the purpose. At the time of the accident the commissioner was not present, and the work was in the sole charge of Cloutier. Nothing had been disclosed before the work commenced indicating a necessity for any mechanical contrivance to protect the workmen. The location and erection of any such structures necessarily devolved upon the workmen acting under the direction of the foreman as the digging progressed. The duty of determining when the exigency of the situation required such protection had not been specially assumed by the commissioner. It was held that the commissioner discharged his duty when he assigned to the work an experienced and competent foreman and furnished him with suitable and sufficient materials for any appliances necessary for the safe conduct of the work, and that the use and application of such materials formed a part of the duty of the workmen; and, if Cloutier's failure to shore up the trench where the dirt caved was negligence, it was the negligence of a fellow servant. In *Berquist v. Minneapolis*,

42 Minn. 471, 44 N. W. 530, the plaintiff was digging a ditch for a water pipe under the general control of a foreman employed by the city. In carrying on the work it became necessary to shore up the walls of the ditch. This was done by planking the sides and bracing these planks by timbers extending across the ditch. This work was done by the men as occasion required. Suitable material was provided for that purpose. At the time of his injury, the plaintiff was shoveling in the ditch at a point where it was some six feet deep. Some of the shoring was then in place, and, while further work was being done to hold the earth in place, the shoring fell in, causing the injury complained of. The negligence relied upon was in the manner in which the curbing was done. It was held that this was the negligence of the plaintiff's fellow servants, and that the city was not liable.

Sometimes the same result is reached in such cases by saying that the safe place rule does not apply where the prosecution of the work itself makes the place and creates its dangers. *O'Connell v. Clark*, 22 App. Div. 468, 48 N. Y. Supp. 74; *Cleveland, C., C. & St. L. R. Co. v. Brown*, 73 Fed. 970, 20 C. C. A. 147; *Norman v. Southern Ry. Co.* (Tenn.) 104 S. W. 1088. But it seems to us more logical to put the case upon the broad ground that the master has fully complied with the safe place rule when he has provided against such dangers as may reasonably be apprehended by furnishing the servant with the means of protecting himself. *Durst v. Carnegie Steel Co.*, 173 Pa. 162, 33 Atl. 1102. This puts the determination of the question of liability upon its true ground—the character of the act or omission which caused the injury. It properly differentiates the duties of the master from those of the servant. It makes the foreman a fellow servant because he has exhausted his functions as the alter ego of the master when he has provided the means of protection, and at that very point he takes up the functions of a fellow laborer. See *Church, Kerr & Co. v. Callaghan*, 155 Fed. 397, 83 C. C. A. 669; *Rocco v. Gillespie Co.*, 73 N. J. Law, 591, 64 Atl. 117; and the instructive note to *La Fayette Bridge Co. v. Olsen's Adm'r*, 108 Fed. 335, 47 C. C. A. 367, 54 L. R. A. 33. These cases are in harmony with our staging cases (*Lambert v. Pulp Co.*, 72 Vt. 278, 47 Atl. 1085, and *Garrow v. Miller*, 72 Vt. 284, 47 Atl. 1087); and under their authority the defendant's motion for a verdict should have been granted.

This defendant was engaged in laying a gas main in the city of Rutland. The plaintiff was a shoveler employed on the job. At the time and place of the accident here involved a ditch had been excavated to the depth of 5 or 6 feet, which was some 18 or 20 inches wide at the bottom, and somewhat wider at the top. The dirt from this ditch had been thrown up on the east side. The

soil was of different kinds in layers, with what is described as "blue gravel mixed with cobble," beneath which was a layer which looked light and hard, but which became as the workmen stood in it soft and wet. The foreman in charge of the work was one Miles, whose competency was not questioned, and who was under the general authority of the defendant's superintendent, who was occasionally present as the work went on, but not at the time of the plaintiff's injury. One Shelvey was the man who calked the joints of the pipe after it was laid in the ditch. Before the pipe was laid, it was necessary to grade properly the bottom of the ditch, and at the points where the joints of the pipe came, to dig out bell holes, to give the calker sufficient room to use his arm in tamping the joint. The bell holes were made by digging out the sides and bottom of the ditch four or five inches. At the time of his injury the plaintiff was directed by Miles to go into the ditch and dig out a bell hole, and to hurry about it so that the joint could be calked before night. The walls of the ditch were not shored up, though the defendant's superintendent testified (and this was not in any way contradicted) that the defendant supplied planking and bracing timbers to protect dangerous places, if any occurred. The plaintiff entered the ditch pursuant to Miles' order, and began the work assigned him. While so engaged, he encountered a stone in the bank, and, while digging around it to remove it, the east bank caved onto him, and caused the injuries herein sued for. After the plaintiff went into the ditch, and before the bank caved, a crack appeared in the dirt thrown up from the ditch running along parallel with the ditch, to which the calker called Miles' attention, suggesting that the bank ought to be braced to prevent caving. Miles replied, in substance, that it would stand long enough to get the joint calked, and gave the plaintiff no warning. The bank caved along this crack. It is urged that the foreman's knowledge of this crack and the plaintiff's ignorance of it save the case for the plaintiff, on the ground that it became the duty of the master to warn the servant of a danger known to him, but unknown to the servant. Such is not the case. The danger was not in a legal sense latent. The crack was not so much the source of danger as it was the manifestation of it. But, in any view, it was in character obvious, though unseen by the plaintiff. The duty to warn is coextensive with the duty to exercise care. If it was the duty of the master to protect the plaintiff from the danger which threatened, it was his duty to warn him of the imminence of the danger indicated by the crack, otherwise, not. So it comes back to the question hereinbefore discussed. However great the moral obligation resting on the foreman to warn the plaintiff, his fellow laborer, he did not, in his neglect

to do so, represent the defendant, for the master's duty had been fully performed. The omission of the foreman in this behalf, like his omission to make use of the shoring, was his own, and not that of his master—an omission which comes within the fellow-servant rule. *Anderson v. Winston* (C. C.) 31 Fed. 528.

The instruction to the effect that it was not the duty of the plaintiff, when ordered into the ditch, to delay the work and make an examination of the surroundings to see if there were any indications of special danger, was inapplicable, as no such indications had then appeared and such an examination would have discovered none. The other exceptions have been sufficiently covered.

Judgment reversed, and judgment for the defendant to recover its costs.

WILLIAMS v. SHAW, Town Treasurer.

(Supreme Court of Rhode Island. Dec. 9, 1908.)

1. APPEAL AND ERROR (§ 1005*)—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

Where, in an action for injuries to a pedestrian occasioned by a wire extending over a sidewalk, the evidence as to the condition of the wire at the place of the accident was conflicting, and there was evidence that the municipality had constructive notice of the defective condition, a verdict for plaintiff, confirmed by the trial judge, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3864, 3948-3950; Dec. Dig. § 1005.*]

2. DAMAGES (§ 130*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where, in an action for personal injuries, the evidence showed that plaintiff sustained a severe wrench, and experienced on the following day a feeling of lameness through the leg, hip, and sides, and suffered much pain, that the injuries aggravated a fibro-cystic growth in the right ovary, necessitating an operation, and that she lost a large amount of money by being unable to pursue her occupation of waitress and by her disability to labor for a long time, a verdict for \$1,100 was not excessive.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 130.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Action by Sadie L. Williams against Joseph A. Shaw, town treasurer. There was a verdict for plaintiff, and defendant brings exceptions. Overruled, and cause remanded, with directions to enter judgment on the verdict.

This was an action of trespass on the case for negligence, to recover for injuries which plaintiff sustained in consequence of being tripped over by a wire dangling from a fence post over and upon a public sidewalk. The jury returned a verdict for plaintiff for \$1,100. The wrench which plaintiff sustained was a severe one, and on the following day she experienced a feeling of lameness through the leg, hip, and sides, and on the second day

she suffered a great deal of pain, which on the third day became very severe. She then consulted a physician. Subsequently an operation was performed on her. A physician testified that he found that plaintiff had at the time of the accident a fibro-cystic growth in the right ovary, and that the rapid increase in the growth thereof was caused by the strain and shock received at the time of the accident. Plaintiff lost a large amount of money by being unable to pursue the occupation of waitress, and by her disability to labor at all for a long time.

Page & Page & Cushing, for plaintiff. Benjamin W. Grim, for defendant.

PER CURIAM. The testimony of the plaintiff and her eyewitness as to the accident is not contradicted. The testimony as to the condition of the barbed-wire fence on the Field lot at the place of the accident was conflicting; but that for the plaintiff was positive, while that in behalf of the defendant was negative. There was evidence from which the jury could find that the town had constructive notice of the defective condition complained of. The verdict of the jury for the plaintiff was confirmed by the judge who sat in the case.

A careful perusal of the testimony fails to disclose any error on the part of judge or jury, and the defendant's exceptions are therefore overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

(222 Pa. 319)

CONOY TP. SUP'RS v. YORK HAVEN ELECTRIC POWER PLANT CO.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

1. TAXATION (§ 114*)—PROPERTY SUBJECT—QUASI PUBLIC CORPORATIONS.

The real estate of a quasi public corporation necessary to its operation is not subject to local taxation in the absence of statutory authority.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 208; Dec. Dig. § 114.*]

2. TAXATION (§ 114*)—"REAL ESTATE"—LANDS OF CORPORATION.

The words "real estate" in the taxing statutes do not include land or appurtenances necessary to the exercise of a franchise of a public corporation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 208; Dec. Dig. § 114.*]

For other definitions, see Words and Phrases, vol. 7, p. 5937; vol. 8, pp. 7778, 7779.]

3. TAXATION (§ 114*)—QUASI PUBLIC CORPORATIONS.

The test as to whether a corporation is a public or quasi public corporation, so as to be exempt from local taxation, is what it is authorized to do, and may be compelled to do, under its charter.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 208; Dec. Dig. § 114.*]

4. TAXATION (§ 114*)—EXEMPTIONS—LOCAL TAXATION.

Where a corporation is chartered to supply water and power to the public, and to individuals and corporations in a named district, it is exempt from local taxation on its real estate, as a quasi public corporation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 208; Dec. Dig. § 114.*]

5. TAXATION (§ 378*)—MODE OF ASSESSMENT—CORPORATIONS—VALUATION OF CAPITAL—PROPERTY INCLUDED.

In Pennsylvania the real estate of quasi public corporations, unless exempt from such taxation by statute, is taxed by including the value thereof in the assessment of the capital stock.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 626; Dec. Dig. § 378.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by the Conoy Township Supervisors against the York Haven Electric Power Plant Company. From a judgment for defendant, notwithstanding the verdict, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Bernard J. Myers and Wm. R. Brinton, for appellant. W. U. Hensel, for appellee.

ELKIN, J. It has been uniformly held in Pennsylvania that the real estate of a public, or quasi public, corporation, essential to the exercise of its corporate franchises is not subject to local taxation in the absence of legislative authority imposing such taxes. The power to tax necessarily includes the power to sell for nonpayment of taxes, and thus the property of a public corporation, without which it could not perform its duties to the public, could be sold piecemeal, and the corporate purpose be defeated by divesting the title to certain portions of the real estate against which tax liens were filed. Again, many quasi public corporations extend into and through different municipalities, and as a question of public policy, it has not been deemed wise to subject them to the exactions of the taxing officer at every municipal division line, but rather to authorize the commonwealth to impose a capital stock tax upon such corporations; and, in appraising the same for the purpose of taxation, the real estate, franchises, earning power, dividends, and all other matters which affect the value thereof, must be taken into consideration. In this manner the real estate of a quasi public corporation is taxed, and while the tax goes directly to the state in the first instance, cities, boroughs, townships, school districts, and other municipal divisions receive the benefits of such taxation by appropriations made to the public schools, to hospitals, to eleemosynary institutions, and to charities of different kinds located throughout the state. But without further discussion of the policy

of the law, which is the foundation of the rule, it is settled in this state that the words "real estate," in our taxing statutes, do not include lands or appurtenances essential and necessary to the exercise of the franchise of a public corporation. *Lehigh Coal & Navigation Company v. Northampton County*, 8 Watts. & S. 334; *Berks County v. Railroad Co.*, 6 Pa. 70; *Schuylkill Navigation Co. v. Berks County*, 11 Pa. 202; *Wayne County v. Canal Co.*, 15 Pa. 351; *Railroad Co. v. Sablin*, 26 Pa. 242; *West Chester Gas Co. v. Chester County*, 30 Pa. 232; *Coatesville Gas Co. v. Chester County*, 97 Pa. 476; *Pittsburg's Appeal*, 123 Pa. 374, 16 Atl. 621; *Roaring Creek Water Co. v. Gilton*, 142 Pa. 92, 21 Atl. 780; *Northampton County v. Easton Pass Railway Co.*, 148 Pa. 282, 23 Atl. 895; *Spring Brook Water Co. v. Kelly*, 17 Pa. Super. Ct. 347; *St. Mary's Gas Co. v. Elk County*, 191 Pa. 458, 43 Atl. 321; *Southern Electric Light & Power Co. v. Phila.*, 191 Pa. 170, 43 Atl. 123; *Philadelphia v. Electric Traction Co.*, 208 Pa. 157, 57 Atl. 354. These and other similar cases hold that the real estate of turnpike, navigation, canal, railroad, street railway, artificial and natural gas, water, and electric light and power companies, essential and necessary to the exercise of their corporate franchises, is not subject to taxation for local purposes. The only question in the present case is whether appellee is a quasi public corporation within the meaning of the law, so as to entitle it to exemption from local taxation.

The learned court below so held, and, after careful consideration, we have reached the same conclusion. If companies incorporated to supply water, electricity, and light to the public, are exempt from local taxation, under the rule hereinbefore mentioned, it is difficult to see why a company incorporated for the express purpose of supplying water and power should occupy a different position. So far as the power of taxation is involved, there is no difference in principle between a company incorporated to supply water or electricity to the public and one incorporated to supply both water and water power, which produces electricity for the same purpose. The test in such cases is not what the corporation has done, or what it may attempt to do, but what it is authorized to do, and may be compelled to do, under its charter in the performance of the duties imposed thereby. Measured by this standard, and there is no other, there can be no doubt about the purpose for which the appellee company was incorporated, nor about what duties to the public it may be compelled to perform. The York Haven Water & Power Company was created under General Corporation Act April 29, 1874 (P. L. 74) § 2, cl. 9, and the several supplements thereto. It does not appear in the application for the charter, nor in the letters patent, what particular supplemental

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

statutes it claims the benefit of, but it is specifically stated that the corporation is formed "for the purpose of supplying water and power to the public and to firms, individuals and corporations in the borough of York Haven, York county, Pennsylvania, and the territory adjacent thereto."

A corporation organized for the purpose of supplying water to the public has been held to be a quasi public corporation, and it has also been decided that a corporation created for the supply, storage, and transportation of water and water power for commercial and manufacturing purposes is a quasi public corporation. It would therefore seem to necessarily follow that a corporation possessing the power to do both of these things is no less a quasi public corporation. Indeed the argument would seem to be in favor of the company enjoying the greater power. It is argued, however, that the appellee company does not supply water or power to the public and firms and individuals and corporations in the borough of York Haven, and that what it attempts to do cannot, in any sense, be considered to be a service to the public, or that the public has a right to compel the performance of any duty to it. The answer to this contention is that the powers, privileges, and duties of a corporation are fixed by its charter, and in a legal proceeding must be determined by the requirements of the charter, and in a case involving the right to impose a tax, the question whether or not such corporation may be exceeding its corporate powers, or has failed to perform duties owed to the public, cannot be raised and determined. In this proceeding the question of whether the appellee is a quasi public corporation must be determined by the powers granted in the charter, and not by evidence dehors the record tending to show that the corporation may be engaged in business not of a public character. If the corporation is exceeding its corporate powers, the commonwealth alone, at the suggestion of the Attorney General, has the right to raise that question. Clearly, however, under the recent case of *Jacobs v. Clearview Water Supply Company*, 220 Pa. 388, 69 Atl. 870, a company incorporated for the purpose of supplying water and water power for commercial and manufacturing purposes, as well as a company supplying water to the public for domestic purposes, is a public corporation.

This case has been exceptionally well prepared and very ably argued by counsel on both sides. The learned counsel for appellant have made an exhaustive examination of the statutes and decisions relating to the subject; and, if we did not consider it a departure from the settled policy of law, much that has been said in behalf of appellant would appeal to us with great force. However, in a long and unbroken line of cases, extending back for a period of more than 80

years, it has been the policy of the law to tax the real estate of quasi public corporations, except those exempted from such taxation by statute, by including the value thereof in the assessment of the capital stock, and we are not convinced that a distinction can be made in the case at bar without making a departure from what must be considered the settled rule in such cases.

Assignments of error overruled, and judgment affirmed.

(222 Pa. 325)

JONES et al. v. LINCOLN SAVINGS & TRUST CO.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

COURTS (§ 475*)—CONCURRENT JURISDICTION—APPOINTMENT OF RECEIVERS.

Where a receiver is appointed for a trust company under a stockholder's bill for the preservation of the assets, he is not superseded by a receiver appointed at the instance of the Attorney General by another court, under a bill to dissolve such corporation, under Act Feb. 11, 1895 (P. L. 4), creating a banking department of the commonwealth.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 475.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Jeremiah C. Jones and others against the Lincoln Savings & Trust Company. From an order discharging the rule to set aside the appointment of a receiver, the Commonwealth appeals. Affirmed.

Willson, P. J., of the court below filed the following opinion:

"On the application of the plaintiff, a stockholder of the defendant corporation, this court, on June 18, 1908, appointed Samuel D. Hyneman, Esq., receiver of the said corporation, with the usual powers of such an officer. It was not alleged in the plaintiff's bill that the assets of the corporation were insufficient to pay its debts. Indeed the contrary was alleged, while at the same time it was, in effect, averred that the appointment of a receiver was necessary to protect the interests of creditors and to prevent a wasteful sacrifice of the assets. The regularity of the appointment of the said receiver is not questioned, but we are asked by the Attorney General, for reasons stated in his petition, to supersede—that is, annul—the decree made by this court, and to direct the receiver named by us to turn over all the assets and property of the said corporation which have come into his possession to Charles F. Warwick, Esq., a receiver appointed by the court of Dauphin county, in proceedings instituted by the Attorney General in the name of the commonwealth. These proceedings were taken under what is commonly known as the 'Banking Act of 1895' (P. L. 4). We do not question the validity or the propriety of the action taken by the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Dauphin county court. The act of Assembly just referred to was designed to furnish, and does furnish, a method, under which the banking business of state banking institutions can be regulated and controlled, with a view to securing honest and safe management of such institutions. A system of procedure is provided for that purpose, and the purpose is most laudable and salutary. We would not deliberately interfere with the successful operation of any of the means or machinery furnished by the statute to accomplish the end in view. If, by reason of the provisions of the statute, all proceedings instituted in a regular manner for the purpose of protecting the interests of creditors, in which a court of competent jurisdiction has appointed a receiver to take and hold the assets of a corporation, are avoided and nullified, then undoubtedly it is our duty to do what the Attorney General asks us to do, and to direct our officer to stay his hands and turn over to the receiver appointed in Dauphin county all the assets that have come into his possession. Whether or not that be the effect of the statute, and our duty depends upon the proper answer to this single question, is the jurisdiction of the court in Dauphin county, which took cognizance of the matter at the instance of the commonwealth, exclusive? Do proceedings there instituted necessarily supersede and avoid all other proceedings regularly and previously instituted in a court of competent jurisdiction for the settlement of the affairs of a corporation? In other and fewer words, the question is, Did the action of the Dauphin county court, resulting in the appointment of a receiver, operate to prevent this court and its receiver from moving forward, in an orderly and ordinary way, towards the end of litigation, which had been here begun before the Dauphin county court took a step in the matter? We need consider no other question. All of the specific reasons urged upon our attention by the Attorney General are wrapped up in the contention that, when the court in Dauphin county made its decree appointing a receiver, the bars were raised against any further proceeding by this court under the bill filed here.

"We are not able to agree with that view of the question, not because we think it to be of any importance who shall receive the fees or commissions that may accrue to a receiver, but because we fail to find in the statute any provision which gives to the proceedings brought in the name of the commonwealth any such exclusive force as is claimed for them. We have not been asked by the plaintiff to do anything which the statute referred to above authorizes. We are not asked to dissolve the corporation. We are not asked to give time for making good an impaired capital, or to make a decree based upon proofs of unsafe or improper conduct of business. On the contrary, we are asked only to give a relief which is custom-

ary and often afforded, and which has no reference whatever to the remedies of a public character that the statute affords. So far as we can see, there is nothing in any proper action which we have taken, or may hereafter take, in the case, that will interfere with the commonwealth's effecting all that ought to be done, in any interest which needs to be guarded, without impinging upon the previously acquired jurisdiction of this court. We have said that we do not find in the statute any grant of exclusive jurisdiction over the case to the court of Dauphin county. This might be owing to some want of perception on our part, but we may go further, and say that no such express grant has been pointed out to us by the Attorney General. In the absence of that which would deprive us of the jurisdiction already taken of the case as it stands before us, we know of no rule of law, or requirement of public policy, which demands that we should vacate the decree made by us. There is, besides, a certain amount of respect for our own tribunal that we are bound to recognize. It would be difficult to give reasons for such a thought more cogent than those uttered on behalf of the Supreme Court of this state, by its present learned Chief Justice, in the case of *Commonwealth v. Order of Vesta*, 156 Pa. 531, 27 Atl. 14, and substantially reiterated in *Fraternal Guardians' Assigned Estate*, 150 Pa. 594, 28 Atl. 482.

"Aside, however, from there being in the statute no express bar against our jurisdiction, and aside, also, from the consideration just referred to, the statute itself, in the fourth and eleventh sections, seems to show that the Legislature intended to preserve the jurisdiction of other courts of the commonwealth over matters which were already within their jurisdiction. In section 4 appears the provision 'and the said corporation shall not be subject to any other visitatorial power than such as may be authorized by this act, except such as are vested in the several courts of law.' Section 11 reads as follows: 'No corporation subject to the supervision of the banking department shall be subject to any visitatorial power other than such as are authorized by this act, or are invested by law in the courts of this Commonwealth.' It seems to us that these express provisions of the statute are totally at variance with the position now taken on behalf of the commonwealth, and that upon the basis of these alone we might well decline to put the plaintiff out of court by granting the application under consideration.

"The case of *Kittanning Ins. Co.*, 146 Pa. 102, 23 Atl. 338, is cited to us as controlling the situation with which we have to deal, but we do not ascribe to it the weight which it appears to have in the mind of counsel. That case arose under the insurance act, which undoubtedly in many respects resembles the banking act. The lower court took jurisdiction of a bill praying for a dissolu-

tion of the corporation. The court made a decree dissolving the corporation and appointing a receiver. On appeal to the Supreme Court, in a per curiam opinion, it was held that the lower court had no power to dissolve the corporation, and in what seems to have been no more than an obiter dictum it was intimated that, where a receiver should be appointed in the court of Dauphin county, he would supersede the officer appointed in the court below. We do not regard this remark as conclusive of the question, even in a case arising under the insurance act. It is far less applicable to the present case, for the reason that the statute last referred to does not recognize, as does the banking act, the right of courts other than the court of Dauphin county to preserve and exercise their jurisdiction over matters that do not arise out of the statute.

"The question under discussion is pre-eminent one for final determination on appeal. We have expressed in this opinion the views that have led us to the conclusion that the rules granted upon the petitions of the Attorney General and of the receiver appointed in Dauphin county should be discharged."

Error assigned was order discharging rule to set aside appointment of receiver.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN and STEWART, JJ.

M. Hampton Todd, Atty. Gen., and J. Edgar Butler, for the Commonwealth. John G. Johnson, Charles E. Bartlett, and Samuel M. Clement, Jr., for appellee.

PER CURIAM. Judgment affirmed by a majority of this court on the opinion of the court below.

(222 Pa. 311)

LONG v. LEMOYNE BOROUGH.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

1. MUNICIPAL CORPORATIONS (§ 107*) — BOROUGHS—LOAN OF MONEY—RESOLUTIONS.

Under Act May 23, 1893 (P. L. 113), requiring that every resolution shall be presented to the chief burgess for approval, a resolution of a borough council authorizing the borrowing of money for municipal purposes, and the giving of a judgment note not approved and signed by the chief burgess, is invalid, and a judgment entered against the borough would be stricken off.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 230, 231; Dec. Dig. § 107.*]

2. MUNICIPAL CORPORATIONS (§ 249*) — LOAN TO BOROUGH—RECOVERY.

Money loaned to a borough under an invalid resolution and used by it may be recovered in an action for money had and received, though the note given therefor is invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 249.*]

3. MUNICIPAL CORPORATIONS (§ 231*) — CONTRACTS—INTEREST OF OFFICERS.

Act March 31, 1860 (P. L. 400) § 66, preventing a member of a borough council from profiting by any contract for the sale or furnishing of any supplies or materials to the borough, does not apply where a borough council authorizes a loan from a bank, and a member of the council is also a member of the banking association.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 661; Dec. Dig. § 231.*]

Appeal from Court of Common Pleas, Cumberland County.

Action by S. W. Long, for the use of the Cumberland Valley Bank, against the Lemoyne Borough. From an order discharging the rule to strike off judgment, defendant appeals. Reversed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

E. M. Biddle, Jr., for appellant. S. B. Sadler and C. S. Brinton, for appellee.

BROWN, J. The borough of Lemoyne was incorporated May 23, 1905. The first meeting of its council was held July 26th following. The new borough being without funds to enable it to start properly on its municipal career, its council on October 31, 1905, passed the following resolution: "Resolved, that the borough of Lemoyne borrow from the Cumberland Valley Bank for general borough purposes the sum of (\$500) five hundred dollars and that the president of town council and borough treasurer be authorized and directed to execute a note in the name of the borough of Lemoyne, and attested by the secretary, to said Cumberland Valley Bank for said loan of (\$500) five hundred dollars and all renewals of the same." To secure this loan of \$500 a judgment note was executed in that sum on November 3, 1905, by the president of the town council and attested by the secretary, payable 90 days after date to the order of S. W. Long, the borough treasurer. A copy of the resolution of October 31st, signed by the president of the town council and duly certified by the secretary, was presented to the bank, and upon the assignment of the note to it by Long as treasurer the same was discounted by the bank and the proceeds placed to his credit as borough treasurer. The borough subsequently made three other loans from the bank in the same way—one for \$1,000, one for \$2,000, and the third for \$1,000. The resolutions authorizing these loans were in the same form as the one of October 31st, and the notes were in the same form as that given for \$500 on November 3d; the only difference being in the amounts. Shortly after the last loan was made on February 27, 1906, all the notes were consolidated into one of the same form for \$4,500, payable to the order of S. W. Long, treasurer, which he assigned to the bank. At

the municipal election in February, 1906, new councilmen were elected; only one of the old members holding over. The new council refused to recognize the obligation for \$4,500 held by the bank, and, when judgment was entered upon it, a rule was taken to show cause why it should not be opened and stricken off on the grounds (1) that no legal action had been taken by the borough authorizing the loans; (2) that, when the resolutions were passed authorizing the loans, a majority of the members of council were members of a partnership association conducting the said Cumberland Valley Bank, and the loans were therefore void under section 68 of the act of March 31, 1860 (P. L. 400); and (3) that a portion of the money borrowed from the bank had been illegally expended by the borough in making improvements. The rule granted was discharged, and from the refusal of the court to interfere with the judgment we have this appeal.

No one of the four resolutions directing the loan to be made was presented to the chief burgess for his approval. It is true he was present when each of them was passed, and he personally applied to the bank for the loans. Under this state of facts the court below was of opinion that he had impliedly approved the resolutions. But this is not the kind of approval recognized by the statute when approval is essential to the validity of an ordinance. The requirement of the act of May 23, 1893 (P. L. 113), is that every resolution shall be presented to the chief burgess, and, if he approve it, he shall sign it. It must be expressly approved by him, and the evidence of such approval is that he has signed it. If the resolutions were of such a character as to require the approval of the borough's chief executive, they never became operative, and the judgment for \$4,500 against the borough was confessed by the president of the town council without authority. Whether the resolutions required the approval of the chief burgess depended upon whether they were legislative or ministerial. If legislative, approval was essential to their validity. If ministerial, it was not. That they were of a legislative character is clear. They did not direct the doing of something which had been provided for by prior municipal legislation, but, on the contrary, each was an independent attempt at original municipal action. No one of them directed the performance of an executory contract previously authorized by ordinance or resolution, but each was a ways and means act, passed for the purpose of authorizing the borough officers to make a contract with the Cumberland Valley Bank, and therefore required the approval of the chief burgess before it could confer authority upon the president of the council to create a municipal liability to the bank. *Jones v. Schuylkill Light, Heat & Power Co.*, 202 Pa. 164, 51 Atl. 762. Without such approval the president of the town council was with-

out authority to execute any kind of obligation in the name of the borough, and appellant's contention that the judgment entered on the note given by him is void for want of authority to confess it must therefore prevail. But, while we are compelled to so hold, the borough will gain nothing by our reversal of the court below. Though the bank cannot recover on the judgment note given to it, because the attempt to do so is an attempt to enforce an express contract which no one had been properly authorized to execute on behalf of the borough, there is an implied obligation resting upon the municipality to pay back what was lent to it in good faith. The council concededly could have authorized the borrowing of the money and the execution of an obligation to repay it to the bank, and, the borough having received, at its special instance and request, \$4,500 from the appellee for its municipal needs, its implied legal obligation is to pay this honest debt. In an action against it for money had and received it will be the duty of the court, under the facts as developed in this proceeding, to direct a recovery. *Rainsburg Borough v. Fyan*, 127 Pa. 74, 17 Atl. 678, 4 L. R. A. 336. Municipal repudiation of honest indebtedness which the municipality intended to contract and could have lawfully contracted is no more to be tolerated than individual repudiation of honest indebtedness merely because it was not incurred in pursuance of a duly executed express contract, unless the municipal charter or the statutes prohibit the municipality from incurring any liability by implication.

As to the second reason given by the borough for asking that the judgment be declared void, it is a sufficient answer to say that the act of 1860 is a penal one and must be strictly construed. *Trainer v. Wolfe*, 140 Pa. 279, 21 Atl. 391. It prevents a member of council from profiting by any contract "for the sale or furnishing of any supplies or materials" to his municipality. Money is not within its letter, and certainly not within its spirit. For the use of money a rate of interest is fixed by statute beyond which no lender can profit. In asking the court below to decide that a loan from a bank to a municipality is void if a member of the banking association making it happens to be a member of the town council authorizing it, the appellant was simply consistent in its narrow, technical, and unconscionable attitude towards the honest claim of the appellee. After the bank had lent the money to the borough in good faith, it was none of its concern how it was spent. A sample of the objections to paying the loan because the borough had illegally expended some of the money is the hiring of teams from two of the members of the town council by the man who was making repairs on the streets. To discuss these objections would be to unduly dignify them.

As a general rule a judgment, regular on

its face, will not be stricken off, but when it is entered wholly without authority it may be stricken off, for it is no judgment at all so far as it affects the rights of the defendant. *Bryn Mawr National Bank v. James*, 152 Pa. 364, 25 Atl. 823. This judgment was entered without authority, and the court below found that the entry of it had never been ratified. It cannot therefore remain on the record.

The order of the court below is reversed, and the judgment is stricken off.

(75 N. H. 587)

PETRUS v. BERLIN MILLS CO.

(Supreme Court of New Hampshire. Coos. Nov. 4, 1908.)

NEGLIGENCE (§ 136*)—DANGEROUS CONDITION OF PREMISES—LIABILITY—QUESTION FOR JURY.

Where one either knew or ought to have known of a danger incident to the condition of his premises which caused injury to another in time to have removed the danger or to have given warning of the danger to the latter, who did not know and was not in fault for not knowing of the danger, the liability of the former for the injuries sustained by the latter was for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 316, 317, 326; Dec. Dig. § 136.*]

Exceptions from Superior Court, Coos County.

Case, for personal injuries, by John Petrus against the Berlin Mills Company. A nonsuit was ordered at the close of plaintiff's case, and he excepts. Sustained.

William H. Paine, for plaintiff. Drew, Jordan, Shurtleff & Morris and Rich & Marble, for defendant.

YOUNG, J. There was evidence that the defendants either knew or ought to have known of the danger incident to the condition of their premises, which caused the plaintiff's injury, in season to have removed the danger or to have warned him of it, and that he neither knew of the danger nor was in fault for not knowing of it. Consequently the evidence should have been submitted to the jury.

Exception sustained. All concurred.

(75 N. H. 59)

AHERN v. AMOSKEAG MFG. CO.

(Supreme Court of New Hampshire. Hillsborough. Nov. 4, 1908.)

1. MASTER AND SERVANT (§ 150*)—INJURY TO SERVANT—DUTY TO WARN OF DANGER.

To render a master liable for not anticipating a danger to a servant who was injured thereby and warning against it, the master's knowledge of the danger must have been, or ought to have been, superior to the servant's.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 299; Dec. Dig. § 150.*]

2. MASTER AND SERVANT (§ 155*)—INJURIES TO SERVANT—PLACE FOR WORK—EQUAL KNOWLEDGE OF DANGER.

Plaintiff, an intelligent adult woman, had worked for 18 months in a room wrapping cloth, brought to the wrappers and removed in trucks. While the electric lights were momentarily extinguished, owing to the melting of a fuse, plaintiff left her table to go to a water-closet, and fell over a truck, sustaining injuries. Held, that her knowledge of possible danger from a truck which might be in her way was equal to the master's, and she could not recover because of his failure to warn her thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. § 155.*]

Transferred from Superior Court, Hillsborough County.

Personal injury action by Margaret Ahern against the Amoskeag Manufacturing Company. Verdict for plaintiff. Transferred from the superior court on defendants' exceptions. Exceptions sustained. Verdict and judgment for defendants.

The evidence tended to prove the following facts: The plaintiff was injured on December 26, 1905, in the defendants' finishing room, where she was employed. She was intelligent, 37 years old, and had been employed in the same room for 18 months prior to the accident, during which period she had worked in the room 373 full days. About 45 people worked in the room, which was 108 feet long and 70 feet wide. The room contained no machinery, but was equipped with rows of tables with passageways between them. Bolts of cloth were brought into the room on trucks and unloaded on the tables, where they were banded and papered; the latter operation consisting in wrapping them in paper to protect the cloth from dust. The cloth was then reloaded upon the trucks and removed. All the work was done in an orderly and systematic manner. There were places in the room to which the trucks were removed when empty. Trucks were used all about the room, but, when empty, they were not permitted to remain in the passageways. The rule required them to be removed to the place reserved for them, and it was not customary to leave them elsewhere. The room was lighted solely by incandescent electric lamps. On the day of the plaintiff's injury, the light was turned on between 2 and 3 o'clock in the afternoon, and was extinguished about 20 minutes before 6 o'clock by the melting of a fuse near the dynamo. The lamps on such a system are liable to be extinguished in this way, and these lights had failed twice before during the fall months. Such systems are in common use. The fuse is a safety device universally employed. When the location of a melted fuse is known, a new one can be substituted in a few minutes. The defendants had an available supply of fuses to replace any which might melt, and an employé whose duty it was to make

the repair. There was no evidence of defect in the lighting system. The plaintiff was a paperer. After the lights failed, she remained at her table and papered a bolt of cloth. Thinking she would have time to go to the water-closet, she started across the room for that purpose, and was proceeding through one of the passageways when she fell over a truck and received the injuries for which she seeks to recover.

Branch & Branch and Michael F. Shea, for plaintiff. Taggart, Tuttle, Burroughs & Wyman, for defendants.

PARSONS, C. J. The defendants adopted for the illumination of the plaintiff's work place a system of lighting commonly in use for such purposes, so far as appears, perfect of its kind, but subject to occasional interruptions. They provided the proper means for restoring the action of the system when such interruptions should occur and a competent person to make the necessary repair. If it be conceded that it could be found it was the duty of the defendants to provide and have in operation a sufficient number of other systems of lighting so that by no possibility could the work place fail to be sufficiently lighted for a moment of time, the question would be whether the breach of this duty caused the injury. There was no machinery in the room. The plaintiff's work was the wrapping of bolts of cloth in paper, and there was light enough after the extinguishment of the artificial system for the plaintiff to continue at her work, which she did for a short time after the light failed. If the plaintiff had continued her work or remained in her place no injury would have resulted. The sudden failure of light did not cause the injury.

For a proper purpose the plaintiff left her place to cross the room, and was injured by falling over a temporary obstruction in her path for the existence of which at that place it is conceded the defendants were not responsible. When she left her place, the plaintiff knew of the absence of light; but she says that the defendants, having adopted a system of lighting which was liable to fail at times, should have promulgated a rule requiring the various employes to remain in their places in case the lights failed, and that such rule was required because of the danger that employes might be injured by others moving about. There was evidence of the absence of such a rule formally made, though whether at the time the employes were directed by the person in charge of the room to remain in their places was in dispute. The plaintiff testified that she did not hear such direction. Whether the other employes were directed to remain in their places or not, they did not remove from them to the plaintiff's injury. There was no evidence that the truck was put where the plaintiff collided with it after the lights went out, or

that it was not at that point when darkness intervened where the rule invoked would have required it to remain. If a rule was required for the reason suggested, the plaintiff was not injured by the action of other employes. So far as she is concerned, the argument is that, if such rule had been communicated to her, she could and would have obeyed it, and remained in her place and avoided the injury. It is not contended that the purpose for which she was leaving the room was of such pressing necessity that she would have been justified in disregarding the rule. So far as the plaintiff is concerned, the only office of a rule would be to warn her of the danger that some of the trucks upon which the cloth was brought into the room and moved to and from the various tables might at the moment of darkness be in a passageway through which in the course of business they were moved.

If there are cases where the risk of injury is so concealed or so serious that warning is not a sufficient performance of the master's duty and only a positive rule forbidding the dangerous course of conduct will excuse him, this case is not of that character. There is nothing unfamiliar about the inability to perceive in the dark obstructions to the course of one who walks without light. If there may be obstructions whose presence cannot be ascertained by the eye, due care requires the use of some other sense to detect them. The evidence is uncontradicted that the plaintiff, relying upon her familiarity with the room, was hurrying through the passage without care as to any temporary obstruction in her path, and was injured because of the unexpected presence of the truck. If it can reasonably be found that the plaintiff was without fault in not anticipating the possible presence of the truck in her path, can it be found that the defendants were in fault for not anticipating the same thing and warning the plaintiff of the danger? Whether they can or cannot depends upon the answer to the inquiry whether upon the evidence it could reasonably be found that the defendants' knowledge of the existence of the danger causing the injury was, or ought to have been, superior to the plaintiff's. *Gaudette v. Railroad*, 74 N. H. 597, 64 Atl. 667; *Dube v. Gay*, 69 N. H. 670, 46 Atl. 1049; *Collins v. Car Co.*, 68 N. H. 196, 38 Atl. 1047.

It is conceded the defendants supplied suitable instrumentalities—workroom, co-employes, and method of business. A place in the room was set apart where the trucks were kept when not in use. The plaintiff was an intelligent adult. During the preceding year and a half she had worked 373 full days in the room. She knew, as well as the defendants could have known, how the work was done. If it was probable a truck might be in her path, she was as capable of judging the danger as any one could be. If the pres-

ence of the truck was so unusual, unexpected, and improbable that she was not in fault for not taking care to guard against it, the defendants cannot be found in fault for not warning her of the unusual, not to be expected, and improbable danger. It cannot reasonably be found that of two persons of equal knowledge and of equal ability to appreciate and understand a danger, one is in fault for not apprehending the danger and the other is not. The defendants were under no obligation to warn the plaintiff of a danger they were not bound to anticipate. If they should have anticipated it, on the evidence so should the plaintiff, and her fault precludes a recovery. The fact that one person is injured and the other is not—that one is employer and the other employé—will not authorize the imposition of different rules of care as to matters of common knowledge about which each has equal information.

Exception sustained. Verdict and judgment for the defendants.

PEASLEE, J., did not sit. The others concurred.

(75 N. H. 123)

GORMAN v. ODELL MFG. CO.

(Supreme Court of New Hampshire. Coos. Nov. 4, 1908.)

1. MASTER AND SERVANT (§ 150*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—METHODS OF WORK, RULES, AND ORDERS.

A master, employing to perform a certain duty a servant, who knows or is informed as to what his duty is, is not negligent in failing to also inform the servant, by rule or otherwise, that he must not neglect his duty.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 150.*]

2. MASTER AND SERVANT (§ 141*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—METHODS OF WORK, RULES, AND ORDERS—FAILURE TO PROMULGATE RULES.

Where defendant employed a competent servant to regulate the discharge of sulphur fumes in his pulp mill, the fact that during a temporary absence from duty of such employé a co-employé was poisoned by the fumes, did not render defendant liable on the ground of negligence in failing to promulgate rules forbidding employés to absent themselves during office hours.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 283; Dec. Dig. § 141.*]

Transferred from Superior Court; Chamberlin, Judge.

Case, for personal injuries, by Kate Gorman, administratrix, against the Odell Manufacturing Company. There was a verdict for defendant, rendered pursuant to an instruction to which plaintiff excepted, and the case was transferred from the superior court. Exception overruled.

The plaintiff's evidence tended to prove the following facts: Thomas Gorman, the plaintiff's intestate, was employed by the defendants in their pulp mill, and worked upon

what were known as the "high screens." Murdock McDonald was foreman in and had charge of another part of the mill, where sulphur was burned, and it was his duty to look after the burning of the sulphur, and regulate the discharge of the fumes by the use of lime water and the ventilating system in the mill. Owing to the peculiar construction of the mill, the fumes from the acid plant, when allowed to escape, would naturally go into that portion of the mill where the plaintiff's intestate worked. While he was employed on the high screens, a few days before his death, he was poisoned by sulphur fumes, which formed a gas and produced vomiting. After an illness of about four days, he died from rupture of a blood vessel in the brain. The evidence relating to McDonald's work is discussed in the opinion. Subject to the plaintiff's exception, the jury were instructed that there was no evidence from which they could find that rules differing "from the regulations, or customs, or methods of doing the work, whatever the evidence showed them to be," were necessary.

Herbert I. Goss and Matthew J. Ryan, for plaintiff. Drew, Jordan, Shurtleff & Morris for defendant.

BINGHAM, J. It appears that sulphur fumes escaped into the portion of the mill where the plaintiff's intestate worked and caused him to sicken and die. It was the duty of McDonald to regulate the discharge of the fumes from the burning sulphur by making use of lime water and the ventilating system provided for the purpose, and there was no evidence that he did not know what his duty was and how to perform it. But the plaintiff's evidence tended to prove that McDonald was not at his post of duty at the time the plaintiff's intestate was poisoned by the sulphur fumes, and that he occasionally absented himself from his work and went into another part of the mill, where he could not readily be found when needed. From this it is urged that the court erred in not allowing the jury to pass upon the question whether the defendants were negligent in not providing a rule that their employés should not absent themselves during working hours. We are, however, of the opinion that when a master employs a servant to perform a certain duty, who knows or is informed as to what his duty is, it cannot be found that the master is negligent if he does not also inform him by rule or otherwise that he shall not neglect his duty; that, having informed the servant as to what his duty is, it is not necessary to enjoin him not to neglect it, as the latter instruction is necessarily included in the former. Upon the evidence here presented, negligence could not be attributed to the defendants because of a failure to suitably instruct, or to provide a proper rule for the guidance of, McDonald;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and whether it could be attributed to them, because of their retaining him in their employment after they knew or ought to have known that he was neglecting his duty, is a question not raised by the case.

Exception overruled. All concurred.

(75 N. H. 122)

STATE v. BEAN et al.

(Supreme Court of New Hampshire. Grafton. Nov. 4, 1908.)

1. INTOXICATING LIQUORS (§ 159*)—OFFENSES—SALE TO MINOR.

A sale or delivery of liquor to a minor by a licensee is a violation of Laws 1903, p. 88, c. 95, § 15, as amended by Laws 1905, p. 450, c. 49, § 9, prohibiting the sale or delivery of liquor to a minor, and is punishable under section 33 (page 93) of the original act as amended by Laws 1905, p. 456, c. 40, § 18.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 159.*]

2. INTOXICATING LIQUORS (§ 215*)—OFFENSES—SALE TO MINOR—INDICTMENT—SUFFICIENCY.

An indictment which alleges that Laws 1903, p. 81, c. 95, and amendments thereto, regulating the traffic in intoxicating liquors, had been accepted and were in force in a town, that defendants, copartners, had a third-class liquor license, and that they unlawfully sold liquor to a minor, charges a violation of Laws 1903, p. 81, c. 95, as amended.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 215.*]

3. INTOXICATING LIQUORS (§ 236*)—OFFENSES—SALE TO MINOR—EVIDENCE.

Where the state proves that one was a licensee within Laws 1903, p. 81, c. 95, and amendments, regulating the traffic in intoxicating liquors, and shows that he sold or delivered liquor to a minor, a violation of the act as amended is established.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 236.*]

Transferred from Superior Court, Grafton County.

Charles H. Bean and another were indicted for selling liquor to a minor, and they moved to quash the indictment. The questions of law raised by the motion were transferred from the superior court. Denied.

The indictment charged that the defendants on October 1, 1907, at Canaan, in the county of Grafton, with force and arms, "not being then and there an agent or agents of any town or city for the purpose of selling spirit, and * * * being then and there copartners, * * * and the provisions of chapter 95 of the Session Laws of New Hampshire enacted in the year of our Lord one thousand nine hundred and three, and amendments thereto, having been duly accepted and being then and there in force in said Canaan, and said copartners having then and there a third-class license from the state board of license commissioners of the state of New Hampshire for the purpose of selling liquor, and not having then and there a license or other lawful authority

to sell liquor to a minor for any other person, did then and there unlawfully sell to one Howard E. Martin for one Warren Chase a large quantity of liquor, to wit, one gallon of malt liquor, he, the said Howard E. Martin, being then and there a minor under the age of twenty-one years and of, to wit, the age of seventeen years, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state." The second count charged in the same language the unlawful delivery of liquor to the minor for another.

Marshall D. Cobleigh, Sol., for the State.

John W. Kelley and George W. Stone, for defendants.

The indictment is bad for uncertainty. If the sale was made, it was made in violation of chapter 112 of the Public Statutes of 1901, and amendments thereto, or it was made in violation of chapter 95, p. 81, Laws 1903, and amendments thereto, to which offenses different penalties attach. Laws 1903, p. 122, c. 122; Laws 1903, p. 93, c. 95, § 83. From a reading of the indictment it is impossible to tell which law applies to the alleged offense. If it was intended to charge a violation of law by the defendants as licensees, the premises upon which they were authorized to sell, constituted license territory, should have been described with substantial conformity to the description of the same in the license, and the sale alleged to have been made on such premises. Laws 1905, p. 529, c. 117, § 1; State v. Langdon, 74 N. H. 50, 64 Atl. 1099.

PARSONS, C. J. The sale or delivery of liquor to a minor by a licensee is a violation of section 15, c. 95, p. 88, Laws 1903, as amended by section 9, c. 49, p. 450, Laws 1905, punishable under section 33, c. 95, p. 93, Laws 1903. Laws 1905, p. 456, c. 49, § 18; State v. Langdon, 74 N. H. 50, 64 Atl. 1099; State v. Kennard, 74 N. H. 76, 65 Atl. 378; State v. Kidder, 74 N. H. 302, 67 Atl. 405. It is alleged that the law licensing the sale of liquor had been duly accepted (Laws 1903, p. 92, c. 95, § 31) and on the date of the offense charged was in force in the town of Canaan; that the defendants were then and there co-partners in business, and, having then and there a license for the purpose of selling liquor, did then and there unlawfully sell (in the second count, deliver) liquor to a minor under the age of 21 years. The allegations that the license law was in force in Canaan, and that the defendants were then and there licensed to sell liquor, are sufficient to make it plain that the offense charged is the violation of the special provisions of the license law by the defendants as licensees. State v. Langdon, 74 N. H. 50, 52, 64 Atl. 1099. If the state proves that when and where they were licensees within

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the meaning of the act the defendants in Canaan sold or delivered liquor as charged, the offense will be made out. It is not advisable to speculate upon possible questions that may or may not arise upon the evidence.

Motion denied. All concurred.

(75 N. H. 36)

STEER v. DOW.

(Supreme Court of New Hampshire. Hillsborough. Nov. 4, 1908.)

1. GARNISHMENT (§ 114*)—TRUSTEES—LIABILITY.

Under Pub. St. 1901, c. 245, §§ 19, 20, a trustee is chargeable for funds of defendant in his hands when the process is served upon him, and with certain exceptions, including wages for labor performed after such service, for all that may come to his hands up to the time of disclosure.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 233; Dec. Dig. § 114.*]

2. EXEMPTIONS (§ 48*)—TRUSTEE PROCESS—WAGES.

Under Pub. St. 1901, c. 245, § 20, exempting from trustee process wages for labor performed after service of such process, only wages for personal service are excepted; a fund created in part by the labor of others than defendant's wife and minor children not being exempt.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 71; Dec. Dig. § 48.*]

3. EXEMPTIONS (§ 48*)—TRUSTEE PROCESS—WAGES.

Under Pub. St. 1901, c. 245, § 20, exempting from trustee process wages for labor performed after service of such process, where no means are furnished to extricate the privileged labor from other ingredients composing the indebtedness and to ascertain its value, the trustee is chargeable.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 71; Dec. Dig. § 48.*]

4. GARNISHMENT (§ 38*)—TRUSTEE PROCESS—EXEMPTIONS—NEGOTIABLE INSTRUMENTS.

One sought to be held under trustee process as liable upon a negotiable instrument, will be discharged unless the instrument falls within Act June 30, 1841 (Laws 1841, p. 527, c. 601; Rev. St. 1843, c. 208, as extended by Gen. St. 1867, c. 230, § 21; Pub. St. 1901, c. 245, §§ 21, 22), specifying the negotiable paper subject to such process.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 74; Dec. Dig. § 38.*]

5. GARNISHMENT (§ 38*)—TRUSTEE PROCESS—EXEMPTIONS—"NEGOTIABLE INSTRUMENT."

A mere contract of employment specifying compensation for services is not a negotiable instrument within Act June 30, 1841 (Laws 1841, p. 527, c. 601; Rev. St. 1843, c. 208, as extended by Gen. St. 1867, c. 230, § 21; Pub. St. 1901, c. 245, §§ 21, 22), specifying the negotiable paper subject to trustee process.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4767-4770; vol. 8, p. 7731.]

6. GARNISHMENT (§ 38*)—TRUSTEE PROCESS—CONTRACT OF EMPLOYMENT—MATERIALITY.

On trustee process to reach money due under a contract of employment, the contract is material only on the question of title, performing the same office as a bill of sale or a

deed in a proceeding to hold the trustee for the price of the goods or land.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 38.*]

7. GARNISHMENT (§ 81*)—TRUSTEE PROCESS—DEBT PAYABLE BEYOND STATE.

That payment of a debt contracted within is to be made beyond the state is no answer to trustee process against the debtor.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 147; Dec. Dig. § 81.*]

8. GARNISHMENT (§ 110*)—TRUSTEE PROCESS—LIABILITY.

The general rule that one can be charged under trustee process only for what defendant could recover of him in suit on their contract is subject to exceptions, and a trustee may be charged where defendant could not sue him without proof of a demand, though none has been made.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 110.*]

9. GARNISHMENT (§ 78*)—TRUSTEE PROCESS—RESIDENCE OF TRUSTEE.

Under Pub. St. 1901, c. 245, § 5, providing that a nonresident doing business in the state may be charged on trustee process as if a resident for credits of defendant through contracts made or performed within the state, a foreign life insurance company is chargeable on such process for renewal commissions due a general agent on business done within the state.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 144; Dec. Dig. § 78.*]

Action by Elizabeth B. Steer against M. Ivan Dow. Transferred from superior court on an issue as to the New York Life Insurance Company's liability as trustee. Trustee chargeable.

Debt, upon a judgment. Facts found by the court. The defendant appeared and was subsequently defaulted. The only controversy is as to the liability of the New York Life Insurance Company as trustee; and that question was transferred without a ruling from the January term, 1908, of the superior court by Plummer, J. The trustee was summoned by service upon the insurance commissioner on November 5, 1906, and at that date was not indebted to the defendant. From the disclosure taken May 10, 1907, it appeared that the trustee was then indebted to the defendant in the sum of \$91.27. Prior to June 30, 1906, the defendant was the general agent of the trustee in New Hampshire, was located in Manchester, and had subagents in his employ. Under his contract of employment he was entitled to renewal commissions payable to him at Manchester on business transacted in New Hampshire by him and his agents. The disclosed indebtedness of the trustee all arose from renewal commissions accruing to the defendant from business in New Hampshire done by him and his subagents. June 30, 1906, the defendant removed to Boston, and his renewal commissions were made payable to him in Boston instead of at Manchester. At the January term, 1908, the trustee appeared by counsel and moved for a discharge upon the following grounds: (1) The renewal commissions

are wages; (2) they are payable in Massachusetts; and (3) at the time of service upon the trustee the defendant was indebted to the trustee.

Andrews & Andrews, for plaintiff. Henry N. Hurd and Burnham, Brown, Jones & Warren, for defendant.

PARSONS, C. J. A trustee is chargeable, not only for the funds of the defendant in his hands at the time process is served upon him, but also, with certain exceptions, for all that may come to his hands up to the time of disclosure. Pub. St. 1901, c. 245, § 19; Gove v. Varrell, 58 N. H. 78; Palmer v. Noyes, 45 N. H. 174, 178; Smith v. Railroad, 33 N. H. 337, 345; Edgerly v. Sanborn, 6 N. H. 397. Wages for labor performed by the defendant after service upon the trustee are an exception. Pub. St. 1901, c. 245, § 20. If the renewal commissions are payments for labor performed in placing the original policy, the fund disclosed is not within the exception because it is to be inferred such labor was performed before the defendant left the state prior to the service, and for the further reason that the wages excepted are only those accruing as payment for purely personal service. A fund created in part by the labor of others than the wife and minor children of the defendant is not excepted. Robbins v. Rice, 18 N. H. 507, 510; Hale v. Brown, 59 N. H. 551, 47 Am. Rep. 224; Gray v. Fife, 70 N. H. 89, 47 Atl. 541, 85 Am. St. Rep. 609. Where "no means are furnished by which it is possible to extricate the privileged labor from the other ingredients composing the cause of indebtedness and to ascertain its value," the trustee is chargeable.

Prior to the act of June 30, 1841 (Laws 1841, p. 527, c. 601; Rev. St. 1843, c. 208), a trustee could not be charged on account of his liability to the defendant on a negotiable promissory note or by reason of any chose in action of the defendant in his possession. The negotiable character of the instrument evidencing his liability in the first case whereby, if he were charged, a bona fide holder might suffer a loss or the maker be compelled to pay twice, and the lack of means for enforcing the security in the second, were the reasons for the holding that such liabilities or securities were not included within the terms "money, goods, chattels, rights or credits," used in the act of 1791. By the act of 1841, means were provided for the collection of choses in action held by the trustee, and his liability upon negotiable promissory notes "made or payable in this state, or the parties to which, at the time of making the same, resided in this state," was made subject to attachment by this process. The legislation was subsequently extended (Gen. St. 1867, c. 230, § 21) so as to include all negotiable paper "made and payable in this state, or the parties to which, at the time of making the same, resided in this state."

Pub. St. 1901, c. 245, §§ 21, 22; Laws (Ed. 1792) p. 151; Cox v. Severance, 70 N. H. 86, 46 Atl. 739, 85 Am. St. Rep. 602; Kibling v. Burley, 20 N. H. 359; Fletcher v. Fletcher, 7 N. H. 452, 453, 454, 28 Am. Dec. 359; N. H. I. F. Co. v. Platt, 5 N. H. 193; Stone v. Dean, 5 N. H. 502. Therefore, where it is sought to hold the trustee as liable upon negotiable paper, the trustee will be discharged, unless the instrument comes within the description of the statute. Chadbourn v. Gilman, 63 N. H. 353; Carbee v. Mason, 64 N. H. 10, 4 Atl. 791.

By the terms of the contract between the defendant and trustee, the fund in question was at the time of the attachment payable in Massachusetts. It does not appear that the original contract or the variation relied upon were reduced to writing. But, assuming that they were, the instrument was not negotiable. So far as it is disclosed, it was a mere contract of employment specifying the agreed remuneration for service rendered. It is not within the exception existing before the legislation extending the process of foreign attachment to cover certain negotiable paper, and the provisions of the statute have no application. The plaintiff is not seeking to enforce the contract, but to reach property in the trustee's hands which the contract shows to belong to the defendant. The contract is material only on the question of title, and performs the same office as a bill of sale or deed of land in a proceeding to hold the trustee for the purchase price of goods or land. The fund in the possession of the trustee here is attachable, regardless of the agreement of the trustee to transport it to the defendant at Boston, precisely as a horse or car load of goods would be. The fact that payment of a debt is agreed to be made out of the state is not an answer to the trustee process. Sturtevant v. Robinson, 18 Pick. (Mass.) 175; Blake v. Williams, 6 Pick. (Mass.) 236, 315, 17 Am. Dec. 372. It does not appear that by the contract a demand by the defendant in Massachusetts was made a condition precedent to his right of action to recover the debt. If it were, in the absence of such a demand, the defendant could not maintain an action for the fund here or elsewhere. To the general rule that the trustee can be charged only for what the defendant could recover of him in an action on the contract there are exceptions. Libby v. Company, 67 N. H. 587, 32 Atl. 772. He may be charged where the defendant could not maintain a suit without proof of a demand, although none has been made. Quigg v. Kittredge, 18 N. H. 157; Woodbridge v. Morse, 5 N. H. 519. "The trustee is to be charged whenever it appears that he has money in his hands which the principal has a right to receive upon demand, whether a demand has been made or not."

In argument in this court it appears to be urged that the trustee is not an inhabitant of the state. It has been held that a resident and inhabitant of another state, al-

though served with process here, cannot be charged as trustee except upon a contract to be performed here, or for goods of the defendant actually in his possession here at the time of the service of the writ upon him. *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Young v. Ross*, 31 N. H. 201; *Sawyer v. Thompson*, 24 N. H. 510; *Jones v. Winchester*, 6 N. H. 497. This objection does not appear to have been taken in the superior court, and the facts as to the residence of the trustees are not fully found; but, from the absence of objection to the validity of the attachment by service upon the insurance commissioner, it may be inferred that the trustee is a foreign "joint-stock or mutual insurance company," duly admitted to and doing business in this state subject to its laws. Pub. St. 1901, c. 169, § 4. In view of the statutory provisions on the subject (Pub. St. 1901, c. 170, § 14; *Id.*, c. 169, § 4), whether such a party appearing as a litigant in the courts of the state is to be regarded as a resident of the state or otherwise may be a question requiring serious consideration. Time need not be now taken for the purpose; for, assuming that the trustee is to be regarded as a nonresident doing business in the state, the case is fully covered by the statute. "A person doing business in this state and residing outside the state may be summoned on trustee process, * * * and he may be charged as trustee, as if he were an inhabitant of this state, * * * for any rights or credits of the defendant by reason of contracts made or performed within the state." Pub. St. 1901, c. 245, § 5. The credits for which it is sought to charge the trustee accrue to the defendant "from business in New Hampshire done by him and his sub-agents." In the language of the statute they are "credits of the defendant by reason of contracts * * * performed within the state," wherever the contract was made, which does not appear. The trustee therefore is to be charged "as if it were an inhabitant of this state."

Trustee chargeable. All concurred.

(75 N. H. 32)

HAYWARD v. SPAULDING et al.

(Supreme Court of New Hampshire. Hillsborough. Nov. 4, 1908.)

1. WILLS (§ 634*)—CONSTRUCTION—REMAINDERS—NATURE.

A will, devising the remainder of testator's estate to his sons' children, devised a contingent remainder where the sons had no children when the will took effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488, 1490, 1498, 1501; Dec. Dig. § 634.*]

2. REMAINDERS (§ 10*)—CONTINGENT REMAINDERS—FAILURE TO VEST.

Where a will devised the remainder of testator's estate to his sons' children at his widow's death, and no children were born during the existence of the life estate, the remainder

never vested, and at common law would fail through the termination of the estate supporting it.

[Ed. Note.—For other cases, see Remainders, Dec. Dig. § 10.*]

3. WILLS (§ 439*)—CONSTRUCTION—RULES—ABROGATED.

A testator's intention will be given effect, regardless of the form of words used and of the absence of technical terms, if he does not intend to create an illegal or impossible estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 935; Dec. Dig. § 439.*]

4. WILLS (§ 491*)—TESTATOR'S INTENT—ASCERTAINMENT—METHOD.

In interpreting a will, testator's intent is to be determined as a question of fact from competent evidence, and not by rules of law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1058; Dec. Dig. § 491.*]

5. WILLS (§ 536*)—CONSTRUCTION—TESTATOR'S INTENTION.

A will giving testator's widow the use of the estate for life, with remainder to his sons' children, does not authorize an inference that he intended that the children should have the estate if he survived his wife, or that his sons should have it if she survived testator and the sons had no children.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 536.*]

6. WILLS (§ 10*)—TRUSTS—CREATION TO PRESERVE CONTINGENT REMAINDER.

Under a will giving testator's widow a life estate, with remainder to his sons' children, testator's failure to provide for trustees to hold an estate sufficient to support the remainder, on the death of the widow before the anticipated birth of children, did not render impossible the preservation of the estate for them; it being presumed that he intended to impose such trust upon the executor appointed to collect the estate, and transmit it to the persons entitled.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 10.*]

7. TRUSTS (§ 160*)—FAILURE OF TRUSTEE—APPOINTMENT BY COURT.

If plaintiff administrator cannot execute a trust impliedly created by testator, to hold an estate to support a remainder on the termination of the particular estate before the birth of the remaindermen, the superior court can appoint a trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 207; Dec. Dig. § 160.*]

8. WILLS (§ 439*)—CONSTRUCTION—TESTATOR'S INTENTION.

Testator's intention that his real and personal estate should take the same course must be given effect.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 439.*]

9. WILLS (§ 728*)—CONSTRUCTION—UNBORN REMAINDERMEN.

A will giving the remainder of testator's estate to his sons' children at his widow's death does not give the sons the income before nor after the birth of the children.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 728.*]

Transferred from Superior Court, Hillsborough County; Peaslee, Judge.

Petition by Henry W. Hayward, administrator, against Albert M. Spaulding and another, for advice as to the execution of Jonathan Spaulding's will, transferred from the superior court. Case discharged.

The will contains the following clause: "At the decease of my said wife, or in case of her marriage after my decease, I give, bequeath, and devise all the property in her hands and possession at the time of the happening of either event in equal shares to the children of my two sons, Charles A. Spaulding and Albert M. Spaulding, and their heirs forever." The will gave the widow the estate for life, with the right to use the principal, if necessary for her support, and named her as executrix. After her decease the plaintiff was appointed and received both realty and personalty as the estate of Jonathan. The two sons were Jonathan's only descendants. Charles died after his father's death, but before that of his mother. He left a widow, but no children. Albert is a bachelor about 50 years old.

George E. Bales, for plaintiff. Hess & Crow, for defendants.

PARSONS, C. J. At his decease the testator left a widow and two sons. Neither of the sons then had, or had had, children. Under the provisions of his will a child of either of the two sons living at the testator's death would have taken an interest in the real estate defined under the terms of the common law as a "vested remainder," the vesting of which would have opened to let in after-born children, while such interest might have been destroyed by the consumption of the estate in the necessary support of the widow. As there was no child in existence when the will took effect, the gift over was to a dubious or uncertain person. Such a remainder is described as "contingent." As no child was born during the existence of the particular estate in the widow, the remainder never vested; and, under the strict rules of the common law, the remainder failed because of the termination of the estate which supported it. Executory devises were instituted to support the will of the testator in cases where, by the rules of law, a devise of a future estate could not operate as a remainder. They "were allowed, out of indulgence to testators, that they might, without the intervention of trustees to preserve remainders, establish future interests in strict settlement beyond the reach of those who had the prior estate." *Burleigh v. Clough*, 52 N. H. 267, 273, 13 Am. Rep. 23; *Wood v. Griffin*, 46 N. H. 230, 235; *Yeaton v. Roberts*, 28 N. H. 459; *Eaton v. Straw*, 18 N. H. 320.

If there had been no devise to the widow, or if the devise to her had lapsed by her death before the testator, the devise to the unborn children would have been supportable as an executory limitation (*Fearne Rem.* 525, 526), because in such case the limited estate was never supported by a freehold and could not be construed a remainder, which requires such an estate to support it. But in consequence of the rule that a devise which can be construed as a remainder will

never be deemed an executory devise (*Burleigh v. Clough*, 52 N. H. 267, 273, 13 Am. Rep. 23), it is said that, where the preceding freehold has once vested so as to support a contingent remainder, the devise cannot, by any subsequent accident, inure as an executory limitation. *Fearne Rem.* 386, 395, 526.

But the validity of these rules, however well supported by authority, need not be considered. However simple their application would make the disposition of the case, they cannot be relied upon. Rules of interpretation under which particular phrases or terms are necessary to express a particular intention, or to give effect thereto, have long since been abandoned here. As was said in *Kennard v. Kennard*, 63 N. H. 303, 311, in reference to earlier cases then cited and relied upon: "Upon the rule of testamentary interpretation established in this state, it is immaterial whether the doctrine of remainders is correctly or incorrectly applied. * * * Whatever that doctrine may be, and however it may be applied, it does not set aside the supreme rule that the interpretation of a will is the ascertainment of the testator's intention. If it upholds the intention disclosed by the terms of the will in this case, it is useless. If it does not uphold it, it is equally useless, as it cannot break the will."

It is not necessary that the intention of any written instrument should be expressed in a particular form of words, or by the use of technical terms. "It is sufficient if the intention of the parties can be gathered from the instrument, read in the light of the competent evidence bearing upon its interpretation." *Upton v. Hosmer*, 70 N. H. 493, 495, 49 Atl. 96. The testator's intention is the sole subject of inquiry. It "is determined as a question of fact by competent evidence, and not by rules of law." *Edgerly v. Barker*, 66 N. H. 434, 447, 31 Atl. 900, 23 L. R. A. 323, and cases cited; *Stratton v. Stratton*, 63 N. H. 582, 585, 44 Atl. 699. When ascertained, such intention is to be given effect, with the exception, however, that the intention cannot be followed when it is impossible or illegal to do so; "for an intention will not avail to create an illegal or an impossible estate." *Burleigh v. Clough*, 52 N. H. 267, 271, 13 Am. Rep. 123. Decisions "which have in so many cases defeated the intention of testators, by substituting, through the application of an artificial and technical rule of law, a different estate from that which the testator intended" (*Eaton v. Straw*, 18 N. H. 320, 329, 330), are not now followed here.

The testator intended that his real estate, as well as his personal property, should go to the children of his two sons. The gift was one he had power to make. The fact that his wife survived him, or that no child was born in the lifetime of the widow, is not a sufficient reason for breaking his will. It cannot be inferred from the will that he intended his sons' children should have the

estate if he survived his wife, and that his sons should have it if she survived him, because he expressly provided in that case for the extent to which the gift to the children should be diminished by the necessities of the widow. Neither does his failure to provide trustees to hold an estate sufficient to support the remainder, in case of the death of his widow before the anticipated birth of children, render impossible the preservation of the estate for them. He knew that at the death of his widow the appointment of an executor in the capacity of the plaintiff, to collect the estate and transmit it to the persons entitled, would be required. Not having provided another to hold the property, if necessary, it is to be inferred he intended to impose such trust upon the plaintiff or upon the person who might occupy his position. *Campbell v. Clough*, 71 N. H. 181, 51 Atl. 668; *Chase v. Currier*, 63 N. H. 90. If the plaintiff cannot execute the trust, a trustee can be appointed by the superior court. 1 Per. Tr. § 121.

The testator intended that both the real and personal estate should take the same course. Effect must be given to that intention. *Parker v. Ross*, 69 N. H. 213, 316, 45 Atl. 576. It is unnecessary to consider whether the objections that have been urged to the preservation of the real estate for the unborn children are, or are not, applicable to the personal estate. If they are not, as appears to be conceded in argument, the testator's intention that both should take the same course is a further answer to the objections that have been raised.

The time of distribution intended by the testator is now immaterial. Whenever he intended or expected such distribution to be made, he did not intend the distribution should be made before any of the class to whom he gave his estate came into existence. As the testator intended the children should have all the property, and gave none to his sons, he did not intend the sons should have the income after, or before, the children should be born.

Case discharged.

PEASLEE, J., did not sit. The others concurred.

(75 N. H. 88)

CHANDLER et al. v. EASTMAN et al.

(Supreme Court of New Hampshire. Merrimack. Nov. 4, 1908.)

1. STATES (§ 67*)—OFFICERS—AUTHORITY—BOARD OF TRUSTEES OF STATE LIBRARY—PUBLICATIONS AUTHORIZED.

Laws 1903, p. 9, c. 6, § 2, impose on the board of trustees of the state library all the powers and duties formerly incumbent upon the board of library commissioners, and Laws 1895, p. 481, c. 118, § 9, require the latter to issue a library bulletin at least twice a year, containing recommendations as to the best library

methods, together with notes on library progress. The board of trustees sought to have published a reference index to biographical sketches of New Hampshire men contained in the state library, which would require more than 100 pages of printed matter. *Held*, that the statute contemplated the publication of small pamphlets, directly relating to library work, as stated therein, and the publication of the index, in the place of special bulletins, was not authorized thereby.

[Ed. Note.—For other cases, see *States*, Dec. Dig. § 67.*]

2. STATES (§ 67*)—OFFICERS—AUTHORITY—TRUSTEES OF STATE LIBRARY—AUTHORITY TO PUBLISH CATALOGUE.

Laws 1893, p. 23, c. 31, § 7, authorizes the trustees of the state library to cause an alphabetical catalogue of the books received to be substituted in place of the existing system of entry of books, provided that a catalogue of the books shall be first made and printed, and, pursuant thereto, an authors' list was published in two volumes, aggregating 1,600 pages, containing a complete list of the books, alphabetically arranged according to the authors' names, and thereafter the state board attempted to publish a catalogue of the same books classified according to their subjects. *Held*, that the authors' list published was the only catalogue authorized by the statute to be published in addition to the periodical supplements thereto, and the second catalogue according to subjects was unauthorized.

[Ed. Note.—For other cases, see *States*, Dec. Dig. § 67.*]

Transferred from Superior Court, Merrimack County; Pike, Judge.

Mandamus by William D. Chandler and others, trustees of the state library, against Edwin G. Eastman and others, members of the Public Printing Commission, to compel defendants to publish certain publications. Facts agreed, and case transferred from the superior court. Petition denied.

The plaintiffs are the trustees of the state library, and the defendants constitute the public printing commission. The questions presented are: (1) Whether the manuscript for a Reference Index to Biographical Sketches of New Hampshire Men in the Books and Publications in the State Library may be published for and in the place of one or more library bulletins, under section 9, c. 118, p. 481, Laws 1895; and (2) whether the manuscript for a Subject List Catalogue of the state library may be printed under section 7, c. 81, p. 23, Laws 1893, an Author List Catalogue having been published thereunder in 1904. If either of these questions is decided in the affirmative, the writ is to issue; otherwise not.

James F. Brennan, for plaintiffs. Edwin G. Eastman, Atty. Gen., for defendants.

WALKER, J. The first question presented by the case is whether the Reference Index, if printed, would constitute a library bulletin which the statute authorizes the trustees to prepare and have printed at the public expense. "All printing, binding, and blank-book making required by the several depart-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ments of the state government and paid for out of the state treasury shall be termed 'public printing' for the purposes of this act. All of the public printing shall be ordered by the public printing commission, and no other party or parties shall have authority to contract for said public printing in the name of the state of New Hampshire." Laws 1901, p. 579, c. 84, § 2. The board of trustees of the state library having all "the powers and duties" formerly "by law made incumbent upon the board of library commissioners" (Laws 1903, p. 9, c. 6, § 2), it is their duty "at least twice in each year" to "issue a library bulletin, which shall contain recommendations as to the best methods to be employed in library work, together with notes on library progress, and such other matters of general information relating to library work as they may deem proper." Laws 1895, p. 481, c. 118, § 9. It cannot be doubted that it has been the established policy of the state for many years to promote and encourage the establishment and maintenance of free public libraries; and, in order to more effectually carry out this purpose, the duty of distributing bulletins of information upon the subject of library management among the town libraries was imposed upon the trustees of the state library. To accomplish the best results such information is manifestly of prime importance, and this consideration cannot be disregarded in deciding the question of the legislative intention in authorizing the publication of library bulletins. But while the trustees have a wide discretion in determining what information relating to library work it is desirable to print in the bulletin, their authority in a given case is bounded by a reasonable construction of the legislative purpose. To label a document a "bulletin" does not necessarily give it that character.

Was it within the purpose of the Legislature, ascertained from all the competent evidence, to authorize the printing and distribution of "a Reference Index to Biographical Sketches of New Hampshire Men Contained in the Books and Publications in said State Library," under the general designation of a library bulletin? It is evident that such a publication would not contain "recommendations as to the best methods to be employed in library work," or "notes on library progress." It would be merely a list of names, or a special catalogue. The principal or determining characteristic of a bulletin, as prescribed by the Legislature, is its capacity to furnish useful advice upon matters pertaining to the successful conduct of town libraries. The proposed index does not fulfill this requirement. It advises nothing; it recommends nothing; it is merely an extended list of names, which would doubtless be of great convenience to librarians in their search for biographical sketches of New Hampshire men, but which does not constitute a library bulletin within the evident

intention of the statute. If further evidence in support of this conclusion were required, it might be found in the fact that the index as prepared would make more than 100 pages of printed matter. It would be an extensive compilation. It cannot be inferred that the statutory authorization included such lists, catalogues, or dictionaries as the trustees might think would be useful to librarians, without regard to their size and extent. A complete catalogue of the books in the state library might be of material assistance in local library work, throughout the state; but it would be difficult to justify a construction of the statute that such a catalogue might properly be called a bulletin. The intention was to provide for the publication, not of large books, but of small pamphlets; not of extensive indexes, but of recommendations and facts relating to library work, stated with reasonable brevity and conciseness. As the proposed Reference Index is intended by the trustees to take the place of several bulletins which would otherwise be issued, during the space of a year or more, and as it does not answer the reasonable requirements of a bulletin, its publication at public expense is not authorized by section 9, c. 118, p. 481, Laws 1895. Its publication would not be a substantial compliance with the statute.

The second question is whether the Author List of the state library constitutes the catalogue which the trustees were authorized to publish by section 7, c. 31, p. 28, Laws 1893; that is, whether the Author List consisting of two large volumes aggregating over 1,600 pages, printed in 1904, is the "catalogue of books" which that statute authorized to be printed, or whether it is only an incomplete catalogue which may now be completed by the publication of an extensive Subject List. The statute referred to provides that "the trustees of the state library are authorized to cause the present system of entry of accessions by classes to be omitted from the report of the librarian, and an alphabetical catalogue of books received for the period covered by each report to be regularly substituted therefor, so far as such books or pamphlets have been entered in the official catalogue; provided, that a catalogue of books shall be first made and printed." If the Author List does not constitute the catalogue which the Legislature of 1893 intended to authorize, it is contended by the plaintiffs that authority remains under the statute for the publication of the Subject List, in order to complete the authorized catalogue. No suggestion is made that the printed volumes are not a complete catalogue of the books "in the miscellaneous department of the library on June 1, 1902," as announced therein, or that they were not intended to be a complete list thereof, arranged substantially according to the authors' names. To one not versed in the technicalities of library work this printed list would

seem to be a catalogue. If it is not as comprehensive and exhaustive as it might be, it is at least complete in itself. If a library catalogue is not completed until the books have been listed upon all useful theories of arrangement and classification known to bibliographers, it would be rash to assume that the Legislature, which is not made up of men having the technical learning of librarians, meant when they used the word "catalogue" a work of several volumes which should unite several distinct theories of arrangement, so that each book would be indexed in as many different volumes as there were theories. Such an understanding evidently was not entertained by the Legislature of 1893. The legislative purpose was to authorize the compilation of a catalogue of the books in the state library, upon some reasonably convenient plan to be determined by the trustees, and not to empower the trustees to publish several extended lists of books, which together might be deemed by some people to constitute one complete catalogue. When the Author List was published, no statutory authority remained for the compilation of another catalogue, however useful and desirable it might be. Thereupon it was provided that the accessions to the library should furnish material for supplements to the catalogue, which have since been published. In this way the Author List has been treated by the trustees as the statutory catalogue, in consonance, as it seems to us, with the legislative purpose. The statute furnishes no authority for the printing of the manuscript of the Subject List.

Petition denied. All concurred.

(75 N. H. 84)

**CLOUGH v. ROCKINGHAM COUNTY
LIGHT & POWER CO. et al.**

(Supreme Court of New Hampshire. Rockingham. Nov. 4, 1908.)

1. ELECTRICITY (§ 19*)—INJURIES INCIDENT TO PRODUCTION—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries by contact with electrically charged wires strung across a street without a license therefor, as required by Pub. St. 1901, c. 81, evidence held to require the submission to the jury of the issue of negligence.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

2. PRINCIPAL AND AGENT (§ 21*)—EVIDENCE OF AGENCY—TESTIMONY OF AGENT.

An agent may testify to the fact of his agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 39; Dec. Dig. § 21.*]

3. PRINCIPAL AND AGENT (§ 22*)—EVIDENCE OF AGENCY—DECLARATIONS OF AGENT.

Declarations of an alleged agent are not admissible to establish the agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

4. PRINCIPAL AND AGENT (§ 22*)—EVIDENCE OF AGENCY—DECLARATIONS OF AGENT.

The declarations of an agent may be received provisionally, as verbal acts indicating that he was acting on another's behalf, leaving it to subsequent proof to establish his connection as agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

5. EVIDENCE (§ 121*)—RES GESTÆ.

In an action for injuries by coming in contact with electrically charged wires strung across a street while plaintiff was engaged in moving a house through the street, evidence of the declarations of a third person, who came and took charge of the wires, in response to a request made on the superintendent of the railway company maintaining some of the wires, made as part of the res gestæ, are admissible as bearing on plaintiff's exercise of due care in attempting to raise the wires from the roof of the house at the time of the accident.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 308; Dec. Dig. § 121.*]

6. ELECTRICITY (§ 19*)—INJURIES INCIDENT TO PRODUCTION—ACTIONS—EVIDENCE—MATERIALITY.

Where, in an action for injuries by coming in contact with electrically charged wires strung across a street without a license therefor, as required by Pub. St. 1901, c. 81, it appeared that no attempt was made, at the time of the injury, to disconnect the wires or to remove their supports, the failure to show that written notice was served on defendant, as required by section 14 of the chapter, did not defeat a recovery.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

7. MASTER AND SERVANT (§ 301*)—EXISTENCE OF RELATION—EVIDENCE.

On the issue whether the superintendent of an electric railway company had authority to direct an employé of the railway company and of a power company to take charge of their high tension wires strung across a street, evidence held not to show such authority, so that the power company was not liable for injuries sustained in consequence of the act of such employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210-1216; Dec. Dig. § 301.*]

Transferred from Superior Court, Rockingham County.

Case for personal injuries by George L. Clough against the Rockingham County Light & Power Company and another. There was a verdict for plaintiff, and the case was transferred from the superior court. Verdict set aside.

The plaintiff's evidence tended to prove the following facts: The plaintiff is a carpenter, and was employed to assist in moving a small house through the streets of Portsmouth by one Ham, who had a permit for the work from the city authorities. The building was drawn on wheels. To move it to its destination it was necessary to pass a certain point where the defendants had strung two telephone wires across a street, and about 20 feet above its surface, and on the same set of poles, about 2 feet above the telephone wires, two electric light wires, each carrying 6,000 volts of electricity, and on the same poles, about 4 feet above the light wires, cer-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tain power wires, each carrying 13,000 volts of electricity. All the wires carried sufficient electricity to kill or severely injure a person coming in contact with them. The defendants had no license or location to place poles in and string wires across the street at this point, as required by chapter 81, Pub. St. 1901. As the building rested on the wheels, its top was a little higher than the telephone and electric light wires. The plaintiff was on top of the building, and when the wires caught on the roof, he attempted to pry them up with a hammer, so that the building would pass under them, and in so doing was severely injured by a shock of electricity. One of the men engaged in moving the building telephoned to Hayden, superintendent of the railway company, asking him to send a lineman to take charge of and look after the wires while the building was being moved under them. Hayden sent Burbank, who worked for both companies, being foreman of the electric railway company's car barn at Stratham, and rotary tender for the defendants at the car barn, and he took charge of and gave directions as to moving the building under the wires at the time of the accident. The evidence also tended to prove that the wires were uninsulated and that such a condition is dangerous, that the defendants were negligent in the location, construction, and management of the wires at the time and place of the accident, and that the plaintiff, in consequence of the defendants' negligence, was himself in the exercise of due care at the time. There was no evidence that Hayden or the railway company were expressly authorized to send Burbank to take charge of the defendants' high tension lines, and the question whether there was evidence that he had implied authority is discussed in the opinion. At the close of the plaintiff's evidence the defendants moved for a nonsuit. The motion was denied, and they excepted. They also excepted to the following portion of the charge to the jury: "One of the disputed points in this case is whether Burbank was present representing the defendant at the time of the accident. The plaintiff claims he was, and the defendant that he was not. You will determine whether he was sent there as a representative of the electric railway company or of the defendant, and, if he was sent representing the defendant, whether the person who sent him was authorized to do so. The defendant claims that Burbank was there as a representative of the railway company, expecting and understanding that the building was to be moved under the railway wires. The plaintiff claims Burbank was sent as an employé of the power company; that is, of the defendant. You will determine how that was. If he was sent there only as an employé of the railway company, then none of his acts bind the defendant. If he was sent there as an employé of the power company, you will then determine whether Hay-

den, who sent him, had authority to send Burbank for the power company; for if he had not, then none of his acts bind the power company. Hayden was not an officer of the power company, and it was not claimed by the plaintiff that he has shown Hayden or the railway company was expressly authorized by the defendant, in writing or orally, to act for it in regard to its lines. But it is claimed by the plaintiff that the authorization of the railway company to act for the power company is shown by repeated acts, where the railway company by its officers have directed linemen to attend to the power company's line, and that this has been done under such circumstances that the knowledge and acquiescence of the power company is shown. An agency may arise by implication from repeated acts done, with the acquiescence of the principal. If you are satisfied that the railway company was habitually delegating linemen or other employés of the railway company to work upon and attend to the defendant's lines under such circumstances that the defendant must have known and acquiesced therein, then you may infer that the railway company was authorized to do these acts." There were other exceptions taken by the defendant at the trial which fully appear in the opinion.

Page & Bartlett and Ernest L. Guptill, for plaintiff. Kivel & Hughes, for defendants.

BINGHAM, J. The motion for a nonsuit was properly denied. There was sufficient evidence from which it could be found that the defendants were negligent, and that the plaintiff was in the exercise of due care. The evidence that the wires were strung across the highway without license, as required by chapter 81, Pub. St. 1901, was properly left to the jury, together with the other evidence in the case tending to show that the defendants were negligent. The instructions of the court in regard to this matter were correct. *Lane v. Concord*, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643; *Bresnehan v. Gove*, 71 N. H. 236, 51 Atl. 916; *Nadeau v. Sawyer*, 73 N. H. 70, 59 Atl. 369. An alleged agent may testify to the fact of his agency. *Union Hosiery Co. v. Hodgson*, 72 N. H. 427, 432, 57 Atl. 384; *Kent v. Tyson*, 20 N. H. 121, 126; 2 Wig. Ev. § 1078, note 4. But a third person cannot testify to declarations made by him for the purpose of establishing his agency. *Nebonno v. Railroad*, 67 N. H. 531, 38 Atl. 17; 2 Wig. Ev. § 1078. His declarations, however, may be "received provisionally as verbal acts indicating that he was acting on another's behalf, not his own, leaving it to subsequent proof to establish his connection as agent." 2 Wig. Ev. § 1078. Therefore the declarations of Burbank to the extent that they were used to establish his agency were incompetent; but as part of the *res gestæ*, and

as bearing upon the plaintiff's exercise of due care in attempting to raise the wires from the roof of the building, they were clearly admissible. The plaintiff had the right to understand, from the fact that Burbank came and took charge of the wires in response to a request made upon Hayden, that he could properly rely upon such information as Burbank gave him, and that it would be safe to attempt to raise the wires as he did.

The exception taken to the plaintiff's failure to show that written notice was served on the defendants, as required by section 14, c. 81, Pub. St. 1901, is without merit. No attempt was made to disconnect the defendants' wires or to remove their supports; and, if there had been, it is not clear that the defendants would have been entitled to the statutory notice. It would seem, rather, that the notice contemplated by the statute was intended to apply only to cases where the wires or poles that are to be disconnected or removed are lawfully in the highway.

The plaintiff concedes that Hayden was not expressly authorized by the power company to direct Burbank to take charge of their high tension wires at the place where the plaintiff was injured; and the defendants' motion for a nonsuit and exception to the charge presents the inquiry whether there was any evidence from which implied authority could be found. It appears that Day was the chief electrician of the railway company; that he not only had charge of the high tension wires of that company, but also of the power company, and had under him some 14 linemen who were located in different places through the territory traversed by the lines of the two companies. Each crew of men had a foreman. The Hampton crew, whose duty it was to take charge of the lines where the plaintiff was injured, consisted of 3 men and a foreman. The linemen constructed all the new work of the railway company, and moved and repaired all of their lines of wire when necessary. They also had charge of the high tension lines of the power company. Each company bore their part of the expense thus incurred. On the day of the accident, when Hayden was requested to send a lineman to take charge of the wires in the vicinity where the house was being moved, all the linemen in the Hampton crew were away at work, and Burbank, the foreman of the Stratham car barn, who also tended a rotary machine for the defendants at that place, was sent. As foreman of the car barn for the railway company, and tender of the rotary machine for the power company, he had nothing to do with the high tension lines of either company. There was no evidence that Hayden, or any officer of the railway company, had at any time, other than the one in question, called upon any of the men in the employ of

the power company or of the railway company, except linemen under the supervision of Day, to take charge of the high tension wires of the power company. The facts that it was the duty of linemen employed under Day to take charge of the power lines of both companies; that they were required to report to him what work was necessary to be done on both lines, and in case of an emergency to make repairs themselves without reporting—have no tendency to prove that Hayden was authorized by the power company to direct men in the employ of the railway company or of the power company, other than linemen, to take charge of or work upon the high tension lines of the power company. If it might be found that officers of the railway company, besides Day, were authorized to direct linemen to make repairs upon and take charge of the high tension lines of the power company, it could not be found that they had authority to direct men who were not linemen under Day to do such work, and for this reason there must be a new trial.

Verdict set aside. All concurred.

(75 N. H. 125)

CAHER v. GRAND TRUNK RY. CO.

(Supreme Court of New Hampshire. Coos.
Nov. 4, 1908.)

1. CARRIERS (§ 803*)—CARRIAGE OF PASSENGERS—EJECTION OF PERSON AT PLACE OTHER THAN STATION—ACTION—NATURE.

A carrier which ejected a person from a train for nonpayment of fare at a place other than a passenger station, in violation of Pub. St. 1901, c. 160, § 6, is not necessarily liable for the resulting damage, but it must appear that it occurred through its failure to perform the duty imposed by statute; and, to recover, the ejected person must prove the insufficiency of the station at the place of expulsion, his own care, and that the injury resulted from defendant's fault.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1445; Dec. Dig. § 803.*]

2. CARRIERS (§ 382*)—CARRIAGE OF PASSENGERS—EJECTION AT PLACE OTHER THAN STATION—ACTIONS.

Where a person was ejected from a train five miles from his home, where there was no passenger station, and was in such good health and so well clothed that he could properly go home afoot, and there was no train that he could wait for, and it appeared that he would have walked home even if there had been a station, an illness contracted by him from the walk had no connection with his ejection, and he could not recover therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1483; Dec. Dig. § 882.*]

Bingham, J., dissenting.

Transferred from Superior Court, Coos County.

Action by George Caher against the Grand Trunk Railway Company for ejecting plaintiff from a passenger train for nonpayment of fare at a place other than a passenger station. Verdict for plaintiff and case transferred from the superior court on defend-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ant's exceptions. Exceptions sustained. Verdict and judgment for defendant.

The plaintiff was ejected from the train for nonpayment of fare at a point about half a mile from the Groveton station and five miles from his home in Stark. The train did not stop at Stark, and there was no other train to that place for almost two days. The plaintiff had but little money, was in good health and well clothed, and walked home to Stark. He stopped to rest several times on the way, and in so doing contracted the illness for which damages were claimed.

Sullivan & Daley and B. H. Hinman, for plaintiff. Rich & Marble and Drew, Jordan, Shurtleff & Morris, for defendant.

PEASLEE, J. The expulsion of Caher for nonpayment of his fare at a place other than a passenger station was illegal (Pub. St. 1901, c. 160, § 6; Baldwin v. Railroad, 64 N. H. 596, 15 Atl. 411); but it does not follow as a matter of course that the defendant is liable for the damage which was thereafter suffered. Caher could not complain that he was not permitted to stay on the train. He had no such right. His right was to be provided with passenger station accommodations when ejected; and this is the only right which the defendant invaded. The failure to provide him passenger station accommodations is the only wrong with which the defendant can be charged upon the facts of the case.

The statute was enacted for the protection of passengers (Laws 1874, p. 344, c. 98), but not for the purpose of enabling those evading the payment of fare to compel the railroad to carry them from one regular station to the next one. Caher's rights certainly did not exceed those of a person going to a station to take passage by virtue of an existing contract for carriage. Yet, when such person sues for failure to perform the statutory duty to provide a reasonable station, he must show that he was "injured through their failure to perform the duty imposed by statute." In such a case the plaintiff must prove (1) the insufficiency of the station; (2) his own care; and (3) that the injury was the result of the defendant's fault. Boothby v. Railway, 66 N. H. 342, 344, 34 Atl. 157. In the present case there was evidence of a failure to provide station facilities and of Caher's care, but none that the injury complained of resulted from the defendant's fault. The failure to provide station facilities did not in any way affect the course of subsequent events. What use would or could Caher have made of a passenger station? He wished to go home, and there was no train he could wait for. He was in such good health and so well clothed that, as he now not only admits but urges, it was entirely proper that he should set out on the

journey afoot. There was no occasion for a station agent to take Caher in charge, or to relieve his physical or mental disabilities. Upon the evidence in the case, it conclusively appears that what did follow would have followed if the lacking station accommodations had been supplied. The plaintiff fails because he does not show any connection between the wrongful act of the defendant and the injury sustained. Reynolds v. Fiber Co., 73 N. H. 126, 128, 59 Atl. 615.

The question of proximate or remote cause is not involved. The fault complained of was not a cause in any degree, nor in the remotest sense, of Caher's subsequent acts. It was neither the cause nor the occasion for his walking to Stark. It was a wrong independent of what followed, and cannot be held to have any causal connection therewith. Edgerly v. Railroad, 67 N. H. 312, 36 Atl. 558; Brember v. Jones, 67 N. H. 374, 30 Atl. 411, 26 L. R. A. 408; McGill v. Company, 70 N. H. 125, 46 Atl. 684, 85 Am. St. Rep. 618; Stearns v. Railroad, 75 N. H. —, 71 Atl. 21. As the illegality of the act did not contribute to the injury, it is not to be treated as a cause thereof. Nutt v. Manchester, 58 N. H. 226; Wentworth v. Jefferson, 60 N. H. 158; Bresnehan v. Gove, 71 N. H. 236, 51 Atl. 916.

The fact that the conductor is liable to the fine imposed in behalf of the state for this violation of the statute (Pub. St. 1901, c. 160, § 9) does not show that the defendant is liable to the plaintiff for damage which followed, but was not caused by, such violation. "It must be shown that such act is a fault which has directly contributed to the loss or damage of which the party complains. It is not a question, as it has been made in some cases, whether the party is a trespasser, or has done some wrongful act, but whether he is guilty of a fault or of negligence in reference to the matter in question which has directly contributed to the injury." Norris v. Litchfield, 35 N. H. 271, 278, 69 Am. Dec. 546.

Exceptions sustained. Verdict and judgment for the defendant.

BINGHAM, J., dissented. The others concurred.

(76 N. H. 113)

MCGREGOR et al. v. PUTNEY.

(Supreme Court of New Hampshire. Hillsborough. Nov. 4, 1908.)

1. VENDOR AND PURCHASER (§ 54*)—EXECUTORY CONTRACTS—EFFECT ON TITLE.

A contract for the sale and purchase of real estate, which binds the vendor to convey on payment of the price, gives to the purchaser an equitable interest in the land, and the vendor holds the legal title charged with the equitable interest.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 85; Dec. Dig. § 54.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

2. VENDOR AND PURCHASER (§ 233*)—BONA FIDE PURCHASER—UNRECORDED CONVEYANCES.

In the absence of a statute making an unrecorded conveyance void after a certain time has elapsed, the rights of holders of unrecorded conveyances are determined by priority in taking the conveyances.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 563; Dec. Dig. § 233.*]

3. VENDOR AND PURCHASER (§ 239*)—BONA FIDE PURCHASER—UNRECORDED CONVEYANCES.

A purchaser of real estate, under a contract binding the vendor to convey on payment of the price, sold, in violation of the contract, the timber on the land to a third person, and subsequently assigned his interest in the premises. It did not appear that the assignee recorded his assignment, or gave the third person notice of it. *Held* that the assignee, though ignorant of the unrecorded sale of the timber, could only recover for timber cut by the third person after actual or constructive notice of the assignment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 560; Dec. Dig. § 239.*]

4. VENDOR AND PURCHASER (§ 233*)—BONA FIDE PURCHASER—UNRECORDED CONVEYANCES.

Where there are two unrecorded conveyances, and the holder of the first continues to act in ignorance of the holder of the second, and their equities are equal, priority in time prevails.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 563; Dec. Dig. § 233.*]

5. VENDOR AND PURCHASER (§ 218*)—BONA FIDE PURCHASER—UNRECORDED CONVEYANCES.

A third person, purchasing the timber on land from one having a contract for the purchase of the land and entitled to a conveyance thereof on payment of the price, is not liable as on a debt due to the owner, but his liability arises from his taking in good faith that which is security for the owner's claim, and, as between the third person and the purchaser in the contract, the former succeeds to the purchaser's right to redeem from the owner, which right is not defeated by the purchaser conveying his interest to another; and hence, as to acts done by the third person before notice of the conveyance of the purchaser's interest, a suit in the right of the owner is defeated by the third person's payment of the amount due on the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 456; Dec. Dig. § 218.*]

6. VENDOR AND PURCHASER (§ 218*)—BONA FIDE PURCHASER—UNRECORDED CONVEYANCES.

A purchaser of real estate, under a contract binding the vendor to convey on payment of the price, sold the timber on the land to a third person, and subsequently assigned his interest in the premises. The assignee paid the price, and obtained the conveyance. The assignee was ignorant of the outstanding unrecorded claim of the third person. The evidence did not show that the amount due to the vendor on the contract of sale was more than the value of the land after the removal by the third person of the timber. *Held*, that the payment of the price by the assignee of the contract could not be treated in equity as an assignment of the claim of the owner against the third person.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 456; Dec. Dig. § 218.*]

Exceptions from Superior Court, Hillsborough County; Chamberlin, Judge.

Assumpsit by George W. Carroll, in his own right and as assignee of the claim of John C. McGregor, against Alfred H. Putney, to recover for the cutting of timber on certain land. There was a judgment of nonsuit, and plaintiffs except. Overruled.

The plaintiff's evidence tended to prove the following facts: In 1902 McGregor was the owner of the farm, and gave one Fletcher a bond to convey the same upon the payment of \$2,800, the sum of \$500 being at once paid on the purchase price. In 1903 Fletcher, for a consideration of \$100, and in violation of the terms of the bond, sold standing timber on the farm to the defendant, and the defendant cut timber both before and after September, 1905. In March, 1905, the bond was recorded, and the next September Fletcher sold his interest to Carroll, who bought in ignorance of the defendant's unrecorded contract. In 1906 Carroll paid the balance due to McGregor, took a deed of the premises and an oral assignment of McGregor's cause of action against the defendant, and then brought this suit.

Wason & Moran, for plaintiffs. Thomas F. Clifford and Bertis A. Pease, for defendant.

PEASLEE, J. The contract to convey the farm upon the payment of the agreed price gave Fletcher an equitable interest in the land, and McGregor thereafter held the legal title charged with the equitable interest. Their relations were in many respects, like those of mortgagor and mortgagee. *Bowen v. Lansing*, 129 Mich. 117, 88 N. W. 384, 57 L. R. A. 643, 95 Am. St. Rep. 427, and authorities collected in note. When Carroll purchased Fletcher's interest, he took the recorded equitable claim to the estate as it then existed. Although he was ignorant of the outstanding unrecorded claim of the defendant to standing trees, he could only recover for the wood or timber the defendant cut after actual or constructive notice of Carroll's title. In the absence of a statute making an unrecorded conveyance void after a certain time has elapsed, when the question arises between two holders of unrecorded conveyances, their rights are determined by priority in taking their conveyances. *Crouse v. Mitchell*, 130 Mich. 347, 90 N. W. 32, 97 Am. St. Rep. 479. If the documents given by Fletcher to Putney and Carroll were entitled to record, Putney's must prevail because of its priority in time. If they were not entitled to record, the result is of course the same. The first purchaser takes title. There is no evidence that Carroll recorded his assignment from Fletcher, or gave Putney notice of it. Whether notice by record, or otherwise, would have been of any avail is not material to a decision of the present case. The notices given by McGregor do not

purport to be anything more than an insistence upon his rights under the bond. The first notice was when the deed of McGregor to Carroll was recorded; and, as the defendant had ceased cutting before that date, it is immaterial here. Whether it is immaterial for other reasons need not be considered. The case is simply one of where there are two unrecorded conveyances, the holder of the first continuing to act in ignorance of the claims of the holder of the later one. In such a case he who has the later conveyance has no superior legal title. Their equities appear to be equal, and priority in time prevails. The plaintiff can take nothing as against the defendant, by virtue of his assignment from Fletcher.

The plaintiff also seeks to recover in the right of McGregor. It is important to keep in mind that the defendant was never liable upon the debt due to McGregor. His sole liability arose from his having taken that which was a security for McGregor's claim. In this state of the facts the plaintiff purchased from the debtor his equity in what was left of the incumbered property, and thereafter paid off the incumbrance. He paid what he had contracted to pay. He did not pay anything the defendant was equitably bound for. So far as appears, Putney acted honestly in cutting the timber. As between him and Fletcher, he would be entitled to succeed to Fletcher's right to redeem from McGregor. This right was not defeated by Fletcher's conveyance to Carroll. As to acts done before Putney had notice of that conveyance, a suit in the right of McGregor could be defeated by Putney's payment of the amount due on the bond. Carroll could then redeem from Putney; but, as such redemption would be in the right purchased of Fletcher, there could be no deduction for timber cut by Fletcher's permission. In such a condition of affairs equity does not require that the payment of the bond be treated as an assignment. If there had been proof that the security had been so depleted that the amount due upon the bond was more than the value of the security, so that Putney would have had to pay for the timber taken, either by way of damages or by paying in redemption more than the pledged property was worth, a case would be made out for an equitable assignment. There is no evidence tending to show such a state of facts. On the contrary, the inference from such figures as appear is the other way. Apparently the farm was worth more than the balance due to McGregor.

McGregor's claim, which he attempted to assign to Carroll, was extinguished by Carroll's payment of the amount due upon the bond, unless it is made to appear that there is an equitable reason for treating the transaction as an assignment. The burden was upon the party claiming such assignment to

produce evidence of the necessity for invoking the aid of the equitable rule. As no such evidence was produced, his case fails. The nonsuit was properly ordered. The question whether assumption could be maintained is not considered.

Exception overruled.

WALKER, J., doubted. The others concurred.

STATE v. UNITED NEW JERSEY R. & CANAL CO.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

1. TAXATION (§ 113*)—STATUTES—RAILROAD PROPERTY.

The language of the "Act relative to transit duties" (Act March 4, 1889; P. L. 1889, p. 226), to the effect that the tax thereby provided for should be paid "until the Legislature shall by general law impose a uniform state tax equally applicable to all railroad and canal corporations of this state," refers to the time when such a tax should be actually imposed, and not to the time when the law authorizing its imposition should be enacted or take effect.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 207; Dec. Dig. § 113.*]

2. TAXATION (§ 113*)—STATUTES—RAILROAD PROPERTY.

The "Act for the taxation of railroad and canal property," approved April 10, 1884 (P. L. 1884, p. 142), took effect immediately, but did not impose a tax until January 1, 1885, and until this date the taxation imposed by Act March 4, 1889 (P. L. 1889, p. 226), continued to be payable in quarterly payments.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 207; Dec. Dig. § 113.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by the State against the United New Jersey Railroad & Canal Company. From a judgment on certiorari for plaintiff (68 Atl. 796), defendant brings error. Affirmed.

James B. Vredenburg and R. V. Lindabury, for plaintiff in error. Robert H. McCarter, Atty. Gen., for the State.

PITNEY, Ch. In this case the Supreme Court reviewed by certiorari (no objection being made to this mode of review) a judgment that had been entered in that court, upon the order of a single justice, against the United New Jersey Railroad & Canal Company, at the instance of the Attorney General, for the amount claimed to be due to the state for taxes assessed during the year 1906 by the state board of assessors upon the main stem, franchise, and tangible personal property of the company. The tax was assessed under the revised "Act for the taxation of railroad and canal property," approved March 27, 1888 (P. L. 1888, p. 269; Gen. St. 1895, p. 3324), as amended by the supplement of April 5, 1906, known as the "Average Rate Law" (P. L. 1906, p. 121).

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The proceeding that eventuated in the judgment was taken under section 14 of the act of 1888, and was instituted in March, 1907; judgment being entered on March 19th. The matter was brought before the Supreme Court upon an application for a certiorari to review this judgment, and by consent of counsel the hearing proceeded as if the writ of certiorari had been allowed and return made, to the end that a final judgment might be entered which would be reviewable by this court. The Supreme Court having reached the conclusion that the judgment for taxes was properly rendered, the record was molded so as to show a writ of certiorari, a return thereto, and the reasons for setting aside the judgment; and thereupon the Supreme Court rendered its judgment, affirming the judgment for taxes, after allowing credit for certain payments that had been made pending its decision. It is the latter judgment that is now under review.

To avoid possible confusion, it should be mentioned that the certiorari upon which judgment was thus rendered by the Supreme Court was not the same writ that is mentioned at the beginning of the opinion delivered by Mr. Justice Swayze. That was a previous writ, tested January 26, 1907, under the allocatur of the Chief Justice, for the purpose of reviewing the tax assessment itself. Upon the hearing of the subsequent writ that brought under review the judgment entered for the same taxes, any objection that might have been taken to this judgment on the ground that the operation of the tax assessment had been suspended by its removal into the Supreme Court by the previous certiorari was expressly waived, and the attack upon that judgment was confined to the single ground that, as alleged, \$298,128.98 of the taxes assessed against the company by the state board of assessors in the year 1906 had been paid at the time the judgment was entered. The controversy dates back to the year 1884, and its history is sufficiently recited in the opinion of Mr. Justice Swayze. So far as the claim of the company is based upon the alleged appropriation of payments made on account of taxes, nothing need be added to what is said in that opinion. So far as the opinion contains findings of fact upon this point, it is not reviewable here. So far as it is based upon matters of law, we do not disagree with it. We also agree with the view, expressed in the opinion of Mr. Justice Swayze, that the language of the "Act relative to transit duties" (Act March 4, 1869; P. L. 1869, p. 226), to the effect that the tax thereby provided for should be paid "until the Legislature shall by general law impose a uniform state tax equally applicable to all railroad and canal corporations of this state," refers to the time when such a tax should be actually imposed, and not to the time when the law authorizing its imposition should be enacted or take effect.

The "Act for the taxation of railroad and

canal property" of April 10, 1884 (P. L. 1884, p. 142), took effect immediately; but we agree with the Supreme Court that it did not impose a tax until January 1, 1885, and that until this date the taxes imposed by the act of 1869 continued to be payable in quarterly payments. Therefore the payments made by the United Company to the state in April, July, and October, 1884, and in January, 1885, aggregating \$298,128.98, were in satisfaction of the taxes that fell due during the year 1884 under the act of 1869. From this it results (in view of the taxes that have been annually assessed against the company since the year 1884 and the payments that have been made by the company to the state on account thereof) that the payments made in April and July, 1906, and the two payments of February 8, 1907 (aggregating \$298,128.98), are properly to be treated as payments, not on account of the taxes assessed in the year 1906, but upon those assessed in the year 1905 and payable in 1906; and there is no question that thereby the latter taxes were paid in full. But it follows that, at the time the judgment was entered in the Supreme Court against the company for the taxes assessed in the year 1906, the sum of \$298,128.98 (or any part thereof) had not been paid on account of those taxes. This being so, it is admitted by counsel for the plaintiff in error that the amount for which the judgment was entered is correct.

But it does not follow from this that the taxes assessed in 1906 were enforceable by judgment and execution at the time the judgment under review was entered; for while section 10 of the revised act for the taxation of railroad and canal property (P. L. 1888, p. 275; Gen. St. 1896, p. 3827) provides that the tax "shall be due and payable into the state treasury on any day between the 1st day of November and the 1st day of February following," there is a proviso that so much of the tax as is applicable to general state uses may be paid in four equal installments on or before the 1st days of February, May, and August, and the 15th day of October, if the portion of the tax which is applicable to county and local purposes be paid before the 1st day of February. But, so far as the present case discloses, the company claimed no benefit of this privilege of deferred payments with respect to the taxes assessed against it in 1906, and, on the contrary, has submitted the case in the Supreme Court and in this court upon the express admission that, unless it was entitled to credit upon these taxes for the four payments aggregating \$298,128.98 already mentioned, judgment should go against it.

What has been said disposes of all the reasons that were assigned in the Supreme Court for reversal of the judgment for taxes, and disposes at the same time of the first and second assignments of error in this court.

The third and fourth errors here assigned set up that the judgment under review im-

pairs the obligation entered into between the plaintiff in error and the state upon the acceptance by the company of the act of 1869, and that the judgment deprives the company of its property without due process of law, and denies to it the equal protection of the laws. These federal questions were not raised in the Supreme Court, and upon the presentation of the case in this court they were submitted without argument. They will therefore be treated as abandoned.

It follows that the judgment under review should be affirmed.

(75 N. J. E. 13)

ROGERS v. GENUNG et al.

(Court of Chancery of New Jersey. Nov. 13, 1908.)

TRUSTS (§ 102*)—CONSTRUCTIVE TRUSTS—BREACH OF DUTY—AGENT.

A real estate agent, who had land for sale, was asked by complainant to carry specific offers to the owners. He had no discretionary authority, and received no commission from complainant. Upon refusal of the last offer without waiting to ascertain if complainant wished to make further offers, the agent sold the land to his own wife, who had knowledge of her husband's relations with complainant; she paying for it with her own money. *Held*, that there was no such fiduciary relation between complainant and the agent as would make the agent's wife a constructive trustee.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 153; Dec. Dig. § 102.*]

Bill by Noah C. Rogers against Helen Fountain Genung and others. Dismissed.

Alfred Elmer Mills and William H. Corbin, for complainant. Charles A. Rathbun and Richard V. Landabury, for defendants.

STEVENS, V. C. This is a suit to compel the defendant Helen Genung to convey a tract of land near Morristown to the complainant. The facts are very simple:

Noah C. Rogers, a New York lawyer, residing in Morristown, on May 14, 1907, wrote to Mr. Genung, a real estate agent and husband of Helen Genung, as follows: "I would be glad if some time at your convenience you would give me a list of small places that you have for sale, with prices, near Madison, Convent, or Morristown stations, either with or without farm buildings—say within a mile or two of stations." To this on May 17th Genung responded: "I beg to offer you below a list of a few places that may be of interest to you. * * * The Conkling farm, this side, is on both sides of the road. * * * There are 15 acres, * * * offered at \$8,000." On May 29th Mr. Rogers replied: "I have your list of places. If you are not otherwise engaged, I should be glad to talk with you about these places to-morrow afternoon at my house. * * * I am inclined to think that the Murphy and Conkling tracts would be the most likely to be of interest, and would be glad if you would ascertain the

lowest prices, and also how much could remain on mortgage, and at what rate of interest." On Thursday, May 30th, there was an interview. Mr. Rogers told Mr. Genung that he wanted to buy the Murphy and Conkling tracts as a plot; they being adjoining parcels. Genung advised him to offer \$7,000 for the Conkling plot and \$13,000 for the Murphy, telling him that offers of \$6,000 and \$6,500 for the Conkling tract had been refused. Rogers authorized these offers to be made. They were made and declined. Shortly after, Rogers, through Genung, took a deed for the Murphy tract at \$15,000. The negotiations about and the conveyance of this latter tract have no bearing upon the matter in hand.

On Tuesday, June 4th, Genung informed Rogers that he could probably get the Conkling property for \$7,000, if he would allow one of the owners, Mr. Conkling, to remain on it for his life. Rogers replied that it was more desirable to have possession and he requested Genung to find out if, by paying a higher price, he could get immediate possession. He authorized Genung, either on the evening of that or the following day, to increase the price to \$7,250 to \$7,500, and, if necessary to \$8,000, if Conkling would give up his life possession. On Thursday, June 6th, Genung and his wife went to the Conkling house. Genung made the offer of \$8,000 which was refused. Then either Mr. Genung, for his wife, or Mrs. Genung herself, made an offer of \$7,000 with the life right, which was accepted. Upon the acceptance, Genung filled up a blank form of agreement which he had brought with him, and it was there executed. On the same evening Rogers called upon Genung and was told by him that he had visited the premises with his wife, and that the Conkling family had decided that they would not sell, except subject to the life lease. He did not tell him that his wife had purchased. Rogers then said: "Very likely I will take it. Anyhow, I will telephone you, but very likely I will take it; but I would very much rather give a higher price and eliminate the life lease. * * * I will let you know to-morrow whether I will take it with the life lease or not. I will communicate with you from New York." Next morning Genung sent his attorney to the Conklings to have them acknowledge the agreement, so that it might be recorded, and immediately after its acknowledgment sent to Mr. Rogers at his New York office a registered letter in which he said: "As your client seems to have hesitated with this life right in view, and as the other party who started the negotiations for the place, as I told you, some days ago, was willing to buy the property with this life right, I have closed a contract with the other party." In an interview had that same evening with Rogers, Genung, on being pressed, admitted

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the "other party" was his wife, and that she had bought it as a speculation. The reason for this sudden purchase would seem to have been that Genung had, from what Rogers had either said or refused to say, begun strongly to suspect that he was really buying the property for Mr. Jenkins, who, or whose wife and nephew, had been purchasing large tracts of land in the surrounding neighborhood. On this state of fact the court is asked to declare that Mrs. Genung is constructively a trustee for Mr. Rogers and bound to convey to him on payment of the price.

The evidence is uncontradicted that it was the money of Mrs. Genung, and not of Mr. Genung, that went into this purchase. As it is conceded that Mrs. Genung was informed by her husband of all the steps taken in the Rogers negotiations, it is argued that Mrs. Genung occupies no higher ground than Mr. Genung, and that the case must be dealt with just as if he had acquired the title. Without expressing any opinion on this proposition, I will, for present purposes, assume that it is sound. It is an undisputed fact that Rogers was not to pay a commission to Genung; that Genung's compensation was to come wholly from the vendors. Notwithstanding this, it is contended that Genung was Rogers' agent, and that as such he was incapacitated from acquiring any advantage for himself or his wife. While counsel do not agree whether Genung was Rogers' agent, they cannot disagree about what Genung was employed or requested to do. He was to carry specific offers from Rogers to the vendors. This was all he was to do. He had no discretionary authority. This being so, I am at a loss to perceive how Genung's position was at all different from that of any other real estate agent who, trying to sell a property that has been placed in his hands by its owner, receives offers for it which he communicates to that owner. Rogers does, indeed, say that in the course of the negotiation Genung asked him if he thought he had the right to represent anybody else, and that he replied: "Decidedly no. While you are representing me confidentially and submitting my offers, I don't consider you have a right to represent anybody else or to go into it with anybody else." To this Genung made no response. "He said nothing more, but dropped the subject." But it seems to me that Mr. Rogers must have said this without due consideration. Genung's first duty was toward his employers—the vendors, who had put the property into his hands for sale; the vendors, to whom he was bound to submit offers, not from one person only, but from all from whom he could obtain offers. On Rogers' own testimony there was, as the result of the inquiry, no promise on Genung's part to do what would have been contrary to his duty. Genung was, indeed, in conversation on the evening of the day on which his

wife agreed to purchase, guilty of a concealment that might, perhaps, from an ethical standpoint, be open to criticism; but, if he failed in any duty imposed by law, it was in one that he owed the vendors, who are not here complaining. He did not give them the information about Mr. Jenkins that, as it appears to have influenced him, might also have influenced them, and he did not, as he ought to have done, tell them that Rogers had made no final offer; that he was evidently anxious to purchase—so anxious that he might be induced to pay more than his wife and concede the life right beside. As far as Rogers is concerned, the case stands merely thus: Rogers said to Genung, "Make certain specified offers for me." This Genung did. He failed, however, to wait and see whether, the last—the \$8,000 one—being refused, Rogers would make another. Rogers had not said that he would or that he would not; but Genung might, very reasonably, have concluded that he would, especially if he thought that the Jenkins family were the real purchasers. Now, as Rogers' money did not go into the purchase, there was, of course, no resulting trust, in the ordinary sense of the term.

But it is said that a trust resulted from the transaction, if it did not from the agreement. This distinction, as applied to the facts of the case, is unintelligible to me. In what did the "transaction," as distinct from the "agreement," consist? It consisted in Genung's submitting to the vendors three or four offers—all declined. If, beyond and in addition to the "transaction," there was anything else, it was, at best, nothing more than an implied undertaking on Genung's part that he would continue to submit Rogers' offers as long as Rogers continued to make them. Now, how did this "transaction" make Rogers a cestui que trust of the property and Genung a constructive trustee, when neither of them had, at any time during its continuance, any interest, either legal or equitable, in the property? And how could the implied undertaking, if there was any, have had any such effect? Could an undertaking to submit offers, based on no consideration moving from Rogers to Genung, be deemed in equity the equivalent of an undertaking on the part of a paid agent to obtain and convey property? In 1 Perry on Trusts, § 135, it is said: "Parol proof cannot be received to establish a resulting trust in lands purchased by an agent and paid for by his own funds, no money of the principal being used for the payment, for the relation of principal and agent depends upon the agreement existing between them, and the trust in such a case must arise from the agreement and not from the transaction, and where a trust arises from an agreement it is within the statute of frauds and must be in writing." In *Wallace v. Brown*, 10 N. J. Eq. 308, Chancellor Williamson took the same

view. He says: "A. employs B. as his agent to purchase a house for him. B. makes the purchase, takes a deed in his own name, and pays his money for it. A. cannot compel B. to convey." To much the same effect are *Nestal v. Schmid*, 29 N. J. Eq. 458, and *Thalman v. Cannon*, 24 N. J. Eq. 127. *Bartlett v. Pickersgill*, 4 East, 576, is the authority upon which this view of the law rests. There defendant bought an estate for plaintiff; but there was no written agreement between them, nor was any part of the purchase money paid by plaintiff. Defendant articulated for the estate in his own name and refused to convey to the plaintiff. There being no written evidence that the estate was purchased for the plaintiff, Lord Keeper Henley held that the statute of frauds applied. This case was doubted by the Lords Justices in *Heard v. Pilley*, L. R. 4 Ch. 548, but followed by *Kekewich, J.*, in the later case of *James v. Smith*, 1 Ch. Div. (1890) 384. In the still later case of *Rochefoucauld v. Boustead*, 1 Ch. Div. (1897) 196, *Lindley, L. J.*, said that *Bartlett v. Pickersgill* could not be regarded as law at the present day, that *Kekewich, J.*, had overlooked the later cases and that "it seemed to be inconsistent with all the authorities of this court, which proceed on the footing that it will not allow the statute of frauds to be made an instrument of fraud." The American cases are equally conflicting. They will be found collected in a note appended to the case of *Johnson v. Hayward* (Neb.) 5 L. R. A. (N. S.) 112.

In view of the utterances of this court in the cases above referred to, it may be doubted whether I would be justified in following the more recent English rule, even if it were considered to be the better. But I do not have to pass upon the question, for all the case require proof, at least, of a special trust and confidence, and such proof is altogether lacking in the case at bar. Genung was not employed to purchase the property for Rogers. He was only employed, or, to speak more accurately, requested, to transmit certain specified offers to Genung's principal. To assert that a request of this character is equivalent to an employment to purchase is a mere perversion of language.

It is further argued that if the case is not one of constructive trust, based upon special confidence reposed and violated, the deceit perpetrated by Genung takes the case out of the statute. As I have already said, Genung's conduct, as far as it was questionable, if it injured any one, injured the vendors, and they do not complain. Up to the time that his wife purchased he had made no misrepresentation to Rogers and had concealed nothing from him. He did, for 24 hours after the purchase, conceal it from Rogers; but this concealment did not induce Rogers to change his position, and it did

not in any wise injure him. If Genung had told him, on the evening of the day on which the agreement was signed, that it had been signed by his wife, he would have stood in precisely the same position that he does now. It is therefore unnecessary to consider the question mooted in the case of *Starrett v. Boynton* (June Term, 1908, Ct. Err. & App.) 70 Atl. 183, whether fraud will, under some circumstances, supply the place of a writing. I think the bill should be dismissed.

(76 N. J. L. 763)

SAUTTER v. SUPREME CONCLAVE, IMPROVED ORDER OF HEPTASOPHS.

(Court of Errors and Appeals of New Jersey. Nov. 16, 1908.)

INSURANCE (§ 719*)—MUTUAL BENEFIT—CONTRACT—SUBSEQUENTLY ENACTED BY LAWS—EFFECT.

Where the application for membership in a beneficial order contained an agreement on the part of the applicant to conform in all respects to the laws, rules, and usages of the order then in force or which might be thereafter adopted, and the benefit certificate issued upon said application set forth that the statements in the application made were made a part of the contract and upon condition that the member should comply in the future with the laws, rules, and regulations then governing the order or that might thereafter be enacted, *held*, that a by-law, passed after the issuance of the benefit certificate, impairing or avoiding the contract evidenced by it, would be construed as affecting contracts entered into after its adoption; and *held*, further, that such by-law would not be applicable to a contract entered into before its adoption, because not being in furtherance of such contract, but destructive of it.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1855; Dec. Dig. § 719.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Margaret Sautter against the Supreme Conclave, Improved Order of Heptasophs. From a judgment for plaintiff in the Supreme Court (72 N. J. Law, 325, 62 Atl. 529), defendant brings error. Affirmed.

W. Holt Apgar and Olin Bryan, for plaintiff in error. Joseph A. Beecher, for defendant in error.

VOORHEES, J. The judgment removed by this writ of error was entered in the Supreme Court after demurrer to a special plea had been sustained by that court. See opinion in *Sautter v. Supreme Conclave*, 72 N. J. Law, 325, 62 Atl. 529. The action is founded upon a benefit certificate of the defendant association issued to the plaintiff's husband, August Sautter. The declaration sets out that on the 10th day of January, 1899, the certificate in question was issued to the said August Sautter, whereby, the conditions thereof being complied with, the defendant promised to pay out of its benefit fund to Margaret Sautter, the wife of the assured, within 60 days from the receipt of satisfac-

tory proof of the death of August, the sum of \$1,000, in accordance with and under the provisions of the laws governing said fund; that said August died on the 27th of March, 1904; and that the benefit fund of the defendant was and is sufficient to pay the amount of the certificate, alleging a general compliance with all the rules of the association by the assured. By the copy of the certificate annexed to the declaration, and referred to, it appears that one of the conditions under which the issue was made is "that the member complies in the future with the laws, rules, and regulations now governing said conclave and fund, or that may hereafter be enacted by the Supreme Conclave and govern said conclave and fund."

The special plea interposed set forth that the assured, in his application for membership, agreed "to conform in all other respects to the laws, rules, and usages of the order now in force, or which may be hereafter adopted by the same," and also recited the foregoing condition excerpted from the certificate, and, further, that on the 9th to the 12th of June, 1903, about one year before the death of the assured, the Supreme Conclave in regular session adopted an order or by-law, viz.: "Sec. 257. No benefits shall be paid to the beneficiary of any member committing suicide, sane or insane"—and then alleged that said August, on the 27th of March, 1904, did commit suicide while sane or insane, and that by reason thereof the contract was voided and vitiated. On demurrer to this plea, on the ground that it did not set out a bar to the plaintiff's right to recover, that the by-law adopted was not retroactive and never became a part of the contract, that the contract was not impaired by the adoption thereof subsequent to the execution and delivery of the certificate, and that it was not in furtherance of the contract between the defendant and that it was unreasonable and illegal, the Supreme Court entered judgment that the plaintiff recover.

It seems to be settled by the weight of authority that, where there is an agreement in the application for membership in a fraternal beneficial society that the member shall be bound by by-laws and rules thereafter to be adopted, such member is bound by any reasonable amendment of the by-laws made after he has become a member; but it is also quite as well settled that the right of amendment must be exercised so as not to interfere with vested rights. Amendments impairing such vested rights are invalid. The difficulty is in applying the facts. The opinion of the court below proceeds on the ground that the by-law in question alters the contract of insurance and is equivalent to authorizing an association to limit its liability to such extent as it chooses. The record in this case shows an unconditional promise to pay the benefits to the decedent's wife within 60 days from receipt of proofs of death. In the condition upon which the certificate was

issued, obliging the member in the future to comply with the laws, rules, and regulations then governing the conclave or that might thereafter be enacted, nothing is said regarding the power to alter the contract, nor is that subject referred to. The laws, rules, and regulations should not be referred to the alteration of a contract securing vested rights, when they may be referred to the innumerable subjects requiring laws, rules, and regulations in a beneficial order of this sort.

The certificate was a contract of a definite character, and conferred a vested right upon the beneficiary and upon the member a property right. It has been held in *O'Neill v. Supreme Council*, 70 N. J. Law, 417, 57 Atl. 463, that even the power of appointment incidental to the status of membership in a fraternal association is a valuable property right, for the deprivation of which an action may be maintained, and cites *Bac. Ben. Soc. § 237*, to the effect that "the member of the society as such under his contract has no interest nor property in this benefit, but simply the power to appoint some one to receive it. The case must not, however, be understood to hold that the member of a benefit society has not a property right in the contract of membership under which he has the power to designate a recipient of the benefit to be paid because of such membership and under the contract. The right of the member in the contract is a valuable one, which the courts will at all times recognize and protect, although, strictly speaking, such member has no property interest in the benefit paid or subject of the power. The membership, which includes the right to pay the agreed consideration and to appoint a person to take the benefit, must be regarded as a species of property, and is to be distinguished from the benefit or sum to be paid itself, in which the member has no property." A fortiori will the courts protect the contract right of the beneficiary under the benefit certificate.

The above amendment to the by-laws, enacted after the contract of membership and insurance had been concluded, is proffered as a defense to this suit by the defendant. The plaintiff urges that a retroactive effect should not be given to it, but, on the contrary, it should be construed prospectively, and thus be made inapplicable to the benefit certificate in controversy. In New Jersey there is no implied provision to be read into a contract of insurance that it will become void if the insured procure his own death. The law is to the contrary, for it is settled by this court that suicide is not a defense against a policy of insurance, unless such policy so provides in express terms or be procured with the intent to commit suicide. *Campbell v. Supreme Conclave*, 66 N. J. Law, 274, 49 Atl. 550, 54 L. R. A. 576. In *Annan v. Hill Union Brewery Co.*, 59 N. J. Eq. 418, 46 Atl. 565, Vice Chancellor Stevens, in speaking of a case where the by-laws provided that they might be amended, changed, altered, or repealed at any time by

consent of a majority of the board of directors, said that "It is one thing for a member to agree generally that the by-laws may be changed by his agents, and quite another for him to agree that the by-laws so changed shall ipso facto become part of his already completed contract. The court leans against giving by-laws a retrospective effect. Otherwise the contract would be anything the directors might from time to time chose to make it. The meeting of minds, so necessary to the conception of a contract, would be purely notional." In *Roxbury Lodge v. Hocking*, 60 N. J. Law, 443, 38 Atl. 603, 64 Am. St. Rep. 596, in construing a by-law reading, "Every brother who has been a member for six months shall, in case of being rendered incapable by sickness or disability, be entitled to receive the reduced allowance therein specified," the court held that this referred to future disability, to members who became disabled after its passage; the leaning of the courts being against the retrospective interpretation unless they are so strong and imperative that no other meaning can be attributed to them. See *Ball v. Board of Trustees*, 71 N. J. Law, 64, 58 Atl. 111.

Upon the issue of this certificate a contractual and vested right accrued to the member and to the beneficiary for the payment of the sum mentioned in the certificate upon the death of the member, whether he died by his own hand or not. Consequently a by-law which ingrafts conditions not appearing in its original contract upon such contract is an alteration and abridgment of those vested rights which would render the by-law, as applied to the certificate, unreasonable and unenforceable. It is reasonable to refer the alteration made by it to those duties owing from members as such to the local conclave, and as governing the payment of assessments to the benefit fund and like matters which from time to time arise in lodges, as also to contracts arising in the future, and not in any way so as to defeat or impair contracts, at the time of its adoption, already completed by making it retrospective.

But there is a further reason why this should be the construction. A contrary rule would tend to defeat, not to further, the subsistence of the contract between the defendant and the member. *O'Neill v. Royal Legion*, 70 N. J. Law, 420, 57 Atl. 467. The above doctrine was announced by the Supreme Court in the case last cited, in a learned opinion by Mr. Justice Pitney (now Chancellor). He thus states it: "It is very generally, if not universally, held that these benefit certificates, like other contracts, confer a vested interest upon the member, which may not be impaired by a subsequent amendment, even though the power to amend be reserved in general terms. If the member's stipulation to comply with all by-laws thereafter enacted could be construed to relate

to a by-law that reduced the benefit from \$5,000 to \$2,000, it must also relate to a by-law canceling the benefit certificate entirely—a result wholly unjust and absurd. This stipulation must be construed as referring only to reasonable by-laws and amendments adopted in furtherance of the contract, and not to such as would overthrow it or materially alter its terms."

Giving retroactive effect to the amendment, it would work a destruction of contract rights, and would not be a reasonable regulation passed in furtherance thereof.

The judgment under review is affirmed.

(74 N. J. E. 828)

TRENTON ST. RY. CO. v. LAWLOR.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

1. CORPORATIONS (§ 426*)—REPRESENTATION BY AGENTS—RATIFICATION OF ACTS—COMPROMISE OF CLAIM.

Where the general manager of a street railway company in charge of its affairs knows of negotiations pending between its attorney and the opposite party for the compromise of a litigation, and orders settlement, making no objections to the terms, and the company accepts the benefit of the settlement by seeking to enforce it, this will be tantamount to a ratification of the compromise by the company.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1714; Dec. Dig. § 426.*]

2. ATTORNEY AND CLIENT (§ 101*)—AUTHORITY OF ATTORNEY—COMPROMISE.

It is the general rule that an attorney without special authority is not authorized to compromise his client's claim. There is, however, no objection to giving an attorney special authority to compromise, in which case the attorney in agreeing to the compromise would bind his client.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 209; Dec. Dig. § 101.*]

3. WITNESSES (§ 201*)—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

A special authorization from a client to an attorney to compromise a suit at law is not a privileged communication.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 754; Dec. Dig. § 201.*]

4. COMPROMISE AND SETTLEMENT (§ 6*)—VALIDITY—CONSIDERATION.

The only elements necessary to a valid agreement of compromise are the reality of the claim made and the bona fides of the compromise. The court will not inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. § 50; Dec. Dig. § 6.*]

5. COMPROMISE AND SETTLEMENT (§ 15*)—UNEXECUTED AGREEMENT—EFFECT.

An accord that is unexecuted is not an available defense at law against the original cause of action, but it may in a proper case become available as an equitable defense thereto.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. § 51; Dec. Dig. § 15.*]

6. INJUNCTION (§ 26*)—PROSECUTION OF ACTION.

The parties to a suit at law, having entered into an agreement of compromise lawful in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

character at its inception, by reason whereof the defendant was induced to change its position by discharging its witnesses and surrendering its right to go to trial at the time when prepared, and the plaintiff thereafter having repudiated the contract, and later having moved the cause for trial, the plaintiff will be enjoined from prosecuting his suit at law upon defendant's paying into court for the benefit of the plaintiff the money which by the terms of the compromise the plaintiff was bound to accept.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 26.*]

7. TENDER (§ 16*)—EXCUSE FOR FAILURE TO MAKE—REFUSAL TO ACCEPT.

A tender to one who announces in advance that he will not accept it is unnecessary.

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 48; Dec. Dig. § 16.*]

8. INJUNCTION (§ 113*)—LACHES.

Under the circumstances recited in the opinion, the complainant was not in laches in filing his bill.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 198-201; Dec. Dig. § 113.*]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill for injunction by the Trenton Street Railway Company against William T. Lawlor. Decree for complainant, and defendant appeals. Reversed for modification.

Thomas F. Noonan, for appellant. George W. Macpherson and W. Holt Apgar, for respondent.

TRENCHARD, J. This is a bill for an injunction filed by the Trenton Street Railway Company to restrain William T. Lawlor from prosecuting a suit at law against the company for personal injuries, and to compel him to perform and carry out an agreement of compromise of the suit alleged to have been entered into by him for a valuable consideration. The learned Vice Chancellor, before whom the case was heard, advised a decree, which was made, granting the relief sought, having found from the evidence that an agreement of compromise had been made whereby the railroad company was to pay and Lawlor was to receive \$1,850 in full settlement. From that decree, Lawlor appeals to this court.

It appears from the testimony taken before the Vice Chancellor: That Lawlor brought an action against the railway company in the Supreme Court to recover damages for injuries received while in the act of alighting from one of its cars. That on October 26, 1906, the suit came up for trial at the Burlington circuit, and on that day the counsel of the railway company, with Mr. Hurley, its general manager, and their witnesses, went to Mt. Holly to try the cause. Upon reaching Mt. Holly, negotiations looking to settlement were had. Mr. Budd, one of the attorneys of Lawlor, said "they would like to have \$1,850, but they would settle for \$1,800." Thereupon Mr. Hurley, speaking to the attorneys of the company, "ordered a set-

tlement," and they (the attorneys of the company) offered Mr. Budd \$1,800 in settlement of the suit. When this offer was communicated by Mr. Budd to Lawlor, the latter asked Mr. Budd to try to get \$60 additional to reimburse him for witness fees. Mr. Budd returned to counsel for the company, who thereupon agreed to pay or have the company pay \$50 for witness fees in addition to the \$1,800 to be paid in settlement. This was communicated by Mr. Budd to Lawlor, who thereupon authorized his attorney to settle for that amount. Whereupon Mr. Budd, in company with Mr. Hurley and the counsel for the company, went into court, and announced that the cause was settled. The parties and their witnesses then departed from the courthouse. It was understood between counsel for the company and the attorney of Lawlor that a release was to be prepared by the former to be executed by Lawlor and the money then paid. The release was immediately prepared and sent to Mr. Budd, but Lawlor repudiated the settlement, refused to sign the release, and engaged other counsel who was later substituted as attorney of record. The new counsel having caused the plaintiff's declaration to be amended in a particular of no importance so far as the present inquiry is concerned, the railroad company at first pleaded accord and satisfaction, but later, upon the plaintiff's again noticing his case for trial, the railroad company filed this bill.

The defendant Lawlor on his appeal asserts that the proofs fail to show any agreement of compromise. We think they show an agreement to compromise for \$1,850. But the defendant further contends that it does not appear that the agreement actually made by the railroad company's attorney was made by its authority. We incline to think it does. It was proved to have been made by the authority of Mr. Hurley, who testified that he was the general manager of the company. The defendant argues that this may have been true at the time the witness testified, but that there was no proof that he held such office at the time the compromise was made. It is sufficient to say by way of answer that Mr. Macpherson, the railroad company's attorney, testified that Mr. Hurley was general manager at the time of the compromise. It is further contended that, even if this is so, it is not within the power of a general manager of a street railway company to authorize the compromise of a suit, unless he has special authority for that purpose from the board of directors. We know of no such rule. The implied powers of one who has been appointed general manager of a corporation are generally understood to be coextensive with the general scope of its business (Thompson on Corporations, § 8556), and probably include power to authorize settlement of a claim. But, however these

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

things may be, it certainly is true that where as in this case, the general manager of a corporation, in charge of its affairs, knows of the negotiations pending between its attorney and the opposite party for the compromise of a litigation, and orders settlement, making no objection to the terms, and the company accepts the benefit of the settlement by seeking to enforce it, this will be tantamount to a ratification of the compromise by the company. *Thompson on Corporations*, § 4943.

It is further contended by the defendant that the defendant did not agree to the settlement. We think he did. It is, of course, the general rule that an attorney without special authority is not authorized to compromise his client's claim. There is, however, no objection to giving an attorney special authority to compromise, in which case the attorney in agreeing to the compromise would bind the client. *Phillips v. Pullen*, 50 N. J. Law, 439, 14 Atl. 222. In this case the evidence clearly shows that Lawlor gave Mr. Budd, his attorney, authority to settle for \$1,850. The contention of Lawlor that he was coerced or otherwise unfairly treated by his attorneys is not supported by the evidence. But it is contended that the testimony of the authority of Mr. Budd, coming as it does from Mr. Budd and Mr. Atkinson, the attorneys of Lawlor, is not competent proof because it was a privileged communication between attorney and client. We think it was competent. The authority given by Lawlor to his attorney to compromise the suit was intended to be communicated to the railroad company. It was necessary that the company should be informed of that fact before dealing with Lawlor's attorney. 23 Amer. & Eng. Enc. of L. (2d Ed.) p. 75, and the cases there cited.

Again it is argued that there was no sufficient consideration for the compromise. We think there is no merit in the argument. The only elements necessary to a valid agreement of compromise are the reality of the claim made, and the bona fides of the compromise. The court will not inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made. *Grandin v. Grandin*, 49 N. J. Law, 508, 9 Atl. 756, 60 Am. Rep. 642. The agreement in question was undoubtedly so made.

It was further suggested at the argument that this was not a case for equitable relief; it being contended that the agreement of compromise could be set up as a defense under a proper plea in the action at law. We think this is not so. The agreement for compromise remains unexecuted; the defendant having refused to accept the money and repudiated his contract. It is therefore an accord unexecuted. An accord that is unexecuted is not an available defense at law against the original cause of action, but it may in a proper case become available as an equitable defense thereto. *Headley v. Leavitt*, 65 N. J. Eq. 748, 55 Atl. 731. In

that case Mr. Justice Pitney at the trial at circuit refused to permit such a defense to be interposed on the ground that the accord was unexecuted and that fact was held by this court to justify the filing of a bill in chancery to restrain the plaintiff from further prosecuting her suit at law until she agreed to permit the defendant to take advantage of the contract which he had subsequently executed; this court thereby recognizing that the unexecuted contract, although it constituted an equitable, did not constitute a legal, defense. *Headley v. Leavitt*, 68 N. J. Eq. 591, 60 Atl. 963. We think the present a proper case for equitable relief. The agreement of compromise was lawful in character in its inception, and, as we have pointed out, may be a good defense in equity. It is apparent that, by making the agreement of compromise with the complainant, Lawlor induced the complainant to surrender its right to go to trial when it had its witnesses present and was otherwise prepared. The complainant having in reliance upon the settlement changed its position by surrendering such right and discharging its witnesses, it would be inequitable to permit Lawlor to withdraw from his contract and bring on the trial with complainant having a defense which was not available to it in a court of law only because Lawlor had refused to accept the money according to the terms of his contract.

Again, it is contended that complainant is not entitled to relief because there was no tender of the money; but a tender to one who announces in advance that he will not accept it is unnecessary. *Thorne v. Mosher*, 20 N. J. Eq. 257.

Nor is there any merit in the suggestion of the defendant that the complainant is in laches by filing a plea of accord and satisfaction to the amended declaration and waiting until notice of trial before filing its bill. The testimony shows that the position of the complainant with respect to the agreement of compromise and its effect was consistent throughout, and that it acted with reasonable promptness in filing its bill.

The decree appealed from awards a perpetual injunction restraining Lawlor, the defendant, from prosecuting his suit at law against the complainant, and orders that he perform the agreement of compromise, and accept the sum of \$1,850 from the complainant in full settlement of the suit. Such is not the precise form in which the decree should be drafted. It should provide that upon the complainant paying into court, for the benefit of the defendant, the sum of \$1,850, the defendant be perpetually enjoined from prosecuting or proceeding in his suit now pending in the Supreme Court against the complainant, or any other suit in that or any other court for the same cause of action.

For the purpose of such modification, the decree must be reversed and the record remitted to the Court of Chancery.

(77 N. J. L. 104)

UNITED ELECTRIC CO. v. MAYOR, etc.,
OF CITY OF NEWARK et al.

(Supreme Court of New Jersey. Dec. 1, 1908.)

ELECTRICITY (§ 4*)—USE OF STREETS—POWER
TO GRANT.

By the act of March 28, 1891 (P. L. p. 249; 1 Gen. St. 1895, p. 465), as amended by the act of April 22, 1897 (P. L. p. 248), the power to pass an ordinance granting to a corporation the right to open the streets of the city of Newark, and to lay therein conduits for the distribution of electricity, and to use such streets for such purposes, is lodged solely in the board of street and water commissioners of that city.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 4.*]

(Syllabus by the Court.)

Certiorari on the prosecution of the United Electric Company of New Jersey against the Mayor and Common Council of the City of Newark and others to review an ordinance. Ordinance set aside.

Argued February term, 1908, before GARRISON, SWAYZE, and TRENCHARD, JJ.

Frank Bergen and L. D. H. Gilmour, for prosecutor. Francis Child, Jr., for defendant City of Newark. Raymond, Van Blarcom & Anthony, for defendant Newark Block Lighting Co.

TRENCHARD, J. This writ of certiorari brings up for review an ordinance entitled "An ordinance granting consent to Newark Block Lighting Company to open certain public streets in the city of Newark and to lay therein subways, pipes or conduits for the supply and distribution of electricity for electric lights, heat and power, and to use said streets for said purposes," passed by the common council of the city of Newark May 3, 1907, and approved by the mayor May 8, 1907.

The question presented is whether the common council of the city of Newark had power to pass the ordinance. The contention of the prosecutor is that that power is lodged solely in the board of street and water commissioners of the city. It is conceded that prior to the time when the board of street and water commissioners was established in the city of Newark the common council had power to pass such ordinances; but it is insisted that that power passed to the board of street and water commissioners upon its organization and was there reposed at the time of the passage of the ordinance in question. The act under which the board was created was passed in the year 1891. P. L. p. 249; Gen. St. 1895, p. 465. The board came into existence in the next following year and still exists. Section 10 of the act provides: "That the said board of street and water commissioners of such city, in addition to all other powers or authority granted by law, and in lieu and place of any common council,

board of aldermen, or other governing body or board or corporate authority of such city, shall have, exclusive of all other boards, departments and officers of such city, all the power and authority over the streets, avenues, lanes, alleys, roads, highways and sidewalks or public ways along the same, or in such city, and in all matters and things in any wise appertaining to the use or occupation thereof or of any part of the same now or hereafter possessed by any board, department or officer of such city, and all other matters the power and jurisdiction over which is transferred by this act to said board of street and water commissioners."

Sections 13 and 14 of the act provide as follows:

"Sec. 13. That every municipal, corporate and official power and duty of every kind in relation to the subject-matters contained in this act, which at the time this act shall take effect in any such city of the first class, is vested or existing, in any board of aldermen, common council or other governing body or board, or in any public aqueduct or water board, or in any office or officer, board, body, department, clerk, employe, or authority in any such city, shall be performed by the board of street and water commissioners in this act provided for, and such board, in the exercise of such powers, authority and duties, shall be substituted for any municipal board, department, office or officer or authority then exercising or performing any such powers, duties, or authority in such city, and the powers, duties and authority aforesaid of the latter shall cease, determine and end as herein provided.

"Sec. 14. That all laws or parts of laws, general, special, local or private, in force in any such city of the first class aforesaid, whenever this act may take effect and become operative therein, and relating to the subject matters contained in or contemplated by the provisions of this act, and consistent with its provisions, shall apply to such board of street and water commissioners of such city, and such board, in such matters, shall be solely vested with all the powers and authority, rights and duties which are or may be at the date of the organization of such board, by law vested in and conferred and imposed upon, or existing in any board of aldermen, common council or other governing board or body, or of any public aqueduct or water board or municipal department, office, officer or authority of any such city, and such law or laws, or parts thereof as aforesaid, hereby are continued in force and are made applicable to such board of street and water commissioners provided for in this act, except so far as the provisions of the same may conflict with or be not consistent with the provisions and intent of this act; and such board of street and water commissioners hereby intended to be substituted and empow-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ered as aforesaid, shall in general be fully authorized and absolutely empowered to do any other act or thing necessary or convenient for the fulfilling and carrying out and accomplishing the purposes of this act."

It is seen, therefore, that the act of 1891, among other things, transferred to the board of street and water commissioners exclusive control of streets and highways in the city, including the regulation and control of the use and occupation thereof by individuals and corporations, in terms that seem to be perfectly plain. But the defendants insist that, even if this be so, the act of 1896 (P. L. 1896, p. 322), relating to electric light, heat, and power companies, conferred upon the common council of the city the right to pass the ordinance in question. This contention we incline to think is unsound in view of the decision of this court in *Oliver v. Jersey City*, 63 N. J. Law, 96, 101, 42 Atl. 782, where it was held that the expressions "common council" and "board of aldermen" in such acts are used in the sense of "governing bodies" and indicate the board of street and water commissioners. This view seems to have met the approval of the Court of Errors and Appeals. *Oliver v. Jersey City*, 63 N. J. Law, 634, 635, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228.

But, however this may be, we think that the power to pass the ordinance in question, if lodged in the common council by the act of 1896, was transferred to the board of street and water commissioners by a supplement to the act of 1891, passed in 1897 (P. L. p. 248). By this act the second section of the act of 1891 was amended to read as follows: "Sec. 2. The said board of street and water commissioners herein provided for, in any city aforesaid, shall be substituted for and become vested with and shall perform such of the powers, rights and duties as are herein specified (i. e., all the powers specified in the entire act), with such authority as may be by law vested in and imposed upon, or exercised by, the board of aldermen, common council, or other governing body or board of such city, or of any public aqueduct or water board or department, or of any department, civil engineer, city surveyor, commissioner, street commissioner, office or officer, clerk, servant or employé or authority of any such city; that the said board of street and water commissioners shall have power to lay out, open, grade, alter, vacate or change the lines of streets, avenues, lanes, alleys or highways, and to pave, repave, repair, improve or clean streets, avenues, lanes, alleys or highways, and sewers and drains, and to make any street, highway or sewer constructions, connections, alterations, repairs or improvements, and to control and regulate the use and occupation of the streets, avenues and highways and sidewalks of such city. * * * Considering all the legisla-

tion referred to, we think it plain that the power to pass an ordinance granting to a corporation the right to open the streets of the city of Newark, and to lay therein conduits for the distribution of electricity, and to use such streets for such purposes, is lodged solely in the board of street and water commissioners of that city.

The result is that the ordinance under review must be set aside, with costs.

(76 N. J. L. 744)

BRADY v. NORTH JERSEY ST. RY. CO.
(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

1. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY—NEGLIGENCE.

A motorman had charge of a trolley car on which the sand box was out of order through his neglect. He had run the car twice over the same route, on which there was a steep grade at the bottom of which a railroad crossed the street. On the third trip the car ran on the railroad and collided with an engine thereon, injuring the motorman. It appeared that on the previous trips the brake and controller were in working order; that in descending the grade on the third trip the brake and controller were applied to arrest the forward motion of the car, but failed to do so; the rails were covered with ice and snow, and the car wheels slid along the rails to the point of collision; the brake shoes were found, immediately after the accident, firmly locked against the wheels. No sand could be applied by the motorman, as was usually done in such cases to aid in stopping the car, because of a defect chargeable to his negligence. *Held*, that no presumption arises from these facts that the brake and controller were defective and unsafe.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 962; Dec. Dig. § 278.*]

2. EVIDENCE (§ 244*)—REPORTS BY MOTORMAN—ADMISSIBILITY.

An entry in a book kept by the company, in which motormen were required to enter the condition of their cars at the end of each round trip, that the car had "bad hand brakes," is admissible in evidence as showing notice to the master of an existing condition, when such notice is a material inquiry, but it is not competent proof of the fact itself.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 244.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Peter Brady against the North Jersey Street Railway Company. Judgment for plaintiff, which was reversed in the Supreme Court (74 N. J. Law, 413, 67 Atl. 754), and plaintiff brings error. Judgment of the Supreme Court affirmed.

Samuel Kalisch, for plaintiff in error.
Leonard J. Tynan, for defendant in error.

BERGEN, J. The plaintiff in error was in the employ of the defendant as a motorman, and, while running a car loaded with passengers down a steep incline in a street in the city of Newark, he was unable to stop it before it ran upon a steam railway track

crossing the street, and was struck by a passing train. The plaintiff was injured by the collision, and brings this suit to recover damages for the injuries he suffered. The declaration of the plaintiff contains two counts. The first avers that the brake and controller on the car furnished by the defendant were so defective that when it became necessary to stop the car, in order to prevent it from running or sliding upon the railroad track, he was unable to do so. This count relies alone upon the alleged defective and unsafe condition of the brake and controller. In the second count the plaintiff charges that the car was equipped with a sand box which should contain sand and be in a condition to drop it on the rails of the track whenever, by reason of the grade of the street or the slippery condition of the rails, the brake, controller, or other appliances supplied for such purpose were inadequate. At the trial the court instructed the jury that the plaintiff had no right of action based upon any defects in the operation of the sand box, and the questions submitted to the jury related alone to the issue presented by the first count in the plaintiff's declaration. At the close of the plaintiff's case, defendant moved for a nonsuit upon the ground that it had not been shown to have been negligent, and at the close of the whole case it moved for a favorable direction for the same reason. Both motions were refused, and there was a verdict for the plaintiff, upon which judgment was entered. This judgment was reversed in the Supreme Court, and to review that determination this writ was brought.

As the case is presented to this court, plaintiff's right to recover depends upon the question whether he has presented any evidence from which a jury could properly draw an inference that the defendant was guilty of negligence in supplying its servant a car to be operated by him which was unsafe for the use intended and required, because the brake and controller, appliances to be used in stopping and otherwise controlling the motion of the car, were defective. There is no direct testimony showing that either the brake or controller were out of order, or defective in any particular part; on the contrary, the plaintiff testified that previous to the trip when the accident occurred he had run the car twice over the same route on the morning of the accident; that on the two earlier trips the track rails were free from snow and dirt, but on the last trip snow and dirt had been carried on the rails by wagons, and had become very slippery. He was asked: "Q. So that on your first trip you went over exactly the same route as you did on the trip of the accident? A. Yes, sir. Q. And your brakes worked all right? A. Yes, sir. Q. And your controller worked all right? A. Yes, sir." The trip referred to was from the car barn to the end of the route, and the second trip was the return through the same streets to the car barn, regarding which the

plaintiff testified as follows: "Q. Did you examine your brake on the return trip, or the second trip? A. Well, I had been examining it all the way along the route. I had been handling it all along the route. Q. And you found it in good order? A. Seemingly in good order. Q. There wasn't anything the matter with it, so far as you could see? A. No." He also testified that on the last trip he had crossed another railroad track about $2\frac{1}{2}$ miles before reaching that of the defendant, which crossed the street at the bottom of a grade of almost the same character as that in the street where the accident happened, and that the conditions were the same, except that there was no ice on the track and the car was not carrying as many passengers, and that on that grade the brake controlled the progress of the car.

The trial court admitted against objection secondary proof of the contents of a book kept in a room in the car barn in which each motorman was required to enter a statement of the condition of the car he had run into the barn. This evidence was admitted after notice to the defendant to produce the book, and the statement of counsel that no such book could be found. The witness on this subject testified that such a book was kept in a room where the men waited to take out cars; that the book lay on the desk, but he could not say whether it was in charge of any one or not; that he saw it on the day of the accident and looked into it to see in what condition the car was when turned in the night before, and found in the book the following entry: "Bad hand brakes, sand box out of order"—that the report was signed by one Warren Stickle, a motorman in the employ of the defendant. There was no positive proof either that Stickle made the entry, and that it was in his handwriting. The trial court in admitting the evidence said: "The suggestion that anything bearing the appearance of a report purporting to be a report of the condition of that car on the day before the accident would of itself operate as a notice to the superintendent in whose office it was kept seems to me to have a good deal of force." That this evidence would have some weight in determining the question whether the defendant had notice of the defective condition of the car, if it was defective, cannot be disputed, but it would not be competent proof that the car was in fact defective. The condition of the car cannot be established by such entry, and its use must be confined to the question whether the defendant had notice of a condition shown to exist, and cannot be accepted as primary proof of the condition it states. Proof tending to show notice of an existing condition is admissible when such notice is a material inquiry, but it is never competent proof of the fact itself. *Louisville & N. R. R. Co. v. Hall*, 87 Ala. 708, 6 South. 277, 4 L. R. A. 710, 13 Am. St. Rep. 84. While the order in which testi-

mony may be admitted is within the reasonable discretion of the trial judge, we are of opinion that the admission of testimony showing notice to the owner of a defective condition should not ordinarily be allowed until there is *prima facie* proof of the existence of the defect, for notice that a negligent situation existed, when in fact it did not, would not be relevant, or tend to sustain the allegation that it did, and its untimely introduction may create improper impressions in the juror's mind difficult to eradicate. This will be avoided by first proving the condition and then notice of it to the person whose duty it is to amend it. There is no proof to justify an inference that either the brake or controller was defective or unsafe when the car started to descend the grade immediately before the accident. The plaintiff testified that on the morning of the accident he had run the car twice down a hill about as steep as the one on the street where the accident happened, and once down the hill, at the bottom of which he was afterwards injured, and that he used the brake, which was seemingly in good order and controlled the car; that there was nothing the matter with the brake or controller; that he made no complaint of any defect when he reached the starting point after he had gone to the end of his route and returned; and that he made no examination before starting out again because the car ran all right on the two previous trips. It would seem from the undisputed testimony that, so far as use and observation could demonstrate it, the appliances were in good order, and not unsafe or defective under ordinary conditions.

But it is urged that the manner in which the brake and controller operated immediately before the accident, and while the car was descending the hill towards the railroad crossing, raises a presumption that they were out of order. The evidence on this point shows that the plaintiff was running his car down the incline from Orange street towards the railroad crossing; that he was slowing up, and, when about half way between the two points, he saw the gates at the railroad crossing go down; that the brake would not hold, and the car slid because there was no sand to give the car a hold; that he tried to work the sand box, but he could get no sand, either because there was no sand in the box or that the pipes were frozen; that he put the brake on as far as he could, and, finding that the car was sliding, partially released the brake and used the controller to obtain a reverse, or backward motion; that he kept the brake quarterways on so as to make the controller power effective, but the car continued to slide, and when asked: "Q. Then the reason your car did not stop before going over the Delaware & Lackawanna Railroad was because the tracks were made slippery by teams going over it and pushing snow on

it"—he answered, "Yes; by the rails being dirty, ice on it. It was frozen. My brakes wouldn't take." It appears that, after the accident the brake shoes were locked tight against the wheels. The plaintiff further testified that he pressed his foot on a pin which should have released the sand from the box, but that it did not flow, and he knew this because the car did not stop. We fail to find in this part of the case any evidence which raises a presumption that the accident happened because the brake or controller furnished him were defective. On the contrary, if the evidence raises any presumption, it is that, if he had had the sand box in order, the progress of the car could have been stopped, and on this subject the jury were instructed by the trial judge that, the plaintiff having three times disregarded the rule of the company regarding the examination of the sand box, he was in a condition of ignorance, as to its condition, by his own conduct, and that, if the absence of sand was the cause of the accident, the negligence of the motorman was contributory negligence.

There being no proof of any defect in the brake or controller before the accident, and no presumption being raised that they were defective because the car, notwithstanding the wheels were locked by the brake, continued to slide down a steep hill on slippery rails covered with ice, the plaintiff has failed to prove the negligence laid in his declaration. There was no averment in the declaration that the defendant was chargeable with negligence because of the condition of the rails, or with any duty to the plaintiff to remove the ice or snow from its tracks on so steep a grade before directing him to run the car over it, and the only question we have considered is whether there was any proof, actual or presumptive, that the appliances complained of were unsafe and defective.

We conclude that there was not, and therefore the judgment of the Supreme Court is affirmed.

(74 N. J. E. 848)

LEMBECK et al. v. LEMBECK et al.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

APPEAL AND ERROR (§ 839*)—QUESTIONS REVIEWABLE.

Where, on a bill filed by executors and trustees for the construction of their testator's will, the decree omits to adjudge all the matters considered, and on appeal no complaint is set out in the petition of appeal that the appellant is aggrieved by such omission, an appellate court will only review so much of the decree, or questions raised by the pleadings which the decree ignores, as the petition sets forth as the grounds upon which the appeal is rested.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3279; Dec. Dig. § 839.*]

(Syllabus by the Court.)

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Court of Chancery.

Bill by Gustav W. Lembeck and others, executors, against Emma Lembeck and others. Decree for defendants (68 Atl. 337), and complainants appeal. Affirmed.

Hudspeth & Carey and Benjamin C. Pascus, for appellants. Collins & Corbin, for respondents Katie and Victor H. Lembeck. Robert J. Bain, for respondent Albert B. Lembeck. William M. Rysdyk, for respondents Emma Lembeck and others.

BERGEN, J. The bill of complaint was filed in this cause by the executors and trustees named in the last will and testament of Henry Lembeck, deceased, and from a decree made in the Court of Chancery this appeal was taken. The decree should be affirmed, for the reasons set out in the opinion of former Chancellor Magie in *Lembeck v. Lembeck* (N. J. Ch.) 68 Atl. 337, so far as they are applicable; but in order to avoid any misconception that may arise from the adoption of the opinion, which contains a conclusion not expressed in the decree, we consider it proper to state that we do not approve that portion of the opinion which expresses the view that under the will of Henry Lembeck his executors have no power to sell the stock of the Lembeck & Betz Eagle Brewing Company during the widowhood of testator's widow.

The only judgment contained in the decree on this point is "that the executors, unless they consider it advisable, need not sell or divide the stock of the testator in the Lembeck & Betz Eagle Brewing Company until 25 years have elapsed after the decease of the testator." The effect of this judgment and decree is that there is vested in the executors a discretionary power to sell the stock, which discretion need not, but may be, exercised at any time within the period of 25 years; but it does not adjudge that the executors have the right of exercising such discretionary power during so much of the widowhood as may be included within the 25 years. Thus, while the opinion below, erroneously as we think, declares that no power of sale existed during so much of the period as widowhood continued, the decree does not so adjudge, nor do the appellants, in their petition of appeal, claim that any point, on which instructions are sought, was not considered and determined, or that they are aggrieved because of any omission, and therefore the question of the power of sale during continuance of widowhood is not presented to us in the present state of the record. That part of the petition of appeal relating to the power of sale is confined to that portion of the decree which adjudges that if the power be exercised within 25 years all of the stock must be sold. We are of opinion that the stock may be sold during the widowhood of

the testator's widow, the proceeds to be held upon the same trusts as the stock; but, this matter not being included in the decree, it is not subject to the present appeal.

Without adjudging the question of the correctness of the construction of the testator's will, as declared in the opinion of the court below, on the question of the power of the executors to sell the stock during the widowhood of testator's widow, because it is not included in the decree, we are of opinion that, for the reasons given by the Chancellor in support of the decree appealed from, it should be affirmed.

(76 N. J. E. 1)

MASSEY v. CAMDEN & T. RY. CO.

(Court of Chancery of New Jersey. Nov. 20, 1908.)

RECEIVERS (§ 173*)—PERMISSION TO FORECLOSE MORTGAGE.

The court which has appointed a receiver for a railroad will grant permission for a suit in a federal court to foreclose the first mortgage; there having been for four months default in payment of interest, and the conditions existing which by the terms of the mortgage make it the duty of the trustee to foreclose.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 173.*]

In the suit of Henry V. Massey against the Camden & Trenton Railway Company, for a receiver, petition is filed for leave to file a suit to foreclose the first mortgage on the company's property. Leave granted.

The Provident Life & Trust Company of Philadelphia, trustee for mortgage bondholders, having filed a petition praying leave to file a bill in the United States Circuit Court for the District of New Jersey for the foreclosure of a mortgage given by the Camden & Trenton Railway Company to said trustee for the security of bondholders, and Daniel Killian, one of the bondholders, having filed an answer to the petition, the matter came on for hearing before the Chancellor upon the petition and answer.

Dickson, Beitler & McCouch, for petitioner. Spencer Simpson, for respondent Daniel Killian. John M. Dickinson, for receiver.

PITNEY, Ch. (after stating the facts as above). By decree made in this cause on the 18th day of February last it was adjudged that the Camden & Trenton Railway Company was insolvent, and Wilbur F. Sadler, Jr., was appointed receiver for the creditors and stockholders of the company, with the usual powers, pursuant to sections 55 and 56 of the general corporation act (P. L. 1896, pp. 295, 296). The receiver entered upon the discharge of his duties and took possession of the property of the defendant corporation, consisting principally of a system of railway situate in the counties of Mercer and Burlington, in this state, with the rolling stock

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and other appurtenances thereto, and certain shares of the capital stock of two electric light and power companies of this state. He is still in possession and is operating the railway under the orders of this court. The property of the defendant corporation at the time of the appointment of the receiver was, and still is, subject to the incumbrance of two mortgages made by the Camden & Trenton Railway Company to the Provident Life & Trust Company of Philadelphia, trustee—the first mortgage, dated November 1, 1899, to secure \$750,000 of mortgage bonds, of which \$710,000 were and are outstanding; and the second mortgage, dated July 1, 1901, given to secure \$1,750,000 of mortgage bonds, of which \$622,500 were and are outstanding. The appraised value of the total assets of the company that came to the hands of the receiver is less than \$800,000. Unsecured claims aggregating more than \$300,000 have been presented to the receiver. The railway company is, and has been for more than four months, in default in the payment of the interest coupons upon the first mortgage, and by the terms of that instrument it is made the duty of the trustee, upon the request of the holders of one-half in amount of the bonds outstanding, to either take possession of the railroad, or institute proceedings at law or in equity upon the mortgage, or sell the property at public sale under the authority thereof. The holders of much more than one-half of the first mortgage bonds have notified the trustee of default made in the payment of interest, and that more than four months have elapsed since such default, and have requested the trustee to proceed for the foreclosure of the mortgage. A foreclosure bill has been prepared to be filed in the Circuit Court of the United States against the Camden & Trenton Railway Company and the receiver and other parties interested. Thereupon application is made to this court for leave to proceed with the foreclosure suit against the receiver.

The petition of the trust company sets forth that the administration of the receiver has been entirely satisfactory to the bondholders, and is believed by the trust company to have been in every respect judicious and efficient, and that it does not appear to the trust company to be necessary to ask for any change in the possession or operation of the railroad property until after the sale thereof and the settlement of the accounts of the receiver, unless in the opinion of this court it is desirable that the court having jurisdiction to foreclose the mortgage should also appoint a receiver, in which event and upon intimation to that effect the trust company will ask the federal court to make such appointment, and will nominate Mr. Sadler such receiver. The present prayer of the petitioner is merely that leave be granted to

file the foreclosure bill and to proceed thereunder to a decree of foreclosure and sale. Upon reflection I am satisfied that this court ought not to place any obstacle in the way of proceedings to be taken by the trust company in behalf of the bondholders in the court selected by it to establish the lien of the mortgages and enforce the same for the security and benefit of the bondholders, provided the possession of the property by the receiver appointed by this court and the administration of the property by the receiver is not interfered with until the property is sold in the foreclosure suit. An order will therefore be made granting leave to the trust company to file its proposed bill for foreclosure in the United States Circuit Court, and to proceed thereon against the receiver herein, as well as against the Camden & Trenton Railway Company and other proper parties, to a decree of foreclosure and sale thereunder, upon terms, however, that this leave shall not extend to interfere with the present receivership, or disturb the possession or control of the receiver, or his management or administration of the estate of the insolvent corporation, nor shall it extend to permit application to be made for the appointment of a receiver in the foreclosure suit, without the further order of this court.

(76 N. J. L. 768)

SCHORB v. HAURAND.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

1. APPEAL AND ERROR (§ 1008*)—TRIAL BY COURT—ASSIGNMENTS OF ERROR.

In case of trial of a cause by the court without a jury, errors cannot be assigned upon the opinion of the court, nor upon matters of blended law and fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8953; Dec. Dig. § 1008.*]

2. EXECUTORS AND ADMINISTRATORS (§ 130*)—POSSESSION OF REALTY.

Where executors are given power to sell real estate generally by their testator's will, except as to certain property "which it is my desire shall be kept intact in my estate for the term of 10 years; but, however, should it become necessary in the opinion of my executors to sell said property in a shorter time than 10 years for the interest and benefit of my estate, then I give them full power to sell and dispose of my said property whenever it shall become necessary in their opinion so to do"—held that, as to the property directed to be held intact, the executors have no right to the possession thereof, to enable them to maintain ejectment for it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 539; Dec. Dig. § 130.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Carrie L. Schorb against Henry Haurand. Judgment for plaintiff, and defendant brings error. Affirmed.

Francis J. Blatz, for plaintiff in error. Melosh & Morten, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

VOORHEES, J. This is an action of ejectment, brought to recover possession of undivided one-third part of lands No. 115 East Front street, in Plainfield, N. J. The case was tried at the circuit by the court without a jury. A motion to nonsuit was made, and to the refusal to grant it the only exception taken at the trial was sealed. The judgment was for the plaintiff. Other alleged errors seem to be assigned upon the opinion upon matters of blended law and fact, without exceptions sealed. Such findings cannot be reviewed by writ of error. *Doolittle v. Willett*, 57 N. J. Law, 393, 31 Atl. 385; *Jersey City v. Tallman*, 60 N. J. Law, 239, 37 Atl. 1026; *Weger v. Delran*, 61 N. J. Law, 224, 39 Atl. 730; *N. J. Rubber Co. v. Commercial Assurance Co.*, 64 N. J. Law, 51, 44 Atl. 848, affirmed 64 N. J. Law, 580, 46 Atl. 777; *Brewster v. Banta*, 66 N. J. Law, 367, 49 Atl. 718; *Allerton v. Grundy*, 67 N. J. Law, 55, 50 Atl. 352; *Snyder v. Commercial Union Assurance Co.*, 67 N. J. Law, 626, 52 Atl. 384.

The plaintiff is one of three devisees for life of the premises under the will of Elizabeth M. Schorb, who died in 1899. The testatrix gives first a life estate to her husband, John M. Schorb. He died December 31, 1906. At the time of the death of testatrix the property was in possession of defendant under a written lease executed by the testatrix in her lifetime, together with her husband, John M. Schorb, which expired March 1, 1902. The defendant after the date of expiration of the lease held over and remained in possession, paying the same rent to the life tenant, John M. Schorb, until his death, December 31, 1906. The right to remain in possession in this manner, of course, could not extend beyond the life of the life tenant. After John's death the defendant still continued in possession and paid his rent for January, February, and March, 1907, to the executors of the testatrix, but by what authority is not shown. The provisions of the will disposing of the property, after the life estate to testatrix's husband, are as follows: "Fourth. In the event of the death of my said husband I give the remainder of my property, both real and personal, to Carrie L. Schorb, wife of John M. Schorb, Jr., Minnie Schorb, wife of William A. Schorb, and Josephine A. Mason, wife of Charles Mason, to be theirs during the term of their natural life, and in the event of the death of any of the above named persons the interest of the parent to go to the children of said parent and their heirs forever; the intention being to divide my property, in the event of my husband's death, into three equal parts as nearly as can be." The will also contained the following clause: "Fifth. I give to my executors hereinafter named, power to sell and give good and sufficient deeds for any real estate which I may own at the time of my death, except the property known as 115 East Front street in

the city of Plainfield, which it is my desire shall be kept intact in my estate for the term of ten years; but, however, should it become necessary, in the opinion of my executors, to sell said property No. 115 East Front street in a shorter time than ten years for the interest and benefit of my estate, then I give them full power to sell and dispose of said property, whenever it shall become necessary in their opinion so to do."

The ground upon which was rested the motion to nonsuit is that the plaintiff was not a proper party, but that the executors should have brought the action. Clearly they had no right to the possession of the property. The plaintiff became entitled to possession of her one-third at once upon the decease of the life tenant, John M. Schorb, December 31, 1906. *Moores v. Moores*, 41 N. J. Law, 440. The power to sell was a naked power, not to be exercised by them for a term of 10 years (at the time of the bringing of the suit not then elapsed), unless it became necessary to sell sooner. So that until that necessity arose, in the opinion of the executors, they had no control whatever over the property. The necessity for sale had not yet arisen in the opinion of the executors, for aught that appears in the case. In any event, they had no right to the possession of the premises. There was no error in refusing to nonsuit.

The judgment is affirmed.

(76 N. J. L. 646)

WYCKOFF v. BIRCH.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

1. MASTER AND SERVANT (§ 233*)—LIABILITY FOR INJURIES TO SERVANT.

Plaintiff's intestate was killed by the fall of a platform composed of planks laid loose across the structural iron bracing inside of a standpipe that was in course of erection by the defendant's servants. The fall of the platform was due to the tearing asunder of one of these iron braces in the attempt to force a lug attached to its distal end into contact with the inner wall of the standpipe where it was to be permanently riveted. The occasion that led to this attempt and to the accident that ensued arose from the faulty workmanship of those engaged in erecting the standpipe which permitted it to become elliptical in form, and from the misuse of the appliances that had been furnished by the master to strengthen the standpipe and secure its cylindrical shape. *Held*, that a master who furnishes his servants with a proper scheme of construction, proper materials, and proper appliances is not liable to them for the results of an accident due solely to improper workmanship, and to a misuse of the appliances he has furnished.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 684-686, 701-742; Dec. Dig. § 233.*]

2. NEGLIGENCE (§ 134*)—NATURE AND ELEMENTS.

Negligence in its essence is always concrete; hence its proof must always rest upon testimony that tends to the establishment of concrete acts either of omission or of commis-

sion. There is no such thing as negligence at large.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 134.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Elizabeth Wyckoff, administratrix of the estate of Leroy Wyckoff, deceased, against Foster F. Birch. Judgment for plaintiff, and defendant brings error. Reversed.

J. L. Conard, George S. Hobart, and Gilbert Collins, for plaintiff in error. Vreeland, King, Wilson & Landabury, for defendant in error.

GARRISON, J. This writ of error brings up a judgment recovered by the defendant in error as plaintiff in the action brought in the court below to recover damages for the death of Leroy Wyckoff, which resulted from injuries received while working on a standpipe that was being erected by the defendant at Mt. Hope, Morris county. To a proper comprehension of the case in its legal aspects, an understanding of the exact nature of the work in which the plaintiff with other servants of the defendant was engaged at the time of the accident is essential. The standpipe in question, which was when completed to be a cylindrical column of sheet iron 80 feet in height by 20 feet in diameter, was constructed of metal sheets riveted together in a series of circular courses and superimposed on each other. Each sheet was three-eighths of an inch in thickness, eight feet in length, and five feet in height, so that allowing for overlapping a course or segment of the column consisted of eight of these sheets, which were riveted together before being brought to the standpipe and hoisted into position. After a course thus constructed had been hoisted into position, it was secured to the one next below it by rivets, its circular shape being restored and preserved in part in this way, but chiefly by a series of internal structural braces called "reaches" or "angle irons" that radiated like the spokes of a wheel from a small central iron pipe surmounted by a sort of iron hub called "a spider," which had eight short arms, to each of which an angle iron was bolted, so that it extended from the arm of the spider to the inner surface of the sheet-iron cylinder, where it was bolted into the under side of a horizontally projecting foot of a right angled lug, whose perpendicular part was held by two bolts to the inside of the cylinder or shell; these angle irons, being of uniform length and situated equi-distant from each other in the circumference of the shell, insured, when properly installed, its cylindrical form. In each section of the standpipe—that is, in every five feet of the ascending column—one of these permanent structural brace-works was constructed. When one course

had been thus completed, the iron pipe in the center was raised five feet to correspond to the height of the next course, another spider was then placed on this new section of pipe, new lugs were bolted to the inner side of the new section of cylinder, near its top, to the horizontal feet of whose lugs were bolted new angle irons that were also bolted to the corresponding arms of the spider, and so on as the work progressed; the work on each course being done from a platform of planks that rested on the angle irons that thus formed part of the construction of the course next below it. The structural bracing thus constructed inside of each course which served the permanent purpose of strengthening the standpipe and securing its circular form performed also the temporary use of a scaffolding to support the platform, from which, after the first course, the work of construction had to be carried on. This iron scaffolding, if it may be so called, was therefore a permanent structure that supported the temporary platform in question. This platform consisted merely of two-inch spruce planks laid loose upon the angle irons, not fastened down, but movable as the exigencies of the work might require. There being eight of these angle irons in a circumference of 60 feet, it is evident that a piece of planking 12 feet long would rest upon three or upon four angle irons according to the distance between such plank and the ends of the angle irons. The length of the planks actually used is not given in the testimony otherwise than that they were of various lengths; but no complaint is made that they were not of sufficient length, or that they were otherwise of an improper character. The complaint is not that proper material for making the platform was not provided, but that the scaffolding—that is, the permanent iron structure—gave way.

The stage of the work at which this accident occurred and the manner of its causation as described by the plaintiff's witnesses was as follows: In order to make the pipe water tight, the two bolts that had during the progress of the work on a given course held the perpendicular part of each lug to the inner aspect of the last section of the shell were taken out, and replaced by metallic pins, which were firmly riveted. This was not done until the work on the newer section was otherwise completed, for the reason probably that the leverage on the angle irons caused by working upon the platform after the lugs that held the scaffolding had been riveted would loose the rivets, and render the pipe at such points liable to leakage. However that may be, the fact is that the replacing of the bolts with rivets was done just before transferring the planking from the old set of angle irons to the new set just above them. In this process of replacing the bolts with rivets there would be times when the lower end of the perpendicular part of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the lug did not exactly parallel the inner surface of the shell, or where the hole in the lug and the corresponding one in the shell did not exactly align, so that the lug must either be forced into contact with the shell or moved laterally until an alignment of the holes was effected. It was at this stage of the work, and while engaged in this part of it, that the plaintiff's intestate met with the accident that caused his death. One of the lugs to be thus riveted was not in contact with the side of the shell, and Wyckoff and a fellow workman named Cole were engaged in forcing the bottom of this lug back against the shell so that it might be riveted. In doing this Wyckoff held a small hammer called "a set" against the lug, and this "set" was struck by a six or eight pound hammer handled by Cole. This process had been going on for a minute or so, Wyckoff kneeling on the planking that rested on the angle iron that was attached by a single bolt to the horizontal foot of the lug that was being forced back, when, upon a blow from Cole's hammer, the bolt that thus held the angle iron to the foot of the lug that was being struck gave way by shearing in two as if cut or torn off, and the end of the angle iron that had been held to the lug by this bolt being thus released dropped, and with it fell the two pieces of the planking that had rested on this particular "reach." Wyckoff, who had been kneeling at this point of the platform, fell with the two planks, and in this way received the injuries of which he afterward died.

I have stated thus circumstantially the character of the work on which the plaintiff's intestate was engaged and the nature of the accident that led to his death as each of these matters is described by the plaintiff's witnesses, in order that the state of the testimony as it stood when the motion to nonsuit was made may be properly understood and applied to the question of the defendant's negligence. At that period of the trial, in addition to the foregoing particulars, the plaintiff had by numerous witnesses shown that, as the standpipe went up section by section, it gradually began to depart from its cylindrical form, and to assume a more or less elliptical shape, so that the angle irons came to be somewhat too long for the shorter axis of the ellipse where they had to be bent, and somewhat too short for the longer axis where they had to be pieced or otherwise adapted. The existence of this state of affairs—that is, the fact that the standpipe was elliptical in form, and the fact that in one axis of this ellipse the angle irons were too short to reach from the "spider" to the circumference of the shell—constituted the two grounds upon which negligence was sought to be ascribed to the defendant both by the plaintiff's declaration in the court below and by the argument made in her behalf in this court. In view, however, of what

has already been said, it is perfectly clear that while the first of these conditions was the cause of the second, and while both together created the occasion that led to the accident by which Wyckoff lost his life, there was nothing in this state of affairs that tended in the slightest degree to demonstrate the negligence of the defendant either in permitting the standpipe to get out of shape, or in failing to furnish angle irons of a proper length. On the contrary, the testimony of the plaintiff's own witnesses showed conclusively faulty workmanship by the defendant's servants, and a faulty use by them of the material and appliances that had been furnished to them by the defendant, which, if properly used, would have entirely obviated both of the conditions that led to the occasion out of which the accident arose. It is nowhere disputed that the standpipe, if properly run up, would have been cylindrical in form, or that the angle irons that had been furnished by the master were for the express purpose of securing and maintaining this cylindrical form of the pipe, or that, if properly used, they would not have done so. It was only, therefore, by faulty workmanship in permitting the sheet iron shell to assume an elliptical shape, and by then adapting the angle irons to this improper shape, instead of preserving the cylindrical form of the pipe by their proper use, that the condition arose under which the application of great force was attempted in order to bring the lug at the end of an angle iron into juxtaposition with the pipe with the result of tearing off the bolt that held the angle iron to the lug, and thus permitting the end of the angle iron to fall. The contention that the negligence of the master was in any wise established by the fact that the courses when hoisted into position were not perfectly cylindrical is entirely without force; that a roll of sheet iron 60 feet in circumference and only $\frac{3}{8}$ of an inch in thickness should preserve an exactly cylindrical form during transportation, and while being hoisted into place, is contrary to the plainest physical laws. Moreover, as has already been pointed out, the inner structural bracing afforded by the "spider," and angle irons was provided for the express purpose first of restoring and afterward of preserving the cylindrical form of the several courses of the standpipe when in place. Similarly the testimony so much dwelt upon in the argument that some of the angle irons were too short or "were punched too short" loses all significance or bearing upon the master's negligence in view of the established fact (as far as the plaintiff's testimony goes) that the condition in question resulted solely from faulty construction, and not from original design or from inadequate materials or appliances. The fact that the angle irons whose proper use was thus disregarded by the defendant's workmen constituted also the supports of the platform on which these

very workmen stood so far from suggesting the negligence of the master in respect to any duty owing to his servants tended rather to aggravate the negligence of their workmanship, in which the master had no part. The workmen knew what the master did not know, namely, the use, or rather the misuse, they were making of the angle irons. They saw what he did not see, namely, that such misuse had led to conditions where much greater force was required than would have been necessary if the proper function of the angle irons had been observed. Whether this degree of force, if applied to a given lug, would put more strain on the single bolt that held it to the angle iron than it could bear, was a question, therefore, that arose from conditions known to the workmen and of their own creation, and not known to the master or of his contrivance. Under these circumstances, when the nature of the work and the manner in which it ought to have been done are considered and the manner in which it was done is understood, it is impossible to ascribe to the defendant from the foregoing conditions any act of negligence that either directly or indirectly contributed to cause the accident by which the plaintiff's intestate was killed. The materials and appliances furnished by the master were proper and adequate to the work to be performed. The plan of construction intended by the master and almost necessitated by the nature of the appliances furnished by him was free from either obvious or latent dangers. The iron scaffolding that was provided automatically in the progress of the work and which was entirely safe as long as the plan of construction was adhered to became unsafe only when and to the extent that such plan was departed from. The plaintiff's own testimony showed that the plan was departed from, not by the master, but in the course of the work, and that the appliances were not properly applied to the purposes for which they had been provided, and, further, that from these acts of faulty workmanship it resulted, not that the scaffolding became unsafe, but that it was literally torn asunder by the application of a force the necessity for which arose entirely from such faulty workmanship. Aside from the elliptical shape thus assumed by the standpipe in the course of construction and the consequent lack of reach of some of the angle irons, no concrete act either of omission or of commission constituting negligence is laid by the testimony at the door of the master. If he was negligent in some other regard that caused the death of plaintiff's intestate, it must have been either with respect to some act done by him or some duty that he omitted to perform, but, as to any such act or as to any such duty, the testimony is not only silent but is conclusively to the contrary. Arguments based upon isolated circumstances or detached statements of witnesses or upon general allega-

tions of negligence go for nothing when unsupported by testimony as to concrete facts. In its essence negligence is always concrete. "There is," as was said upon another occasion, "no such thing as negligence at large." *Bien v. Unger*, 64 N. J. Law, 596, 46 Atl. 593.

The rule of law applicable to the present case is that a master who furnishes to his servants a proper scheme of construction, proper materials, and proper appliances is not liable to them for the results of an accident occasioned by and solely due to improper workmanship and a misuse of the appliances that the master has thus furnished. For this proposition no citation of authority is deemed necessary.

The result in our opinion, therefore, is that when plaintiff rested without having adduced testimony as to any fact from which the negligence of the defendant, either as the proximate or the remote cause of the death of the plaintiff's intestate, could legitimately have been found by the jury, the motion for a nonsuit should have prevailed. It may be added that the testimony afterward adduced by the defendant, which contradicted much of the plaintiff's case, added nothing to it by way of supplying its deficiencies.

Nothing has been said regarding the contributory negligence of the plaintiff's intestate, the case having been considered and disposed of upon a broader ground, and in what has been said the fellow-servant rule has not been invoked or referred to for the reason that this question was not raised in the trial court either upon the motion to nonsuit or at the close of the entire case. The only question that has been considered is that of the negligence of the defendant. Whether or not this question was properly raised by the motion to nonsuit is a matter that at first gave us some hesitation. The language of counsel in making this motion was as follows:

"Mr. Conard: I desire to move on behalf of the defendant for a nonsuit [citing certain cases]. There is absolutely nothing to show in this case other than that the plaintiff who was the servant of the defendant caused whatever dangerous circumstances there were. Whatever occurred to the plaintiff in this case occurred through his own negligence in the progress of the work on which they were occupied."

This language was certainly not well adapted to suggest that the motion was based upon the ground that the negligence of the defendant had not been established, so that, if the bill of exceptions had left it in doubt whether the mind of the trial court had been directed to this point, we would be inclined to hold that the judicial ruling could not in this respect be made the basis of a reversal. The bill of exceptions, however, shows beyond all question that this point was present in the mind of the trial judge, for his response to counsel's motion was:

"The Court: The only question for the

court in a case of this kind is as to whether or not there is any evidence from which the jury under instructions from the court might infer and conclude as to the negligence of the defendant. If there is any such evidence, it is not the duty of the court to pass upon the quality of that evidence or its conclusiveness. It is entirely for the jury. There is some evidence which under the pleadings it is competent for the jury to pass upon as to the negligence of the defendant, and, that being so, the question is entirely for the jury."

The question of the defendant's negligence which was thus raised at the trial having been fully argued by counsel of either party in this court is therefore properly before us on this writ of error. For the reasons already given, the judgment of the Supreme Court must be reversed.

(76 N. J. L. 713)

PIVER v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

1. RAILROADS (§ 303*) — DEFECTIVE STREET CROSSING—INJURIES TO TRAVELER.

A railroad company is liable for an injury resulting to a traveler from its failure to use reasonable care to keep the passageway over its tracks maintained by it at a street intersection in proper repair.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 959; Dec. Dig. § 303.*]

2. TRIAL (§ 143*)—TAKING CASE FROM JURY.

A trial judge cannot direct a verdict when the testimony that the parties have been permitted to introduce leaves any fact material to the issue in substantial dispute.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

(Syllabus by the Court.)

Error to Circuit Court, Camden County.

Action by Elijah Piver against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Gaskill & Gaskill, for plaintiff in error.
Matthew Jefferson and John W. Wescott, for defendant in error.

TRENCHARD, J. The plaintiff, Elijah Piver, while driving on Fourth street, in the city of Camden, was thrown from his wagon while crossing the tracks of the Pennsylvania Railroad Company where they intersect that street, and was injured. This suit was brought to recover compensation for such injuries. The plaintiff bases his right to recover upon the allegation that the accident was due to the failure of the railroad company to keep in proper repair the passageway over its tracks. The trial of the case resulted in a verdict and judgment in favor of the plaintiff, and the present writ of error brings up that judgment for review.

The assignments of error upon which defendant chiefly relies are based upon exceptions to the refusal of the trial judge to nonsuit the plaintiff, and to direct a verdict on the ground that there was no negligence upon the part of the defendant company. When the motion to nonsuit was refused, the evidence justified the jury in finding the following matters of fact: That the plaintiff was driving in a wagon down Fourth street upon the trolley tracks laid in that street, when he came to the railroad crossing, and, as he was passing over one of the three parallel tracks laid there, one of the feet of his horse became fast between the rail and a plank, causing the animal to fall. The sudden checking of the wagon threw the plaintiff to the ground, and injured him. When this case was formerly here for review (*Piver v. Pennsylvania R. Co.*, 74 N. J. Law, 619, 67 Atl. 109), the testimony then before the court failed to show where or in what manner the horse's foot was caught, and, in view of the testimony on the part of the defendant, was held to be insufficient to support a finding of any neglect of duty on the part of the defendant company in maintaining in good repair a proper passageway over its railroad tracks. But the evidence now before the court, chiefly by reason of the witness Thompson's testimony, is different from that produced at the first trial, and supports the theory of the plaintiff that the horse's hoof was caught in a hole in the crossing between a plank and the rail resulting from want of proper repair.

The plaintiff in his testimony says: "My horse got his foot fast and threw him. * * * That pitched me forward. I went over the horse's head. * * * As soon as I could possibly get up, I got up, and the horse was lying on his side. * * * The next thing I saw was a man with a crowbar prying the horse's foot out from where it was fast there." He was then asked: "Q. Did you notice how it was that your horse's hoof was caught? A. No, sir; I couldn't say positive how his foot was. His foot was down in between two somethings, but I couldn't say positive what."

The witness Thompson (not produced at the former trial) testified as follows: "Q. Where were you standing? A. I was at the house at the time, and I went to the window, the side window, and I seen that the horse was down there at the track. * * * Q. Then what did you do? A. I went over to assist him, and I went over and got hold of the horse's head, and held the horse's head down so he would not get up, and while I was holding the horse's head a man went after a crowbar to get the horse's hoof out of the track. Q. Now, where was the horse's hoof fastened? A. It was caught. Here is the track here, and here is the plank, and the horse's hoof was down, half way down.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Q. Between the track and the plank? A. Yes, sir. Q. Now, how was the horse's hoof pried out? A. It was pried out with a crowbar. * * * Q. Did you notice what condition the horse's hoof was in when it came out? A. In bad condition. Q. Well, describe how it looked. A. Well, it looked to me as if the hoof was pretty near tore off, and bleeding very much." On cross-examination he further testified: "Q. Now, did you say in your direct examination that the horse's hoof was pried out from between a plank and a rail? A. Yes, sir. Q. Not pried out between two rails? A. No, sir; here was the plank and here was the rail where the car ran on. Q. Now, it is a fact that there were two rails there right together, one you would call the main rail and the other the guard rail? A. Yes, sir. Q. And it was not in that space that the horse's hoof was caught? A. It was caught. Here is where the wheel of the car goes, you see, and here is the planks here, the wide planks. Well, there was about that much opening there. Q. How much? A. About that much opening that they had not completely fixed, and the horse's hoof went down there, and that is what caught him. Q. Between the plank and the rail? A. Yes. * * * Q. Was the space where the horse's hoof was caught between the two rails that form a single track, or was it outside of one of the rails? A. No; it was on the inside of the rail. Q. So that the hoof then was caught in the space between the plank and the guard rail? A. Yes, sir. * * * Q. And the space where the horse's hoof was caught was right in there where the flange of the wheel runs, wasn't it—right in the space where the flange of the wheel runs? A. It was, yes; but, as I am saying, here is the car track here, and here is the plank here. That is where the horse's hoof went down. Q. Between the rail and the plank? A. Between the rail and the plank. Q. And in the space where the flange of the wheel runs? A. Yes. * * * Q. Did you see the hoof pried out? A. Yes, sir; I did. Q. Well, was it the shoe or the foot and hoof that was caught? A. It was the hoof caught. Q. It was the hoof? A. Yes, sir; that was caught. Q. And did you see it before it was pried out? A. I did; yes, sir. Q. And was the hoof in this space that you say existed? A. Yes, sir. Q. Not only the shoe, but the hoof as well? A. Yes, sir." This testimony undoubtedly permitted of the finding by the jury that the horse's hoof had caught between the planking and the rail in a hole caused by want of proper repair. In view thereof, there was no error in refusing to grant the motion to nonsuit; the rule being that a railroad company is liable for an injury resulting to a traveler from its failure to use reasonable care to keep the passageway over its tracks maintained by it at a street intersection in prop-

er repair. *Sonn v. Erie Railroad Co.*, 66 N. J. Law, 423, 49 Atl. 458; affirmed 67 N. J. Law, 350, 51 Atl. 1109.

We also think that the motion for a direction of a verdict for the defendant was properly denied. Whether the horse's hoof was caught in the manner indicating lack of reasonable care on the part of the company in keeping the crossing in proper repair, as plaintiff contended, depended upon whether the plaintiff's witnesses were to be believed in the face of contradictory evidence given by the defendant's witnesses to the effect that the accident was caused by the calk of the horse's shoe being caught between the main rail and the guard rail of the "cross-frog" of standard pattern. This presented essentially a jury question which it was not error to leave to the jury. *D., L. & W. R. R. Co. v. Shelton*, 55 N. J. Law, 342, 26 Atl. 937.

We have examined the other assignments of error, and find no merit in them.

The result is that the judgment below should be affirmed.

BADEWITZ v. WEST JERSEY & S. R. CO.
(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

APPEAL AND ERROR (§ 635*)—RECORD—SUFFICIENCY OF CASE.

Where the printed case submitted with the briefs on writ of error does not show that any judgment was rendered by the lower court, the writ of error will be dismissed without prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2780; Dec. Dig. § 635.*]

Error to Supreme Court.

Action by Paul Badewitz against the West Jersey & Seashore Railroad Company. Judgment for plaintiff (67 Atl. 1007), and defendant brings error. Dismissed.

Gaskill & Gaskill, for plaintiff in error.
David O. Watkins, for defendant in error.

PER CURIAM. The printed case submitted with the briefs herein does not show that any judgment has been rendered by the Supreme Court.

The writ of error will therefore be dismissed, with costs, but without prejudice.

(75 N. J. E. 71)

REILLY v. ABSECON LAND CO. et al.
(Court of Chancery of New Jersey. Nov. 9, 1908.)

1. CORPORATIONS (§ 136*)—STOCK—SALE—VALIDITY.

A sale of corporate stock, accompanied by a delivery of the certificate and power of attorney authorizing its transfer on the books of the corporation, is valid as against a creditor of the seller, and gives the buyer a precedence over subsequent judgments, executions, and attachments procured by creditors of the seller, though

a by-law of the corporation provides that its stock shall be transferable only on its books.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 483; Dec. Dig. § 136.*]

2. CORPORATIONS (§ 136*)—STOCK—TRANSFER.

A sale of corporate stock, accompanied by a delivery of the certificate and power of attorney authorizing its transfer on the books of the corporation, deprives the seller of any interest therein subject to attachment, though a transfer on the books of the corporation has not been applied for or made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 483; Dec. Dig. § 136.*]

3. CORPORATIONS (§ 133*)—STOCK—SALE—TRANSFER OF STOCK ON CORPORATE BOOKS.

Where a buyer of corporate stock, accompanied by delivery of the certificate and power of attorney authorizing its transfer on the corporate books, failed for a long time to demand a transfer on the books of the corporation, and during the interval the stock was levied on and sold in attachment proceedings against the seller, the court would require him to indemnify the corporation against loss as a condition precedent to a decree requiring the corporation to transfer the stock to him on its books.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 133.*]

4. CORPORATIONS (§ 133*)—STOCK—SALE—TRANSFER OF STOCK ON CORPORATE BOOKS.

The fact that an officer holding a writ of attachment under which corporate stock which had been sold by the debtor to a third person was levied on and sold directed the corporation to issue to the purchaser at the sale under the attachment proceedings a certificate of stock did not prevent the enforcement of the right of the third person to have a transfer to himself of the stock on the corporate books.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 133.*]

5. CORPORATIONS (§ 133*)—STOCK—SALE—TRANSFER OF STOCK ON CORPORATE BOOKS.

Equity will compel a transfer on the books of a corporation of stock to a buyer thereof, on the theory that the buyer is the equitable owner, and seeks to consummate a legal title.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 515; Dec. Dig. § 133.*]

Suit by James B. Reilly against the Absecon Land Company and others. Heard on bill, answer, replication, and proofs. Decree for complainant advised.

One Wills was the owner of certain capital stock of defendant corporation, and sold the same to complainant. At the time of the sale Wills delivered to complainant the certificate representing the shares and executed on the back of the certificate the usual assignment and irrevocable power of attorney authorizing its transfer on the books of the company. Complainant now surrenders the certificate to defendant company, and seeks to compel the company to issue to him a new certificate in lieu thereof.

The defense which is interposed arises by reason of an attachment having been issued against complainant's assignor. After the stock had been sold by Wills to complainant, and before a transfer had been applied for or made on the books of the corporation, an attachment was issued against Wills and

levied upon the stock by notice to the secretary of the corporation. Subsequently a sale of the stock was made under the attachment levy, and one Lewis became the purchaser. After the sale, the officer holding the writ gave notice to the secretary of the corporation that Lewis had become the purchaser at the sale, and requested the secretary to "turn over" to Lewis the certificate. A new certificate was then issued by the corporation to Lewis as purchaser at the sale under the attachment. Subsequently (about a year after complainant purchased his stock) Lewis sold the stock so acquired by him to defendant Stewart, and Lewis, having lost the certificate issued to him, indemnified the corporation against loss, and a new certificate was issued by the corporation to defendant Stewart, who now holds it. Complainant had no knowledge of the attachment or the subsequent transfers until he presented the certificate received by him from Wills for transfer upon the books of the company, when he was then informed by the secretary of the corporation of the matters above recited and the request for transfer was refused. Neither Lewis nor defendant Stewart knew of the sale from Wills to complainant; but defendant Stewart knew that the stock which he purchased had been acquired by his vendor under an attachment sale. The by-laws of defendant company contain the usual provision to the effect that the stock of the company shall be transferable only on the books of the company.

Godfrey & Godfrey, for complainant. Eli H. Chandler, for defendant Stewart.

LEAMING, V. C. (after stating the facts as above). Some courts have held that a sale of corporate stock accompanied by a delivery of the certificate and usual power of attorney, without further steps toward completing the transaction by notice of the transfer to the company or by causing an actual transfer to be made on the books of the company, is presumptively fraudulent, and therefore invalid as against judgment or attaching creditors of the assignor. A different rule, however, must be regarded as settled in this state. Our courts have uniformly held that such a sale is valid as against creditors of the assignor, and that the sale gives the assignee a precedence over subsequent judgments, executions, and attachments procured by creditors of the assignor. The provisions touching transfers on the books of the company are held to be intended for the protection of the company. It is manifest that such provisions cannot be easily considered as intended to have the effect of recording statutes for the protection of creditors of stockholders, for the public at large is not entitled to access to the stock books of our corporations. *Broadway Bank v. McElrath*, 13 N. J. Eq. 24;

Hunterdon County Bank v. Nassau Bank, 17 N. J. Eq. 496; Mt. Holly, Lumberton & Medford Turnpike Co., v. Ferree, 17 N. J. Eq. 117; Prall v. Tilt, 28 N. J. Eq. 479; Matthews v. Hoagland, 48 N. J. Eq. 455, 490, 21 Atl. 1054. As a valid title to the stock had passed from Wills to complainant at the time the attachment against Wills was issued, it necessarily follows that there could be no interest in Wills subject to attachment and no title conferred by the attachment sale.

It is urged in behalf of the corporation that it should be protected, as it has issued a certificate to the purchaser at the sale under the attachment and a subsequent certificate to defendant Stewart. I cannot see that the corporation is in danger of loss. The purchaser at the sale under the attachment knew, in the light of the adjudications already cited, that his purchase was void as against any bona fide purchaser of the stock prior to the date of the levy of the attachment. Defendant Stewart also knew that the interest which he was purchasing had been acquired under the attachment proceedings, and defendant company was indemnified against loss by reason of the certificate issued to him. But, inasmuch as the provisions touching a transfer on the books of the corporation are for the protection of the corporation and some danger of loss to the corporation may exist, I think it proper to impose terms upon complainant to the effect that he indemnify the corporation against loss arising from the issuance of the certificates now sought by complainant. The long delay of complainant in presenting his certificate for transfer on the books of the corporation seems to make these terms appropriate.

There was no statutory authority for the direction given by the officer holding the writ requesting the company to issue a new certificate to the purchaser, and that direction can afford no obstacle to the enforcement of complainant's rights at this time.

This court will exercise jurisdiction to compel a transfer on the books of a corporation in a case of this nature on the theory that complainant is the equitable owner and seeks to consummate a legal title. Archer v. American Waterworks Company, 50 N. J. Eq. 33, 50, 24 Atl. 508.

I will advise a decree for complainant, pursuant to the prayer of the bill, with terms imposed as above stated.

(76 N. J. L. 786)

COX v. PENNSYLVANIA R. R. (two cases).
(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

NEGLIGENCE (§ 136*)—PROXIMATE CAUSE—
QUESTIONS FOR JURY.

When it cannot be said as matter of law that an intermediate object or agency in the chain of causation was the immediate or proximate cause of the injury complained of, it be-

comes a question for the jury under the circumstances to determine whether defendant's act, if wrongful, was the proximate cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 331; Dec. Dig. § 136.*]

(Syllabus by the Court.)

Error to Supreme Court.

Separate actions by Rachel Cox and Alfred Cox against the Pennsylvania Railroad. Judgments for defendant, and plaintiffs bring error. Affirmed.

Gaskill & Gaskill, for plaintiffs in error. J. H. Kelsey and Samuel K. Robbins, for defendant in error.

MINTURN, J. Rachel Cox and Alfred Cox are plaintiffs, respectively, in suits instituted against the defendant railroad company to recover damages resulting from a fire which destroyed their property at Jullustown, in this state, on the 28th day of April, 1906. The defendant's right of way extended along the northerly side of the property of Rachel Cox and the property of Pitman & Stackhouse, on which latter property was located a hay press, which was distant about 33 feet from the center of defendant's main track. The defendant company also maintained a siding connecting with a freight station and a platform contiguous to the Pitman & Stackhouse building. The testimony of plaintiff's witnesses presented a condition showing that the weather had been dry, and that between the rails of the siding, and also between the siding and the main track in the immediate vicinity of the Pitman & Stackhouse building, dead grass and other combustible material had been allowed to accumulate, until, in the language of one witness, the condition of the track was "weedy and dirty." Under this condition, about 3:38 p. m., on the day in question, one of the defendant's trains passed on its way from Jullustown to Lewistown, and shortly thereafter a fire started in the dead grass between the main and side tracks at a point contiguous to the Pitman & Stackhouse hay press, and spread to the Pitman & Stackhouse building, and from thence extended to the plaintiff's buildings, which, with their contents, were consumed by the fire. The defendant company met this presentation of facts with testimony that the right of way was kept in good order, and that it was free and clear of combustible material; thus negating the plaintiff's allegation and presenting a question for the jury, which the court submitted to them upon proper instructions, and which they found against the defendant. That verdict not being reviewable here upon this writ, the defendant urges as matter of law that the plaintiff's loss was attributable not to the fire, originating, as we must assume in view of the verdict, by defendant's negligence on its right of way, but to the spreading of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fire from the Pitman & Stackhouse building which intervened in point of time between the negligent act of defendant and the destruction of plaintiff's buildings. The questions of causal connection and remoteness of damage thus presented are not *res nova* in this court.

Mr. Justice Depue in *D. L. & W. R. R. Co. v. Salmon*, 39 N. J. Law, 308, 23 Am. Rep. 214, after a most thorough examination of the authorities upon these questions in this and other jurisdictions, assimilated the principle here involved to that enunciated in the celebrated "squib case," *Scott v. Shepherd*, 2 W. Bl. 892. It was a task of supererogation to again review the cases and apply the distinctions as was done in the *Salmon Case*. It should suffice to say that the questions here raised by the learned counsel for the defendant were there fully considered in the light of the authorities, and the rule enunciated was: "In actions for injuries resulting from fire originating through the defendant's negligence and communicated to the plaintiff's property, where distance, intervening objects, or the manner in which the fire was communicated presents the question whether the plaintiff's loss is attributed to the defendant's negligent act, and there being no intervening agency apparent which may stand in law as the immediate cause of the injury, the question is one for the jury whether, under all the conditions under which the loss happened, the destruction of the plaintiff's property was a result which might reasonably have been expected (though not in fact anticipated) from the defendant's negligent act." See, also, *Wharton*, Neg. § 85. Under this rule the question of causal connection and intervening cause, if any existed, were properly left by the court to the determination of the jury, and their verdict under the circumstances upon this writ cannot be disturbed.

No error appearing upon the record, the judgment should be affirmed.

(74 N. J. E. 307)

IN RE STATE MUT. BUILDING & LOAN ASS'N OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey. Nov. 16, 1908.)

BUILDING AND LOAN ASSOCIATIONS (§ 42*)—INSOLVENCY—MORTGAGES—ENFORCEMENT BY RECEIVERS.

The rule laid down in the case of *Weir v. Granite State Provident Association*, 56 N. J. Eq. 234, 38 Atl. 643, approved by this court in *Harris, Receiver, v. Nevins*, 68 N. J. Eq. 684, 63 Atl. 172, does not apply to mortgage debts of borrowing shareholders of building and loan associations, that became due, not by the insolvency of such association, but according to the terms of such mortgages, and under the by-laws of the association, by the default of the borrower himself prior to the insolvency of the association. As to debts thus due and collectible by the association as a going concern, a receiver afterward appointed proceeds in like man-

ner as the directors of the association might have done if insolvency had not supervened.

[Ed. Note.—For other cases, see *Building and Loan Associations*, Dec. Dig. § 42.*]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Petition for instructions by the trustees in voluntary liquidation of the State Mutual Building & Loan Association. From a decree of the Vice Chancellor (68 Atl. 108), the receivers of the association appeal. Reversed.

Harvey F. Carr, for appellants. William N. Clevenger, Eli H. Chandler, and William S. Casselman, for respondents.

GARRISON, J. In *Fitzgerald v. State Mutual Building & Loan Association*, 69 Atl. 564, we held that trustees elected by stockholders under the provisions of chapter 24 of the Laws of 1904 (Act March 7, 1904; P. L. 1904, p. 44) were not the proper officers to wind up an insolvent building and loan association and that a receiver for the defendant should forthwith be appointed. This decision was carried into effect in the Court of Chancery by the appointment of three receivers, who are the appellants in the proceeding that is now before us, which was instituted by the trustees while engaged *de facto* in winding up the affairs of the insolvent association. In that capacity the trustees filed a petition which is the basis of the present proceeding, and before being displaced they also took an appeal from the order made by the Court of Chancery on their said petition. This appeal the receivers, upon assuming the duties of their office, adopted, and hence they now appear, and properly so, as appellants in the proceeding thus set on foot by the petition of the late trustees. The petition was filed by the trustees to obtain the direction of the Court of Chancery with respect to what credits upon the principal sum secured by mortgages should be allowed for premiums paid by the shareholding mortgagors, first, in cases called in the petition "Class No. 1," where the borrowing shareholder had fully paid all dues, interest, and premiums up to and including those for the month of April, 1907, that being the date of liquidation stated in the petition; and, secondly, in cases called "Class No. 2," where the borrowing shareholders prior to such date of liquidation had defaulted in the payment of said dues, interest, and premiums, so that by the conditions of their mortgages and under the by-laws of the association the principal sum of said mortgages had become due and payable. The petition further set out the facts of three concrete cases, one falling under class No. 1 and two falling under class No. 2, with respect to which latter cases the petition states that "under the terms of said bonds and mortgages the association has exercised its op-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion of declaring the full principal sums of the said mortgages as due and payable." By a stipulation all of the facts stated in the petition are admitted to be true, which includes the date of liquidation. There is, furthermore, a general statement that a large part of the assets of the association consists of mortgages that fall within one or the other of the two classes, and the brief of counsel for the appellants contains the unchallenged statement that mortgages aggregating \$125,000 fall within class No. 2, and that as to these mortgages the item of premium alone amounts to \$45,000. But whether the concrete facts respecting these mortgages are identical with those of the two specified cases set forth in the petition we are not informed, nor are the shareholding mortgagors other than those in the two specified cases brought into court as parties defendant.

It is evident, therefore, that apart from the two specified cases the direction sought by the petition was of a general character, and it is equally evident that what the petition sought to ascertain was whether the rule laid down in the Court of Chancery in the case of *Weir v. Granite State Provident Association*, 56 N. J. Eq. 234, 38 Atl. 643, and approved by this court in *Harris v. Nevins*, 68 N. J. Eq. 684, 63 Atl. 172, was applicable to class No. 1, where liquidation other than by insolvency was being enforced, but chiefly whether this rule, if applicable to class No. 1, was also to be applied to class No. 2.

The first of these questions, which was answered by the court below to the effect that class No. 1 came within the rule laid down by *Harris v. Nevins*, is not now before us; the appellants having expressly abandoned their appeal as to that part of the order. Mortgages coming within this class are therefore to be allowed credits in conformity with the rule laid down by the cases that have been cited.

Upon the second question, which was the chief one, and is the only one before us on this appeal, the learned Vice Chancellor reached the conclusion that the rule applicable to class No. 1 should also be applied to class No. 2—that is, mortgages that by the nonpayment of dues, interest, and premiums had before the date of liquidation become due and payable according to the conditions of the said mortgages and the by-laws of the association; and the conclusion thus reached is embodied in the order appealed from, which in its direction makes no distinction between the two classes of mortgage debts. In reaching this conclusion we think that the learned Vice Chancellor fell into error, and that his error consists in his failure to observe that the two classes of mortgages were clearly to be distinguished upon the essential features that constituted the basis of the equitable rule laid down in *Weir v. Granite State Provident Association* and *Harris v. Nevins*. The equitable considerations that gave rise to the rule laid down in these cases were,

as stated by Vice Chancellor Reed in the earlier decision, that the premiums had been paid by the borrowing shareholder in consideration of the complete execution of a contract that permitted him to pay his debts by the application of his matured shares, and when the premature termination of the existence of the company prevented the borrower from thus liquidating his debt the contract in consideration of which he had paid his premiums had failed. The gist of this equity of the borrowing shareholder, therefore, was that his debt had become not only prematurely collectible in invitum and by the effect of insolvency, but that it had thus become collectible in a way and at a time entirely different from that for which he had paid the consideration represented by his premiums. The contractual relations of the parties, as evidenced by their mortgages and by the by-laws of the association, affording no legal rule applicable to this juncture, recourse to some equitable mode of adjustment was manifestly proper, and the rule laid down in the two cases cited was the result. But in the case of a borrowing shareholder, whose debt has become due, not in invitum by the effect of insolvency, but according to its own terms and solely by the act of the borrower himself, there is nothing to call for the application of any rule other than that provided by the contract of the parties for just such a contingency. In such cases the fact that enforced liquidation or insolvency supervened after the borrower's debt had by its own terms and by his default become due no more gives him a standing in equity than would the breakdown of a train before reaching its destination create a legal right in a passenger who had voluntarily left the train before the breakdown occurred. The two classes of cases are therefore distinguishable upon the precise feature that invokes the equitable rule in class No. 1, while relegating class No. 2 to the terms of its legal contracts. As to mortgage debts, therefore, that were thus due by the default of the debtor and collectible by the association while it was a going concern, the appellants, as receivers, stand in precisely the same situation as the directors of the association stood when the debts fell due. As to such cases no equitable rule is to be applied, for the simple reason that the mere breach of a legal contract, nothing more appearing, gives rise to no equitable considerations of any sort. If circumstances other than those stated in the petition before us should call for equitable treatment, such cases must be dealt with as they arise, and upon their own peculiar facts, and when the parties in interest are before the court. Upon the only question now before us the receiver should be directed to proceed to the collection of all mortgage debts that were due from borrowers prior to the date of liquidation, precisely as if enforced liquidation or proceedings in insolvency had not supervened. Specific direction in such cases is not

within the purview or prayer of the petition, and is not presented by this appeal. If foreclosure proceedings are defended, or if a mortgagor files his bill to redeem, as was done in the Weir Case, the facts constituting such defense or such suit to redeem may be dealt with as they arise; for, as was observed by Vice Chancellor Reed in the Weir Case, the right to foreclose and the right to redeem are so far reciprocal that questions material to the ascertainment of the debt due on the mortgage may be as well settled in one form of action as in the other.

The order of the Court of Chancery should therefore be reversed, to the end that it may be modified, so as to apply in its present form only to mortgages that had not, while the association was a going concern, become due and payable by the mortgagor's default in the payment of dues, interest, and premiums. As to mortgages that had thus become due by the default of the shareholder as aforesaid, the receivers should be directed that, in collecting or computing the amounts of such mortgages, they should proceed in like manner as the directors of the association might have done, if enforced liquidation or insolvency had not supervened.

(76 N. J. L. 602)

CARTER v. WEST JERSEY & S. R. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

1. DEATH (§ 81*)—WHEN ACTION MAINTAINABLE.

Where children are supported in a home maintained with the earnings of the father, and the mother performs the ordinary household duties, including such care of the children as a mother usually takes, and the mother loses her life through the wrongful act of a third party, the statute (P. L. 1848, p. 151; Gen. St. 1895, p. 1188, § 10) permits an action to be maintained by the administrator of the mother to recover, for the benefit of the children, the damages occasioned by the deprivation of the expectation of pecuniary advantage which would have resulted by a continuance of the mother's life.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 38; Dec. Dig. § 31.*]

2. DEATH (§ 18*)—RIGHT OF ACTION—PECUNIARY BENEFITS.

The statute (P. L. 1848, p. 151; Gen. St. 1895, p. 1188, § 10) does not require the plaintiff to show that the next of kin would probably have received from the deceased contributions of money, or of things purchased with money.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20; Dec. Dig. § 18.*]

Garrison, Reed, and Voorhees, JJ., dissenting.
(Syllabus by the Court.)

Error to Circuit Court, Camden County.

Action by William B. Carter, administrator of Ida M. Carter, against the West Jersey & Seashore Railroad Company. Judgment

for plaintiff, and defendant brings error. Affirmed.

Gaskill & Gaskill, for plaintiff in error.
Lewis Starr, Allen S. Morgan, and James Gay Gordon, for defendant in error.

PITNEY, C. This action was brought under the so-called "Death Act" (P. L. 1848, p. 151; Gen. St. 1895, p. 1188, § 10) and resulted in a verdict and judgment for substantial damages. It appears from the record and bill of exceptions that William L. Carter and Ida M. Carter, his wife, while traveling as passengers upon an electric railway car operated by the defendant company, lost their lives through the derailment of the car. The resulting actions against the company were tried together. The defendant's responsibility was admitted. The deaths occurred on October 23, 1906, when the husband was 36 years of age, and the wife two years younger. There was no direct evidence to show whether either survived the other. They left surviving two daughters, one 14 and the other 10 years of age, who by the terms of the statute (amended Act March 31, 1897 [P. L. p. 134]), are the beneficiaries of the resulting actions against the company. The present writ of error brings under review only the judgment in favor of the administrator of Ida M. Carter, the wife.

Motions were made for a nonsuit and for the direction of a verdict for the defendant, upon the ground that there was nothing to show any pecuniary loss to the next of kin as a result of Mrs. Carter's death. We think these motions were properly overruled. There was evidence to show that the children lived with their parents in the city of Camden, in a home maintained with the earnings of the father, and that the wife performed the household duties, except that a woman was occasionally employed to do washing and cleaning. It was reasonably to be inferred that she took such care of her children as a mother usually takes. The statute provides that the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the next of kin. As was long ago pointed out by Chief Justice Beasley, this means "A deprivation of a reasonable expectation of a pecuniary advantage, which would have resulted by a continuance of the life of the deceased." Paulmier, Adm'r, v. Erie R. R. Co., 34 N. J. Law, 151, 158. This definition has been consistently adhered to in subsequent cases. Demarest v. Little, 47 N. J. Law, 28, 30; Consolidated Traction Co. v. Hone, 60 N. J. Law, 444, 446, 38 Atl. 759; Cooper v. Shore Electric Co., 63 N. J. Law, 558, 567, 44 Atl. 633. Under circumstances such as are here presented we think there is a reasonable inference that the continuance of the mother's life would have resulted in substantial pe-

cunlary benefit to the children. The statute does not require the plaintiff to show that the next of kin would probably have received from the deceased contributions of money or of things purchased with money.

In *Tilley v. Hudson River R. R. Co.*, 24 N. Y. 471, 475, Denio, J., said: "The injury to the children of the deceased by the death of their mother was a legitimate ground of damages; and we do not agree with the defendant's counsel that they ought to have been nominal. The difficulty upon this point arises from the employment of the word 'pecuniary' in the statute, but it was not used in a sense so limited as to confine it to the immediate loss of money or property; for if that were so, there is scarcely a case where any amount of damages could be recovered. It looks to prospective advantages of a pecuniary nature, which have been cut off by the premature death of the person from whom they would have proceeded; and the word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes also those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value. But infant children sustain a loss from the death of their parents, and especially of their mother, of a different kind. She owes them the duty of nurture and of intellectual, moral, and physical training, and of such instruction as can only proceed from a mother. * * * It is argued by the defendant's counsel that there should be no recovery on these grounds, because the father is obliged to provide what the children have been deprived of by the loss of their mother. But this is not an adequate answer. The children have been deprived of that which they were entitled to receive by the wrongful act of the defendants. Their loss may or may not be made up to them from another source; but in the meantime they are entitled to a fair and just compensation from the wrongdoers by the provisions of this statute." And see *s. c.*, 29 N. Y. 252, 285, 86 Am. Dec. 297. In *Gottlieb v. North Jersey St. Ry. Co.*, 72 N. J. Law, 480, 63 Atl. 339, this court decided that under the statute an action may be maintained by the administrator of a deceased wife for the benefit of her next of kin, notwithstanding the husband be still living. In that case the husband was himself administrator.

In the present case it is argued that the services rendered by Mrs. Carter to her children were rendered in performance of the duty that she owed to her husband, and the suggestion is that the children's expectation of benefit in this behalf was, or ought to have been, included in the action brought by the

administrator of their father. The record before us does not disclose what was the outcome of the latter action; nor, in our opinion, are we concerned with it. Each parent owes duties to the children, independent of the marital duties they owe to each other. The presumption is that the death of both parents is more detrimental to dependent children, from the pecuniary standpoint, than the death of a single parent only. What damages ought to be allowed for the death of either is to be regulated by instructions to the jury. *May v. West Jersey, etc., R. R. Co.*, 62 N. J. Law, 63, 42 Atl. 163, is cited as sustaining the proposition that, pending the husband's life, the wife's services in the household are due to him, and are only incidentally beneficial to the children, and that the prospect that the wife would have survived the husband, whereupon her services would become a direct pecuniary benefit to the children, is too remote to be considered in fixing the pecuniary benefit of which the children are deprived by the mother's premature death. In the case referred to the only question for determination was whether the damages were excessive. The decision is not authoritative upon the question of the right of recovery, and in the discussion of that question the expressions in the opinion are not to be accepted without modification. Moreover, if we were to treat the mother's care of young children as bestowed, during the father's lifetime, in performance of a duty owing to him rather than to them, the assumption would have little, if any, bearing upon the present case. For here the father's life had already terminated before the issue was tried, and so his expectancy of life was no longer in the realm of speculation. Not only so, but his death was caused by the same act of the defendant that terminated the mother's life. There was no error in the refusal of the motions for nonsuit and for direction of a verdict in favor of the defendant.

The only other ground relied upon for reversal is the instruction of the trial judge to the jury respecting the damages to be allowed in the event of a verdict for the plaintiff. Taking the whole of the charge together, we think it not open to reasonable criticism upon this point.

The judgment under review should be affirmed.

GARRISON, J. (dissenting). The beneficiaries in whose interest this judgment was recovered are the children of William L. and Ida M. Carter, both of whom were killed in the same railway accident. The resulting actions against the company, in the cases of both the father and the mother of the beneficiaries, which, as stated in the opinion, were brought by the same administrator, in the same court, were tried together, and submitted to the jury in a single

charge, in which the rule for the admeasurement of damages in each case was laid down. In the father's case the jury was instructed that in awarding the damages which were to be only of a pecuniary nature, they should take into consideration "the loss by these children of the maintenance and support of their father, the comforts and conveniences of home, the education of these children, and the provision at his death from the accumulated savings of his income."

In the case of the mother, which is the one before us on this writ of error, the jury was instructed: "As to the other suit, the suit brought by the administrator of the mother, Ida Carter, you may award such sum as you think these children have lost by being deprived of her services, care, and attention which had she lived she would have given to them, and which now must be procured by them in some other way."

This instruction, which was specifically excepted to, is in my opinion an erroneous one that permitted, if it did not necessitate, a reduplication of damages. The concrete vice of the instruction is that, if it is limited to damages of a pecuniary nature, it covers the same ground as the instruction given in the case of the father. If it is not so limited, it is on that account erroneous. Assuming that in each case the damages were only such as were of a pecuniary nature, the "services, care, and attention" of a mother, which the jury were told to give in one case, are normally directed chiefly, if not wholly, to securing and promoting the "comforts and conveniences of home and the education of the children," which the jury had been told to award in the father's case; so that, if the jury obeyed both instructions, as we must presume they did, they necessarily awarded in the case of the mother damages which, in so far as they were of a pecuniary nature, they also awarded to the case of the father, and which, if not of a pecuniary nature, should not have been permitted in either case.

This result inevitably inheres in the instructions that were given to the jury, and does not depend upon any speculations as to matters allunde respecting survivorship.

For this judgment in the case of the mother of the beneficiaries must stand either upon the theory that the father was living at the time of her death, or that he was not. If the former, then under the instruction of the court the children were awarded damages which, in so far as they were susceptible of pecuniary assessment, they had not sustained. If the latter, they were awarded damages which, in so far as they were capable of pecuniary admeasurement, they recovered in the action for the father's death. Whichever theory be adopted a verdict rendered in accordance with the instruction under re-

view would be founded upon an erroneous rule of damages.

In my opinion the judgment should therefore be reversed.

REED and VOORHEES, JJ., concur.

(76 N. J. L. 778)

ROBESON v. WHITNEY.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

APPRENTICES (§ 12*) — CONSTRUCTION OF AGREEMENT — "TWELVE HUNDRED ACTUAL WORKING DAYS."

In an agreement of apprenticeship binding the apprentice to serve as such for "1,200 actual working days," which throughout the indenture were referred to as a term, *held*, that the above phrase should be construed to mean that the service shall continue through a term or period within which there are 1,200 days, exclusive of Sundays and holidays, and not to mean 1,200 days upon which the apprentice should actually perform work for the master.

[Ed. Note.—For other cases, see Apprentices, Dec. Dig. § 12.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Morris Robeson against John P. Whitney. Judgment for plaintiff, and defendant brings error. Affirmed.

Francis B. Davis and A. H. Swackhamer, for plaintiff in error. David O. Watkins and John Boyd Avis, for defendant in error.

VOORHEES, J. The judgment removed by this writ was founded upon a balance of moneys due from the defendant to the plaintiff upon an agreement of apprenticeship, of which the following is a copy:

"This indenture, made the twenty-fourth day of January, A. D. nineteen hundred and two, between Morris Robeson, aged twenty-one years, on the thirtieth day of November, nineteen hundred and one, of Glassboro, in the County of Gloucester and State of New Jersey, party of the first part, and J. P. Whitney, of Glassboro, in the County of Gloucester and State of New Jersey, party of the second part, witnesseth: That the said party of the first part has of his own free will and accord, bound himself as an apprentice to said party of the second part in the art, trade and occupation of a glass-blower, with him to serve as an apprentice for twelve hundred actual working days, during which term the said apprentice, his master faithfully shall serve, his secrets keep, his lawful commands and the lawful commands of his agent, manager and employé everywhere obey. He shall do no damage to his said master, nor see it done by others, but he, to the utmost of his power, shall forthwith give warning to his said master of the same. He shall not waste the goods of his said master nor lend them unlawfully to any. He shall not absent himself from his said master's service

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

unlawfully. He shall not during said term join or become a member of any labor organization. At all times and in all things as a faithful, industrious, and obedient apprentice he shall behave and demean himself towards his said master, and his said agent, manager, and employé. And the said party of the second part in consideration of the faithful services of the said apprentice in the art of glass-blowing, as said art is carried on in the glass factories in New Jersey, and during said term find and provide for the said apprentice or furnish him with the means to find and provide for himself good and sufficient clothing, diet, and lodging, the moneys to be advanced therefor not to exceed one-third the wages of an ordinary workman for the same class of work, but subject in all respects to the stipulations hereinafter mentioned, to which said party of the first part hereby assents and agrees. That in case said party of the first part shall absent himself from the service of the said party of the second part without previous written permission from him or his authorized agent or manager, except only in case of sickness of said party of the first part, when a regular physician's certificate of his said illness is produced if requested, or shall join any labor organization during his term of service, the said party of the second part may cancel this indenture, discharge said apprentice and retain any funds in his hands agreed to be paid to said party of the first part and his waste and damage to the property of the said party of the second part. That the said party of the first part shall and will in all things do, keep, and perform all things in this indenture mentioned on his part to be done, kept, and performed, and shall serve the said party of the second part during the full term of said twelve hundred actual working days. If the said party of the first part shall during said term of service absent himself from the service of the said party of the second part from any cause whatever, said party of the first part hereby agrees to continue serving the said party of the second part under the terms of this indenture until he shall have made up any and all lost time. And the said party of the second part hereby covenants and agrees that he, the said party of the second part, will at the expiration of said entire term of twelve hundred days, if the said party of the first part shall have faithfully done, kept, and performed all duties, services, and agreements by him keep and perform and shall have not absented himself from the service of the party of the second part without the previous written permission from him or his authorized agent or manager except only in case of sickness of said party of the first part when a regular physician's certificate of his said illness is produced when requested, nor be a member of any labor organization during his term of service, pay to the said

party of the first part one-half the full wages of a skilled workman of the same class of work, to be computed from the commencement of the term of service until the expiration of said twelve hundred days, deducting what may have been previously advanced and paid to the said party of the first part or to his use for clothing, diet, lodging or otherwise. If at the end of six months his work is not satisfactory, said J. P. Whitney shall have privilege of laying off said Morris Robeson. Saturday will not count as lost time."

The case turns upon the construction of this contract. The defendant insists that, by the true reading of the contract, the plaintiff must have actually performed work for the defendant upon 1200 days to complete the services contracted for; while the plaintiff contends that the agreement means that he must serve the defendant for a term or period included in which there are 1200 actual working days. The latter view was taken by the trial court, who thereupon gave the jury binding instructions. The proof on the part of the plaintiff was that he had served under the agreement from January 24, 1902, to February 2, 1907, which period includes 1282 actual working days after a deduction for holidays and for the months of July and August in each year (which are not working days in the glass trade), but not deducting Saturdays. It was also in proof that the plaintiff did not work on each one of the above 1282 days, being prevented sometimes by sickness, but for which no certificate of a physician was asked or demanded, and being also prevented from working on some of those days because of the closing down of a portion of the plant of the defendant, and at other times for lack of work, or for other causes. The phrase "twelve hundred actual working days" in the contract must be deemed to be a term or period. This number of days is referred to throughout the contract as constituting a term. Effect must also be given to the word "actual," but in my opinion that will not alter the above interpretation. As before said, it was proved that July and August by the custom of the glass trade were not days upon which employes performed work, and hence not actual working days in this trade. As popularly understood, working days, a familiar and well understood expression, are all the days of the years except Sundays and holidays. This contract must be construed by the known usage of the trade existing when the contract was made. Hence the word "actual" limits "working days" to those so known in this trade, as distinguished from "working days" as they are generally understood; i. e., all days except Sundays and holidays. Actual working days, therefore, are not intended to mean days upon which work was actually performed by the plaintiff, but days upon which work is ordinarily done in this

trade as distinguished from those when it is not ordinarily done; i. e., Sundays and holidays and the months of July and August.

The contract further specified that "Saturdays will not count as lost time." Does this sentence have the effect of changing the above construction of the contract? I think not; but rather to confirm it. If the agreement is construed to mean actual days work, then this is superfluous for the length of service in that event must be determined by the actual number of days upon which the apprentice shall have worked, and it can make no difference whether Sundays are counted as lost time or not. If read, however, as above construed, then the phrase is pertinent. Saturday is a half holiday in virtue of the amendment to "An act in relation to days of recreation and holidays, and fixing the days and parts of days so to be set apart and observed, and regulating the maturity of commercial paper with respect thereto" (P. L. 1895, p. 779), and therefore has a somewhat uncertain meaning as applied to working days. It is thus made clear that the half holiday "will not count" against the apprentice by making him lose time, that Saturdays shall not be counted as nonworking days, and shall not tend to extend the term and postpone the date of his emancipation.

The indenture, therefore, means that the service shall continue through a term or period within which there are 1200 days, exclusive of Sundays and holidays and all days of July and August in each year; the custom of the trade being not to work during these months. This is also the reasonable view. The arrangement at the beginning contemplated a term, the duration of which could be definitely foreseen and the end accurately ascertained.

The contract was properly construed by the trial court. The amount due to the plaintiff, if he was entitled to recover at all, having been agreed upon between the parties, and the judgment entered for the amount so determined, makes it unnecessary to consider the other assignments of error.

The judgment is affirmed.

(76 N. J. L. 505)

DIRIGOLANO v. JERSEY CITY, H. & P. ST. RY. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

**STREET RAILROADS (§ 117*)—TRIAL (§ 178*)—
INJURY TO CHILD—QUESTIONS FOR JURY—
DIRECTING VERDICT.**

In an action for damages for personal injuries, the case constituted by the testimony most favorable to the plaintiff was that the plaintiff, a child five years of age, while running at dusk across a city street alongside of which he had been playing with a number of other children, fell on the trolley track, and

before he could get up was run over by a trolley car that was being driven at a rate of speed characterized in the testimony as "running very, very fast," and as "an awful rate of speed," "not stopping at all" (at intersecting streets).

Held: (1) That, on a motion for a nonsuit or for the direction of a verdict, the question whether the rate of speed at which a car was being driven was consistent with the exercise of due care and circumspection by the motor-man, and whether the failure to exercise reasonable care under the circumstances occasioned the injury to the plaintiff, were for the jury, and not for the trial court.

(2) That the question presented by a motion to nonsuit or to direct a verdict is not whether the trial judge would infer that the defendant had been negligent, but whether the jury might legitimately find from the testimony that such negligence had been established.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 251, 253; Dec. Dig. § 117; Trial, Dec. Dig. § 178.*]

Gummere, C. J., and Bergen, Voorhees, Min-turn, Vredenburg, and Dill, JJ., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by Joseph Dirigolano against the Jersey City, Hoboken & Paterson Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William D. Edwards, for plaintiff in error.
John J. Fallon, for defendant in error.

GARRISON, J. The plaintiff brought his action in the court below to recover damages for injuries received by his being run over by the defendant's trolley car. The case went to the jury, upon whose verdict the judgment brought up by this writ of error was entered against the defendant, whose contention in this court is that the case should not have gone to the jury, but that the trial court upon the motion to nonsuit or upon the motion to direct a verdict should have resolved the issues on which liability depended favorably to the defendant.

Upon this review of the trial in its strictly legal aspects, the two motions may be considered together as they were substantially to the same effect, namely, that no negligence on the part of the company had been shown, and that the accident was an unforeseen and unavoidable one which "no amount of diligence" and "no human skill could have prevented." The question presented, therefore, is whether the trial court in denying these motions upon the grounds stated committed legal error. In ruling upon these motions the trial court was required, not only to consider such alone of the testimony as was favorable to the plaintiff, but also to consider such testimony in the light of the most favorable inferences of which such testimony was legitimately susceptible. The plaintiff's case as thus constituted was that on September 14, 1906, at about 7 o'clock in the evening, a number of children who were

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

playing around some lumber that was piled up along the curb of Summit avenue, in Jersey City, in front of a new building that was in the course of erection, were driven away by the caretaker in charge of the building; that as they scattered in various directions the plaintiff, a child five years of age, together with a larger boy, ran across Summit avenue; that in doing so the plaintiff on reaching the trolley track slipped on it and fell on his stomach, and, before he could get up, was run over by a trolley car of the defendant that was being driven at a rate of speed that was variously described by the plaintiff's witnesses as "a high rate of speed," "running very, very fast," "going full, what we call on the loop," "full rate of speed, I should judge, not stopping at all" (at intersecting streets), and "went at an awful rate of speed." The trial court with this testimony before it which it could neither disregard nor disparage was called upon by the defendant's motion to say that notwithstanding this testimony it conclusively appeared that the driving of the car in question at the rate of speed shown in the testimony in the dusk of the evening through a city thoroughfare where children were playing along the curb involved no element of negligence that contributed to cause the injuries to the plaintiff, but that the accident that ensued was one that no amount of diligence and no human skill could have prevented. It would seem to be too plain for discussion that, upon the foregoing facts, the question whether the motorman was exercising reasonable prudence in the management of his car, and whether he used reasonable circumspection under the circumstances, were questions that were within the domain of fact; that is, they were matters to be determined by comparing the legal duty of the motorman with his actual conduct as evinced by the various circumstances shown by the testimony, and by the legitimate inferences to be drawn therefrom. The legal duty of the motorman was for the court to declare to the jury, but whether the rate of speed shown in the testimony was under all the circumstances of the case consistent with the due performance of that duty was essentially a question of fact for the jury. "The question," as was said in *Mumma v. Easton & Amboy Railroad Company*, 73 N. J. Law, 660, 65 Atl. 210, "was not what the trial judge would infer from the evidence, but whether the jury might legitimately conclude that the proofs of the plaintiff showed the defendants to have been negligent." The argument that a court question was presented by the consideration that, after the plaintiff fell, it was a physical impossibility to have stopped the car, and that at this juncture the accident must have happened even if the car had been going at a proper rate of speed, is wholly inconclusive, for the reason

that such argument takes into consideration only the conduct of the motorman at this particular juncture, and fails to extend a like consideration to the propriety of his conduct as he was approaching, but had not yet reached, the place where the accident happened. While the car was thus approaching, the motorman in the exercise of proper circumspection would have seen that there were children in the street, and in a general way what their ages were and what they were doing there; at least it was open to the jury to find that he would. Whether in view of what he would thus have seen reasonable precaution would have dictated that he slow down his car while running past the children, or at least that he refrain from going at "a high rate of speed" or "very, very fast," were certainly questions that under our trial system are passed upon by juries, and not by judges. The jury would have been entitled to give some weight in this connection to the circumstance that the other boy who was with the plaintiff when he fell, a boy 13 or 14 years old, was also struck by the car, and also to the consideration that the plaintiff's fall may itself have been due to the confusion produced in one so young by the rapidity with which the car was being driven toward him. These and other like inferences bearing upon the question of defendant's liability were within the case made by the plaintiff's testimony, and could not have been legally disregarded by the trial judge or resolved in favor of the defendant by granting either of the motions that were made.

The case of *Graham v. Consolidated Traction Company*, 64 N. J. Law, 10, 44 Atl. 964, cited by counsel, was a rule to show cause decided by the Supreme Court solely on the weight of evidence. It established no legal rule that absolves motormen from the duty of exercising reasonable care to avoid running over children. *Fitzhenry v. Consolidated Traction Company*, 64 N. J. Law, 674, 46 Atl. 698, also cited, was a case in which this court confined the grounds of its decision solely to the contributory negligence of a child sui juris. In the present case, in view probably of the extreme youth of the plaintiff, his contributory negligence or his voluntary assumption of risk were not made a feature of the case either in the court below or in this court. The circumstance that the plaintiff was playing in the street or running across it from a place where he had been playing on the sidewalk has no legal bearing upon the present case. The trolley company becomes of its own volition a user of the streets as they are. The duty involved in such use is the exercise of reasonable care with respect to the conditions that actually exist. The abstract question, therefore, of the legal right of children to play in the streets, is not at all involved.

It was not error in the trial court to deny the defendant's motions.

The judgment of the circuit court is therefore affirmed.

GUMMERE, C. J., and BERGEN, VOORHEES, MINTURN, VREDENBURGH, and DILL, JJ., dissent.

(77 N. J. L. 15)

BOARD OF HEALTH OF CITY OF ASBURY PARK v. NEW YORK & LONG BRANCH R. CO.

(Supreme Court of New Jersey. Dec. 1, 1908.)
HEALTH (§ 38*)—REGULATIONS—VIOLATION—PENALTIES—ACTIONS.

An action for the recovery of a penalty for the violation of an ordinance of the board of health of the city of Asbury Park is properly brought in the police justice court of Asbury Park in the name of the board of health.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 37; Dec. Dig. § 38.*]

(Syllabus by the Court.)

Certiorari to Court of Common Pleas, Monmouth County.

Action by the Board of Health of the City of Asbury Park against the New York & Long Branch Railroad Company. Judgment for plaintiff was reversed in the common pleas, and it brings certiorari. Judgment of the common pleas reversed and of the justice court affirmed.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

Patterson & Rhome, for prosecutor. John S. Applegate & Son, for defendant.

GARRISON, J. The board of health of the city of Asbury Park, who is the prosecutor of this writ of certiorari, obtained a judgment in the police justice court of that city against the New York & Long Branch Railroad Company for a penalty for the violation of one of the ordinances of the said board. Upon an appeal to the court of common pleas, a trial was had in which a nonsuit was directed upon the ground that the action should have been in the name of the city of Asbury Park, and not in the name of the board of health. The propriety of this ruling is the sole question before us on this certiorari.

The nonsuit was ordered upon the ground that "An act relating to and providing for the government of cities of this state containing a population of less than 12,000 inhabitants" (Act March 24, 1897 [P. L. p. 46]), which had been adopted by the city of Asbury Park, established a city police court with jurisdiction over "enforcing and recovering any penalty for the violation of any ordinance, by-law or regulation of such city or any board thereof," to which end it was empowered "to issue process at the suit of said city." Section 78. The court below, treat-

ing the provision last quoted as a part of the charter of the city of Asbury Park, and conceiving that the board of health of that city was "a board thereof" within the meaning of such charter, made the ruling that is now under review.

It is, to say the least, open to question whether the board of health established in the city of Asbury Park is "a board thereof" within the meaning of the statute that has been cited. The preposition "of" in this context may denote source, creation, or authorship, or it may denote mere existence or possession, just as the expression "books of mine" may mean books of which I am the author or books belonging to me. The context in the present case would seem to indicate that the former of these meanings was intended rather than the latter, for the associated words of the clause all refer to matters that are in this former sense related to the city as their source or author. Boards of health, on the contrary, though established in and by cities, trace their source and derive their authority and jurisdiction, not from such city or its charter, general or special, but from the board of health act of 1887. Gen. St. 1895, p. 1634. This act, which is a complete legislative scheme upon the subject, provides that there shall be a local board of health in every city, the powers, authority, and procedure of which it minutely defines, leaving to such city merely the manner of appointment and the term of office of its members. With respect to the local boards thus required to be in every city, the act provides that they may prescribe penalties for the violation of their ordinances, and enforce them in the local or police court of such city, which is "to issue process at the suit of any such board." Page 1638, § 18. That a board of health when established in any city by the appointment of members to fill such board is in all essential particulars a creature of the board of health act would seem to be clear. Such was the view taken in the Court of Chancery in *Trenton Board of Health v. Hutchison*, 39 N. J. Eq. 218, and such is the view that has been uniformly held by those upon whom the duty of administering the law in this respect has devolved. It is true that the act of 1897 under which the city of Asbury Park is regulated was enacted under the board of health act of 1887, and that the act of 1897 by its twenty-second section authorizes the common council "to establish a board of health and define its powers and duties." But the case before us shows that all that the common council of the city of Asbury Park did in this regard was to adopt an ordinance organizing a board of health in said city in accordance with "An act to establish in this state boards of health," ordaining nothing with respect to the duties or procedure of such board. The provision of the statute of 1897 that process

should issue in certain cases in the name of the city occurs not in relation to the establishment of the board of health, but in an entirely different section defining the jurisdiction of police justices. If, therefore, the provision of the board of health act that process should issue at the suit of such board be supplanted or amended by the provision as to police justice courts contained in the act of 1897, such amendment has been brought about by legislation that makes no reference whatsoever to the act that is thus amended either by its title or otherwise; and it is contended that, if it be unconstitutional to amend a law by reference to its title only, it is clearly unconstitutional to amend such law without making any reference to it whatsoever. This contention, however, we have not considered, for the reason that there is a broader ground for holding that the provision as to process in police courts in the act respecting cities does not supplant or repeal the corresponding provision in the board of health act, and that is that, if such force be given to such latter act, its title is constitutionally inadequate, in that no such object is expressed therein. The title to the act in question is "An act relating to and providing for the government of cities in this state containing a population of less than twelve thousand inhabitants." No one I venture to say upon reading this title would find expressed in it any purpose to repeal or in any other respect to alter the procedure established throughout the state by the board of health act, and unless such title in some way expresses such purpose—that is, unless such title is, as Chief Justice Beasley puts it, "something in the way of being a notice of what is doing" (*Rader v. Union*, 39 N. J. Law, 509)—such title would not in a constitutional sense support the provision thus construed. Whence it follows that such construction ought not or rather cannot be given to it. It may also by way of parenthesis be added that there is no conceivable reason that occurs to me for changing the provision as to the procedure of the board of health act as applied to cities of less than 12,000 inhabitants that is not equally appropriate to cities having a larger population or to towns, boroughs, or any of the local municipalities of the state to which the board of health act is made expressly applicable. The cases illustrating the force to be given to the constitutional requirement respecting titles to acts are referred to in *Griffith v. Trenton* (N. J.) 69 Atl. 29. And the familiar rule that an act can be amended or repealed only under an appropriate title is illustrated in *Evernham v. Hullt*, 45 N. J. Law, 53; *Glass Co. v. Ross*, 69 N. J. Law, 157, 53 Atl. 675; *Arzonico v. Board of Education* (N. J.) 69 Atl. 450, and many others that will be found collected in *Bradley's Citations*, page 61.

The view that the construction placed upon the charter act of Asbury Park by the court below ought not to be given to it is further supported by the consideration that since the passage of such act such effect has not in contemporaneous practice been given to it either by the officials charged with the duty of administering the board of health act, or by the courts before which such actions have been brought. A partial list of cases cited from our reports in the very admirable brief of counsel for the prosecutor shows that from the time the act of 1897 was passed down to a very recent date the uniform practice of the bar and of the boards of health has been to bring actions for the violation of ordinances of such boards under the procedure laid down by the board of health act, and not under the provisions as to the police courts of the various municipalities involved. *Morford v. Board of Health of Asbury Park*, (1898) 61 N. J. Law, 386, 39 Atl. 706; *Board of Health of Glen Ridge v. Werner* (1901) 67 N. J. Law, 103, 50 Atl. 585; *La Porta v. Board of Health of Hoboken* (1904) 71 N. J. Law, 88, 58 Atl. 115; *Blanke v. Board of Health of Hoboken* (1899) 64 N. J. Law, 42, 44 Atl. 847; *Board of Health of Asbury Park v. Rosenthal* (1901) 67 N. J. Law, 216, 50 Atl. 439; *Dodd v. State Board of Health* (1902) 67 N. J. Law, 463, 51 Atl. 456; *Board of Health of Woodbury v. Cattell* (1906) 73 N. J. Law, 516, 64 Atl. 144.

In two of these cases it will be observed that the charter act of the city of Asbury Park was as directly involved as it is in the case now before us.

In view, therefore, of the relation sustained by the prosecutor to the board of health act of the state, and in view of the lack of any proper relation between the title of the charter act of Asbury Park and such board of health act, and in view of the uniform practice that has been pursued, we think that the construction placed by the court below upon the charter act of 1897 was not sound, and that the action was properly brought in the name of the board of health of Asbury Park.

The judgment of the court of common pleas should therefore be reversed, and the judgment of the police justice court of the city of Asbury Park affirmed.

(75 N. J. E. 152)

CLARK v. VAN CLEEF.

(Court of Chancery of New Jersey. Nov. 7, 1908.)

1. EQUITY (§ 263*)—CROSS-BILL—MOTION TO STRIKE—DEMURRER.

A motion to strike a cross-bill because it does not allege ground for equitable relief, and because the alleged equitable mortgage sought to be foreclosed is barred by limitations, etc., is equivalent to a demurrer.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 535; Dec. Dig. § 263.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. EQUITY (§ 263*)—BILL—DEMURRER.

A motion to strike a cross-bill because it does not allege any ground for equitable relief will be sustained only in case all the facts, taken together, do not make a case on which complainant is entitled to any relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 535; Dec. Dig. § 263.*]

3. SPECIFIC PERFORMANCE (§ 44*)—CONTRACT TO GIVE MORTGAGE.

Equity will decree specific performance of a contract to give a mortgage on land, where the contract, although by parol, has been executed, on complainant's part, by payment of the money for which the mortgage was to be executed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 126; Dec. Dig. § 44.*]

4. EQUITY (§ 263*)—CROSS-BILL—MOTION TO STRIKE—LIMITATIONS.

A motion to strike a cross-bill to enforce an equitable mortgage properly specified as a distinct ground that the alleged mortgage was barred by limitations.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 535; Dec. Dig. § 263.*]

5. TENANCY IN COMMON (§ 15*) — ADVERSE POSSESSION—MORTGAGES.

Defendant's mother, owning property subject to a mortgage, on December 11, 1880, applied to defendant to take up the mortgage, promising to give to defendant a mortgage on the property for the amount advanced. Defendant took up the mortgage, which was thereupon released, but no new mortgage was executed by her mother prior to her death 14 years after the transaction, when defendant became entitled to an undivided one-third of the property, and was in possession, in law and in fact, with the other heirs, her co-tenants, for 13 years prior to suit for partition. Held that, since after the mother's death defendant's co-tenants had no opportunity to assert a hostile title, defendant having neither possession as mortgagee of record nor in fee, defendant could not make her alleged equitable mortgage the basis of a claim to defeat her co-tenants' claim of limitation.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 42; Dec. Dig. § 15.*]

6. EQUITY (§ 87*)—LACHES—FOLLOWING STATUTE OF LIMITATIONS.

Where defendant paid off a mortgage on her mother's land, on the mother's promise to execute a new mortgage to defendant for the amount advanced, which she failed to do, defendant had a remedy at law by assumpsit to recover the money so advanced, which was barred after six years, and hence could not maintain a suit in equity to compel specific performance of the contract to execute the mortgage, and to foreclose a lien on the land therefor, after the expiration of a similar period.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244; Dec. Dig. § 87.*]

7. ASSUMPSIT, ACTION OF (§ 1*)—SCOPE.

The breach of all parol or simple contracts, whether verbal or written, express or implied, as for the payment of money, or for the performance or omission of any other act, is remediable by action of assumpsit.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 3-8; Dec. Dig. § 1.*]

8. JUDGMENT (§ 273*)—ENTRY—NUNC PRO TUNC—DEATH OF PARTY.

Entry of a judgment nunc pro tunc as of the date of submission will be ordered on the suggestion that the party against whom the judgment is rendered has died in the meantime.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 273.*]

Bill by Staats V. D. Clark against Ellen S. Van Cleef to partition certain lands, in which defendant filed a cross-bill for the foreclosure of an alleged equitable mortgage. On motion to strike out cross-bill. Motion granted.

Arthur H. Bissell, for the motion. Alan H. Strong, opposed.

WALKER, V. C. The bill is one for partition of lands of which Joanna Clark, late of New Brunswick, died seised. The defendant, Ellen S. Van Cleef, who owns an equal undivided one-third of the premises, has answered, and sets up that on January 16, 1879, Mrs. Clark, her mother, the then owner, made a mortgage upon the premises in question to a Mrs. R. L. Macauley for \$4,000; that on or about December 11, 1880, Mrs. Clark applied to the defendant, her daughter, and requested her to pay off Mrs. Macauley's mortgage, agreeing that if she would do so, that she (the mother) would secure her (Mrs. Van Cleef) for the money expended by making a mortgage upon the premises to her; that the defendant, relying upon the promise of her mother, paid off Mrs. Macauley's mortgage on December 11, 1880, and caused it to be canceled of record, and also caused to be prepared a bond and mortgage from her mother to her, and tendered it to her mother for execution, but for some reason (not stated) the execution of the mortgage was temporarily deferred, and was from time to time thereafter postponed, and was never in fact executed, although Mrs. Clark never denied that Mrs. Van Cleef had advanced the money, nor that Mrs. Clark owed the money to her daughter, nor that she agreed to give the mortgage mentioned as security. Then, by way of cross-bill Mrs. Van Cleef prays a decree that she is entitled to a lien upon the whole premises for the money expended in the discharge of the mortgage of \$4,000, with interest from December 11, 1880. Counsel for Mrs. Van Cleef moves under rule No. 213 to strike out the cross-bill for these reasons: (1) That it does not set forth any ground for equitable relief; (2) that the alleged equitable mortgage is said to have been made more than 27 years ago, and is barred by the statute of limitations and the practice of this court; and (3) upon such other grounds as appear from the reading of the cross-bill and the pleadings heretofore filed in this cause. This motion is equivalent to a demurrer. *Stevenson v. Morgan*, 63 N. J. Eq. 707, 53 Atl. 78.

The first reason assigned in the notice, namely, that the cross-bill does not set forth any ground of equitable relief, will prevail only if all the facts, taken together, do not make a case on which the complainant is entitled to any relief. *Safford v. Barber* (N. J. Ch.) 70 Atl. 371. Now the relief sought is the establishment of an equitable mortgage

by way of the creation of a lien upon land; and if this court can decree the specific performance of a parol agreement to make a mortgage, then, if the defendant is for any reason entitled to have such mortgage, or its equivalent, this ground of motion fails, even though for some specific reason the defendant might not be entitled to the relief just mentioned, as will presently be seen. That is, it will be seen that, by the operation of the statute of limitations, the defendant is barred of relief. The court will decree specific performance of a contract to give a mortgage upon lands where the contract, although by parol, has been executed on the claimant's part. *Dean v. Anderson*, 34 N. J. Eq. 496, and reporter's note. Taking the allegations of the cross-bill to be true, which must be done on this motion, the conditions exist which entitle Mrs. Van Cleef to the relief she seeks; that is, the consideration for the mortgage passed from her and that, too, upon her reliance upon the promise of her mother to make the mortgage claimed. On the question of want of equity generally, the defendant fails.

This brings me to the consideration of the second ground of the motion, namely, the statute of limitations. This has been specified as a distinct ground, and properly so, under the rule on which the motion is based, and also under *Safford v. Barber*, *ubi supra*, and the cases therein cited. Counsel for the complainant points out that the lien by way of mortgage which the defendant seeks to establish had its inception on December 11, 1880, over 27 years ago, and, further, that the defendant cannot claim to be in any better position than the rule that equity regards as done that which should have been done would place her—that is, that she has no greater equity than if a mortgage had formally been made and delivered to her on the date last mentioned—and, as the cross-bill itself shows that no part of the principal nor any interest has been paid upon the claim, the statute of limitations would be a bar the same as in a foreclosure case (*Blue v. Everett*, 56 N. J. Eq. 455, 39 Atl. 765; *Colton v. Depue*, 59 N. J. Eq. 126, 44 Atl. 662; *Id.*, 60 N. J. Eq. 455, 46 Atl. 728, 83 Am. St. Rep. 650), and that, by analogy and upon principle, she should be held to be barred of the remedy she seeks here. Counsel for the defendant, Mrs. Van Cleef, contends that the limitation of 20 years, which would be necessary to bar foreclosure of a mortgage, has not run because, upon Mrs. Clark's death in March, 1894, the fee in the lands descended to her heirs at law, one of whom was Mrs. Van Cleef, who, as remarked, inherited an equal undivided one-third, and that since the death of Mrs. Clark there has been no possession adverse to Mrs. Van Cleef, who it is asserted has been in possession in law and in fact together with the other heirs. It will be observed that it was less than 14 years from the date of the trans-

action to the death of Mrs. Clark, and that Mrs. Van Cleef has been an owner of an undivided interest in the fee since that time. The contention is that there has not been 20 years' possession adverse to Mrs. Van Cleef, and that therefore she is entitled to relief the same as though her mortgage had been in existence all the time. To this proposition I cannot assent. After the death of Mrs. Clark the co-tenants of Mrs. Van Cleef had no opportunity to assert a hostile title to her, because she had no possession as mortgagee, either of record or by matter in pais, notice of which was brought home to her co-tenants. Certainly she had no title of record, and no notice in fact is disclosed or claimed. To permit Mrs. Van Cleef to make her latent and secret equity the basis of a claim to defeat an adverse possession, if in fact it be necessary for her co-tenants to rely upon any adverse possession, which I do not concede, would be inequitable. My judgment is against the claim set up by the cross-bill upon this question of the statute of limitations, based upon a 20 years' adverse possession. But whether I be right or wrong in this view, there is another statute of limitations, which, to my mind, is entirely dispositive of the case against Mrs. Van Cleef. It is the 6-year period, within which an action of assumpsit may be commenced for the recovery of damages for a breach of a simple contract for the payment of money, for, even if she were entitled to an equitable mortgage, she also had a remedy at law for the recovery of the amount she expended for the use of her mother at her mother's request. Where there is both a legal and an equitable remedy for the same cause of action, if the legal remedy is barred by lapse of time the equitable remedy will also be held to be barred. *Smith's Adm'r v. Wood*, 42 N. J. Eq. 563, 17 Atl. 881.

The averment is that Mrs. Van Cleef, at the special instance and request of her mother, Mrs. Clark, laid out and expended the sum of \$4,000 for her in the payment and discharge of a mortgage, upon her promise to execute a mortgage to Mrs. Van Cleef, to secure her upon the land which she exonerated by the payment of the mortgage for her mother. The allegation, further, is that the mother failed and neglected to make the mortgage to her daughter. The money was advanced December 11, 1880. Upon the breach of this contract, which occurred as soon as the contract was made, Mrs. Van Cleef, instead of resorting to equity for the establishment of a lien upon the lands for the money in question, or for a specific performance of the contract to execute a mortgage, could have sued her mother in a common-law court for money paid to the use of her mother. The breach of all parol or simple contracts, whether verbal or written, or express or implied, or for the payment of money, or for the performance or omission of any other act, is remediable by action of

assumpsit. Thus it lies to recover money lent by the plaintiff to the defendant, or paid by the plaintiff on the account of the defendant at his request. 1 Ch. Pl. *99. In a case of a bill for an account of the profits of an estate, received by the defendant while the complainant was an infant, it appeared that the defendant had possession under an agreement constituting him a trustee for the infant. The bill was not filed until more than six years after the infant became of age, and it was held that the statute barred the action in equity as it would have barred a common-law action of account, as the complainant might have had his action of account at law, and there was therefore no necessity for his seeking relief in equity. *Partridge v. Wells*, 30 N. J. Eq. 176, at page 179. In this case (*Partridge v. Wells*) Vice Chancellor Van Fleet remarked: "The test, then, obviously prescribed by the rule is, Had the suitor a remedy at law which he has lost? If the complainant in this case had a complete remedy at law, which has been lost by lapse of time, he is not entitled to the remedy he seeks here." There can be no doubt of Mrs. Van Cleef's adequate and appropriate remedy in a court of law, in an action of assumpsit for money paid to the use of her mother, during the six years which elapsed next after the date of the transaction. This ground of objection, namely, that the statute of limitations is fatal to the relief sought by the defendant, Mrs. Van Cleef, on her cross-bill, being valid, the motion will prevail, and the cross-bill must be struck out.

It is unnecessary to consider the third ground of objection to the cross-bill, which, by the way, would not be considered in any event, as it is too vague and general.

Since the argument of this motion the death of the complainant has been suggested on the record. This being so, the order striking out the cross-bill may be entered nunc pro tunc as of August 25th last, the day on which the matter was submitted. This is the usual practice. *Dan. Ch. Pl. & Pr.* (6 Am. Ed.) *1017; *Burnham v. Dalling*, 16 N. J. Eq. 310.

(73 N. J. E. 697)

ROLL et al. v. EVERITT et al.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

1. EVIDENCE (§ 177*)—SECONDARY EVIDENCE.
Secondary evidence of documents out of the jurisdiction of the court is not admissible merely upon proof of that fact, even though the documents are the papers of a third party not interested in the pending controversy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 577; Dec. Dig. § 177.*]

2. TENANCY IN COMMON (§ 20*)—TAX TITLE—RIGHTS OF CO-TENANTS.

Where one tenant in common acquires a tax title or redeems land from a tax sale, his

act inures to the benefit of his co-tenants upon their reimbursing him for their proportionate share of the amount paid by him.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 60, 61; Dec. Dig. § 20.*]

3. TENANCY IN COMMON (§ 30*) — RIGHT TO CONTRIBUTION—ENFORCEMENT.

A tenant in common who discharges a lien upon the common property has a right to contribution from his co-tenant, and as security is entitled to a lien upon his co-tenant's share of the property. The lien may be enforced in equity by treating the tax deed as valid and subsisting for that purpose.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 95, 99; Dec. Dig. § 30.*]

4. PARTITION (§ 19*)—RIGHT TO SUE—OUSTER.

A tenant in common who has been dispossessed is not entitled to partition, but, to prevent a tenant in common from having partition, there must be an actual ouster.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 60; Dec. Dig. § 19.*]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Melford N. Roll and others, executors, against Abraham Everitt and others. From a decree (65 Atl. 732) advised by the Vice Chancellor, defendants appeal. Reversed.

Alan H. Strong, for appellants. Frederick M. P. Pearce, for respondents.

SWAYZE, J. This was a bill for partition. The property was conveyed by one Cotheal to Mary Jane Roll and Sarah E. Dey by deed dated April 16, 1874, which purported to convey three tracts of land, including the land now in question. The complainants are the successors in title of Mary J. Roll, but it is unnecessary to state in detail the devolution of title to the share claimed by them. Sarah E. Dey's share was conveyed by the sheriff in 1877 to Ward C. Perrine and Abraham Everitt, who subsequently acquired a tax title.

The first difficulty in the case arises out of the following clause in the deed: "It is agreed by and between the parties to these presents, that this indenture shall not conflict with the title of any part of the aforesaid premises previously sold and conveyed by said Alexander I. Cotheal and James D. Thomas, to any party or parties, and this deed is subject to any such conveyances." The defendants contend that the property in question had been conveyed by Cotheal and Thomas in 1835 to Peter G. Taylor, and that, therefore, no title passed by the deed to Roll and Dey. They also claim a title paramount to the complainant by virtue of a tax deed from the collector of taxes dated June 4, 1877, to Ward C. Perrine and Abraham Everitt. The interest of Everitt under this tax deed was conveyed after his death by commissioners appointed in partition proceedings to Ward C. Perrine, George L. Everitt, and John R. Ever-

itt. The share of George L. Everitt subsequently passed by his will to his sons Abraham and William C.—two of the defendants. The share of Ward C. Perrine subsequently passed by his will to other defendants.

The proof offered of the alleged conveyance from Cotheal and Thomas to Taylor consisted of copies of books of account of Cotheal and Thomas as trustees containing record of sales of lots, part of the tracts in question. It was the same proof that was resorted to in the case of *Roll v. Rea*, 50 N. J. Law, 264, 12 Atl. 905, and there held sufficient to carry the case to the jury. This ruling was subsequently approved by this court in *Roll v. Rea*, 57 N. J. Law, 647, 32 Atl. 214. In that case, however, the copies taken from the trustees' books had been introduced by consent, and the question presented was whether such a reasonable search had been made for the deed to Lary, which was the one there in question, that secondary evidence of its contents was permissible. In the present case the defendants seek to go further, and, without having the consent of their adversaries, they seek to prove the existence of a similar deed to Taylor, not by the secondary evidence of the original books of the trustees, but by a copy of that secondary evidence. If we assume that the books themselves would be admissible evidence, it does not follow that a copy thereof is admissible because they are out of our jurisdiction. On this question the authorities are at variance. In the last edition of *Greenleaf on Evidence*, § 563e, and in *Wigmore on Evidence*, § 1213, cases are cited on either side. Thus, in *Boyle v. Wiseman*, 10 Exch. 647, it was held that the contents of a letter written by Cardinal Wiseman, and in the possession of a resident of France, which was alleged by the plaintiff to be libelous, and could not be proved by secondary evidence merely because the person who had possession of it was beyond the jurisdiction of the court, and had refused to deliver it up at the request of a third person, who did not disclose the purpose for which it was wanted; and in *Turner v. Yates*, 16 How. 14, 14 L. Ed. 824, secondary evidence of an invoice, which was presumed to have been sent to London, was rejected, upon the ground that the deposition of the party in London having possession in that way should have been taken, or some proper attempt made to obtain it. On the other hand, in *Bruce v. Nicolopulo*, 11 Exch. 129, where it became necessary to prove that the failure to load a vessel in accordance with a charter party was due to the restraint of princes, it was held that evidence of the contents of printed placards purporting to be signed by Prince Gortschakoff, and posted at a Black Sea port, was admissible; and in *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299, the court in Vermont admitted secondary evidence of the contents of the books of a bank in New York

state. Although in the opinion in this case it was said that, the books being out of the state and beyond the jurisdiction of the court, secondary evidence to prove their contents was admissible, it must be noted that the plaintiff had endeavored to obtain them for use on the trial, and that the custodian refused to permit them to go, and the deposition of the cashiers of the bank during the period covered by the controversy was taken. We think it would be quite unsafe, in view of the grounds upon which the rule forbidding the introduction of secondary evidence rests, to lay it down broadly that secondary evidence of documents out of the jurisdiction of the court is admissible when that fact alone appears, even though the documents are the papers of a third party not interested in the pending controversy. It ought at least to appear that some effort had been made to secure the original documents. We are not prepared to say that such an effort ought not to include the taking of depositions within the foreign jurisdiction. In the present case the defendants did nothing to secure the original documents, and contented themselves with proving the death of Cotheal, and the fact that he had resided outside of the jurisdiction of New Jersey. No effort seems to have been made to ascertain whether the documents were still in existence, and, if so, in whose custody they were to be found. We think, therefore, that the Vice Chancellor was quite right in disregarding the claim of the defendants that the title to the land in question was in Taylor.

With reference to the tax title, the Vice Chancellor held upon an examination of the tax deed that it was void because it failed to comply with the law then in force; but he felt constrained by our decision in *Slockbower v. Kanouse*, 50 N. J. Eq. 481, 26 Atl. 333, not to determine that question, regarding it as a question of pure law. He therefore held the case to enable the defendants to establish their title under that deed, and required them to take proceedings for that purpose within 30 days. Upon their failure to take such proceedings, he advised a decree that the premises described in the bill are free and clear of any lien or incumbrance under and by virtue of the tax deed.

We do not find it necessary to determine whether the Court of Chancery had the right to impose upon the defendants in a partition suit the burden of establishing a title adverse to that of the complainant. That question was not involved in the case. At the time the tax title was acquired Ward C. Perrine and Abraham Everitt were tenants in common with Mrs. Roll by virtue of the sheriff's deed conveying the Dey title to them. The law is well settled that, where one tenant in common acquires a tax title or redeems land from a tax sale, his act inures to the benefit of his co-tenant upon their reimbursing him for their proportionate share of the amount

paid by him. The principle is in some of the cases put upon the ground of a confidential relationship between the tenants in common. 1 *Leading Cases in Equity* (4 Am. Ed.) 68, ff. Other cases rest the doctrine upon the principle that one cannot be allowed to acquire a right by his own default. This principle would be violated if a tenant in common, who is equally obligated to pay all the taxes upon the joint property, were allowed to acquire rights superior to his co-tenant by defaulting in his obligation, and forcing the public authorities to take proceedings for the collection of the tax. Other cases seem to rest the doctrine upon the view that one who has title to land cannot acquire a superior title by means of a tax deed. In the view of these cases, the acquisition of the tax title amounts to nothing more than a redemption of the purchaser's own land from a lien.

The cases are carefully stated by Mr. Justice Holmes in *Hurley v. Hurley*, 148 Mass. 444, 19 N. E. 545, 2 L. R. A. 172. The rule has been held applicable where the tenant in common became such after the tax title was acquired. *Dubois v. Campan*, 24 Mich. 360. *Flinn v. McKinley*, 44 Iowa, 68, a case where one tenant in common had become the assignee of a tax certificate, and afterwards became a tenant in common before he received the tax deed; and to cases where the tenant in common had acquired the tax title from a third person, who had purchased at the tax sale, *Lloyd v. Lynch*, 28 Pa. 419-423, 70 Am. Dec. 137.

The extent to which the courts go is well illustrated by *Burns v. Byrne*, 45 Iowa, 285, *Busch v. Huston*, 75 Ill. 343, and *Chace v. Durfee*, 16 R. I. 248, 14 Atl. 919, where it was held that a purchase by the husband of a tenant in common would inure to the benefit of all the co-tenants of the wife. The cases are collected in a note to *Hoyt v. Lightbody*, 8 Ann. Cas. 984.

In the present case the taxes were assessed prior to the acquisition of title by Perrine and Everitt under the sheriff's deed. If the lien of the municipality for the taxes had not then expired, Perrine and Everitt could only secure the release of their undivided interest by payment of the whole tax, and in making such payment were only discharging their obligation to the public on account of their land. Upon the principles above stated they could not acquire any title to the land against their co-tenant by their own default. If, however, the lien had then expired, the collector of taxes was without power, and the tax deed conveyed no title.

The right of a tenant in common who discharges a lien upon the common property is to contribution from his co-tenant, and as security he is entitled to a lien upon his co-tenant's share of the property. That lien

may be enforced in equity by treating the tax deed as valid and subsisting for that purpose; and in *Hurley v. Hurley*, it was held that, until the amount had been paid, the co-tenant had no right to the possession of any part of the land in equity or at law. It was accordingly held in that case that the petition for partition was rightly dismissed. In the *Hurley Case*, however, the tenant who had paid the taxes actually took possession of the property. In the present case the land is unoccupied land of which neither complainants nor defendants have the actual possession. At common law a tenant in common who had been disseised could not have the writ of partition; and the reason is that given by Co. Litt. 167, in discussing the right of partition as between copartners: "They no longer hold the estate together." But, in order to prevent one tenant in common from having a partition, there must be an actual ouster. In the absence of such ouster, the ordinary rule prevails that the possession of one tenant in common is the possession of all. *Foulke v. Bond*, 41 N. J. Law, 527.

The fact that the statute authorizing the sale of land for taxes as it existed when the tax deed was made (Gen. St. 1895, p. 3351, § 322) authorized the purchaser at the tax sale to hold and enjoy real estate during the term for which he purchased the same does not prevent the operation of this rule. The tax deed inures to the benefit of all tenants in common; and, if kept alive at all, is only kept alive in equity for the purpose of enforcing the right to contribution. Such right is no bar to a bill in equity for partition.

The result is that we reach the same conclusion reached by the Vice Chancellor, except so far as he decreed that the premises were free and clear of any lien or any incumbrance under or by virtue of the tax deed. In this respect the decree is erroneous and must be reversed, and the record remitted to the Court of Chancery, and a decree entered for partition, which shall provide that the defendants have a lien upon the complainants' share for the proportionate part of the taxes upon the property in question paid by the defendants or their predecessors in title, with interest from the date of payment. This will necessitate the taking of further proofs.

(76 N. J. L. 613)

FLECKENSTEIN BROS. CO. v. FLECKENSTEIN.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1908.)

1. CONTRACTS (§ 117*)—RESTRAINT OF TRADE—VALIDITY.

A provision in a contract for the sale of defendant's interest in a corporation, binding him not to engage in, promote, or give his name to, any similar business located within 500 miles from Jersey City for 20 years, was only in par-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tial restraint of trade, and was not, therefore, contrary to public policy, unless it went further than was reasonably required for the protection and enjoyment of the business sold, or unless the restraint was so great as to interfere with the interests of the public.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 554, 555; Dec. Dig. § 117.*]

2. CONTRACTS (§ 117*)—AGREEMENT NOT TO ENGAGE IN BUSINESS—VALIDITY.

A contract not to engage in business within a specified area for a specified term is not injurious to public interests as long as the area is no greater than that covered by the business, the good will of which is sold.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 554, 555; Dec. Dig. § 117.*]

3. CONTRACTS (§ 137*)—RESTRAINT OF TRADE—PARTIAL ILLEGALITY—SEVERANCE.

Defendant, on selling his interest in a corporation, agreed not to engage in promoting, or to give his name to, any similar business within 500 miles of Jersey City for 20 years. *Held*, that such contract should be construed to restrain defendant, either in Jersey City or within 500 miles therefrom, and as so read was severable and sustainable in so far as it applied to the city, even if unenforceable as to the outside territory.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 554, 555; Dec. Dig. § 137.*]

Pitney, Ch., and Swayze, Voorhees, and Green, JJ., dissenting.

Error to Supreme Court.

Action by the Fleckenstein Bros. Company against George Fleckenstein. Judgment for defendant, and complainant brings error. Reversed.

Gilbert Collins and Albert I. Drayton, for plaintiff in error. James A. Gordon, for defendant in error.

GUMMERE, C. J. The plaintiff in this case, Fleckenstein Bros. Company, was incorporated in 1901, with a capital of \$40,000, for the purpose of manufacturing bologna and other pork products, curing hams and bacon, and selling these articles, both at wholesale and retail. Its principal places of business were located in Jersey City, but its product was sold, not only there, but also in other places in Hudson, Essex, Union, and Passaic counties, in New York City, and places adjacent thereto, and, to a limited extent, in Pennsylvania. Its business was almost immediately a profitable one. The defendant George Fleckenstein, was its manager, and owned a controlling interest in its stock. On October 6, 1902, he sold out his holdings of stock to one Niederlitz, and others who were associated with him, thus giving them the control of the corporation. The consideration for the sale was over \$24,000, and for this payment, in addition to the transfer of his stock, the defendant entered into the following agreement with the corporation: "Jersey City, N. J., October 6, 1902. For the sum of one dollar to me paid (receipt of which is hereby acknowledged) by Fleckenstein Bros. Company of Jersey City, N. J., I do hereby guarantee and agree

to and with said company that I will not directly or indirectly engage in, promote or give my name to any business of the same kind or character as that now carried on by said company within five hundred miles from the city of Jersey City, N. J., at any time within the period of twenty years from the date hereof. George Fleckenstein. Witness, Henry Niederlitz." In less than five months after the making of this agreement the defendant became interested in a competing business established in Jersey City, under the name of R. E. Fleckenstein & Co., and this suit was brought to recover the damages resulting to the company from the breach of his contract. The trial of the cause resulted in a nonsuit, the court below being of opinion that the contract was one which imposed an unreasonable restraint upon trade, and was therefore invalid; that it was indivisible, and therefore not enforceable, even within the territory of Jersey City. The correctness of this ruling is now challenged by the plaintiff.

The contract in question is one which is in partial restraint of trade. It is therefore, under all the cases, not objectionable to public policy, unless it goes further than is reasonably required for the protection and enjoyment of the business sold, or unless the restraint is so great as to interfere with the interests of the public. And it may be added that the trend of opinion of the present day is that such a contract is not injurious to the public interests, so long as the area within which the business is restrained is no greater than is covered by the business whose good will has been sold. Page on Contr., vol. 1, § 378, and cases cited. Whether a contract which extends the area of restraint beyond the territory within which the business is being carried on at the time of its sale imposes an unreasonable restraint upon trade is a question upon which courts differ. The preponderance of view seems to be that it does. Nevertheless there is much force in the contention that a person who purchases the good will of a business, with the purpose of extending its scope, is entitled to bargain with his vendor against competition within the territory into which he designs to extend it, and that such a contract is not opposed to public policy when the area which it embraces is not greater than that which the parties may fairly anticipate the extended business will cover. "It is of public interest that the owner of a business who desires to sell it shall be able to get a fair price for it, and that his purchaser shall be able to obtain by his purchase that which he desires to buy. Obviously the only practical mode of accomplishing that purpose is by the vendor's contracting for some restraint upon his acts preventing him from engaging in the same business in competition with that which he has sold." *Trenton Potteries Co. v. Oli-*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

phant, 58 N. J. Eq. 514, 43 Atl. 728, 46 L. R. A. 255, 78 Am. St. Rep. 612. And just as obviously the value of the good will is enhanced by affording to the vendee protection against competition from the vendor within the territory into which both parties understand the vendee proposes to, and may reasonably expect to be able to, extend the business.

If a contract having the scope suggested does not impose an unreasonable restraint upon trade, it would seem that the question whether the area which was embraced in a given contract was greater than was required for the full protection of the vendee must ordinarily be one of fact to be determined by the jury, rather than the court, when an action at law is brought for its breach. As was pointed out in the Trenton Potteries Case, *supra*, in the days when orders and responses had to be transmitted by mail, and the mail was carried by stagecoach and goods were transported by pack or wagon, the area of the trade of a manufacturer or tradesman was necessarily limited by these conditions. Now that orders and responses may be transmitted over hundreds of miles by telegraph and telephone, and quick transit may be had for goods, either by express or freight, competition has assumed altogether different proportions, and what would have been at one time merely a burden upon the vendor may now be essential to the reasonable protection of the vendee. The case in hand, however, does not require a determination of the question whether or not such a contract as that indicated imposes an unreasonable restraint upon trade. By the terms of the agreement sued upon the defendant promised not to engage in a competing business "within five hundred miles from the city of Jersey City." Taken literally, this language does not include the city of Jersey City within the area of protection; and yet, when it is remembered that the principal business of the corporation was carried on in that city, it cannot be doubted that both parties intended by the words used to include it in the territory within which the defendant agreed not to carry on a competing business. So construed, the contract may fairly be read as binding the defendant not to engage in a business of the character conducted by the corporation, "either in the city of Jersey City or within five hundred miles from that city." Reading it thus, the description of the area within which the contract restrains the defendant is a divisible one, embracing not one whole area, but two areas disjunctively described. Assuming that the restraint contracted for, so far as it embraces territory outside of Jersey City, is unreasonable, and that the contract is to that extent invalid, nevertheless, in respect to Jersey City, it was clearly necessary for the protection of the business as it existed at the time of the sale, and to

that extent is not in opposition to public policy, and may be enforced. *Trenton Potteries Co. v. Oliphant, supra*.

It is said that a construction which makes the area embraced in this contract divisible is a forced one; that the words used in the contract describe an indivisible area, and express the intention of the parties in that regard. I cannot think so. Ordinarily it is a reasonable presumption that parties intend to make a valid contract; that in a case like the present they design to provide a restraint which will be reasonable, in their judgment, for the protection of the purchaser in the enjoyment of the subject of the purchase (*Trenton Potteries Case*, 58 N. J. Eq. 517, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612), and I see nothing in the language used by these parties which requires the conclusion that their intention was that, unless the full measure of protection afforded to the plaintiff by the contract was capable of enforcement against the defendant, there should be no protection at all against competition by the latter. The construction of this contract which makes the description of the restricted area divisible is certainly a possible one; and it seems to me that, when a vendor endeavors to steal from his vendee the business which he has sold, having in his pocket the moneys which were paid to him for it, courts should be diligent in the endeavor to find a way to prevent the consummation of so fraudulent a scheme. As was said by Lord Macnaughten in *Nordenfelt v. Maxim, etc., Co.*, App. Cas. 1894, p. 573, in speaking of a case like the present, it seems almost absurd to talk of public policy in connection with such a case. It is a public scandal when the law is forced to uphold a dishonest act; and the public suffers no injury in being deprived of the privilege of dealing with a man who is carrying on his business in violation of his solemn engagement not to do so.

The construction of the present contract, which makes the territory it embraces divisible, is as I have said, a possible one. That being so, public policy, which is best subserved by the administration of justice, requires that it should be adopted.

The judgment under review will be reversed.

PITNEY, Ch., and SWAYZE, VOORHEES, and GREEN, JJ., dissent.

(75 N. J. E. 68)

MATHIS v. STEVENSON.

(Court of Chancery of New Jersey. Oct. 31, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 437*)—ACTIONS — LIMITATIONS — BAR OF ACTION AGAINST ESTATE.

Orphans' Court Act, Act June 14, 1898, § 67 (P. L. p. 738), requires a decedent's cred-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

itors to bring their claims against the estate within a certain time. Section 70 (page 740) bars a claim not made within that time, and section 71 (page 740) provides that the executor may give written notice that the claim is disputed, when the creditor must commence suit thereon within three months from such notice, or the claim will be barred. Complainant's claim for money loaned her husband during his lifetime was disputed by the executor, and suit was not brought thereon within three months. *Held*, that the purpose of the statutes being to effect a speedy settlement of estates, section 71 applied, as a general rule, to suits in equity, as well as legal actions, and complainant's suit, having been brought in equity only because of the relationship when the debt was created, was barred by her failure to bring it within the required time.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1758; Dec. Dig. § 437.*]

2. WORDS AND PHRASES—"SUIT."

The term "suit," though frequently used to include both actions at law and suits in equity, is more appropriately applied to the latter.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 7, pp. 6769-6778; vol. 8, p. 7809.]

Suit by Elizabeth Mathis against Charles R. Stevenson as executor of William Mathis, deceased. Decree for defendant.

The bill is filed by a widow against the executor of her deceased husband, to recover money alleged to have been loaned by her to her husband in his lifetime.

The plea asserts that complainant presented her said claim, in writing, to defendant, and that defendant gave notice, in writing, to complainant that her claim was disputed, and that this suit was not brought until after the expiration of three months from the time of the giving of such notice, and that the surrogate has, by final decree, ordered that all creditors of defendant's testator who have not brought in their claims shall be barred from any action therefor against defendant.

The plea has been set down for hearing to determine its sufficiency as a bar to recovery.

Thompson & Cole, for complainant. French & Richards, for defendant.

LEAMING, V. C. (after stating the facts as above). It is contended, in behalf of complainant, that the provisions of our statute barring claims against executors do not contemplate claims of the nature of the present one, over which a court of law cannot take jurisdiction. I am unable to reach that conclusion. While a court of law will not entertain jurisdiction over an action by a wife against her husband, or of a widow against her deceased husband's executor, for a debt due from the husband to the wife, the jurisdiction of a court of equity to maintain such a suit has long been recognized; and I find nothing in either the terms or the policy of our statute barring claims against executors which indicates that the statute relates alone

to actions at law. Section 67, Orphans' Court Act (Act June 14, 1898 [P. L. 1898, p. 738]), requires "creditors of the decedent to bring in their debts, demands and claims against his estate" within the time therein specified. Section 70 provides for a final decree barring a creditor who has not brought in his claim within the time limited, and enacts that such creditor "shall, by such decree, be forever barred of his or her action therefor against such executor." Section 71 provides that when a claim is presented the executor may in writing give notice that the claim is disputed, and in such case "such creditor shall bring suit therefor in three months from the time of giving such notice; and in any suit not commenced within said time, said decree shall bar any recovery of the account or part so disputed, as if said debt or claim had not been presented within the time so limited by the court." It will be observed, by reference to the provisions of the statute above quoted, that the terms of the statute clearly include any debt of the deceased, without limitation as to the court where such debt must be recovered. The requirement that "suit" shall be commenced within three months from the time the claim is disputed contains no suggestion that an action at law is alone contemplated. The term "suit" though frequently used to include an action in a court of law, as well as a suit in a court of equity, is more appropriately applied alone to the latter. See *Black's Law Dictionary*, title "Suit." The well-recognized spirit and purpose of the provisions of the statute under consideration also indicate that the intention of its framers was to require a creditor to litigate a claim for the recovery of an alleged indebtedness of deceased, within the time specified, without limitation as to the court in which such claim of indebtedness should be appropriately asserted. It has been repeatedly held that the general purpose of the statute is to effect a speedy settlement of estates of deceased persons. *Newbold v. Fennimore*, 53 N. J. Law, 307, 309, 21 Atl. 939; *Emson v. Allen*, 62 N. J. Law, 491, 493, 41 Atl. 703; *Simons v. Forster*, 73 N. J. Law, 338, 341, 63 Atl. 858. With such general legislative purpose in view no reason suggests itself why the statutory requirement should not be held to include suits in equity as well as action at law.

I have not undertaken to inquire whether it may not be possible for some class of equitable claims to arise against the estate of a deceased person, the assertion of which may not fall within the provisions of the act. But where, as here, the claim is for the recovery of a debt arising from money loaned by a wife to her husband, and the assertion of the claim falls within the jurisdiction of the court of chancery only because the indebtedness arose at a time when the relationship

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of husband and wife existed, I am entirely clear that both the terms and spirit of the act must be held to include such a claim.

I will advise an order sustaining the plea.

(76 N. J. L. 735)

KINNEY v. PHILADELPHIA WATCH CASE CO.

(Court of Errors and Appeals of New Jersey. Nov. 16, 1908.)

1. CONTRACTS (§ 323*)—ACTIONS—QUESTIONS FOR JURY—PERFORMANCE.

Whether a contract has been performed is a jury question, if there is evidence from which it might properly infer that the plaintiff had performed its agreement in substantial compliance with its terms.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1543-1548; Dec. Dig. § 323.*]

2. EVIDENCE (§ 546*)—APPEAL AND ERROR (§ 971*)—OPINION EVIDENCE—EXPERTS—QUALIFICATION—REVIEW—DISCRETION OF COURT.

The qualification of an expert witness rests largely within the discretion of the trial court, and its finding will not be reviewed on writ of error, if there be legal evidence before the trial court to justify its finding.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2363; Dec. Dig. § 546;* Appeal and Error, Cent. Dig. § 3852; Dec. Dig. § 971.*]

3. CONTRACTS (§ 849*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

The defendant introduced in evidence a letter, written by it to the plaintiff, complaining that a chimney erected by plaintiff for defendant was defective, and the plaintiff replied, by letter, that he was willing to repair any defects in the chimney which might be pointed out. To this no reply was made, nor opportunity afforded the plaintiff to make any repairs; but the defendant proceeded to demolish the chimney, although the contract between the parties required the plaintiff to repair, free of charge, during a period of five years, any defects. *Held*, that plaintiff's letter was not incompetent, immaterial, or irrelevant on the question of the substantial performance of its contract by the plaintiff.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 849.*]

4. APPEAL AND ERROR (§ 1047*)—HARMLESS ERROR—WITHDRAWAL OF EVIDENCE.

The plaintiff offered a letter, written by it, which was admitted in evidence over defendant's objection. At the close of the case plaintiff moved for permission to withdraw the letter which was granted. *Held*, that the defendant suffered no injury from this proceeding; for if the letter was properly admitted, and the defendant desired that it remain in evidence, it had the right to offer it on its own behalf, which it neglected to do.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1047.*]

Parker, Vredenburg, Green, and Gray, JJ., dissenting.

(Syllabus by the Court.)

Error to Supreme Court.

Action by George H. Kinney against the Philadelphia Watch Case Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Gaskill & Gaskill, for plaintiff in error. Wilson, Carr & Stackhouse, for defendant in error.

BERGEN, J. The Weber Steel Concrete Chimney Company contracted to build a factory chimney for the Philadelphia Watch Case Company, the agreed price being \$4,500, of which \$1,500 was paid during construction; and this suit was brought to recover the residue, payment having been refused because, as defendant claims, the work had not been performed in substantial compliance with the contract. The plaintiff sues as assignee of the Weber Company. At the close of the plaintiff's case defendant moved for a direction in its favor for \$1,500, the amount paid on the contract price, upon the ground that the plaintiff had not shown that the contract had been performed or the chimney constructed in a "first-class and workmanlike manner," and also that the construction had not been approved and accepted by Dr. Drysdale, as defendant insists is required by the contract. This motion was refused, an exception taken, and error assigned thereon.

On the question of performance there was evidence from which a jury might properly infer that the work had been done in a first-class and workmanlike manner, substantially as required by the contract, and therefore a question of fact for the determination of a jury was presented. On the other point, viz., that the character of the work was subject to the approval of Dr. Drysdale, it appears that the Weber Company submitted a proposal and specifications containing a statement of the materials to be used and the character of the proposed work. Below the signature of the Weber Company to the proposal and specifications there appears the following: "Subject to the approval and acceptance of Dr. W. A. Drysdale"—and at the beginning thereof: "Approved August 17, '08. W. A. Drysdale." It is admitted that Dr. Drysdale did approve the proposal and specifications, and the record shows that the approval bears the same date as that on which the proposal was submitted. We are satisfied that the approval required related to the form, and not to the fulfillment, of the proposal and specifications. This view is supported by the fact that the approval as to form was obtained before the proposal was submitted, and also a part payment was made by the defendant without any approval of the work, as it is now contended by the defendant the contract required. In addition to this, the defendant, in a letter addressed to the Weber Company, dated December 8, 1906, said that, as a condition of acceptance, it "would require the chimney to be approved by an expert of our own selection," which would not be necessary if it had already contracted for the approval of Dr. Drysdale. The motion for direction was not renewed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

after the entire case was closed, and defendant relies upon the alleged error in refusing to take the case from the jury when the plaintiff rested. We find no error in the refusal to which the exceptions on this point are directed.

The defendant also assigns error on exceptions relating to the admission of expert testimony. We have carefully examined the proofs relating to the qualifications of the expert witnesses, and are of opinion that there was sufficient legal evidence to justify the finding of the trial court that the witnesses had the necessary experience to qualify them to give an expert opinion. The qualification of an expert is to be determined by the trial court as a question of fact, and its conclusion will not be disturbed on error, if there be legal evidence to support the finding that a witness has the necessary experience to qualify him to give opinion evidence. Mr. Justice Dixon, in speaking for this court in *Convery v. Conger*, 53 N. J. Law, 468-476, 22 Atl. 43, 549, regarding the exercise of such a discretion, quoted with approval from *Bacon v. Williams*, 13 Gray (Mass.) 525, that "this court would be slow to revise a ruling on such a question, unless the error was very plain and palpable."

Two letters were admitted in evidence over objection by the defendant—one dated February 7, 1907, which it is admitted was prior to, and the other April 26, 1907, after, the commencement of this suit. Both letters were written by the attorneys of the Weber Company to the defendant, but no objection to their admission was rested upon any lack of authority in the attorneys to act for the Weber Company in making the offer to repair, as expressed in the letters. The letter of February 7, 1907, has not been printed as a part of the case prepared by the plaintiff in error, and we have no knowledge of its contents beyond that disclosed by counsel when he offered it in evidence, which was that it contained an offer, on the part of the Weber Company, to repair any defects in the chimney which were pointed out, or to be pointed out, and a request that, if any existed, an opportunity be given to repair the same. The objection to its admission was that it was incompetent, immaterial, and irrelevant to the issue; but no objection was made that the contents of the letter was other than as stated, and if the defendant wished to rely upon any other matter it should have printed the exhibit as a part of the record. The case shows that the defendant had previously written to the Weber Company that the construction of the chimney was defective, and, if it should conclude to accept it, that it would not do so unless it was furnished with a bond to indemnify it against any loss it might sustain by reason of the chimney not being properly erected, and that it would in any event require the chimney to be approved by an expert of its own selection. In view of the

fact that the defendant had offered this letter in evidence, which contained a general complaint of the character of the work, we can see no reason why it was not competent for the plaintiff, in rebuttal, to show that it had notified the defendant that it would repair any defects that might be pointed out. Its contract required it to repair, free of charge, for a period of five years, any defective material or workmanship; and it was manifestly proper that it should have pointed out to it the defects complained of, and be afforded an opportunity to remedy them before the defendant was justified in tearing down and destroying the chimney, as it afterwards did.

In the letter of April 26, 1907, sent to defendant after suit was commenced, the Weber Company, after stating that, although its engineer had reported to it that the chimney conformed to the specifications, yet, as the defendant contended that the lower ring of the chimney was soft, and in consequence rendered unstable, offered to renew this section, and inquired whether the defendant was willing to permit the chimney company to replace the ring. After counsel had closed their argument to the jury the plaintiff asked permission to withdraw the letter, and to have the jury instructed that they should disregard it. This was permitted, and an exception taken to such ruling. If it be conceded that the admission of the letter was an error, it worked no injury to the defendant; for the same offer to repair was contained in the letter of February 7, 1907, and in addition to the offer it contained a notice that if the property was destroyed, which defendant threatened, it would be held liable for the loss which the Weber Company might sustain thereby. It appeared that defendant had taken down the chimney, after suit was brought and before the trial, in disregard of the notice. In offering to withdraw the letter from the consideration of the jury, the plaintiff was endeavoring to cure any error arising from its admission, a proceeding to which the defendant objected, upon the ground that, the letter having been admitted and read to the jury, it was entitled to have it remain as an exhibit in the cause, although it was, as it claims, irrelevant and immaterial. It is a sufficient answer to this objection to say that, if the defendant was injured or prejudiced by the withdrawal of the letter, it was within its discretion to immediately offer it on its own behalf, and, if the offer had been refused, an exception to such ruling could have been taken. The defendant did not do this, but chose to stand on the alleged erroneous ruling of the court in permitting the plaintiff to withdraw the letter. We are of opinion that the record discloses no error on this branch of the case.

Error was also assigned on that part of the charge to the jury which instructed them that the defendant was bound to afford the

plaintiff a reasonable opportunity to repair any defects, and if such defects could have been remedied within a reasonable time, and without loss to the defendant, it had no right to demolish the chimney without affording such opportunity. We find no error in this, for by the contract the Weber Company agreed to repair any defects, and certainly the defendant was bound to afford it an opportunity to do so within a reasonable time after they were discovered.

We have considered the other assignments of error presented for consideration, and do not find in any of them any legal justification for a reversal.

The judgment below is affirmed.

PARKER, VREDENBURGH, GREEN, and GRAY, JJ., dissent.

(76 N. J. L. 795)

BROWN et al. v. NEW JERSEY SHORT LINE R. CO. (two cases).

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

1. EVIDENCE (§ 546*) — OPINION EVIDENCE — VALUE OF LAND.

Upon the trial of issues embracing the market value of land taken under condemnation proceedings for the use of a railroad, it is within the discretion of the trial court to admit in evidence opinions of witnesses as experts upon such value, if it appears from their preliminary examination before the court, they have acquired some special knowledge of that subject from sales of other land when made under conditions disclosed in the following opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2363; Dec. Dig. § 546.*]

2. EMINENT DOMAIN (§ 201*)—EVIDENCE (§ 142*)—PROCEEDINGS TO CONDEMN—ADMISSIBILITY OF EVIDENCE.

The exclusion by the trial court of an offer in evidence of a map of the geological survey of New Jersey, where such offer is limited to the purpose of illustration only, does not constitute error; nor was it error for the court, acting within the range of its legal discretion in such matter, to reject offers to prove prices paid by the condemning company for other lands purchased by it (following Laing v. N. J. R. R. & C. Co., 54 N. J. Law, 576, 25 Atl. 409, 33 Am. St. Rep. 682).

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 540½; Dec. Dig. § 201.* Evidence, Cent. Dig. §§ 416-420; Dec. Dig. § 142.*] (Syllabus by the Court.)

Error to Circuit Court, Middlesex County.

Separate condemnation proceedings by the New Jersey Short Line Railroad Company against David A. Brown and others, and against Euphemia Brown and others. On appeal by the landowners to the circuit court from the awards of the commissioners, judgments were entered in their favor, and the railroad company brings error. Affirmed.

Linton Satterthwaite, for plaintiff in error.
Ephraim Cutter, for defendants in error.

VREDENBURGH, J. These two causes, tried below together, and argued by briefs before us, present the same questions for decision, and require but one opinion. The principal errors alleged by the railroad company, the plaintiff in error, relate to the conduct of the trial in the admission of certain opinion evidence of witnesses, offered by the appealing landowners, to prove the market value of the strip of land sought to be condemned for the uses of the company. In the exercise of the discretion vested in the trial judge he allowed certain witnesses to express before the jury, after preliminary examination of their fitness therein, their expert opinions of the value of this land. The undoubted rule of law regulating this judicial discretion is that, while it is very broad, it is not unlimited—to adopt the language of the courts of review in the cases cited below—unless this action of the trial court in deciding this preliminary question is “clearly shown to be erroneous in matter of law,” or, more precisely speaking, if there is “any legal evidence” to support such determination, it will not be deemed sufficient ground for reversal. *State v. Arthur*, 70 N. J. Law, 426, 57 Atl. 156; *Riley v. Camden and Trenton Ry. Co.*, 70 N. J. Law, 280, 57 Atl. 445; *Stephen’s Dig. of L. of Ev.* (1904) 277; *New Jersey Zinc Co. v. Lehigh Zinc Co.*, 59 N. J. Law, 180, 35 Atl. 915.

In deciding this narrow question it will answer, I think, all present necessities to consider the voluminous testimony of these witnesses in bulk, and not in detail, and only so far as it bears upon their special experience and knowledge, acquired through previous sales and purchases of other similar lands in the vicinity of the land in question. Whether such other lands were sufficiently like the land taken, and such sales were sufficiently near in point of time and vicinity to qualify opinion evidence as to value, was, under the authorities, also very largely within the range of the discretion of the trial court. These hold that a wide discretion should be given the trial judge in determining whether the conditions are such as readily to admit of reasonable comparison between the land taken and the lands so sold. *Laing v. United N. J. R. & C. Co.*, 54 N. J. Law, 576, 25 Atl. 409, 33 Am. St. Rep. 682; *Shattuck v. Stoneham Branch Railroad*, 6 Allen (Mass.) 115. Evidently, in view of these authorities, the most material circumstance forming this qualification of expert witnesses as to land values consists of the fact, either that they have themselves made sales or purchases of other similar lands in the neighborhood of the land in question within recent periods, or that they had knowledge of such sales by others. How recent the occurrence of such sales, in point of time, and how near in location, and how nearly similar in comparison must, of course, vary with

the circumstances of each case, and it is therefore impossible to define a general rule applicable to all cases. Yet, there are cases which afford some definite guide as to such time, distance, and similarity. For instance, in *Benham v. Dunbar*, reported in 103 Mass. 365, upon a petition, under a statute, for a jury to assess the value of a lot of land to be taken for public uses on an island in Boston Harbor, it was held, upon error, by the Massachusetts Supreme Court, that the admission of evidence of the price of other similar lands sold at different times from eight years to one year before, and distant from a half of mile to six miles, was not erroneous after the introduction of testimony (without objection) tending to show such similarity. An examination of the evidence in the case at bar shows, beyond room for controversy, I think, some knowledge, on the part of all these witnesses, of sales of lots and portions of lands similar to and in the immediate neighborhood of the condemned land. Turning to the evidence in the record here to ascertain with more precision the application of these general terms to the case in hand, we find that it appeared that all of these sold lots and parcels of land were located within a radius of, at most, two miles (and nearly all of them within a much less distance) from the land in question, and that in point of time the sales testified to had all taken place within a period of at most three years from the date of the giving of the testimony, except that in the instance given by the real estate agent, Ashley, a period of five or six years had intervened. It is therefore apparent that some special experience in real estate values had been acquired by each of these persons sufficient, we think, to justify the judicial action below, the weight of the opinion testimony being left, of course, to the admeasurement of the jury.

The other assigned errors demand but brief comment. The admission in evidence of the answer of the respondent's witness Kelly was, if erroneous, rendered harmless by the action of the court in striking the answer from the record, before the close of the trial, upon the motion of the counsel of the plaintiff in error. The exclusion by the trial court of the offer in evidence by the plaintiff in error of the map of the geological survey of New Jersey is next assigned for error. But that offer was expressly confined by counsel, to use his words, "for the purpose of illustration." It was not introduced to contradict any facts previously put in evidence by the defendants in error, nor to meet nor controvert any issue presented for trial, and its materiality, if any, to the controversy is not manifest. In the brief of counsel it is said that it was admissible to show "town boundaries," and "the relative location of Port Reading, Cartaret," etc., but of these statutory boundaries and general topographical conditions the court was

bound to take judicial notice without evidence.

The seventeenth and eighteenth assignments of error challenge the court's refusal to permit one of the witnesses, called by the railroad company, to state the prices paid by him, the president of the company, in acquiring certain rights of way for the company in the neighborhood of the land in question. In the case of *Laing v. United N. J. R. R. & C. Co.*, supra, it was held that testimony as to the price paid by the company to other owners for land and damages was inadmissible under the circumstances presented in that case, and it was there stated in the opinion of this court (page 579 of 54 N. J. Law, page 410 of 25 Atl. [33 Am. St. Rep. 682]) that testimony as to the price paid by the company to other owners of land is received only upon the idea that there is "substantial similarity" between the land in question and the other land previously acquired by the company, and that "the practice does not extend, and the rule should not be applied, to cases where the conditions are so dissimilar as not easily to admit of reasonable comparison," and that "much must be left to the discretion of the trial judge in the determination of the preliminary question whether the conditions are fairly comparable." Upon examining the record before us as to the conditions appearing before the trial court when it excluded this testimony, we find that the prices sought to be put in evidence were paid by the railroad company for these rights of way as a whole, nothing being made to appear in the testimony showing what part of the total sum paid was applicable to the value of the land taken, nor what portion thereof was assignable to the satisfaction of the damages resulting to the vendor's adjoining land from such taking. There was thus an entire absence of proof as to this important condition. The trial judge could not form, from the prices referred to, any reasonable test or comparison by which the value of the land alone could be compared with, or measured by, the value of the rights of way previously purchased by the company. The discretion of the trial court in excluding the proffered evidence was, we think, properly exercised.

The last contention is that the court erred in refusing to permit the same witness to detail an alleged conversation between him and one of the owners of the land in controversy. The pertinency of such conversation is, in the brief of counsel for the plaintiff in error, attempted to be explained thus: "The testimony of the witness shows that the defendant's right of way across the plaintiff's land was located where it was located in consequence of a conversation with the said William M. Brown, one of the plaintiffs, and the inference may well be drawn that the conversation would show some admission as to the damage done by the railroad, where the line was run after

this conversation with this one of the owners." We need but add that if such was the inferential purpose of the offer, namely, an admission of such plaintiff upon the subject of the damages done by the railroad's location to his other lands, the record fails to disclose that such purpose was expressed to the trial court. As the offer appears in the record, the conversation was immaterial, and was properly overruled.

For the reasons given, we find no error in the proceedings below, and affirm the judgment.

(76 N. J. L. 741)

ACKLEY v. WEST JERSEY & S. R. CO.
(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

1. RAILROADS (§ 275*)—INJURIES TO LICENSEE—EVIDENCE—NEGLIGENCE.

A notification, given by a railroad company to a consignee of freight, of its arrival, and that, if he desired to avoid the payment of demurrage, he should unload it within a fixed time, is an invitation to enter upon its premises for that purpose; but, where the car had been placed on a side track, along one side of which there was an unobstructed approach to the car, such invitation does not imply the right to place a timber on the car so that it projects over the adjacent main line track of the company and obstructs the use of that track, although the timber, brought upon the premises by the consignee, was used by him in removing the freight from the car to his wagon, and the railroad company is not liable for injuries caused by a train, moving on the main line, striking the timber, and thereby injuring one at work on the car being unloaded, where the company had no notice that the timber was so placed.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 873; Dec. Dig. § 275.*]

2. RAILROADS (§ 275*)—INJURIES TO LICENSEE.

The duty of exercising reasonable care which the company owes under such circumstances is only coextensive with the invitation, and it is incumbent upon the consignee to show that he was acting within the limit of the invitation as intended, by proof of some act or conduct by the company that affords a reasonable basis for the belief, on its part, that the invitation authorized him to create the situation, from which it is claimed the duty arises.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 873; Dec. Dig. § 275.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Charles S. Ackley against the West Jersey & Seashore Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Francis D. Weaver, for plaintiff in error.
Gaskill & Gaskill, for defendant in error.

BERGEN, J. The case made by the plaintiff was that the defendant company notified him that a car load of stone consigned to him had been received by it, and that he was required to unload it within a fixed time if he wished to avoid the payment of demurrage; that plaintiff, with his servants, went upon

the company's property for the purpose of unloading the cargo, and found that the car had been placed upon a side track parallel with the main line track, and that he was able to approach the opposite side of the car without obstruction, and he thereupon caused his wagon to be placed along that side of the car, and proceeded to remove the stone from the car to the wagon; that the stones were so heavy that they could not be taken from the car to the wagon without the use of a piece of timber, which plaintiff supplied from buildings he was erecting in the neighborhood. The timber was placed so as to reach from the car to the wagon, in order to shove the stone along the timber from the car into the wagon. The timber was 14 feet long, and was lying across the car when the plaintiff arrived there, about a half hour after the unloading had commenced, and he went upon the car to see the size of the stone. The car was a platform car without a cover, and the timber, as placed by plaintiff's servants, extended over the car towards the main line far enough to be struck by a car moving along the main track. While the timber was in this position, a shifting engine, moving on the main track, struck the plank with sufficient force to throw it against the plaintiff and injure him, to recover compensation for which this suit was brought. The defendant company had no notice that the timber had been so placed as to project over the main line, nor was any signal given by the defendant company that the engine was approaching. On this state of facts the trial court ordered a judgment of nonsuit, to review which this writ of error was issued. We think that the nonsuit was proper, and that the judgment under review should be affirmed.

The plaintiff was on defendant's premises by invitation, for the placing of the car upon the side track where it could be unloaded, and the notification to unload, was an invitation to go upon the defendant's premises for that purpose, and defendant owed to plaintiff a degree of care coextensive with it, but the extent of the invitation is the limit of defendant's duty in the premises, and the extent of such duty must be gathered by implication from the circumstances established by the undisputed testimony. We are asked in this case to infer that, because the plaintiff was invited to the defendant's premises to unload a car, such an invitation implied the right to obstruct the passage of trains along a track adjacent to the car being unloaded, with a timber which the plaintiff brought upon the premises for the purpose of moving the stone from the car to a wagon standing on the side of the car away from the main line. Mr. Justice Garrison, in speaking for this court in *Furey v. N. Y. C. & H. R. R. Co.*, 67 N. J. Law, 270, 51 Atl. 505, said: "Implied invitation, therefore, is a part of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

law of negligence by which an obligation to use reasonable care arises from the conduct of the parties. Its essence is that the defendant knew, or ought to have known, that something that he was doing, or permitting to be done, might give rise, in an ordinarily discerning mind, to a natural belief that he intended that to be done which his conduct had led the plaintiff to believe that he intended. It is not enough that the user believed that the use was intended. He must bring his belief home to the owner by pointing to some act or conduct of his that afforded a reasonable basis for such a belief." No inference can be drawn from the evidence in this case that the defendant knew, or ought to have known, that when it invited the plaintiff on its premises for the purpose of unloading the car, he would bring there a timber 14 feet in length, and so place it on the car as to project over it a sufficient distance to come in contact with trains passing along another track, and there is no evidence of any act or conduct of the defendant that afforded a reasonable basis for the claim that it had led the plaintiff to believe that it intended its invitation to go to that extent. Nor is there any evidence to support a reasonable inference that the plaintiff had any such belief.

The application of the rule always depends upon the particular facts of the case under consideration, for the owner's liability is only coextensive with his invitation, and it is incumbent upon the plaintiff to show that, at the time the injury was received, he was acting within the limit of his invitation, and that there was a reasonable basis for a belief, on the part of the inviter, that the invitation implied the right to create the situation under which it is claimed the rule becomes applicable. In this case the invitation was to go upon the premises, and, by necessary implication, with horses, wagons, and required appliances to unload the car on the side of it away from the main line, and the mere using of the main track, in the absence of any notification that, in carrying out the purpose of the invitation the plaintiff was about to infringe on that track, was no breach of the invitation given.

The judgment below should be affirmed.

(77 N. J. L. 523)

STATE v. HERRON.

(Court of Errors and Appeals of New Jersey.
Nov. 27, 1908.)

1. CRIMINAL LAW (§ 1134*)—APPEAL—REVIEW OF EVIDENCE.

Since the revision of Criminal Procedure Act (P. L. 1898, p. 915), § 136, when the entire record of the proceedings had upon the trial of a criminal cause is returned with the writ of error, the court is not authorized to review the evidence adduced upon trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1134.*]

2. CRIMINAL LAW (§ 1129*)—APPEAL—ASSIGNMENTS OF ERROR.

Under section 137 of the criminal procedure act (P. L. 1898, p. 915), of 1898, where the plaintiff in error elects to take up the entire record with his writ of error, he must specify the causes in the record relied upon for relief or reversal with sufficient precision to apprise the court and the counsel for the state of the injury of which he complains.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2957; Dec. Dig. § 1129.*]

3. CRIMINAL LAW (§ 570*)—INSANITY—INSTRUCTIONS.

In a criminal case where the defense is insanity, it is not error to refuse to charge that, if the evidence creates a reasonable doubt of the defendant's sanity, the jury must find the defendant not guilty on the ground of insanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1286; Dec. Dig. § 570.*]

4. CRIMINAL LAW (§ 741*)—INSTRUCTIONS—INSANITY AS DEFENSE.

In a criminal case where expert medical witnesses testify that the defendant is insane and no expert testimony is offered in rebuttal, it is not error to refuse to charge that their testimony stands uncontradicted or that the state had the right to rebut the expert testimony, but failed so to do.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1712, 1731; Dec. Dig. § 741.*]

5. CRIMINAL LAW (§ 1166½*)—TRIAL—COMMENTS ON EVIDENCE.

It is not a good cause for the reversal of a judgment in a criminal case under section 136 of the criminal procedure act (P. L. 1898, p. 915) that the trial judge commented or expressed an opinion upon the testimony, provided the facts in issue were submitted to the jury for its decision.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3125; Dec. Dig. § 1166½.*]

(Syllabus by the Court.)

Error to Court of Oyer and Terminer, Middlesex County.

Archibold Herron was convicted of murder, and brings error. Affirmed.

Charles T. Cowenhoven, for plaintiff in error. George Berdine, for the State.

SWAYZE, J. The plaintiff in error was convicted of murder in the first degree, and has elected to bring up the entire record under section 136 of the criminal procedure act (P. L. 1898, p. 915). His counsel in the argument of the case urged a reversal upon the ground that the evidence must leave a reasonable doubt of the defendant's guilt in every considerate mind, and relied upon our opinion in *Kohl v. State*, 59 N. J. Law, 445, 36 Atl. 931, 37 N. E. 73. That case, however, was decided under the act of 1894 (1 Gen. St. 1895, p. 1154, § 170). Under that act the appellate court was required to order a new trial if it appears in the record that the plaintiff in error suffered manifest wrong or injury upon the evidence adduced upon the trial. This act now appears as section 136 of the revised criminal procedure act (P. L. 1898, p. 915), but the revisers were careful to omit the provision for a new trial where

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the injury arose upon the evidence adduced upon the trial below, and we have decided in a case arising under the revised act that we are no longer required to review the whole evidence. *State v. Jagers*, 71 N. J. Law, 281, 58 Atl. 1014, 108 Am. St. Rep. 746. Our right to review such injuries arose wholly out of this statutory provision, and with its repeal we are no longer authorized to review for such a cause.

Much of the argument on behalf of the plaintiff in error was directed to the admission and rejection of evidence. These alleged errors are supposed to be covered by general reasons that the judge rejected legal evidence and admitted illegal evidence. The criminal procedure act by section 137, which was inserted in the act by the revisers in 1898, requires that in all cases where the plaintiff in error shall elect to take up the entire record with his writ of error he shall specify the causes in the record relied upon for relief or reversal, and shall serve a copy of the causes so relied upon on the Attorney General or prosecutor of the pleas. The object of this section is plain. It was to apprise the court and the counsel for the state of the cause for reversal with sufficient precision to make the point intelligible. It should, therefore, where the objection is to the admission or rejection of evidence, point out the precise evidence which was erroneously admitted and the precise offer which was erroneously rejected. If this is not done, it becomes incumbent upon the counsel for the state and the court to examine the whole of a record, which may be very voluminous, and the object of the act is not achieved. We think the causes as assigned in this case are too general to avail the plaintiff in error. We have, however, in *favorem vitæ* examined the particular points of which complaint is made in the brief for the plaintiff in error, and do not find that he has suffered manifest wrong or injury either in the admission or rejection of this testimony.

It was argued with apparent confidence that the court should have charged that, if the evidence of the experts and all the witnesses created a reasonable doubt of the defendant's sanity, then the jury must find the defendant not guilty on the ground of insanity. The law is settled to the contrary. *Graves v. State*, 45 N. J. Law, 347, 46 Am. Rep. 778; *Winters v. State*, 61 N. J. Law, 613, 41 Atl. 220.

The defendant at the trial, in order to prove his insanity, produced two medical witnesses, who testified that he was insane. This testimony was not met by medical testimony on the part of the state, and it is insisted that the court should have charged that their testimony stood uncontradicted, and that the state had a right to rebut it, but failed so to do. The trial judge carefully reviewed the testimony in this respect,

and correctly stated the rule of law, leaving it to the jury to decide as to the mental responsibility of the prisoner. This, we think, was all that he was required to do. The request presented no legal rule and amounted to no more than a request that the court should comment upon the absence of medical testimony on the part of the state. The character of the comments which were made upon the testimony was within the discretion of the trial judge, and we do not find anything to indicate that he abused that discretion.

The stress of the argument for the plaintiff in error was directed to the comments made by the trial judge upon the testimony, particularly the testimony of the medical experts as to the prisoner's mental condition. It is enough to say that these comments were within the latitude allowed by our decisions. We think his comments were justified by what was said by Chief Justice Hornblower in *State v. Spencer*, 21 N. J. Law, 196, 208, and by this court in *Winters v. State*, 61 N. J. Law, 613, 617, 41 Atl. 220. The facts in issue as to the insanity of the prisoner and as to his guilt upon the evidence were fairly left to the jury. Where that is done it is the province of the trial judge to comment upon the evidence. *Donnelly v. State*, 26 N. J. Law, 463; *Engle v. State*, 50 N. J. Law, 272, 13 Atl. 604; *State v. Hummer*, 73 N. J. Law, 714, 65 Atl. 249.

A careful examination of the whole record in the case fails to show that the plaintiff in error has suffered manifest wrong or injury in any of the respects which we are required to consider by the 136th section of the criminal procedure act; and the judgment must be affirmed.

(76 N. J. L. 330)

UNITED NEW JERSEY R. & CANAL CO.
et al. v. MAYOR, ETC., OF CITY
OF NEWARK.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

TAXATION (§ 317*)—RAILROADS—STATUTES—
VALIDITY.

Since Act May 18, 1906 (P. L. p. 571), providing that taxes assessed on railroad and canal property referred to in subdivision 2 of section 3 of the railroad taxation act of 1888 (P. L. p. 269) shall be assessed in each taxing district, etc., is unconstitutional, such property is taxable by the state board of assessors, as provided by the act of 1888.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 317.*]

Error to Supreme Court.

Certiorari by the United New Jersey Railroad & Canal Company and others to determine the proper mode of taxing certain property in the city of Newark. There was a judgment of the Supreme Court (67 Atl. 1075) affirming the tax imposed by the city of Newark, and petitioners bring error. Reversed and rendered.

Vredenburg, Wall & Carey, for plaintiffs in error. Francis Child, Jr., for the city of Newark. Robert H. McCarter, Atty. Gen., for the State.

PER CURIAM. This writ of error brings up the determination of the Supreme Court in a matter of double taxation of real estate for the year 1906. The property in question, known as lot No. 10 in block No. 152, on the assessment map of the city of Newark, is for the most part covered by the passenger station of the Pennsylvania Railroad at Market-street, Newark, and the platform appurtenant thereto. The remainder, about one quarter of the plot, is occupied by railroad tracks. The Supreme Court, whose opinion is reported in 67 Atl. 1075, found as a fact that the tract in question formed no part of the roadbed of the railroad, but was what is known for purposes of railroad taxation as "second class" property which before the passage of the supplement (P. L. 1906, p. 571) to the railroad taxation act of 1888 (Act March 27, 1888 [P. L. p. 269]) was taxable by the state board of assessors; and having held that supplement constitutional (Central R. R. Co. v. State Board of Assessors [N. J. Sup.] 67 Atl. 672), and finding a tax to have been imposed on the tract, both by the state board of assessors and by the city of Newark, for the year 1906, adjudged that the tax imposed by the city of Newark was lawful and should stand, and directed that assessed by the state board of assessors to be set aside.

This court having reversed the decision of the Supreme Court as to the supplement of 1906, and having declared it unconstitutional, it follows that the reverse course is proper with regard to the tax under review, which should have been assessed and collected under the law as it stood in the absence of Supplement 1906, p. 571, viz., by the state board of assessors, and not by the city of Newark. By consent of counsel let the judgment of the Supreme Court be reversed, without costs, and in lieu thereof a judgment entered affirming the tax levied by the state board and setting aside that imposed by the city of Newark.

(76 N. J. L. 832)

NEW YORK BAY R. CO. v. MAYOR, ETC., OF CITY OF NEWARK.

(Court of Errors and Appeals of New Jersey. Nov. 16, 1908.)

TAXATION (§ 317*)—RAILROADS—STATUTES—VALIDITY.

Since Act May 18, 1906 (P. L. p. 571), providing that taxes assessed on railroad and canal property referred to in subdivision 2 of section 3 of the act of March 27, 1888 (P. L. p. 271) shall be assessed in each taxing district of the state, etc., is unconstitutional, such property is

taxable by the state board of assessors as provided by the act of 1888.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 317.*]

Error to Supreme Court.

Application of the New York Bay Railroad Company for a summary determination as to taxation of lands in the city of Newark. There was a judgment (67 Atl. 1049) reducing the assessment in part and sustaining it in part, and the applicant brings error. Affirmed in part, and reversed and rendered in part.

Vredenburg, Wall & Carey, for plaintiff in error. Francis Child, Jr., for city of Newark. Robert H. McCarter, Atty. Gen., for the State.

PER CURIAM. This case is similar in principle to United New Jersey Railroad & Canal Company v. City of Newark, 71 Atl. 275, and submitted with it. The controversy in the Supreme Court, as will appear by the opinion of that court, reported in 67 Atl. 1049, was whether the property in question was taxable as "main stem" or "second class" property. The Supreme Court found that part was main stem and part second class; and, applying to the latter the supplement of act May 18, 1906 (P. L. p. 571), sustained a tax imposed on it by the city of Newark for 1906, and set aside a corresponding tax levied by the state board of assessors, reserving for further proof the question whether a small part was main stem or not.

The adjudication by this court of the unconstitutionality of the supplement referred to leaves all the property in question taxable by the state board, so that, as to that part adjudged taxable by the city of Newark, the judgment of the Supreme Court is reversed, by consent of counsel, without costs, and judgment may be entered setting aside the tax assessed by the city of Newark, and affirming that imposed by the state board.

(76 N. J. L. 708)

BUTLER v. EASTON & A. R. CO. et al.

(Court of Errors and Appeals of New Jersey. Nov. 16, 1908.)

1. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—NEGLIGENCE.

Where the evidence tends to show that the defendant left standing in a public highway, unnecessarily and for an unreasonable time, an object naturally calculated to frighten horses of ordinary gentleness, at which the ordinarily gentle horse of the plaintiff took fright, whereby the plaintiff was injured, the question of the negligence of the defendant is for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1155; Dec. Dig. § 350.*]

2. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

The evidence tended to show that the plaintiff was driving an ordinarily gentle horse upon a public highway; that, on approaching a railroad crossing where a locomotive engine and

tender had been left standing partly in the highway, he waited at a reasonable distance and for a reasonable time to see if the engine would move on, or if his horse would take fright; that, having ascertained that the engine would not move and that his horse was not frightened, he drove on along the traveled portion of the highway. *Held*, that the question of his contributory negligence should have been submitted to the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1186; Dec. Dig. § 350.*]

Gummere, C. J., and Garrison, Voorhees, Vroom, Green, and Gray, JJ., dissenting.
(Syllabus by the Court.)

Error to Supreme Court.

Action by William C. Butler against the Easton & Amboy Railroad Company and the Lehigh Valley Railroad Company. Judgment for defendants, and plaintiff brings error. Reversed.

William C. Gebhardt, for plaintiff in error.
H. B. Herr, for defendants in error.

TRENCHARD, J. This writ of error brings under review a judgment of the Supreme Court entered on a nonsuit at the Hunterdon circuit. The action was brought by William C. Butler to recover for injuries resulting from being thrown from his wagon by reason of his horse taking fright and shying at a locomotive engine. Since other verdicts in this case were under review in the Supreme Court (72 N. J. Law, 27, 60 Atl. 218, and 74 N. J. Law, 245, 65 Atl. 872), the plaintiff has amended his declaration. He now bases his right to recover compensation for his injuries upon the following averment in his amended declaration: "That the said defendants, by their servants, then and there unlawfully, carelessly, negligently, and unnecessarily permitted and allowed the said locomotive engine and tender to stand near, adjacent to and upon the said public highway, which said locomotive engine and tender was of great size, and of such size, shape, and color as was naturally calculated to frighten horses of ordinary gentleness that were upon said highway." At the close of the plaintiff's case the learned trial judge granted a nonsuit, and this writ of error raises the question whether in so doing there was error.

The evidence when the nonsuit was directed would have justified the jury in finding the following matters of fact: Where the tracks of the Easton & Amboy Railroad Company at Landsdown cross a public road at about a right angle, a locomotive engine, with tender attached, belonging to the Lehigh Valley Railroad Company, was standing on the track and partly within the limits of the public highway. The engine was a new, large "hog" locomotive, and was just out of the shops "newly painted and shiny, and smelled of paint." It was in charge of an employé of the Lehigh Valley Company. The

plaintiff approached the crossing seated in a one-horse wagon. His horse was ordinarily gentle, and was being driven by the plaintiff's son, who occupied a seat in the wagon beside the plaintiff. When some distance from the locomotive, and because of its presence, the horse was stopped for five or ten minutes to wait for the engine to get out of the way, or to see if the horse would take fright. The engine not moving, the horse, which had shown no signs of fright, was driven along the traveled part of the road past the rear end of the tender and locomotive. When the horse reached the crossing, it took fright, and ran away, throwing out and injuring the plaintiff. At the time of the accident the engine was undergoing repairs, and showed no signs of steam or smoke. It had been standing there about a half an hour. The repairs were unnecessarily being made at the crossing. It appeared that they could have been made just as conveniently several hundred feet away from the public highway. The plaintiff seems to have been nonsuited upon the theory that there was no evidence of the negligence of the defendants, and that the plaintiff was guilty of contributory negligence. We think both questions should have been submitted to the jury.

The general rule is that an object in the public highway of such a character that it is naturally calculated to frighten horses of ordinary gentleness may constitute a nuisance. *Elliott on Roads* (2d Ed.) § 649. Liability for injuries resulting therefrom has been recognized by our Supreme Court in *Ayars v. Camden & Sub. Ry. Co.*, 63 N. J. Law, 416, 43 Atl. 678, and in this court in *McCann v. Consolidated Traction Co.*, 59 N. J. Law, 481, 36 Atl. 888, 38 L. R. A. 236. In *Wharton's Law of Negligence*, § 107, it is said that inasmuch as it is neither unnatural nor unusual for horses, when traveling on a road, to become frightened at extraordinary noises or sights, so, therefore, he who upon a road thus traveled by horses makes noises or exhibits such spectacles is liable for any damages caused by their taking fright. The same author, at section 836, notes the distinction between "necessary and unnecessary instruments of alarm," and says that the former—such for instance as a steam whistle on a locomotive or the like—being essential to important industries, are tacitly, if not expressly, licensed by the state, and the necessary use of them is not per se negligence, even though animals should be frightened thereby and injury ensue, though it is otherwise he declares when the use is not necessary to the industry. In accordance with the principle thus laid down by the text-writer, many cases, besides those referred to, have been decided. See *Jones v. Housatonic R. Co.*, 107 Mass. 281; *Bussan v. Milwaukee, etc., R. Co.*, 56 Wis. 325, 14 N. W. 452; *Denver, etc., R. Co. v. Robbins*, 2 Colo. App. 318,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

80 Pac. 261; Atchison, etc., R. Co. v. Morrow, 4 Kan. App. 199, 45 Pac. 956; Kyne v. Wilmington, etc., R. Co., 8 Houst. (Del.) 922, 14 Atl. 922; Myers v. Richmond, etc., R. Co., 87 N. C. 345. An examination of the cited cases shows that it is negligence for a railroad company to leave standing in a public highway, unnecessarily and for an unreasonable time, an object naturally calculated to frighten horses of ordinary gentleness. We have pointed out that in the present case the evidence tended to show that the engine and tender were left standing on the public highway for a half an hour unnecessarily.

Under these circumstances, the question of the character of the object, as well as the urgency of the occasion and the reasonableness of the use, was for the jury, and hence the negligence of the defendants should have been submitted to them. *McCann v. Consolidated Traction Co.*, 59 N. J. Law, 481, 36 Atl. 888, 38 L. R. A. 236; *Ayars v. Camden & Suburban Ry. Co.*, 63 N. J. Law, 416, 43 Atl. 678; *Tompkins v. North Hudson Ry. Co.*, 63 N. J. Law, 322, 43 Atl. 885; *Johnston v. N. Y. & L. B. R. R. Co.*, 65 N. J. Law, 421, 47 Atl. 586; *Esler v. Camden & Suburban Ry. Co.*, 71 N. J. Law, 180, 58 Atl. 113; *Mumma v. Easton & Amboy R. R. Co.*, 73 N. J. Law, 653, 65 Atl. 208. The alleged contributory negligence of the plaintiff was also a question for the jury. The fact that the plaintiff might have taken another and more inconvenient road is immaterial. He was entitled to travel the public highway in question. To hold otherwise would permit a railroad company to exclude such travelers from the highways. We have pointed out that the jury was justified in finding that the plaintiff was driving an ordinarily gentle horse; that he waited at a reasonable distance for a reasonable time to see if the locomotive would move on or if his horse would take fright. When it appeared that the locomotive was not going to move, and that his horse was not frightened, the plaintiff drove on. Under these circumstances, it cannot be said as a matter of law that the danger was so imminent and threatening that a reasonably prudent man would not assume the hazard of encountering it. It will not do to say that, if he did not anticipate the fright of the horse, neither could the defendants. They were the original wrongdoers, and were bound to anticipate any result that might reasonably be anticipated. We have already said that the evidence tended to show that the engineer in charge of the locomotive was in the employ of the Lehigh Valley Company, and that the railroad was operated by the Easton & Amboy Company. It was therefore for the jury to say whether either or both defendants were liable.

The nonsuit not being justified, the judgment under review should be reversed, and a venire de novo awarded.

(76 N. J. L. 608)

ATKINSON v. NEW YORK TRANSFER CO.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1908.)

1. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—PREJUDICIAL EFFECT.

An erroneous instruction, prejudicial only to plaintiff, is not ground for reversal on defendant's appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

2. CARRIERS (§ 150*)—CARRIAGE OF GOODS—LIMITATION OF LIABILITY—NEGLIGENCE.

A common carrier cannot by contract exempt itself from liability for losses caused by its own or its servants' negligence; such contract being contrary to public policy, as tending to induce want of care by the carrier in the performance of its duties.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 654; Dec. Dig. § 150.*]

3. CARRIERS (§ 158*)—CARRIAGE OF GOODS—LIMITATION OF LIABILITY—LIMITATION AS TO AMOUNT—FIXING OF VALUE.

Since a carrier is entitled to compensation in proportion to the value of the goods shipped and the consequent risk assumed, it may stipulate with the shipper as to the value of the goods, and contract to limit its liability to the amount fixed; such contract not being opposed to public policy.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 663; Dec. Dig. § 158.*]

4. APPEAL AND ERROR (§ 852*)—REVIEW—QUESTIONS CONSIDERED.

In an action against a carrier for the value of goods shipped, defendant claiming that plaintiff could only recover the amount fixed in the bill of lading, whether the shipper, after accepting the bill of lading without dissent, could afterwards assert ignorance of its contents need not be determined, where the case was tried below on the theory that the shipper was not bound, even if she knew of the limitation in the bill of lading, unless she assented thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3402; Dec. Dig. § 852.*]

5. CARRIERS (§ 137*)—CARRIAGE OF GOODS—LIMITATIONS ON LIABILITY AS GROUND OF DEFENSE—INSTRUCTIONS.

In an action against a carrier for the value of goods lost in transit, where the bill of lading recited that the charge was based upon a valuation not exceeding \$100, and provided that the carrier should not be liable for loss by negligence or otherwise in excess of that amount, an instruction that, even if the shipper knew of the limitation in the bill of lading, the carrier would still be liable for the full value of the goods, unless the shipper assented to the provision in the bill of lading, in effect instructed that a shipper knowing that the transportation charge is based upon a value below the actual value of the goods, and that the shipping receipt limited the carrier's liability to that value, may accept the receipt in silence, and afterwards deny his assent thereto, and recover the full value of the goods, and was erroneous.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 594; Dec. Dig. § 137.*]

6. CARRIERS (§ 158*)—CARRIAGE OF GOODS—LIMITATIONS OF AMOUNT OF LIABILITY—LIMITATION WHERE VALUE IS DISCLOSED.

Where a shipper fraudulently misrepresents to the carrier the value of the goods consigned, he cannot claim full indemnity, nor can he claim their full value if he knowingly receives a bill of lading containing a contract fixing the value of the goods and limiting the carrier's liability

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to such value, since the carrier may infer from the shipper's silence that the value fixed is proper, for the purpose of determining the carrier's liability.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 708; Dec. Dig. § 138.*]

Error to Supreme Court.

Action by Harriet Atkinson against the New York Transfer Company. Judgment for plaintiff, and defendant brings error. Reversed.

George Holmes and William D. Edwards, for plaintiff in error. Francis V. Dobbins, for defendant in error.

GUMMERE, C. J. This action was brought by Mrs. Atkinson to recover damages from the defendant company for the loss, through its negligence, of a trunk and contents, intrusted by her to it for shipment from Ocean Grove in this state, to her home in Brooklyn, N. Y. At the trial the defendant company admitted liability, but contended that the amount of the recovery against it should be limited to \$100, notwithstanding the fact that the value of the property lost considerably exceeded that sum. This contention was rested upon the fact that, at the time it received the trunk, the company delivered to the plaintiff a bill of lading, which recited, among other things, that its charge for the transportation thereof was based upon a gross valuation not exceeding \$100, and contained an express agreement between the shipper and the carrier that the latter should not be liable, in case of loss or damage by reason of negligence, or otherwise, for an amount exceeding that sum, and the further fact that the plaintiff received the bill of lading without expressing any dissent from its provisions. The trial court, in its instruction to the jury as to the effect of the delivery of this bill of lading to the plaintiff, stated that if "it was presented to the plaintiff, and received by her as a contract, she would not be entitled to recover more than \$100, but that, if she did not know that it was offered to her as a contract, and received it without knowing its contents, supposing that it was simply given to her as a receipt in order to enable her to trace her property, then the limitation in it would not apply, and that, even if she knew that the rate charged for the trunk was based upon a valuation of \$100, still the limitation would not obtain, and the company would still be liable for the full value of the goods, in the absence of any assent by her to a restriction of that character." The court then proceeded as follows: "The question would therefore seem to be whether Mrs. Atkinson, when this receipt was handed to her, and she took it, assented to it as an agreement between her and the company, or whether she took it as a mere receipt. In order to constitute assent there must be knowledge, and if she did

not know of these words, did not know what the company claimed it was, then there could be no valid assent. If she did know, still it would remain a question as to whether she assented to it as a contract." The jury returned a verdict in favor of the plaintiff for \$300, the full amount of the property lost, and the defendant now assigns error upon this excerpt from the charge.

The first question which the case presents for consideration is whether a contract, which fixes the value of goods shipped at a price less than their real worth, and limits the liability of the carrier for a loss resulting from its own negligence to the value thus fixed, is valid; for, if it is not, then the instruction complained of, so far as it was erroneous, was harmful to the plaintiff, not to the defendant, and affords no ground for reversing the judgment. We fully concur in the soundness of the generally recognized rule that a common carrier cannot contract for exemption from liability for losses resulting from his own negligence, or that of his servants. But this rule does not, we think, prevent the carrier from stipulating with the shipper as to the value of the property intrusted to it, and contracting that its liability shall be limited to the amount so stipulated. The carrier is entitled to be compensated for his services in proportion to the value of the article consigned and the consequent risk assumed by him. The shipper is entitled to take the benefit of a lower rate, if he desires to do so, by placing a value upon his goods, for the purpose of their shipment, below their actual worth. Such a stipulation stands as if the carrier had asked the value of the goods shipped, and had been told by the consignor that it was the sum named in the contract. The reason why contracts exempting the carrier from liability for loss resulting from his own negligence are held to be invalid is that they are against public policy, because their natural effect is to induce want of care on the part of the carrier in the performance of his duties. But a stipulation as to the value of the goods to be shipped has no such tendency. It exacts from the carrier the measure of care due to the value agreed on, and is, we think, a proper and lawful mode of securing a due proportion between the amount for which the carrier can be held responsible and the charges received by it as a consideration for the safe transportation of the goods shipped. This is the view expressed by the Supreme Court of the United States in *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 340, 5 Sup. Ct. 151, 28 L. Ed. 717, and is that adopted in many of our sister states. 5 Am. & Eng. Ency. 328, and cases cited; 6 Cyc. pp. 402, 403, and notes.

Having determined that a contract between a carrier and shipper which fixes the value of the goods shipped at a sum less than their

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

real worth, and limits the liability of the carrier, in case of their loss, to the amount so fixed, is binding upon the shipper, we take up the consideration of the court's instruction to the jury in this case. It is insisted, on behalf of the plaintiff in error, that Mrs. Atkinson, by receiving the bill of lading, became bound by its provisions; that the mere acceptance of this paper without any indication of dissent from its terms bound her as fully as if she had expressly assented to them, and that she could not afterward deprive the plaintiff in error of the protection of its provisions by asserting that she was ignorant of its contents. We are not required to pass upon the soundness of this proposition advanced on behalf of the plaintiff in error, for the trial court in its instruction to the jury did not make the plaintiff's ignorance of the contents of the paper which was delivered to her the test of her liability under it. The jury were told that, even if she knew that the rate charged for the transportation of her trunk was based upon a value of \$100 the company would still be liable for the full value of the goods, in the absence of any assent by her to the restriction of liability. And, further, that even if she knew of the words (that is, the words contained in the paper limiting the carrier's liability), still it would remain a question as to whether she assented to the bill of lading as a contract. The purport of this instruction, as it seems to us, is that a shipper, who knows that the charge made by the carrier for the transporting of his goods is based upon a value placed upon them which is below their actual worth, that this value is stated in the receipt which is given to him by the carrier, and that the receipt contains a stipulation limiting the carrier's liability to the amount thus stated, may accept the receipt in silence, and afterwards, in case the goods are lost, may deny that he assented to the valuation which was made the basis of the carrier's charge, may repudiate the limitation of liability, and recover the full amount of his loss.

It is held by the best-considered authorities that, if the shipper is guilty of fraud or imposition, by misrepresenting to the carrier the value of the goods consigned to him, he destroys his claim to full indemnity, and the reason of it is that by his act he has deprived the carrier of his right to be compensated in proportion to the value of the goods and the consequent risk assumed by him; that what he has done has tended to lessen the vigilance which the carrier would otherwise have exercised for the safety of the goods. 2 Kent's Com. 603, and cases cited. The soundness of this principle seems to us to be beyond controversy, and we are unable to see any distinction in law between an express misrepresentation of value made by the shipper to the carrier and a statement

made by the carrier to the shipper as to the rate charged and the liability assumed by him, based upon the value of the goods, being a sum named by him, and the reception of that statement by the shipper in silence, so far as the determination of the rights of the respective parties is concerned. The carrier has a right to infer from the silence of the shipper that his valuation is accepted by the latter as accurate, not only for the purpose of fixing transportation charges, but also for the purpose of determining the amount of liability in case of loss. Having taken advantage of the lower rate, based upon the value fixed by the carrier, the shipper is estopped from afterwards asserting that the value is greater. To permit him to reap the benefit of a lower rate in case there is no loss, and to repudiate the valuation upon which that rate was based if there be a loss, would be repugnant to every principle of fair play.

We are of opinion that the instruction complained of was erroneous, and that, for this reason, the judgment under review must be reversed.

(77 N. J. L. 584)

JORDAN v. REED.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1908.)

1. TRIAL (§ 109*)—OPENING—STATEMENT—SCOPE AND EFFECT.

A motion for a nonsuit on the opening of a case to the court and jury is not usual, but is permissible if the statement of counsel, by its omissions or admissions, renders it clearly evident either that no case can be made out, or that a recovery is precluded. The rule applied.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 109.*]

2. PLEADING (§ 387*)—CONTRACTS (§ 346*)—APPEAL AND ERROR (§ 888*)—ISSUES, PROOF, AND VARIANCE.

(a) Under the Practice Act (P. L. 1903, p. 571) § 125, there can be permitted no substantial variance between the case declared upon and the case proven, but a recovery must be *secundum allegato et probata*.

(b) When a declaration sets up a contract growing out of commercial paper and entered into by the defendant alone, proof of a contract of a different nature entered into by the defendant and others will not sustain the declaration unamended, for thereby the defendant would be denied an opportunity to plead the nonjoinder in abatement. Neither can the declaration be amended on error to conform to the proofs, because thereby the defendant would be bound by a verdict upon a matter which he had not expected or intended to try.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1300; Dec. Dig. § 387; Contracts, Cent. Dig. § 1740; Dec. Dig. § 346; Appeal and Error, Cent. Dig. § 3619; Dec. Dig. § 888.*]

3. BILLS AND NOTES (§ 422*)—PRESENTMENT AND NOTICE OF DISHONOR—WAIVER.

Evidence to the effect (a) that a defendant and others have received property of the maker of a note on an agreement to take care of the note at maturity, or (b) that, after maturity, a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant has admitted responsibility upon a note, which is shared by others with himself, will not support an action against such defendant as indorser alone, on the theory that, by the receiving of such property or the making of such admissions, he has waived presentment and notice of dishonor of the note, or the holder stands excused therefrom.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1203; Dec. Dig. § 422.*]

4. TRIAL (§ 170*)—DIRECTION OF VERDICT.

When the plaintiff in an action might lawfully have been nonsuited at the trial, if such motion had been made, the direction of a verdict in his favor, on the same evidence, is erroneous, and cannot be upheld.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 390; Dec. Dig. § 170.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Albert M. Jordan against H. Phelps Reed, executor of the will of I. Whilden Moore, deceased. Judgment for plaintiff, and defendant brings error. Reversed, and a venire de novo awarded.

Originally this was an action upon contract brought in the Supreme Court by Albert M. Jordan, now defendant in error, against I. Whilden Moore, the testator of the present plaintiff in error.

The declaration filed is unusual in form and in substance, but may be said to set up a cause of action of the nature following: Whereas the Northside Land Company had made its promissory note, in writing, bearing date on June 11, A. D. 1903, and thereby promised to pay to the order of the La Charge Dredging Company the sum of \$6,000, one year after date, at the Second National Bank of Atlantic City, value received, thereupon, in consideration of a credit of \$6,000 then and there made by the payee in said note named to the maker thereof, and of a like credit then and there made by the plaintiff, Albert M. Jordan, to the said payee, he, the said I. Whilden Moore, then and there being the business manager of the said corporation maker, promised and undertook "absolutely to pay him the said note at its maturity, by indorsing and delivering the same to the plaintiff, and waive and forego" presentment for payment and notice of dishonor of the said note. Nevertheless the said I. Whilden Moore did not, neither did any other person, pay to the plaintiff the sum of money in said note specified or any part thereof, to his damage, etc. The said I. Whilden Moore interposed a plea of the general issue, and similiter was added.

After issue joined, the said I. Whilden Moore died testate, and his death was duly suggested upon the record, and the cause was continued against H. Phelps Reed as sole executor of his last will and testament. The issue was brought down for trial at the Atlantic circuit before one of the circuit judges duly assigned and a jury.

The evidence offered by the plaintiff was to

the effect following: The note in suit was made by the Northside Land Company, and was indorsed by I. Whilden Moore, the original defendant. It had also been indorsed by William I. Garrison, but the name of the latter was erased. The note had come into the possession of Albert M. Jordan, the plaintiff, after the indorsement by Moore, but when, why, or how was not made clear. The Northside Land Company was the owner of lands in Atlantic county, and intended to improve the same for sale in building lots. The La Charge Dredging Company was employed to fill in these lots in order to fit them for building. I. Whilden Moore was interested in the land company's project both as a shareholder and manager, and had charge of the contract with the dredging company. After the making of the note in suit, and while it was outstanding, the land company having liabilities (inter alia. to the dredging company) which it was unable to meet, Moore proposed to the land company and the holders of shares therein that the land company should turn over its lands to himself and some other gentlemen, if a consideration therefor could be agreed upon. The sum of \$51,400 was at length agreed upon, including the value of the outstanding capital stock, and all of the indebtedness of the land company, and, as part of such indebtedness, the particular note in suit. In these negotiations Moore was the active spirit on behalf of himself and his three associates, and he promised that the debts and the value of the stock should be paid. These negotiations resulted in a sale of the company's lands, and the making of a deed, dated February 17, 1904, between the Northside Land Company, and John Myers, I. Whilden Moore, Charles R. Myers, and Robert Moore, whereby, for the consideration above mentioned, all of the company's lands were assured to them. After the making of this conveyance and before the bringing of the action, Moore acknowledged his indorsement of the note to one of the witnesses, but at the same time declared that he did not wish to pay the note until he could get Charles and John Myers and Robert Moore to join him in the payment, and the statement of Moore was couched in words which at least tended to warrant an inference that in his view their common interest and concern in the property, rights, and obligations of the land company bound them to take care of the note. No evidence was offered on the part of the defendant. There was a motion for a nonsuit on the plaintiff's opening, which was refused, and an exception was taken. There were sundry exceptions to rulings of the trial judge in admitting evidence against the defendant's objection. There was also a motion to direct a verdict for the defendant, which was refused; and no exception ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pears to have been sealed thereon. At the close of the case the trial judge directed a verdict for the plaintiff for the amount of the note, with interest; and an exception was sealed upon such direction.

A verdict having been found agreeably to the direction, judgment was entered thereon in the Supreme Court, and such judgment has been removed into this court on writ of error. Error is specially assigned in that the trial judge refused a nonsuit on the plaintiff's opening, in that the trial judge admitted, over objection, evidence which was at variance with the declaration, in that the trial judge admitted, over objection, evidence which was incompetent and illegal, and in that the trial judge directed a verdict for the plaintiff contrary to law.

Clarence L. Cole (E. A. Armstrong, on the brief), for plaintiff in error.

(1) The declaration not showing a cause of action, there should have been a nonsuit on the plaintiff's opening.

(2) If it be assumed that a legal cause of action is set up in the declaration, there was no proof sufficient to support it. The proofs offered by the plaintiff below were at variance with the declaration.

(3) So far as the evidence made out any case against the defendant below. It placed Moore, the defendant's testator, in the position of undertaking orally to pay the debt of another, the land company.

(4) Irrelevant evidence was admitted, to the injury of the defendant below.

(5) So far as the proofs established any contract, it was one made by four jointly, and not by Moore alone.

(6) There should have been no direction of a verdict for the plaintiff below. Most favorably to the plaintiff, it should have been held that there was a jury question.

John J. Crandall, for defendant in error.

Under the declaration and proofs a primary undertaking by Moore to pay the note was established. If not, the facts establish the liability of Moore, as an indorser, who, by getting property of the maker into his hands, had waived presentment and notice.

GREEN, J. (after stating the facts as above). The first contention of the plaintiff in error appears to be that the plaintiff below should have been nonsuited upon the opening of his counsel, either because the facts stated by counsel, if proved, would not have sufficed to sustain a verdict, or because, if proved, they would have established, not the cause of action alleged in the declaration, but a cause of action different therefrom. A motion for a nonsuit on the opening of a case to the court and jury is not usual, but it is permitted in some jurisdictions. In order to its allowance, it is in general held that in a case like the present the

statement of counsel, by its omissions or admissions, must render it clearly evident either that no case can be made out, or that a recovery is precluded. *Emerson v. Weeks* (1881) 53 Cal. 382, 385; *Oscanyan v. Arms Co.* (1880) 103 U. S. 261, 263, 264, 26 L. Ed. 539; *Hoffman House v. Foote* (1902) 172 N. Y. 348, 350, 65 N. E. 169. In this court the matter was lately considered in *Kelly, Adm'r, v. Bergen County Gas Co.* (1906) 74 N. J. Law, 604-607, 67 Atl. 21; and it was then declared that, by analogy to the motion for a nonsuit at the close of the plaintiff's evidence, the question is whether the facts stated as to be proved and the reasonable inferences which may be drawn from them disclose that the plaintiff is not entitled to submit his case to the jury because a verdict in his favor could not be sustained. Among cases which dealt with the motion at the close of the plaintiff's evidence, it is sufficient to note *Case v. Cent. R. R. Co.* (1896) 59 N. J. Law, 471, 473, 37 Atl. 65, 59 Am. St. Rep. 617, and *Polhemus v. Prud. Real. Corp.* (1906) 74 N. J. Law, 570, 580, 67 Atl. 303. If now we turn to the plaintiff's declaration, we find the pleader's averments to be, in brief, that the original defendant, Moore, for valuable consideration, indorsed and delivered to the plaintiff the note made by the Northside Land Company to the La Charge Dredging Company for the payment of \$6,000, and promised and undertook to pay the said note absolutely, and to waive presentment and notice. Whether the original defendant, by this irregular indorsement, became liable to the dredging company or not liable, may be unimportant. The averments would under sections 64, 82, and 109 of the negotiable instrument act (P. L. 1902, pp. 594, 595, 598, 601, 602) show a liability to the plaintiff, the immediate indorsee, if the averments were sustained by legal evidence. If we turn to the opening of counsel, we find the gist of his statement to be that the original defendant, who was the promoter and manager of the land company, for a valuable consideration, indorsed and delivered to the plaintiff, who was the backer of the dredging company, the note for \$6,000, made by the former company to the latter company; and that, before the maturity of the note, the original defendant, by an executed bargain with the land company, agreed, in consideration of a conveyance of all of its lands to himself, to take care of this note, among other debts of the company. This may have been a somewhat loose and meager statement. Nevertheless we incline to the notion that, if the statement were followed by legal proof of the facts stated, a case would have been presented for the consideration of a jury. See *Kelly, Adm'r, v. Bergen County Gas Co.* (1906) 74 N. J. Law, 604, 605, 67 Atl. 21; *Story on Bills*, §§ 316, 374; *Story on Prom. Notes*, § 282. The motion for a nonsuit on the opening was then properly refused.

It is next contended on the part of the plaintiff in error that, if a valid cause of action were alleged in the declaration, the evidence of the plaintiff below did not support it; but, on the contrary, was at variance therewith. He also contended that, so far as the proof went, it placed Moore, the original defendant, in the position of promising orally to pay the debt of another. To these contentions the defendant in error urged that, under the declaration and proofs, a primary undertaking to pay the debt was established. It could hardly be said by one who had considered the evidence with care that there was any proof of an express undertaking by Moore to become primarily liable upon the note to his immediate indorsee; and therefore *Schley, Ex'x, v. Merritt* (1872) 37 Md. 352, 353, 360, is not pertinent. The defendant in error thinks, however, that the evidence was enough to warrant, inferentially, a finding of primary liability, because it was shown that Moore had taken into his hands the property of the maker of the note, and had thereupon agreed to take care of this note with other obligations of the maker. The proof was not of a conveyance of the lands of the maker of the note to Moore alone, but to four men who were named and of whom the original defendant was one. It becomes proper, therefore, to inquire whether such proof sustained the declaration and opening, or was at variance therewith.

(a) Variance, or discrepancy, between a material averment in pleading and the evidence adduced in support of it, was in early times of vital importance. 1 Chit. on Plead. (3d Lond. Ed.) *303-308; *Bristown v. Wright* (1781) 2 Dougl. K. B. *665, *667a; *Mulford v. Bowne* (1827) 9 N. J. Law, *315, *318. Since the enactment of the provisions now embodied in Practice Act, Revision of 1903 (P. L. p. 571) § 125 (Mott, P. A. p. 64), variance has with us been of less consequence. Nevertheless to-day it is sound law and sound reason that there must be no variance to the prejudice of the adverse party between the case declared upon and the case proven, and that recovery must be *secundum allegata et probata*. *Hallock v. Commercial Ins. Co.* (1857) 26 N. J. Law, 268, 274; *Bristow v. Wright*, *supra*; *Martinez v. Runkle* (1894) 57 N. J. Law, 111, 117, 122, 30 Atl. 593. Applying the doctrine to the facts in evidence, we think that there was a substantial variance between the case declared upon and the case proven, inasmuch as no defendant would anticipate that an alleged absolute and primary undertaking by A. to pay money to Z. would be supported or be thought to be supported by proof of an undertaking by A., B., C., and D. to pay the same money, in consideration of the transfer of property to them by Y.

(b) If we should assume, without deciding, that under the principle of *Joslin v. N. J. Car Spring Co.* (1873) 36 N. J. Law, 141, 146, the plaintiff might have sued

the original defendant with J. Myers, C. R. Myers, and R. Moore upon their contract with the land company to assume and pay the obligations of the company, we could not deem it lawful to permit the proof of such contract to sustain the present declaration unamended. Under Practice Act (P. L. 1903, p. 545) § 38 (Mott, P. A. p. 16), the nonjoinder of a defendant in an action *ex contractu* can be taken advantage of only by a plea in abatement. *Gray v. Sharp* (1898) 62 N. J. Law, 102, 103, 40 Atl. 771. Had the original defendant been sued upon the contract of assumption which had been made by himself and three associates, he would at once have perceived the necessity of pleading the nonjoinder; but, when he was sued upon a contract alleged to be founded upon a particular note and to have been entered into by himself alone, no necessity of such a plea could have been apparent. Hence, were the present recovery to stand, the result would be that he would be held, to his injury, to be bound alone by a contract first indicated by the proofs, and would be denied all opportunity of pleading the nonjoinder. See *Lieberman v. Brothers* (1893) 55 N. J. Law, 379, 380, 26 Atl. 828. On the other hand, it would not be consistent with justice now to amend the declaration so as to make it conform to the proofs. To use the language of Mr. Justice Dixon in *Excelsior Electric Co. v. Sweet* (1896) 59 N. J. Law, 441, 443, 31 Atl. 721, so to do would be "to support a verdict which may have been rendered upon a matter which the parties have not fairly litigated." Such cases as *Price v. N. J. R. & T. Co.* (1865) 31 N. J. Law, 229, 231-234, and *Redstrake v. Cumb. Ins. Co.* (1882) 44 N. J. Law, 294, 296, would not justify an amendment. The original defendant and his executor, as substituted defendant, never expected or intended to try an issue upon the contract of assumption of the land company's obligations. Indeed, the substituted defendant stoutly resisted the attempt so to do, throughout the trial. Usually, when a substantial variance appears in the course of the trial, the plaintiff should be nonsuited. Such was the older practice. 1 Ch. Plead. (3d Lond. Ed.) *303; *Bristow v. Wright* (1781) 2 Dougl. *665, *669. Such seems to be our modern usage in cases of variance or failure of proof. *Case v. Cent. R. R. Co.* (1896) 59 N. J. Law, 471, 472, 37 Atl. 65, 59 Am. St. Rep. 617; *Folsom v. Squire* (1905) 72 N. J. Law, 430, 60 Atl. 1102. In the case in hand no motion for a nonsuit was made at the close of the plaintiff's case; and when, on the same evidence, the defendant moved for the direction of a verdict, no exception was sealed upon the denial of the motion. Nevertheless, as inadmissible evidence was received against the objections of the defendant properly taken, and error is assigned thereon, we think the defendant should be relieved from the judgment upon a verdict which

was based at least in part on evidence not admissible under the pleadings.

It is further contended by the plaintiff in error that irrelevant evidence was admitted to his injury, and that, so far as the evidence established any contract, it was one made by four jointly, and not by Moore, alone. It would seem that such arguments have already been sufficiently considered were it not that the defendant in error (plaintiff below) answers that, an absolute and primary undertaking aside, the proofs, under the declaration, establish the liability of Moore as an indorser, who, having taken the property of the maker of the note into his own hands, waived presentment and notice. The defendant in error was driven to take this position by the exigencies of his case. By the admission of his counsel on the opening and by the absence of affirmative evidence, it appeared at the trial (as counsel put it) that "the note was never protested." It is then proper to consider the evidence afresh from this view point.

(a) As we first review the law invoked, it is manifest that the argument of the defendant in error rests upon the doctrine that when an indorser has received full security or indemnity for the amount of a note or bill, or has received money or property for the very purpose of taking up such note or bill at maturity, the holder of the paper is excused from the duty of presenting it for payment, and of giving notice to such indorser of the dishonor. Story on Prom. Notes, §§ 281, 282, 357; Story on Bills (4th Ed.) §§ 316, 374; Chitty on Bills (9th Lond. Ed.) *440, *449, *506, notes. This principle, thus broadly stated, although approved by some eminent authors, such as Story and Kent, and having with us the countenance of a dictum in *Perry v. Green* (1842) 19 N. J. Law, 61, 63, 38 Am. Dec. 536, is doubted or denied by other writers (see 2 Dan. on Neg. Inst. [5th Ed.] §§ 1129-1134); and it is not now necessary for this court either to indorse or condemn it. It will be observed that the stronger cases which apply the principle base the excuse upon the facts that the indorser himself has received enough or all (if not enough) of the maker's property for the purpose of securing the former against his liability, or for the purpose of meeting the obligations which he has incurred on behalf of the latter. *Corney v. Da Costa* (1795) 1 Esp. N. P. 302, 303, approved, arguendo, in *Brown v. Maffey* (1812) 15 East, 216, 222; *Bond v. Farnham* (1809) 5 Mass. 170, 171, 173, 4 Am. Dec. 47; *Barton v. Baker* (1815) 1 Serg. & R. (Pa.) 334, 336, 7 Am. Dec. 620; *Mechanics' Bank v. Griswold* (1831) 7 Wend. (N. Y.) 165, 166, 167, 170. As we turn to the facts brought out in the case in hand, we recall that Moore, as indorser, did not alone receive the property of the maker of the note in suit. The taking over of the property was by four, and not by one, and therefore there is lacking a fact or circumstance deemed by many to be essential to the application of the prin-

ciple invoked. It would seem manifestly unjust because of waiver or excuse based upon the holding of property to enforce against Moore or his executor alone a liability for a whole debt, if or while the property, out of which the debt was intended to be met, is in title or possession vested largely in others.

(b) The case of the defendant in error is not bettered if reliance be placed upon the acknowledgments or admissions of Moore between the maturing of the note and his decease. His admissions, he it remarked, were not of any sole responsibility, but of a responsibility shared by three associates, who should be consulted and who should act or be bound together with himself. The law applicable to such conduct is that acts, admissions, or promises after maturity, in order to be evidential of a waiver of presentment and notice, or of an excuse for the want of presentment and notice, must be done or made with full knowledge of the discharge from liability upon the contract of indorsement, and must, in form and effect, be unequivocal and unconditional. *Barkalow v. Johnson* (1838) 16 N. J. Law, 397, 398, 400; *Sussex Bank v. Baldwin* (1840) 17 N. J. Law, 487, 495, 496; *Harrison v. Bailey* (1868) 99 Mass. 620, 621, 97 Am. Dec. 63; *Thornton v. Wynn* (1827) 25 U. S. 183, 187, 189, 6 L. Ed. 595; *Sigerson v. Mathews* (1857) 61 U. S. 496, 499, 500, 15 L. Ed. 989; *Woods v. Dean* (1862) 32 L. J. K. B. 1, 3, a case better reported here than in 3 Best & Smith.

(c) In passing it may be observed that, under the facts brought out, no excuse for the lack of notice of dishonor could be justified by the provisions of Negotiable Instruments Act 1902 (P. L. p. 602) § 115. The evidence discussed was, in any aspect suggested, inadmissible or irrelevant to show a waiver or excuse as to presentment or notice; and its reception was therefore injurious to the plaintiff in error. The conclusions thus far reached make it unnecessary for us to expend labor upon a question barely touched upon at the hearing—whether the plaintiff below showed any title to the note in suit. It appeared in part by the evidence, and in part by the admission of counsel at the bar of this court, that the attorney of the plaintiff below wrote the name of the La Charge Dredging Company on the back of the note just before action brought. There being no proof whatever of the authority of such attorney, our silence must not be deemed an approval of any seeming title acquired by his act. Quære, whether the circumstances might not repel the favorable presumptions which in a proper case exist under Negotiable Instruments Act (P. L. p. 587) § 16.

The last contention of the plaintiff in error is that there was error in directing a verdict for the plaintiff below when he rested; no evidence being offered by the defendant below. On the principal points urged by the defendant in error, to wit, that his proofs established an absolute and primary

undertaking by the testator of the plaintiff in error, or, such testator being secondarily liable, established an excuse for the want of presentment and notice, we have already held against him. On the first point we held that through a substantial variance between allegation and proof he proved, if anything, a cause of action different from that laid in his declaration, and on the second point we held that he failed to prove facts essential to the excuse under the very principles which he invoked. In such a situation the defendant in error might lawfully have been nonsuited at the trial had such a motion been made. *Case v. Central R. R. Co.* (1896) 59 N. J. Law, 471, 472, 87 Atl. 65, 59 Am. St. Rep. 617. See *Neutze v. Atl. City R. R. Co.* (1904) 71 N. J. Law, 407, 408, 53 Atl. 1083; *U. S. Fidel. & Guar. Co. v. Donnelly* (1902) 68 N. J. Law, 654, 655, 54 Atl. 457; *Folsom v. Squire* (1905) 72 N. J. Law, 430, 431, 60 Atl. 1102. Plainly, if the defendant in error might have been nonsuited below, the direction of a verdict in his favor upon the same evidence is erroneous, and cannot be upheld. The citation of cases to support this proposition is needless. If, as his adversary suggests, we should look at the matter most favorably to the defendant in error, the result must be the same. The rule is that, when any material facts are in dispute, even though the evidence be open to debate and leaves the mind in some doubt, a verdict should not be directed, but the question is for the jury. *D., L. & W. R. R. Co. v. Shelton* (1893) 55 N. J. Law, 342, 345, 26 Atl. 937; *Baumann v. Hamb.-Amer. Pack Co.* (1901) 67 N. J. Law, 250, 252, 253, 51 Atl. 461.

Let the judgment of the Supreme Court be reversed and a venire de novo awarded, to the end that there may be a new trial, if the defendant in error be so advised.

(77 N. J. L. 142)

PALMER v. BOARD OF CHOSEN FREEHOLDERS OF ESSEX COUNTY et al.

(Supreme Court of New Jersey. Dec. 4, 1908.)

1. JUDGMENT (§ 472*)—COLLATERAL ATTACK.

Where a court of general jurisdiction has jurisdiction of the subject-matter, and has acquired jurisdiction over the person of the defendant, its judgment is invincible against collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 908; Dec. Dig. § 472.*]

2. JUDGMENT (§ 501*)—COLLATERAL ATTACK—IRREGULARITIES.

Upon collateral attack, mere irregularities in proceedings in a court of general jurisdiction are cured by judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 941-950; Dec. Dig. § 501.*]

3. JUDGMENT (§ 503*)—COLLATERAL ATTACK—INSUFFICIENCY OF CAUSE OF ACTION.

A declaration, on its face exhibiting a cause of action barred by the statute of limita-

tions, is not equivalent to stating no cause of action whatever.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943; Dec. Dig. § 503.*]

4. MANDAMUS (§ 180*)—PROCEEDINGS—PEREMPTORY WRIT—ISSUANCE.

Where both parties have been heard on a rule to show cause for mandamus, and there are no disputable facts, a peremptory writ may issue in the first instance.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 405; Dec. Dig. § 180.*]

5. TIME OF SERVICE OF SUMMONS.

Quere: Whether the statute of 1846 (Gen. St. 1895, p. 410, § 3), requiring that the service of a summons issued against a board of chosen freeholders shall be made "at least thirty days before the session of the court to which such process is returnable," was not impliedly repealed by section 52, Practice Act, Revision 1903 (P. L. p. 549).

6. SERVICE OF DECLARATION WITH SUMMONS.

Quere: Whether section 95, Practice Act, Revision 1903 (P. L. p. 564), providing for the service of a declaration with the summons, includes municipal corporations defendant.

(Syllabus by the Court.)

Rule to show cause by Nicholas F. Palmer, Jr., surviving executor of William Bromley, deceased, requiring the Board of Chosen Freeholders of the County of Essex and others to show cause why a peremptory or alternative writ of mandamus should not issue. Rule made absolute.

On rule to show cause why a writ of mandamus should not issue. The facts established by the proofs taken under this rule are: That the relator on November 19, 1907, instituted an action in the Essex county circuit court against the board of chosen freeholders of the county of Essex, by the issue of a summons on that day returnable December 6, 1907. Declaration was attached to and served with the summons November 20, 1907. On December 10, 1907, judgment by default for want of a plea was duly entered, and execution has been issued thereon, and returned unsatisfied by the sheriff. A written demand for payment was served upon the county collector, together with a copy of the execution. A like written demand was also made upon the finance committee of the board and upon the board of freeholders at their annual meeting, but the board has failed to make provision for the payment of the judgment. The subject of the action was the recovery of money paid by the plaintiff's testator to the Essex public road board, whose successor the defendant is, as the amount of an assessment, afterwards set aside as illegal by this court. The declaration alleges that the assessment was made April 2, 1881, and paid December 10, 1884, and was set aside November 27, 1889. After entry of the judgment application was made to the circuit court to open it, because improvidently entered, and because the defendant has a legal defense in the statute of limitations which application was refused. Thereupon this rule was ob-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tained, requiring the said board of freeholders and the individual members thereof to show cause why a peremptory or alternative writ of mandamus should not issue commanding them to add to the amount to be raised by taxation for current expenses, etc., for the coming year, an amount sufficient to pay the execution, and commanding them to order the county auditor and collector to pay to the petitioner the amount of the execution out of any funds in their hands belonging to the board of freeholders.

Argued November term, 1908, before GARRISON, PARKER, and VOORHEES, JJ.

Edward Oakes, for relator. Elvin W. Crane, for defendants.

VOORHEES, J. (after stating the facts as above). The issuance of the writ asked for is resisted upon several grounds, each of which is an attack upon the judgment. It is well settled that, where a court of general jurisdiction has jurisdiction of the subject-matter, and has acquired jurisdiction over the person of the defendant, its judgment is invincible against collateral attack. It is only where there is lack of jurisdiction in one or both of the above particulars that the judgment is void, and may be so treated in a collateral proceeding. *Westcott v. Garrison*, 6 N. J. Law, 132; *Van Dyke v. Bastedo*, 15 N. J. Law, 224; *Godfrey v. Myers*, 23 N. J. Law, 197; *Hess v. Cole*, 23 N. J. Law, 116; *National Docks Co. v. P. R. R.*, 52 N. J. Eq. 58, 28 Atl. 71; *Podesta v. Binns*, 69 N. J. Eq. 387, 60 Atl. 815. Jurisdiction will be presumed in cases of domestic judgments of courts of general jurisdiction. *Miller v. Dungan*, 35 N. J. Law, 389. The defendant insists that the record discloses upon its face that the judgment was improvidently and prematurely entered, and hence is void. The reasoning of the defendant on this subject is that the statute of 1848 (Gen. St. p. 410, § 3) requires the service of a summons issued against a board of chosen freeholders to be made "at least thirty days before the session of the court to which such process is returnable," and as such service was not made in this case, the judgment is a nullity. There would be no merit in this contention if the above statute was impliedly repealed by section 52, Practice Act, Revision 1903 (P. L. p. 549). *Roche v. Jersey City*, 40 N. J. Law, 257. But assuming the premature entry of the judgment, that fact does not render it void. It will stand until reversed or set aside. *Hoey v. Aspel & Co.*, 62 N. J. Law, 200, 40 Atl. 776. Irregularities in proceedings in a court of general jurisdiction, as against collateral attack, are cured by judgment (*Apel v. Kelsey*, 52 Ark. 341, 12 S. W. 703, 20 Am. St. Rep. 183; *Fischer v. Holmes*, 123 Ind. 525, 24 N. E. 377) which is fatal to the objection that, in actions against boards of freeholders, the statute does not permit a declaration to be

served with the summons. If the provisions of section 95, Practice Act, Revision 1903, include municipal corporations defendant, this objection has no foundation. *Dock v. Elizabethtown Mfg. Co.*, 34 N. J. Law, 312, and *Cooper v. Cape May Point*, 67 N. J. Law, 441, 51 Atl. 511, are cases which point to this construction. Nor can it be successfully urged that, because the declaration on its face exhibits a cause of action barred by the statute of limitations, it is equivalent to stating no cause of action whatever. Such is the contention of the defendants. The statute does not obliterate the cause of action. This defense may be waived. To be availed of it must be pleaded. *Christie v. Bridgman*, 51 N. J. Eq. 331, 25 Atl. 393, 30 Atl. 429; *Peer v. Cockrow*, 13 N. J. Eq. 136; *Inhabitants of West Hoboken v. Syms*, 49 N. J. Law, 546, 9 Atl. 780. These are matters that should be addressed to the court in which the judgment was entered, and that were correctly decided by it in refusing to open the judgment, and while we have considered them, they cannot be availed of as a means of collateral attack upon the recovery.

The rule to show cause will be made absolute with costs, and a mandamus will be issued (*Lyon v. Elizabeth*, 43 N. J. Law, 158; *Londrigan v. McNally*, 65 N. J. Law, 163, 46 Atl. 597), peremptory in form, both parties having been heard on this rule, and there being no disputable facts. *State ex rel. v. Paterson*, 35 N. J. Law, 196.

(76 N. J. L. 655)

NEILSON et al. v. RUSSELL, Surrogate, et al.
(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

TAXATION (§ 867*)—INHERITANCE TAX—PROPERTY SUBJECT.

Stock in a New Jersey corporation belonging to a testator domiciled in England is not subject to the inheritance tax imposed by the act of May 15, 1894 (P. L. p. 318); 3 Gen. St. 1895, p. 3339.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1682; Dec. Dig. § 867.*]

Pitney, Ch., and Bergen and Green, JJ., dissenting.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Alfred Neilson and others, executors, against George E. Russell, surrogate, and others. Judgment for defendants, and plaintiffs bring error. Reversed.

See, also, 69 Atl. 476.

Frank R. Lawrence, Joseph Coult, and John W. Griggs (William A. Smith and Frank Lawrence, on the brief), for plaintiffs in error. Theodore Backes and Robert H. McCarter, Atty. Gen., for defendants in error.

SWAYZE, J. In a case like this the temptation is strong to pass an opinion upon the fundamental and important questions which

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were exhaustively discussed at the bar, and in the able opinion of the Supreme Court. We prefer, however, to confine our discussion to the exact point presented by the case, which we think is the much narrower one of the proper interpretation of the statute. For that purpose we assume that shares of stock in a New Jersey corporation have a situs in this state, and that succession thereto or transfer thereof may be taxed by our Legislature, and that the tax imposed by the act of May 15, 1894 (P. L. p. 818) is either a legacy or a succession tax and not a property tax, and therefore not in conflict with our constitutional provision. The question we have to decide is then simply whether the statute reaches the present case.

An examination of the act shows that it imposes a tax (1) upon all property which passes by will or the intestate laws of this state from any person who may die seised or possessed of the same while being a resident of the state; (2) upon all property which shall be within this state which shall be transferred by inheritance, distribution, bequest, devise, deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the intestate, testator, grantor, or bargainor. The first class obviously affects the succession of residents of this state only. If the present tax is to be sustained, it must be because the succession sought to be taxed comes within the second class.

Our act was modeled after the New York act of 1885 (Laws 1885, p. 820, c. 483, § 1); and, if we had made no change in that act, we should be held upon well-settled principles to have adopted with the act the construction previously placed thereon by the New York courts in the case of *Enston's Will*, 113 N. Y. 174, 21 N. E. 87, 3 L. R. A. 464. In fact, however, we modified the language of the New York act by inserting at the beginning of the clause the words "all property" in place of the mere relative "which" and by adding the words "inheritance, distribution, bequest, devise." We are not therefore concluded by that decision.

It is clear that the Legislature did not intend to tax all successions of nonresidents. If it had meant that, it would have taxed all property within this state which should be transferred from a decedent by will or intestacy. (We disregard as quite inapplicable to the present case transfers by deed, grant, sale, or gift intended to take effect after death.) Instead of using this general language which was naturally suggested by the use of the words "by will or by the intestate laws of this state," employed in the previous clause, the act limits the taxation upon transfers of the property of nonresidents to transfers by inheritance, distribution, bequest, or devise. The words "inheritance" and "distribution" are apt and proper words to designate the succession of an heir or next of kin; the words "bequest" and "de-

viser," that of a legatee or devisee. The only one applicable to the present case is "bequest." What is to be taxed, therefore, as far as the present case is concerned, is a transfer by bequest from Mills to his legatees, or, to use the language of Mr. Justice Holmes in *Blackstone v. Miller*, 188 U. S. 189, 207, 23 Sup. Ct. 277, 47 L. Ed. 439, it is the singular succession of the legatee, not the universal succession of the executors. That this is the true construction of the act is indicated further by the provisions of section 6 (Gen. St. 1895, p. 3341, par. 268) authorizing the executors to deduct the tax from the legacy or property for distribution. The tax is not a general charge against the estate, but a charge upon the legacies. *Wycokoff v. O'Neill* (N. J. Err. & App.) 67 Atl. 32. Section 10 authorizes a refund of taxes where the legatee has been obliged to refund part of this legacy to pay debts proven after distribution. Although there seems to be no provision in the statute authorizing the deduction of debts in making the appraisal we can hardly doubt in the face of section 10 that such a deduction ought to be made. It has never been thought that an insolvent estate was liable to this tax, although no machinery can be provided in this state by which the fact of solvency or insolvency can be ascertained. Such machinery is unnecessary if it is only the value of the legacy that is to be ascertained. These considerations persuade us that it is the legacy that is taxed, and not the estate. The question recurs whether the succession of the legatees in the present case was meant to be taxed.

This succession is a succession under English law by which the validity and amount of the bequest must be determined. *Jenkins v. Guarantee Trust & Safe Deposit Co.*, 53 N. J. Eq. 194, 32 Atl. 208. By that law, as well as by our own, the title to a legacy is not complete and perfect until the executor has assented (2 Williams on Executors, 1372, 1373), and he ought not to assent until creditors are satisfied. This assent must of necessity be the assent of the executors at the domicile. They alone can ascertain whether the estate is solvent or insolvent, and it is only upon a settlement of their accounts that it can be determined whether the legatee will actually receive anything or not; and, if he is to receive only a portion of the legacy, the amount in which it shall abate can be decided by the courts of the domicile only. The succession to the legacy is complete only in a foreign jurisdiction, and it would certainly be anomalous to tax that succession here. The case differs from those arising under the New York act of 1892 (Laws 1892, p. 814, c. 399), and statutes modeled thereon, which assume to tax the transfer of property within the jurisdiction. Under those statutes it is the situs of the property which justifies the taxation of the transfer. Our statute of 1894 does not

undertake to tax all transfers of property within our jurisdiction but only transfers by inheritance, distribution, bequest, or devise. In this respect our statute differs also from the Maryland act which was before the court in *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82, 3 L. R. A. 372, where the act as construed by the court imposed a tax upon all estates, real, personal, and mixed, money, and public and private securities for money of every kind, being in the state. The Massachusetts cases are not in point for a like reason. There the statute imposes a tax on "all property within the jurisdiction of the commonwealth and any interest therein, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible." *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372. In short, our statute imposes a legacy duty and not a transfer or succession tax. The view we take is the same that finally prevailed in the English courts. *Thompson v. Advocate General*, 12 Cl. & F. 1.

We reach the same result if we disregard the technical force of the words "inheritance, distribution, bequest, and devise," and look at the tax as a succession tax. It is conceded, as it must be in view of our constitutional provision, that the tax cannot be sustained as a property tax. The ground upon which this extraordinary exaction and the exemption of small estates and the taxation by some states, and at one time by the federal government, of large estates at a higher rate, is sustained, is, as stated in the opinion of the Supreme Court, that "the rights of testamentary disposition and of succession are creatures of law upon the exercise and operation of which the lawmaker may impose terms." We think it follows logically that the only law which can impose the terms is the law that creates the right. In this case it is the English law. The title to the stock passed by virtue of the will to the executors from the moment of the testator's death, and probate was operative only as the authenticated evidence, not as the foundation of the executors' title. 1 *Williams on Executors*, 293, 294, 629. The English executors were authorized without probate in this state to transfer the stock (*Hutchins, Administrator, v. State Bank*, 12 Metc. [Mass.] 421; *Luce v. Manchester & L. R. R.*, 63 N. H. 588, 3 Atl. 618), and to vote at a corporate election. In *re Cape May, etc., Navigation Co.*, 51 N. J. Law, 78, 16 Atl. 191, in which Justice Depue cited as authority the cases just referred to. However convenient it may have been to take out letters testamentary in New Jersey, such a course was not essential under our laws to vest the title in the executor. It was only of consequence as a matter of procedure, and to put the executors in a position to compel a transfer on the books of the corporation, if

the corporation was unwilling to recognize the foreign letters. It is true that the New Jersey executors have a title and a right to administer (*Banta v. Moore*, 2 McC. 97); but the difficulties already mentioned in dealing with the tax as a legacy duty are quite as forceful when it is looked on as a succession tax. There is the additional difficulty that the New Jersey administration is ancillary only, and the provisions of the statute authorizing the executor to collect the tax from the legatee or to deduct it from the legacy cannot be enforced. After administration here, the balance of the estate would properly be transferred to the English executors for distribution in accordance with the laws of the domicile of the testator. Our view in this respect is supported by the authorities. *Wallace v. Attorney General*, L. R. 1 Ch. 1, 35 L. J. Eq. 124; *Embury's Estate*, 19 App. Div. 214, 45 N. Y. Supp. 881, affirmed 154 N. Y. 740, 49 N. E. 1096; *Eidman v. Martinez*, 184 U. S. 578, 22 Sup. Ct. 515, 46 L. Ed. 697.

The claim of the state is not helped by section 11 of the act. Gen. St. 1895, p. 3342, par. 273. That applies only to the case of stock which is liable to the tax, and is intended to afford a means of collection of a tax imposed by other sections not to impose a tax.

The judgment must be reversed.

PITNEY, Ch., and BERGEN and GREEN, JJ., dissent.

(77 N. J. L. 29)

LAUTER & CO. v. O'TOOLE.

(Supreme Court of New Jersey. Dec. 1, 1908.)
SALES (§ 452*)—CONDITIONAL SALES—STATUTORY PROVISIONS—REPEAL.

The provision of the conditional sales act of May 9, 1889 (P. L. p. 421), touching the rights of purchasers in good faith is not affected by section 71 of "An act respecting conveyances," Revision of 1898 (P. L. 1898, p. 670). Nor is such conditional sales act repealed by "An act to repeal sundry acts respecting conveyances" (P. L. 1898, p. 711), for the reason that in neither case is such object expressed in the title of such later act.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 452.*]

(Syllabus by the Court.)

Appeal from District Court of Jersey City.

Replevin by Lauter & Co. against John O'Toole. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

Clarence Kelsey, for appellant. L. F. Goldenhorn, for appellee.

GARRISON, J. The plaintiff brought its action of replevin in the district court for a piano it had delivered to a prospective purchaser under a lease and contract that pro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vided that until paid for the piano should remain the property of the vendor, i. e., the plaintiff. This writing was not recorded.

The defendant, O'Toole, was in possession of and claimed title to the piano under a purchase and bill of sale which was also unrecorded.

The history of the transaction is this: The plaintiff had parted with the possession of the piano to one Morton under the contract above mentioned. Morton had borrowed of O'Toole \$55 to secure which he had made a chattel mortgage to one Graney, which Graney had assigned to O'Toole, who had advanced the loan to Morton. Morton, still being in possession of the piano, sold it outright to Jefferson, and gave him a bill of sale therefor. O'Toole, the assignee of the chattel mortgage, then bought the piano of Jefferson for \$50, and received with it a bill of sale from Jefferson. Neither of the bills of sale were recorded. This was the situation when suit was brought by the original vendor against the last purchaser. The conflict, therefore, was between a plaintiff who claimed under an unrecorded contract of conditional sale, and a defendant who had possession and claimed under an unrecorded bill of sale. The state of the case establishes that O'Toole had bought without notice of the plaintiff's rights as also had Jefferson.

The case thus constituted was decided by the court below in favor of the purchaser in possession in accordance with the provisions of the conditional sales act of May 9, 1889 (P. L. p. 421; 1 Gen. St. 1895, p. 891), and this was correct unless as the appellant contends that statute was repealed by "An act to repeal sundry acts respecting conveyances" (P. L. 1898, p. 711) or its provisions materially modified by "An act respecting conveyances" (Revision of 1898 [P. L. p. 670]). Section 21 of the last-mentioned act unquestionably makes express provision for the recording of contracts for the conditional sale of goods and chattels, and section 71 imposes upon purchases of chattels a new condition that, if valid, radically affects their rights as previously declared in the act of May 9, 1889. For by the act of 1889 contracts of conditional sale that came within its purview were, unless recorded, void as against subsequent purchasers in good faith; whereas by the act of 1898 such conditional sales, although unrecorded, were good as against subsequent purchasers, unless their "deeds shall first have been duly recorded." It is under this last-mentioned provision of the act of 1898 that the appellant claims priority for its unrecorded contract over the appellee's unrecorded bill of sale. This claim, however, cannot be supported. In the first place, there is no provision in the act of 1898 for the recording of bills of sale. In the next place it is far from clear that in an act respecting conveyances "deeds" can be read to mean "bills of sale," and in the third place, if it were permissible to treat the word "deeds" as cover-

ing every instrument under seal, it would not help the appellant, for it so happens that in this case the bill of sale was not under seal. There is, however, a more far-reaching ground upon which the present case must be decided, viz., that "An act respecting conveyances" is not a proper title under which to provide for the recording of contracts for the conditional sale of personal property or under which to alter the existing law respecting the effect of such contracts when unrecorded. Neither is the title "An act to repeal sundry acts respecting conveyances" a proper one under which to repeal "An act requiring contracts for the conditional sale of personal property to be recorded," which is the title of the act of May 9, 1889.

It seems to us to be too plain for extended argument that contracts of this sort whose sole object and operation is to arrest or impose conditions upon the normal effect of a transfer of the possession of personal property can in no sense be aptly termed "conveyances," even if that term in a legislative title ought not to be limited to real property. This being so, the two acts passed in 1898 fail to effect the conditional sales act of 1889. That this was the view held by Mr. Justice Collins in respect to estates in expectancy is evident from the opinion delivered by him for the Court of Errors and Appeals in the case of *Bouvier v. Balt. & N. Y. R. R. Co.*, 67 N. J. Law, 281, 290, 51 Atl. 781, 784, 60 L. R. A. 750, in which he says: "An attempt was made in the recent revision of some of our statutes to transfer the provisions of this one to the 'Act respecting conveyances,' but, as the repealer of the original act has the similar title, we may disregard this attempt, and the new title may be deemed to be inadequate."

Apparently what the revisers did was to bring about the re-enactment in 1898 under the title of "An act respecting conveyances" of such statutory provisions as they found already grouped in the compilation of 1895 (General Statutes), under the head of "Conveyances." But there is this radical difference between a compilation and a revision, viz., that, while there is no constitutional interdiction against the mere collocation of existing statutes under a common head which is all that a compilation is, there is a positive prohibition against the enactment of any law under a title that does not express its object. Reaching the conclusion that the title "An act respecting conveyances" does not express any object affecting contracts of conditional sales, and that the ancillary repealing act is under the same infirmity, the result is that the rights of the present parties are to be tested by the act of 1889. The present case is thereupon within the decision of this court in *Wheeler & Wilson Mfg. Co. v. Brookfield*, 68 N. J. Law, 478, 53 Atl. 211, delivered by Mr. Justice Dixon. The point thus decided was permitted to go without criticism by the Court of Errors, although the case was there reversed upon another ground by an opinion

delivered by Mr. Justice Fort. Justice Dixon's opinion was delivered in November, 1902, that of Justice Fort in June, 1904, and both of these judges had participated in the decision of *Bouvier v. Balt. & N. Y. R. R. Co.*, in March, 1902, in which Justice Collins' opinion pointing out the inadequacy of the title of the 1898 act has already been quoted.

It is highly improbable to say the least that these two capable and experienced judges were both ignorant of the attempted repeal of the conditional sales act under this inadequate title. In any event, it is clear either that they knew of such attempt and viewed it as Justice Collins had done or else that the title itself was so deceptive as to mislead them; and it goes without saying that a title that does not suggest the scope of an enactment to men rendered expert by their calling can scarcely be said to be a title that would apprise legislators and the ordinary layman of its object, and this, after all (and with a double meaning), is the common-sense rule as to the constitutional adequacy of a legislative title.

The present case coming under the act of 1889, our conclusion coincides with that reached in the court below, whose judgment is in all respects affirmed.

(77 N. J. L. 170)

MILLIKEN et al. v. BOARD OF CHOSEN FREEHOLDERS OF SOMERSET COUNTY.

(Supreme Court of New Jersey. Dec. 9, 1908.)

BRIDGES (§ 46*) — DEFECTS — NEGLIGENCE IN REPAIRING.

The defendant, charged with the duty of repairing a highway bridge, being notified that it was out of repair and unsafe, undertook to repair the same, and in doing it used a part of the old planking which was worn at the edges, replacing them with the worn side down, so that, while the flooring presented a smooth surface, the planking was thin at the point where the worn edges were joined. The plaintiffs' horse, while being driven over the bridge, stepped upon one of the thin edges of the old planking which gave way, causing the horse's foot to pass through the broken portion, in consequence of which the plaintiff was injured. *Held*, that it was a jury question whether replacing the worn plank with the thin edges joined together, which afterward gave way under ordinary and intended use, was a wrongful neglect in making the repairs.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. § 120; Dec. Dig. § 46.*]

(Syllabus by the Court.)

Error to Circuit Court, Somerset County.

Action by Jennie L. Milliken and others against the Board of Chosen Freeholders of the County of Somerset. From a judgment of nonsuit, plaintiffs bring error. Reversed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

James L. Griggs, for plaintiffs in error.
John A. Frech, for defendant in error.

BERGEN, J. This action was instituted by the plaintiffs, husband and wife, to recover damages, grounded upon, as charged in the declaration, the wrongful neglect to repair a bridge, the erection and repair of which was chargeable to the board of chosen freeholders of the county of Somerset. The trial court directed a nonsuit, the propriety of which this writ of error seeks to review. At the close of the plaintiffs' case, there was evidence tending to show that, while the wife was driving a horse and carriage over the bridge the floor gave way at a point where the edges of the plank in the floor met, and, one foot of the horse passing through the opening made by the breaking of the floor, it was thrown, causing the injury complained of; that defendant had been notified about three months before this accident that the bridge was unsafe, and had thereupon caused certain repairs to be made; that the repairing went to the extent of putting in some new planks and replacing most of the old ones, although the latter had been worn quite thin at the edges, by turning the worn side down, the effect of which was to present a smooth surface, although, owing to the wearing of the planks at the joints, they were quite thin where the edges met; that the break in the floor happened where the thin edges were joined.

It is sought to support this nonsuit under the authority of *Creighton v. Freeholders of Hudson*, 70 N. J. Law, 350, 57 Atl. 870, which was determined upon a rule to show cause, and the verdict set aside, upon the ground that the county was not an insurer, but only liable where it wrongfully neglects to repair, and that to render it liable it was necessary to prove, not only that the bridge was out of repair, but, in addition, either that the board of freeholders had knowledge of its condition, or that it had been out of repair so long that they were chargeable with notice thereof in time to have made the necessary repairs. Neither actual or constructive notice was shown in that case.

The conditions present in the case under consideration differ materially from those reviewed in *Creighton v. Freeholders of Hudson*, supra. Here it appears that the board of freeholders had been notified that the bridge was unsafe; that they undertook to make the necessary repairs, and, instead of taking out all of the worn planks, took out some, and retained others worn at the edges, which broke under ordinary usage. I am of opinion that in this case it was a jury question whether repairs necessary to make a safe bridge had, after notice given, been made. The defendant had notice of the unsafe condition of the bridge, and, when it undertook to repair, it should have done it in such manner as to make it safe for the passage of horses and wagons under ordinary conditions. Whether the taking

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

up worn plank, turning them over, and replacing them with the thin edges joined together, which afterward gave way under ordinary and intended use, is a wrongful neglect in making repairs, was a jury question.

The plaintiffs claim that this action can be supported under the act, approved March 24, 1859 (P. L. p. 624) (Gen. St. 1895, p. 2840, § 173) entitled "A supplement to an act concerning roads approved April sixteenth, Eighteen Hundred and Forty-Six," which provides that if a damage shall happen to any person by means of the insufficiency or want of repair of any bridge upon any public road in any township of this state, which such township or the county in which the same is situate shall be liable to make or repair, the person injured shall have a right of action against the county, and argues that the supplement of March 15, 1860 (P. L. p. 285), to "an act respecting bridges" (Gen. St. 1895, p. 307, § 9), does not apply to this case, and that it was not required that there should be a "wrongful neglect," as required by the latter act, and therefore a sufficient case was made by the plaintiffs if it appeared that the injury resulted from an insufficient bridge without proof of "wrongful neglect." The difficulty with this contention is that each count in the plaintiffs declaration alleges the breach of defendant's duty to be "the wrongful neglect of the said defendant to maintain and keep said bridge in good repair." Manifestly this declaration is founded upon the wrongful neglect of the defendant as provided in the act of 1860, and not upon the mere insufficiency or want of repair as provided in the act of 1859. Therefore the claim of the plaintiffs that they are entitled to recover under the act of 1859 is without merit, and not entitled to consideration.

The declaration is framed upon the act of 1860, and I think there was sufficient evidence offered by the plaintiffs from which the jury might infer a wrongful neglect in keeping the bridge in good repair, and for this reason the nonsuit should be set aside, and a new trial ordered.

(75 N. J. E. 158)

McCARTER, Atty. Gen., v. UNITED NEW JERSEY R. & CANAL CO. et al.

(Court of Chancery of New Jersey. Nov. 21, 1908.)

1. EQUITY (§ 228*)—DEMURRER—SUFFICIENCY.

A demurrer admits the truth of the facts in a bill or information only for the purpose of denying that the law arising upon those facts entitles the complainant or informant to relief; and a demurrer containing a protestation of the truth of the facts, while thus qualifiedly admitting them, is not bad as a denial of the truth of the facts pleaded, but is good in form.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 228.*]

2. EQUITY (§ 233*)—OFFENSES INCIDENT TO CONSTRUCTION AND MAINTENANCE—PLEADING—DEMURRER.

When the Attorney General files an information in the Court of Chancery under a statute imposing certain duties upon railroad corporations, and prays relief which by the statute the court is empowered to grant, the defendants may demur generally, alleging that the informant has not made or stated such a case as entitles him to relief, and a demurrer in such form constitutes an appropriate pleading.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 509; Dec. Dig. § 233.*]

3. EQUITY (§ 263*)—PLEADING—DEMURRER—MOTION TO STRIKE—PRACTICE.

A motion to strike out a demurrer as insufficient is according to the established practice.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 263.*]

4. EQUITY (§ 263*)—PLEADING—DEMURRER—SUFFICIENCY.

A demurrer which goes to the whole information and raises the question of want of power in the court to grant relief will not be struck out as insufficient unless it is frivolous; and especially when the argument of the motion was confined alone to the question of form will it not be struck out, if the form be good.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 263.*]

5. EQUITY (§ 230*)—PLEADING—DEMURRER—SUFFICIENCY.

The demurrer in this case considered, and that part of it which is in the form of a general demurrer *held* to be good, and that part which consists of specification of causes of demurrer *held* bad, because not pointing out particular defects in the information.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 506; Dec. Dig. § 230.*]

(Syllabus by the Court.)

Information by Robert H. McCarter, Attorney General, on the relation of the Board of Railroad Commissioners, against the United New Jersey Railroad & Canal Company and the Pennsylvania Railroad Company, lessee. Defendants demurred, and the Attorney General moves to strike out the same. Motion overruled in part and granted in part.

Nelson B. Gaskill, Asst. Atty. Gen., for the motion. Alan H. Strong, opposed.

WALKER, V. C. The Attorney General, on the relation of the board of railroad commissioners, has exhibited an information in this court, in which he shows that the board was constituted and appointed pursuant to the provisions of an act of the Legislature entitled "An act to create a board of railroad commissioners for the state of New Jersey and to prescribe its powers and duties" approved May 15, 1907 (P. L. p. 450); that in section 8 of the act the board is charged with the duty to hear and examine complaint touching railroad service, and applications for changes of stations, crossings, abolition of grade crossings, and all other matters of railroad operation, to see that the laws of this state regulating said railroad companies are observed and enforced, to have

authority upon such matters to make and issue such orders to any railroad company as in the judgment of said board shall be reasonable and just, which said orders said railroad company shall comply with; that, upon failure to do so, said board shall report the failure to comply with said orders and all such violations, with the facts in their possession, to the Attorney General, and it shall then be his duty, within 30 days, to institute proper proceedings to enforce the order or orders of said commission, to recover suitable penalties or damages, or to institute proceedings in equity, mandamus, injunction, receivership proceedings, or other civil remedies; further, that the "New Jersey Railroad & Transportation Company," a body corporate by virtue of the provisions of an act of the Legislature entitled "An act to incorporate the New Jersey Railroad & Transportation Company," passed March 7, 1832, by section 6 of said act (P. L. p. 98) of incorporation was invested with all the rights and powers necessary to the construction and repair of a railroad from New Brunswick through or near Rahway and Woodbridge, through Newark, and thence to the Hudson river opposite the city of New York; that by section 20 of said act of incorporation it was made the duty of said New Jersey Railroad & Transportation Company to construct and keep in repair good and sufficient bridges or passages over or under said railroad where any public or other road shall cross the same, so that the passage of carriages, horses, and cattle on said road shall not be impeded thereby; that said New Jersey Railroad & Transportation Company subsequently, and in pursuance of the powers and subject to the limitations of said act of incorporation, constructed its railroad upon the route mentioned; that subsequently a certain agreement of consolidation was made between the Delaware & Raritan Canal Company, the Camden & Amboy Railroad & Transportation Company, on the one part, and the said New Jersey Railroad & Transportation Company, on the other part, whereby the said New Jersey Railroad & Transportation Company became merged in and with the other parties to the said agreement, under the name of the "United New Jersey Railroad & Canal Company"; that the said agreement was made pursuant to the powers granted by, and subject to, the limitations contained in a certain act of the Legislature, entitled "An act to validate and confirm certain agreements between the companies owning the railroad lines between New York and Philadelphia," approved February 27, 1867 (P. L. p. 115); that in and by section 2 of said act it was provided that the respective charters of said companies, with all the restrictions and liabilities therein contained, except as necessarily modified by such consolidation, should continue in force; that subsequently, and on June 30, 1871, the Delaware & Raritan Canal Company, the Camden

& Amboy Railroad & Transportation Company, and the said New Jersey Railroad & Transportation Company, being then merged into and known as the United New Jersey Railroad & Canal Company, together with the Philadelphia & Trenton Railroad Company, as parties of the first part, entered into certain articles of lease and contract with the Pennsylvania Railroad Company, whereby the latter company as lessee became, and was, and is, entitled to hold, and now does hold, use, and enjoy, the property and franchises of the several lessors; that said articles of lease and contract were ratified, confirmed, and validated by an act of the Legislature entitled "An act to validate and confirm a certain lease and contract between the companies now known as the 'United New Jersey Railroad & Canal Company' and the 'Pennsylvania Railroad Company,'" approved March 27, 1873 (P. L. p. 1298, pt. 2); that a railroad constructed and operated pursuant to the privileges and powers, and subject to the limitations contained in the act incorporating the New Jersey Railroad & Transportation Company, is now operated through the city of Rahway, and the tracks thereof cross a certain public street and highway of said city known as Irving street at grade, and at a point where said street is joined by another public street and highway known as Broad street which runs parallel with the right of way of said railroad; that said crossing is about 65 feet long and 45 feet wide, and over it the railroad has four tracks, two of which are normally used for freight and two for passenger trains, and over which tracks continuously passes and repasses at all hours of the day and night an enormous and heavy railroad traffic destined to and from the city of Newark, Jersey City, New York, and elsewhere; that the right of way of said railroad through the city of Rahway is fenced on each side for practically its entire extent, by reason whereof no speed regulations for the operation of trains thereon are observed within the limits of said city, but a large number of express trains, both freight and passenger, constantly pass through the said city and over the said crossing at a high rate of speed; that the city of Rahway is estimated to contain 10,000 inhabitants, and is divided by the said railroad tracks into two practically equal parts, of which the eastern part is chiefly the residential section and the western part chiefly the business section, and all the travel and intercourse between the two sections must pass and repass over the said railroad tracks by means of the public streets and highways of the city; that Irving street, by reason of its location, is one of the principal crossings, and is constantly and continuously used by a very large number of pedestrians, teams, both light and heavy, and by one line of electric street railway cars; that there is no overhead bridge or underground tunnel at Irving street, but that all travel must

pass over said crossing at grade, which crossing is at present protected by appliances commonly known as safety gates, and by a flagman, but, owing to the heavy travel over said crossing by pedestrians, vehicles, and street cars, and the continual and constant passage of trains at a high rate of speed over and along the said railroad tracks at said street, the inhabitants of the city of Rahway and all other persons passing along said street and across the said railroad tracks at that crossing are constantly and continuously subjected to inconvenience, delay, and obstruction in the conduct of their affairs, and to the liability of bodily injury and death, and that the passengers and employes upon the trains operated upon the said railroad tracks are also constantly and continuously subjected to the liability of bodily injury arising from the collision of such trains with vehicles upon the said crossing; further, that the Pennsylvania Railroad Company, lessee as aforesaid, has been requested by the said board of railroad commissioners to provide some other method for the passage of travel over said Irving street, which will remove or alleviate the present inconvenience, delay, obstruction, and danger hereinbefore set out, and render the said crossing a good and sufficient passage over or under the said railroad, as required by the act of the Legislature incorporating the said New Jersey Railroad & Transportation Company, but that the said Pennsylvania Railroad Company, lessee as aforesaid, hitherto has refused, and still does refuse, so to do; further, that it is the duty of said Pennsylvania Railroad Company, lessee as aforesaid, by virtue of the premises aforesaid, to construct and keep in repair a good and sufficient bridge or passage over or under the said railroad where Irving street crosses the same in the city of Rahway, so that the passage of carriages, horses, and cattle on said Irving street shall not be impeded thereby, and that this duty is a continuing duty which is not discharged when once performed, but always must be measured by circumstances, and that this duty now demands that the crossing as now maintained shall be discontinued and some other method of crossing substituted, which will be, measured by present conditions and circumstances, a good and sufficient crossing within the meaning of the act incorporating the New Jersey Railroad & Transportation Company.

The prayer is that the United New Jersey Railroad & Canal Company and the Pennsylvania Railroad Company, lessee of the United New Jersey Railroad & Canal Company, may, by mandatory injunction, be compelled to construct and keep in repair good and sufficient bridges or passages over or under the said railroad tracks where Irving street crosses the same in the city of Rahway, so that the passage of carriages, horses, and cattle on said Irving street shall not be impeded thereby, the sufficiency whereof shall be measured

and determined by the exigencies of the present public travel over said crossing, and that in order to give force and precision to the order of the court and to enable the defendants more readily to comply therewith, and the informant more readily to inform the court in the event of noncompliance with its order, if such should be the case, that the court may inquire into and thereupon direct what method of crossing, whether by change of grade of railroad tracks or of Irving street, or otherwise, should be adopted by the defendants and constructed and maintained by them as a good and sufficient crossing over the said Irving street; and for other and further relief.

To this information the defendants, the United New Jersey Railroad & Canal Company and the Pennsylvania Railroad Company, have jointly and severally demurred. The demurrer is general in form, and it also purports to specify several causes of demurrer in addition. That part which is general reads as follows: "(1) These defendants by protestation, not confessing all or any of the matters and things in the said information contained to be true in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer show that the said informant hath not, in and by the said information, made or stated such a case as entitles him in this honorable court to any discovery from these defendants or either of them, or to any relief against them or either of them as to the matters contained in the said information or any of such matters. For further cause of demurrer the defendants aver (2) that it does not appear by the information that the existing crossing of the railroad tracks by Irving street is not a good and sufficient crossing and passage, nor that the said defendants or either of them have not fully discharged their legal obligation in that behalf; (3) that the mayor and common council of the city of Rahway are not made a party to the information; (4) that the board of railroad commissioners has no lawful power or authority in respect to the conditions alleged in the information to exist at the crossing of Irving street and said railroad, nor any lawful power or authority to act as relator in the information; (5) that this court is without jurisdiction to grant any relief under the information."

The Attorney General now moves to strike out the demurrer (1) for the reason that it contains in fact both a plea and a demurrer to the information; also (2) to strike out the first cause of demurrer because it is too general, in that it does not state with sufficient particularity the cause alleged, and also because it does not contain any confession of the truth of the matters set out in the information, and thereafter denies that such matters entitle the informant to any discovery or relief, and because it raises a question of fact upon the denial of the truth of

the matters contained in the information; also (3) to strike out the second cause of demurrer because it is too general, and does not aver with sufficient particularity any cause of demurrer; also (4) to strike out the third cause of demurrer because it does not set forth with sufficient particularity any right on the part of the defendants to complain of the misjoinder or nonjoinder of other parties, nor the necessity for a joinder of said parties; also (5) to strike out the fourth cause of demurrer because the same does not set forth with sufficient particularity the reason why the board of railroad commissioners has no lawful power or authority in respect to the conditions alleged in the information, nor to act as relator; also (6) to strike out the fifth cause of demurrer, because it does not set forth with sufficient particularity wherein the Court of Chancery is without jurisdiction to grant any relief under the information. The motion to strike out is rested on six different grounds, and the causes of demurrer, including the general demurrer for want of equity, number five. The first two objections go to the general demurrer, which I have numbered 1. A motion to strike out an insufficient demurrer is in accordance with the established practice. *Bishop v. Waldron*, 56 N. J. Eq. 484, 486, 40 Atl. 447.

The several grounds of the motion to strike out will now be considered in their order.

First. The informant asserts that the demurrer contains in fact both a plea and a demurrer to the information. This objection on the argument was leveled against that part of the demurrer which is general and which is above recited verbatim. The contention of the Attorney General in this regard is that the demurrer does not unequivocally admit the truth of the information, and, that the pleading, as drawn, only qualifiedly admits the truth; that is, admits the truth only for the purpose of argument, and reserves the question of fact. He cites *Graham v. Spence* (N. J. Ch.) 63 Atl. 344, as authority for his position. Neither that case nor *Teeter v. Veitch*, 66 N. J. Eq. 162, 57 Atl. 160, upon which it is rested, bear out counsel's contention. The form of the demurrer interposed in neither of those cases is set out in the opinions. In the former case it is distinctly said that a demurrer which denies facts alleged in the bill will not be considered; and in the latter it is held that, if a demurrer introduces any facts or misrecites the statement of the bill, it will not be sustained. The demurrer itself is in the form immemorially used in cases where an attack is made upon a bill for want of equity, and follows the form of the commencement of a demurrer in *Dick. Ch. Pr.* p. 89, and follows the general averment of want of equity. *Id.* p. 92. Protestation against the truth of the matters contained in the bill is a practice borrowed from the common law, and undoubtedly intended to avoid conclusion in another suit or in the suit in which it is

put in in case the demurrer should be overruled. *Dan. Ch. Pl. & Pr.* *585. The only criticism which can be made upon the form of the demurrer, so far as I can see, is that it asserts that the informant is not entitled to any "discovery" as well as any relief. As no discovery is prayed, the demurrer might better have averred that the informant had not made or stated such a case as entitles him to any "relief" against the defendants, omitting reference to discovery. However, the assertion that the informant is not entitled to "discovery" should be and will be disregarded as surplusage. Strictly speaking, there is no "equity" in the information at all. It is not a bill praying relief under any recognized head of equity jurisprudence, but is a pleading invoking the aid of the court under a statutory jurisdiction recently conferred. The court of chancery is the forum pointed out for the administration of the remedy given by the legislative enactment upon the particular state of facts pleaded because its writ of injunction is the only appropriate method of enforcing the statutory duty imposed upon the defendants. However, the defendants are entitled to resist the informant by any defense known to equity pleading, one of which is by demurrer. And the demurrer may be of any kind recognized in practice. There are, as is well known, two kinds, general and special; and, although rule 209 of this court requires that all demurrers, whether general or special, shall distinctly specify the ground or several grounds of demurrer, it has been held that a simple statement of want of equity, in the usual language of a general demurrer, will constitute a sufficient specification of the ground of demurrer in cases where the court finds on looking at the complainant's bill that his right to relief is doubtful or uncertain. *Essex Paper Co. v. Greacen*, 45 N. J. Eq. 504, 19 Atl. 466; *Safford v. Barber* (N. J. Ch.) 70 Atl. 371. If in a cause invoking a strictly statutory jurisdiction of the court the defendant conceives that such a case has not been made by the bill, or other equivalent pleading, as entitles the complainant to relief, he may file a demurrer general in form, which form is just as appropriate as a general objection to relief under a statute as under a principle of equity, if the language employed is that such a case has not been made or stated as entitles the complainant to relief. Now, that is exactly what the general demurrer in this case avers, namely, that on the face of the information the informant is not entitled to relief. That question the demurrant is entitled to solemnly argue, and it cannot properly be considered and decided on a motion to strike out, unless upon inspection of the information it so clearly appears that the informant is entitled to relief that the demurrer may be said to be frivolous. In this connection it is sufficient to remark that the matter sub judice was presented and argued only as to the

form of the demurrer, and consequently the only question that is decided is as to the form of the pleading. Its form, in my judgment, is good and sufficient.

Second. It is asserted that the first specified cause of demurrer is too general, in that it does not state with sufficient particularity the cause alleged, and because it denies any confession of the truth, and denies that the statements of the information entitle the informant to any relief, and because it raises a question of fact upon the denial of the truth of the matter contained in the information. This is disposed of in the observations already made on the form of the general demurrer.

Referring again to the form of a demurrer as regulated by rule 209, it is to be observed that it has been held that, where the defect in the bill is obscure or latent to such an extent that the court cannot readily discern it, an explicit statement of the ground will be required. *Essex Paper Co. v. Greacen*, *ubi supra*. And, where the want of power in the court to grant the relief prayed springs out of some cause which can be distinctly stated in the demurrer in an intelligible proposition, whether it be collateral to the bill, strictly speaking, or whether involved in the main case, then the cause of demurrer must be specified. *Safford v. Barber*, *ubi supra*. The grounds of demurrer specified in the pleading under consideration will now be examined with a view to ascertaining whether the specifications distinctly point out specific objections to the information.

Third. The assertion is that the second specified cause is too general, and does not aver with sufficient particularity any cause of demurrer. This cause asserts that it does not appear by the information that the existing crossing at Irving street is not good and sufficient, or that the defendants, or either of them, have not fully discharged their legal obligation in respect to it. To my mind the assertion in the demurrer in this behalf is insufficient. The information shows by the recital of facts which are above set forth, and which it is not necessary here to repeat, that the railroad crossing at Irving street, Rahway, is such as subjects to inconvenience, obstruction, and delay the citizens of this state who are required to pass and repass over the crossing on foot or with horses and wagons and subjects to the liability of bodily injury and death all such persons, and also the passengers and employes upon the trains of the railroad operated at the place in question; further, that it is the duty of the Pennsylvania Railroad Company, lessee, by virtue of the act of the Legislature incorporating the New Jersey Railroad & Transportation Company, to maintain a good and sufficient passage over or under the railroad at Irving street, and that the duty is a continuing one, not dis-

charged when once performed but always to be measured by circumstances, and that that duty now demands that the present crossing shall be discontinued and some other method of crossing substituted, which will, measured by present conditions and circumstances, be a good and sufficient crossing within the meaning of the act incorporating the railroad company last mentioned. The information contains an averment of facts showing, or tending to show, the inadequacy and danger of the present crossing of Irving street, and the specification of demurrer directed at this state of facts is that they do not make it appear that the crossing is not good and sufficient. Here is no denial of the truth of the facts alleged, but an attempted denial that those facts warrant the conclusion which the pleader draws from them. This in my opinion may not be done, because whether or not the crossing is at the present time of the character attributed to it by the information is an issuable averment, which is confessed by the demurrer. *Pope v. Skinkle*, 45 N. J. Law, 39. Although a demurrer only confesses the matters stated in the bill to be true which are well pleaded, and does not admit any matters of law which are suggested in the bill or inferred from the facts stated (1 Dan. Ch. Pl. & Pr. *545; *Redmond v. Dickerson*, 9 N. J. Eq. 507, 59 Am. Dec. 418; *Paterson H. R. Co. v. Jersey City*, 9 N. J. Eq. 434), nevertheless because in the information it is averred that the crossing is insufficient and dangerous, stating facts tending to warrant that conclusion, and because the demurrer confesses those facts, a question is presented which is traversable and not demurrable.

Fourth. The informant contends that the third specified cause of demurrer is too general, and does not with sufficient particularity point out any right on the part of the defendants to complain of nonjoinder or necessity for the joinder of any other party. The cause alleged is that the city of Rahway is not made a party to the information. In *Wilson v. Bellows*, 30 N. J. Eq. 282, Mr. Justice Scudder, speaking for the Court of Errors and Appeals at page 284, said: "There can be no question that this defect in joining proper parties can be taken advantage of by demurrer where it appears on the face of the bill as it does in this case." Whenever a want of parties appears on the face of a bill, it is a cause of demurrer, unless a sufficient reason for not bringing them before the court is suggested. 1 Dan. Ch. Pl. & Pr. *558. The Legislature has imposed upon the railroad company the duty of constructing and maintaining a railroad crossing at Irving street in the city of Rahway, and has also clothed the relator with the power and duty of enforcing this obligation of the railroad. Whether or not the charter of Rahway imposed upon it any duties in this regard which conflict with the powers

of the relator, or with reference to which it may or must act in conjunction with the relator, might properly be raised by plea. Certain it is that the information does not, and the demurrer cannot, give us any information on the subject. Duties committed formerly to the municipality of Rahway and devolved upon the relator by the act of its creation, if any such there be, would seem to be duties now belonging to the relator under the rule for the construction of inconsistent statutes; but that is not a matter decided or even mooted upon this argument. There is nothing upon the face of the information whereby it can be said that it appears that the city of Rahway should be made a party to the information, or that the defendants are injured by want of the presence of the municipality named as a party in the cause. This objection to the cause of demurrer is in my opinion well taken.

Fifth. The motion is to strike out the fourth cause of demurrer because it does not set forth with sufficient particularity the reason why the relator has not lawful power or authority in respect to the premises nor to act as relator. The answer to this is that the assertion by the demurrant that the relator has no power in the premises goes directly to the question of the validity of the act under which the relator was created, and to the scope and extent of its powers. It is only another statement of the want of jurisdiction appearing upon the face of the whole information, and it is in my judgment comprehended under the general demurrer and is bad as a specified cause.

Sixth. It is claimed that the demurrer does not set forth with particular sufficiency wherein this court is without jurisdiction to grant any relief under the information; the cause alleged being that the court is without such jurisdiction. This is only a statement in another form of the general want of jurisdiction, and for the reason given as to the last cause considered it is insufficient. If it refers to any collateral matter, it should have been specifically stated. As the demurrant by his formal demurrer first above referred to has attacked the power of the court to grant relief generally, the attack made in the sixth specified cause of demurrer may well be considered to refer to some collateral matter, else it is entirely unnecessary to be pleaded, and it should, for want of particularity, be overruled.

The result is that the motion to strike out the first cause of demurrer—that is, that part of the demurrer which is general in form—will be overruled, and the motion to strike out the specified causes of demurrer will be granted, and they will all be struck out. That leaves the cause before the court on a general demurrer limited in its scope under the rule of court and decisions to which reference has been made.

(76 N. J. L. 754)

DORAN v. THOMSEN.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

1. MASTER AND SERVANT (§ 301*)—LIABILITY FOR INJURIES TO THIRD PERSONS—RELATION OF PARTIES.

Where a father was possessed of an automobile which he kept upon his premises, and his daughter, about 19 years of age, was accustomed to drive it and did so whenever she felt like it, asking permission to use it when the father was at home, but when not at home took it sometimes without permission, there being no proof that the daughter was actually employed by the father to operate the machine, *held*, in an action against the father, where the daughter in using the machine for her own pleasure in driving her personal friends negligently injured a person in the highway, that such proof was not sufficient to constitute the daughter the servant or agent of the master, and that a motion for a direction of a verdict for the defendant should have prevailed.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 301.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6422-6429; vol. 8, p. 7798.]

2. MASTER AND SERVANT (§ 302*)—INJURIES TO THIRD PERSONS—SCOPE OF EMPLOYMENT.

An act by a servant not malicious is within the principle that, to render a master liable for the negligent act of the servant, such act must be within the scope of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1225; Dec. Dig. § 302.*]

3. MASTER AND SERVANT (§ 302*)—INJURIES TO THIRD PERSONS—SCOPE OF EMPLOYMENT.

To render the master liable for the negligent act of the servant, the act must be done for the purpose of executing the master's orders and in doing his work and while actually engaged in serving the master, and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1225; Dec. Dig. § 302.*]

4. MASTER AND SERVANT (§ 301*)—LIABILITY FOR INJURIES TO THIRD PERSONS—RELATION OF PARTIES.

The court charged the jury: "If she took that machine out at that time in pursuance of a general authority of her father to take it whenever she pleased for the pleasure of the family, and for her own pleasure, for the purpose for which the master bought it, for the purpose for which her father owned it, for the purpose for which he expected her to operate it, then she was the servant of the father. Under those circumstances, that was the business for which the father bought the machine." *Held* error, because it based the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child, ignoring an essential element in the creation of that status as to third persons, that such use must be in furtherance of, and not apart from, the master's service and control.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 301.*]

(Syllabus by the Court.)

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Error to Supreme Court.

Action by Patrick Doran against Hugo A. Thomsen. From a judgment of the Supreme Court, defendant brings error. Reversed, and a venire de novo awarded.

Collins & Corbin, for plaintiff in error.
Willard W. Outler, for defendant in error.

VOORHEES, J. This action was brought to recover for personal injuries inflicted upon the plaintiff by being run into by an automobile at Morristown. A demurrer was filed to the declaration, originally consisting of three counts, and was sustained as to the first and third counts, but overruled as to the second count. The Supreme Court said: "It [the second count] in effect avers the relationship of master and servant, and that the accident was caused by the negligence of the servant while operating the motor vehicle for the master." *Doran v. Thomsen*, 74 N. J. Law, 445, 66 Atl. 897. The allegations of the second count are that the defendant possessed an automobile of great power capable of being operated at a speed of 60 miles an hour, and thereby it became the defendant's duty to use due care in its management while being operated along the public highways; yet the defendant, not regarding his duty, consented and allowed the said vehicle in his possession and control to be operated along the public highways at such a high rate of speed, to wit, at 60 miles an hour, that the vehicle was not in safe and proper control, and could not be properly managed by the person in charge, and that on the 22d of September he did negligently direct, consent, and allow the said vehicle in his possession to be operated by a member of his family so carelessly and without regard to the safety of the plaintiff and other persons in the highways at such a high rate of speed that the vehicle was not under control of the person operating the same, and then and there through the negligence of the person operating it ran into and collided with the plaintiff, by means of which he was injured. If the defendant is liable for the negligent manner in which the vehicle was operated, then a jury question was presented, and, as to that negligence, the court properly submitted the case to the jury; but there is another and preliminary question to be considered, which arises upon motions to nonsuit and to direct a verdict for the defendant.

The question thus presented is whether upon the theory adopted by the Supreme Court in allowing the second count of the declaration to stand and upon which the case was tried the defendant can be held liable. That theory involves the application of the doctrine of respondeat superior arising out of the relation of master and servant or of principal and agent. The automobile in question was the property of the defendant. He lived at Madison and kept it on his prem-

ises. His daughter, about 19 years old, was accustomed to drive it. She used it sometimes twice a day. At the time of the accident she had three friends in the car with her, and was out for her own pleasure. No other member of the family was with her; so that the machine was then being run by the daughter upon no errand of the father. There was no evidence to show that defendant's daughter was employed by him to operate the machine, but she was allowed to do so from time to time and drove it whenever she felt like it, as also did her brother. The defendant's testimony was that he bought the machine "for our own use, the same as a person might buy a horse and carriage for the family"; that it was operated mostly by his son and daughter, and, when he was at home, they had to come and ask for permission to use it, but, when not at home, they sometimes took it without permission. On the day in question the father was absent in New York City, and did not actually know that his daughter was intending to use the automobile, but he knew that she did use it whenever she desired to do so. She on this particular day took it of her own accord without asking permission. This evidence was uncontradicted. The case was submitted by the trial court to the jury solely upon the theory that the daughter of the defendant in driving the machine was the defendant's servant, and instructed the jury that, unless they found that the daughter was such servant, the defendant would not be liable.

The mere fact of the relation of parent and child would not make the child the servant of the defendant. In *McCauley v. Wood*, 2 N. J. Law, 86, Chief Justice Kirkpatrick in a case brought against a parent for the trespasses of her sons as such said: "Upon principles of law one person can never be made liable for the trespass of another. It is true that, if one command or authorize his servant to commit a trespass, he is responsible himself, but then it is the trespass of the master according to the well-known maxim of the law, 'Qui facit per alium facit per se,' and it must be so charged in the declaration." To constitute the relation of master and servant as to third persons, it is not essential that any actual contract should subsist between the parties, or that compensation should be expected by the servant. While the relation of master and servant in its full sense invariably and only arises out of a contract between the servant and the master, yet such contract may be either express or implied. "The real test as to third persons," says Mr. Wood in his work on *Master & Servant*, p. 11, § 7, "is whether the act is done by one for another, however trivial, with the knowledge of the person sought to be charged as master with his assent express or implied, even though there was no request on his part to the other to

do the act in question." It will be noticed that the act must be done by the one for the other. That was not so in the case at bar, and so there was no evidence upon which to find the existence of the relation if the daughter was not doing an act for her father. She was not even driving other members of the family. She was using the machine as a means of recreation and pleasure for herself and her own friends, and it would seem impossible to draw the conclusion that she could be regarded as the agent or servant of her father upon that occasion.

But there is still another ground. Assuming that the relation of master and servant existed generally between the father and daughter, yet it does not appear in this case that on the occasion in question she was acting as such servant within the scope of her employment. That the master is responsible for the negligence of his servant when acting within the scope of his employment is elementary law, but that he is not responsible if the negligence was committed by the servant when engaged in some private matter of his own is equally elementary. These two propositions are well stated in two New York cases. *King v. N. Y. C. & H. R. R. R.*, 66 N. Y. 181, 23 Am. Rep. 37, where the court spoke as follows: "Where one person has sustained injury from the negligence of another, he must in general proceed against him by whose negligence the injury was occasioned. If, however, the negligence which caused the injury was that of a servant while engaged in his master's business, the person sustaining the injury may disregard the immediate author of the mischief, and hold the master responsible for the damages sustained." In *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285, the court said: "The doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of such neglect or wrong at the time and in respect to the very transaction out of which the injury arose." In *Holler v. Ross*, 68 N. J. Law, 324, 53 Atl. 472, 59 L. R. A. 943, 96 Am. St. Rep. 546, Mr. Justice Fort, speaking for this court, says: "The servant of the master cannot bind the master to respond in damages to the plaintiff unless it be shown that the act which the servant did which caused the injury was an act which was expressly or by necessary implication within the line of his duty under his employment." We have seen that there was no express authority for the daughter to take the vehicle on the occasion of the accident, nor can we perceive that, by necessary implication, her use of it for her own purposes was within the line of her duty under her assumed implied employment. In *Evers v. Krouse*, 70 N. J. Law, 653, 58 Atl. 181, 66 L. R. A. 592, the case last cited received again the approval of this court, and it was further

stated that "an act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, done not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent * * * purpose of the servant. Such an act is not as a matter of fact the act of the master in any sense, and should not be deemed to be so as a matter of law. As to it, the relation of master and servant does not exist between the parties, and for the injury resulting to a third person from it the servant alone should be held responsible." In that case the defendant's son had been intrusted with a garden hose with which to sprinkle his father's lawn, and while so engaged deliberately turned the water upon a horse, frightening him, causing the injury complained of and for which the father had been sued. The court then said: "The fact that he [the son] used the tool supplied to him for the doing of his father's work for the accomplishment of his own mischievous purpose did not make it an act within the scope of his employment, and did not render the defendant liable for the injury resulting therefrom." While in that case the act was malicious, yet an act not malicious is within the enunciated principle, if such act is not expressly or by necessary implication within the scope of duty, and with regard to which it cannot be said that the servant was engaged in the performance of the act for the other. The act must be done for the purpose of executing the master's orders and doing his work and while actually engaged in serving the master, and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master. *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405; *Howe v. Newmarch*, 12 Allen (Mass.) 49. For a clear exposition of this principle, see *Morier v. St. Paul, etc., Ry. Co.*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793. The following are some recent authorities on this subject with special relation to automobiles: *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 577; *Clark v. Buckmobile Co.*, 107 App. Div. 120, 94 N. Y. Supp. 771; *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946; *Quigley v. Thompson*, 211 Pa. 107, 60 Atl. 506; *Patterson v. Kates (C. C.)* 152 Fed. 481; *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133; *Evans v. Dyke Auto Supply Co.*, 121 Mo. App. 268, 101 S. W. 1132; *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922; *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338; *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216.

Undoubtedly liability might be visited upon the father, but upon quite different grounds. If the machine had been bought for his children's use, and it was in its nature or use a menace to the safety of others,

then under the theory illustrated in *Van Winkle v. Am. Steam Boiler Co.*, 52 N. J. Law, 240, 19 Atl. 472, it might well be that liability would arise by reason of the father's intrusting a dangerous machine or agency to the hands of an inexperienced or incompetent person. Such a liability does not rest upon the negligence of the servant, but upon the father's negligence in permitting his child to use a dangerous machine. In the one the gist of the action is the negligence of the servant imputed to the master; in the other, the negligence of the father. This distinction is thus stated in 29 Cyc. 1665: "The mere relation of parent and child imposed upon the parent no liability for the torts of the child committed without his knowledge or authority expressed or implied; and, although when a parent authorized his child to act as his agent or servant in any matter he is liable for the torts of the child committed in the course of the employment, this liability does not grow out of the relation of parent and child, but is based upon the relation of principal and agent or master and servant, and is governed by the principles applicable to such relations. So also, while the parent may be liable for an injury which may be caused directly by the child, where, by his negligence, he made it possible for the child to cause the injury complained of, and probable that the child would do so, this liability is based upon the rules of negligence rather than the relation of parent and child." We are not at liberty to consider this possible liability, for there could not be any finding of fact against the defendant to this effect; it appearing from the bills of exception that the trial judge excluded from the consideration of the jury that question of fact by his instruction that, unless there was agency, there was no liability. *Felders v. North Jersey St. Ry.*, 68 N. J. Law, 343, 53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. Rep. 552. It was therefore error to refuse to direct a verdict for the defendant.

Error has also been assigned upon exception taken to the charge. The defendant requested the court to charge: "If at the time of the accident Miss Thomsen was using the machine for her own pleasure, and without reference to the defendant's business, then there must be a verdict for the defendant." This the court refused, and instead charged: "When you come to consider the defendant's business, * * * it is the business for which he bought this machine; that is, the business of the defendant. * * * It was the particular business for which he bought this machine. Was this servant engaged in operating that machine for the purpose for which her father bought it? Was she operating it for her own pleasure in the way that she has testified to? If she took that machine out at that time in pursuance of a general authority of her father to take it when-

ever she pleased for the pleasure of the family and for her own pleasure, for the purpose for which the master bought it, for the purpose for which her father owned it, for the purpose for which he expected her to operate it, then she was the servant of the father. Under those circumstances, that was the business for which the father bought the machine. If she did not have this general authority from her father, if she took this machine out for her own recreation, amusement, and pleasure, contrary to the authority of her father, and this accident occurred, while she may be liable, the father is not. I charge the sixth request to charge with the qualification which I have stated to the jury." This makes the defendant's liability to depend upon the object for which he purchased the machine, which was for the pleasure of the family, in connection with the fact that his daughter operated it for that purpose, the jury being instructed that thereby she became his servant. This is contrary to the doctrine of *Evers v. Krouse*, supra. It would subject a parent to liability if he bought for his son a baseball or for his daughter a golf club, and by permitting them to be used by his children for their appropriate purposes injury occurred. It bases the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child. This proposition ignores an essential element in the creation of that status as to third persons, that such use must be in furtherance of and not apart from the master's service and control, and fails to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs. The reason for liability is founded upon the idea of control which a master has over his servant. The court, although attempting to rest the liability upon the relation of master and servant, yet actually tested the liability by the fact that she was intrusted with the operation of the machine for her own pleasure, if purchased for that object, whereby she ipso facto became a servant. So that the charge thus in fact left the legal relationship of master and servant out of account and raised it in name only because the daughter was allowed to drive the machine. In this there was also error.

The judgment must be reversed and a venire de novo awarded.

(77 N. J. L. 73)

SOOLA v. BOARD OF EDUCATION OF TOWN OF MONTCLAIR et al.

(Supreme Court of New Jersey. Dec. 9, 1908.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 79*)—BOARD OF EDUCATION—POWERS.

Under Public School Act Oct. 19, 1903 (P. L. p. 5), a board of education has the power

to build a central heating plant, from which heat is to be distributed through pipes to a group of schoolhouses situated in the vicinity of, but not adjoining said central plant.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 188; Dec. Dig. § 79.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 80*)—BOARD OF EDUCATION—POWERS.

The school act requires that there shall be advertisements for proposals for the building, enlargement, or repair of schoolhouses, and that no bid shall be accepted which does not conform to the specifications therefor. *Held* that, after the reception of bids, it was not within the power of the board of education to modify the specifications by omissions and changes, and award a contract to a former bidder, although the lowest, to execute the work according to the revised specifications, although at a price less than the original bid.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 192; Dec. Dig. § 80.*]

(Syllabus by the Court.)

Certiorari on the prosecution of Peter Scolla against the Board of Education of the Town of Montclair and Norman S. Kellogg, to review a resolution. Resolution set aside.

Argued November term, 1908, before REED, BERGEN, and MINTURN, JJ.

MacLear & Fort, for prosecutor. Guild, Lum & Tamblin, for defendant N. S. Kellogg. Edwin R. Goodell, for defendant Board of Education of Town of Montclair.

REED, J. This writ brings up a resolution authorizing a contract to be entered into, between the board of education of the town of Montclair and N. S. Kellogg, for the construction of a central heating plant for five school buildings in the town of Montclair. The resolution was adopted July 7, 1908, at a regular meeting of the board of education, and it provides substantially that, upon the full compliance of N. S. Kellogg with certain stipulations and specifications as to contract, and upon notice from the proper town officials that funds are available for the erection and completion of said buildings, the president and secretary of the board of education are authorized to execute contract for said building with N. S. Kellogg. One of the reasons urged against the validity of this resolution attacks the power of the board of education to enter into any contract to construct the heating plant proposed to be erected. It is not questioned that the board of education possessed the power to erect, enlarge, repair, or furnish a schoolhouse or schoolhouses. Sections 52, 53, 72, 76, Public School Act, approved October 19, 1901 (P. L. 1903, pp. 21, 26, 28). The provisions of these sections, all contained in article VI of the act of 1903, were accepted by the voters of Montclair under the provisions contained in section 243 of said act.

The point made is that the proposed structure is a heating plant, and not a school

building. The facts are that there are four school buildings existing, and another in the course of erection. There is a grammar school building, a primary school building and a manual training school building, upon the lot on which the central heating plant is to be placed. The high school building is about 200 feet away on an adjoining lot. The Hillside grammar school building, now being erected, is about the same distance from the first three mentioned buildings, and near to the high school. This cluster of five buildings constitute a group called "The Central Schools." The buildings are of various ages, from 15 to 50 years. The central heating plant will be approximately 60 feet from the primary school building, and 200 feet from the high school and the Hillside grammar school buildings. The central heating plant is designed to furnish heat to all these five school buildings, and to these buildings only. It seems manifest that the board had the ability to enter into a contract for heating one or all of these five schools, because artificial heat is essential to the use of the buildings designed for school purposes. Therefore, had the board contracted for stoves for each room in each schoolhouse, or for single heaters to heat all the rooms in each house, such a contract would be clearly within the statutory authority conferred. The stoves would have been a part of the furnishing of the buildings, and the heaters would have been a part of the buildings themselves. Now if directly adjoining each house a room had been devoted to the generation of heated air, from which heated air was conveyed by pipes into the various rooms, there would still be no doubt that this was a part of the school building. But the insistence is that the present proposed building will be detached from any present or proposed school building, and therefore can be no part of the school buildings.

The only case in this state which I recall as possessing any pertinence to the question thus presented is that of *Chamberlain v. Cranbury*, 57 N. J. Law, 605, 31 Atl. 1033, on error 58 N. J. Law, 347, 33 Atl. 923. That case arose under the old school law as amended in 1894. P. L. 1894, p. 506. Section 19 of that act provided that the majority of legal voters of a school district could authorize the board of education of the district to issue bonds for the following purposes: (a) The purchase of land for school purposes; (b) the building of a schoolhouse or schoolhouses; (c) making additions, alterations, repairs, or improvements in or upon schoolhouses already erected, and the lands upon which they are located. The question was discussed whether under this statute the voter could empower the board of education to issue bonds, not only for the purchase of a lot and the building of a schoolhouse, but also for fencing, grading,

water supply, and furniture for the schoolhouse. The Supreme Court held that the grading, fencing, digging of a well, or providing other means for supplying the school with water, and the equipping of the schoolhouse with school furniture, were all a legitimate part of the construction of the schoolhouse, and the proper equipment of school property. On error, the court of last resort observed: "We are inclined to so regard the fencing, grading, and water supply; so also any furniture which may be constructed with, and permanently fixed to, the building, such as slates or blackboards built into the wall. But we cannot so regard the ordinary movable furniture of a school which is not fixed to the building." The court, it seems, imported the doctrine of fixtures into the question whether furniture was a part of the schoolhouse. If that test is applied in this case, we think the central heating plant is to be regarded as a part of the school buildings. It is to be applied to the use to which the schoolhouses are devoted. There is intention that it shall be so applied, and there is annexation to the houses by pipes which will convey the hot air from the plant itself to the separate buildings. *Atlantic Safe Deposit & Trust Co. v. Atlantic City Laundry Co.*, 64 N. J. Eq. 140-146, 53 Atl. 212. Nor does the fact that the heating plant is built as a single structure, and not in connection with the schoolhouse now in course of erection, matter, for the power to improve, repair, or furnish school buildings is as plenary as the power to erect them. So we think there is no defect of power to issue bonds upon this ground of objection.

There is however, a ground upon which the resolution must be set aside. Section 52, School Act 1903, printed in the fore part of P. L. 1903, pp. 5-21 enacts that: "No contract shall be entered into for the building of a new schoolhouse or for the enlarging or repairing of a schoolhouse already erected except after advertisements made under such regulations as the board may prescribe." There is a proviso which does not affect the present case. Section 53 provides that: "No bill for building or repairing schoolhouses or for supplies shall be accepted which does not conform to the specifications furnished therefor, and all contracts shall be awarded to the lowest responsible bidder." These statutory provisions, as already observed, were accepted by the voters of Montclair in accordance with section 243 of the above statute. In the present instance the advertisement for proposals directed the bidders to state the sum for which each would supply material for and erect the central heating plant, stating the amount to be deducted from the bid in case a specific change should be made in the material to be used in each of three particulars. Bids were received from eight bidders, the lowest of whom was N. S. Kellogg, whose bid was \$26,945. The architect re-

ported to the board of education a tabulated statement of the bids, with the remark that he had "had Mr. Kellogg in, and that Kellogg would deduct from the amount of his bid \$1,440 for omitting the Smith system, and would deduct other specified sums for the changing or omitting of certain work required in the specifications. By these changes and omissions, Kellogg's revised bid was reduced to \$23,763.37. The resolution brought up authorized the president and secretary of the board of education to accept the contract with Mr. Kellogg upon the revised basis. The reason assigned for this revision of the specifications and this reduction of the amount to be paid Kellogg was that the estimate of the amount of money necessary to be appropriated to the construction of the plant was insufficient to complete the general work, as well as the particular work, upon which Kellogg and the others bid, and so the changes and reduction of price were to bring the cost of the work within the estimated appropriation. These reasons were no doubt conceived in good faith. The question, however, propounded is whether the resolution to award the contract to Kellogg was in conformity with the statutory scheme of competitive bidding. It is manifest that there was no competitive bidding upon the work as revised. Even if the accepted proposal had been for less work than included in the specifications, or in other words, if the change was not in adding to, but only in discarding certain items which had been a part of the plan upon which the bidders had figured, it would nevertheless be a fact that the bidders had not bid upon the revised plan. What estimates each bidder would place upon the various items of work which went to make up the entire estimate does not appear. So whether the amount which each person would have bid, if the specifications had included only the work which Kellogg subsequently agreed to do, whether it would have been more or less than Kellogg's price, is a matter for conjecture. But there are not merely omissions, but changes, in the plans as revised; changes in the Acme system, and changes in the pipe coverings. This fact only accentuates the difference between the specifications as bid upon, and the specifications upon the basis of which the contract was directed to be accepted. It is because the legislative purpose to require competitive bidding will be foiled if municipal bodies can enter into a contract upon a basis other than that advertised that it has been held that a contract must correspond with the specifications upon which bids were invited. In *State, Skirm, v. City of Trenton* (N. J. Sup.) 29 Atl. 158, it was said: "The contract set out in the return is also improper in allowing six months for the doing of the work, while the proposal for bids stated that the work should be completed in 120 working days. Correspondence

between the advertised proposals and the contract in this particular is enjoined by the statute, and is necessary to secure impartiality toward the bidders." So in *Shaw v. City of Trenton*, 49 N. J. Law, 339, 12 Atl. 902, Mr. Justice Magie observed: "In my judgment, a contract awarded with a warranty of 9 years was not the contract for which proposals were asked, and therefore the competition required by section 107 of the charter (P. L. 1874, p. 385) was not afforded." Although this case was reversed by the Court of Errors for another reason, the view expressed in the Supreme Court was concurred in. *Van Relpen v. Jersey City*, 58 N. J. Law, 262, 270, 33 Atl. 740. In this last case it was held that, bids having been invited upon the condition that the contractor should provide reservoir capable to store a water supply for 100 days, delivery at the rate of 50,000,000 gallons per diem, the contract was not lawfully awarded to one of the bidders, for the reason that it offered to provide a storage capacity sufficient for 250 days. Indeed this rule that a contract must conform to the specifications is one so essential to the preservation of the policy to be carried out by competitive bidding that it has been recognized whenever the matter has been brought under judicial notice. 20 Cyc. of Law, p. 1169, and cases cited.

The resolution should be set aside.

(75 N. J. E. 4)

OTT v. TEWKSBURY et al.

(Court of Chancery of New Jersey. Oct. 31, 1908.)

LIFE ESTATES (§ 7*)—RIGHT OF LIFE TENANT TO POSSESSION OF PROPERTY.

Testator in general terms gave half his estate to his widow for life, and at her death to his issue surviving her; and besides the general rule of construction in such a case, without more, that the personal property is to be converted and invested by the executors, and the income only paid to the life tenant, other clauses expressly authorizing the executors to sell any or all of the personal property and invest the proceeds, and to sell the real estate, and expressly directing that the management of real estate in which O. was interested with testator should continue with him, indicated that the whole estate should be converted by the executors and invested by them; they paying the income to the widow. *Held*, that a contrary intention, that she should have possession of the principal, overcoming this, was not shown by the provision expressing the desire of testator that his widow should out of his personal estate make such gifts to certain friends (preferably money to two of them) as they should desire and the executors should approve.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 30; Dec. Dig. § 7; * Wills, Cent. Dig. § 1748.]

Suit by Simon Ott, sole surviving executor of George Tewksbury, deceased, against Charlotte Tewksbury and others for construction of a will. Heard on bill, answers, replication, and proofs. Will construed.

Alonze Church (Munn & Church, of counsel), for complainant. A. F. Skinner (Pitney, Hardin & Skinner, of counsel), for defendant Charlotte Tewksbury. W. T. Carter, Jr., for infant defendants.

EMERY, V. C. One question was reserved on the hearing of this case, which is a bill filed by an executor for the construction of a will and directions as to payment of a legacy to the tenant for life. The testator, George E. Tewksbury, a resident of this state, died possessed of considerable personal property and also of real estate situate mainly out of this state. By his will, after first directing payment of his just debts and funeral expenses, he gave, devised, and bequeathed to his wife, "one-half of all my estate, both real and personal, during her natural life, and at her death to my lawful issue her surviving." One child is living, the infant defendant of whom the wife has been appointed guardian. The remaining half of his estate, both real and personal, was devised and bequeathed to his lawful issue him surviving. After these two general bequests and devises by the second and third items of his will, disposing of all his estate, real and personal, after payment of debts and funeral expenses, the testator makes devises and bequests which, being subsequent, qualify or affect the previous gifts. By the fourth item he directs that a house and lot in New Hampshire, in which his mother was living, and which (as appears by the evidence in the cause) testator claimed to be his property, be sold and the proceeds divided, one half to his wife, and the other half to the defendants, his sister and brother, equally. This property has been sold and the one-half of the proceeds to which the wife is thus entitled absolutely is in the executor's hands for payment to her, subject to his accounting, and payment of this one-half should be made to the widow as directed on the hearing. The fifth clause directs that the sale and management of the real estate in which testator was jointly interested with his partner, Simon S. Ott, of Topeka, Kan., shall be left entirely to his discretion.

The sixth and seventh clauses are as follows:

"Sixth. I desire that my wife shall out of my personal estate make such gifts to my friends Howard W. Hayes, my long and faithful partner Simon S. Ott, my uncle Col. A. S. Johnson and his wife, L. A. Johnson, (which I suggest in their case shall be money) as they may desire and my executors may approve.

"Seventh. I authorize my executors to sell and dispose of any or all of my personal property at public or private sale at their discretion and to invest the proceeds thereof whenever in their judgment such course shall

be necessary or advisable for the carrying out of any of the provisions of this my will. I also empower them to sell and dispose of any or all of my real estate at public or private sale at their discretion."

Howard W. Hayes, of Newark, and Simon S. Ott, of Topeka, were appointed executors and took out letters in this state, and, Mr. Hayes having since died, Mr. Ott, as surviving executor, has filed his account in the orphans' court for settlement. All of the real estate has not been sold, but some of it has been converted, together with the personal property, and the debts have been paid. The widow of testator, as entitled to one-half of the estate, claims payment directly to her of one-half of the principal fund ready for distribution under the second clause of the will tendering herself ready to give security, if required under section 8 of the act concerning legacies of May 17, 1894 (P. L. p. 398; Gen. St. p. 1939, par. 12), providing "that whenever personal property is bequeathed to any person for life * * * the executor shall not be compelled to pay or deliver the property so bequeathed to the person having any such life interest * * * until security shall be given to the orphans' court in such sum and form as in the judgment of the said court shall sufficiently secure the interest of the person or persons entitled in remainder, whenever the same shall accrue or vest in possession."

The question for decision is whether one-half of the property in the hands of the executor for distribution on the settlement of his account shall on this claim of the widow under the general devise and bequest be paid over to her (on giving security, if required), or whether the executor must retain this one-half for investment, paying to the widow only the income. The property sought to be paid over consists of the proceeds of personal property and of real estate which have been converted, and is now held for the trusts of the will. The general rule in relation to payments or delivery to the life tenant of personal property or the principal to the income or use of which he is entitled for life is the one declared by Lord Eldon in the leading case *Howe v. Earl of Dartmouth*, 7 Ves. 137 (1802), that where personal property is bequeathed for life, with remainders over, in general terms and not specifically, the property is to be converted and invested by the executors, and the income only paid to the life tenant. This general rule has been approved in so many cases in this state as to have become a settled rule of construction, and it must prevail unless there be in the will an indication of contrary intention, and that the tenant for life is to enjoy the possession of the property in specie and as given specifically. *Ackerman's Adm'r v. Vreeland*, 14 N. J. Eq. 23, 27, 28 (Green, Ch., 1861); *Rowe's Ex'r v. White*, 16 N. J. Eq. 411, 416, 84 Am. Dec. 169

(Green, Ch., 1863); *Howard v. Howard's Ex'rs*, 16 N. J. Eq. 486 (Green, Ch., 1864); *Parker's Ex'rs v. Moore*, 25 N. J. Eq. 228, 238 (Runyon, Ch., 1874); *Helme v. Strater*, 52 N. J. Eq. 591, 605, 30 Atl. 333 (McGill, Ch., 1894). In reference to the indications of such contrary intention, it is claimed on behalf of the life tenant that the tendency of the courts, as shown by the later cases, has been to allow small indications of intention as sufficient to prevent the application of the rule. The decision of Vice Chancellor Wigram in *Hinves v. Hinves*, 3 Hare, 609; 611 (1844), and of Leach, M. R., in *Collins v. Collins*, 2 Mylne & K. 703 (1833), and in *Pickering v. Pickering*, 4 Mylne & C. 289 (Lord Cottenham, 1839), are cited as illustrations of this tendency. But in a still later case—*Macdonald v. Irvine*, 8 Ch. Div. 101 (1877)—where the general rule and the effect of these cases on its application was considered, it was concluded by the Court of Appeal that it was altogether a question of a fair and reasonable construction of the will in reference to the intention of the testator that the property in question was to be enjoyed in specie, and that the general rule requiring conversion was not to be applied. And it was said by Thesiger, L. J., page 122, that in every case where such intention was found to exist (except one which was referred to as having gone almost to the extreme length consistent with the existence of the rule at all) there were either words in their natural and literal sense importing use or enjoyment of the property in the state in which the testator left it at his death, or directions contained in the will as to the conversion, which were inconsistent with a conversion by the court taking place upon the death of the testator. And it was further held to be the result of the cases (*James, L. J.*, page 124) that it was quite clear the rule in *Howe v. Dartmouth* must be applied, unless upon a fair construction of the will you find a sufficient indication of intention that it is not to be applied, and that the burden of establishing this was on the person asserting that the rule of the court should not be applied. This is the principle to be applied here and the test being, as I think it should be, whether the will, fairly construed, indicates such an intention that the property in question is specifically bequeathed and to be enjoyed in specie as to make the general rule for conversion inapplicable, the question in the case is whether the sixth clause of the will, which is the only indication relied on, has this effect. None of the personal property is expressly bequeathed to the life tenant by description or in specie, and it is claimed that the direction in the sixth clause that his wife shall out of his personal estate make gifts to his two executors and two others (preferably money to these two) is a specific gift by implication, because it neces-

sarily contemplates the possession of the personal property by the wife in order that she may make the gifts. This claim made under this clause, which applies only to personal estate, cannot reach to so much of the fund in hand as is derived from the proceeds of sale of the real estate, and, if valid at all, would seem to reach to the possession of the whole personal estate and not merely of the one-half, for it is not given out of the widow's one-half, but out of the whole personal estate. The gifts also are subject to the approval of the executors to whom in the first instance all the personal estate would ordinarily go, and who, by reason of this possession, are able to enforce the requirement of their approval. But, independent of these considerations, the plain and natural construction of this whole clause, and one which is consistent with the whole will, is that the wife (who is not one of the executors) may take out of the personal estate, being the whole estate which comes to the hands of the executors, property or money as gifts to the four persons named. These gifts which, as to character and amount, are thus to be fixed by the wife at her discretion, subject only to the executors' approval, are then to be given to her by the executors for the purpose of gifts by her to the persons named. This construction of the clause carries the testator's whole intention, as expressed by this clause, into effect, while leaving undisturbed the general plan of conversion of the entire estate and investment by executors made by the other portions of the will. For it must be further observed as bearing on the question of the testator's intention that the property is to be enjoyed by the widow in specie, and not be converted, that we have in this will a case in which the general rule as to the testator's intention of conversion, derived from the formal terms of the bequest itself, is fortified by other clauses indicating specially an intention that the executors shall convert all of the estate and hold the proceeds, and that pending the conversion the tenant for life shall not enjoy the possession of the property in specie as it existed at testator's death. These clauses are those which expressly authorize the sale of any or all of the personal property at public or private sale, and the investment of the proceeds to carry out the provisions of the will, the express authority to sell the real estate, and the express direction that the management of the real estate in which Mr. Ott is interested with him, shall continue in him, thus excluding the tenant for life from any enjoyment in specie of these lands or of their proceeds of sale. These are express special indications appearing by the will that, after the payment of debts and the delivery to the widow of the four gifts selected by her and approved by the executors, it is the testator's intention

that the whole estate, real and personal, shall be converted by the executors and invested by them for the purpose of paying the income to the wife.

Confirming, as they do, the application of the general rule as to conversion, which arises from the form of the bequest itself (a general bequest to persons taking in succession the same property), I must hold that the tenant for life is not entitled to demand of the executors the payment of the principal fund.

(74 N. J. E. 356)

NELSON v. NEW JERSEY SHORT LINE RY. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1903.)

EMINENT DOMAIN (§ 147*) — LEASES — CONSTRUCTION.

An agreement in a lease that a railroad, then being constructed, should go through the premises, and should not be opposed by the lessee, did not lessen the lessee's estate in the land, but amounted only to an agreement to allow the matter to be controlled by the lessors.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 395; Dec. Dig. § 147.*]

Appeal from Court of Chancery.

Suit by Meyer C. Nelson against the New Jersey Short Line Railway Company. From the decree (67 Atl. 1032), defendant appeals. Affirmed.

Linton Satterthwait, for appellant. E. Cutler, for respondent.

PER CURIAM. The decree should be affirmed for the reasons stated by the Vice Chancellor. The agreement by the complainant in his lease that a railroad then under way should go through, and not be opposed by him in any way, did not, as the defendant argues, operate to lessen his estate in the land. It amounted only to an agreement to allow that matter to be controlled by the lessors. That this is the correct view is shown by the subsequent agreement of the lessors that, if an agreement was made by the owner with a railroad company for the construction of a railroad across the farm, the lessee should be paid for any damages he might sustain as tenant, and that the clause in the lease in relation to a railroad was not intended to prevent him from being paid for any such damages. This was a construction of the lease by the parties thereto, and in harmony with the language of the lease itself. Whether the effect is not such as to require the compensation to the tenant to be taken out of the amount of the award by the commissioners already paid into the Court of Chancery is a question which may properly arise on the distribution of that fund, or on proper proceedings by the railroad company, but is not now before us.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(29 R. 1. 329)

LENNON v. BOARD OF CANVASSERS & REGISTRATION OF CITY OF PAWTUCKET et al.

(Supreme Court of Rhode Island. Dec. 14, 1908.)

1. ELECTIONS (§ 83*)—QUALIFICATION OF VOTERS—PAYMENT OF TAXES.

Payment of personal property taxes, requisite to entitle the persons assessed to vote, by another, without authority of such taxpayers, does not qualify them to vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 80; Dec. Dig. § 83.*]

2. ELECTIONS (§ 112*)—QUALIFICATION OF VOTERS—PAYMENT OF TAXES.

In certiorari against the board of canvassers and registration of a city to quash the certification of certain persons as voters, on the ground that their taxes were paid by another without their authority, respondents must show an authorization to pay the taxes in each instance sufficient to meet the constitutional requirements.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 112.*]

Petition for certiorari by John F. Lennon against the Board of Canvassers and Registration of the City of Pawtucket and others, to quash the certification of certain persons as voters and taxpayers. Assigned for further hearing.

Hugh J. Carroll, for petitioner. Frank W. Tillinghast, Edward W. Blodgett, and Michael J. Lynch, for respondents.

PER CURIAM. The testimony is undisputed that 1,293 taxes on personal property, each assessed on a valuation of \$200, and which amounted to \$3.31 in each case, were paid on October 27, 1908. It is further not disputed that on the same day William H. Barclay paid to the collector of taxes of Pawtucket the sum of \$3,800 for the payment of such taxes, and that that sum did, in fact, pay the taxes of 1,148 persons, including 475 of the qualified electors of the Third ward. Deducting 1,148 from 1,298, it thus appears that such personal property taxes of only 145 persons were paid in the entire city on that day otherwise than by the Barclay fund. If even half of these 145 are assumed to have been qualified electors of the Third ward, and also to have paid their taxes personally, there still remain more than 400 persons in that ward who appear to have been qualified, if at all, only by the payment made by Barclay, a number which exceeds the highest plurality of any successful candidate.

As the evidence now stands, there being no testimony either from Barclay or the individual taxpayers, the payment of these taxes appears to have been a voluntary and unauthorized act on the part of Mr. Barclay, and prima facie did not qualify the persons assessed to vote. We think it is incumbent upon the respondents to show, if they can,

an authorization in each instance sufficient to satisfy the requirement of the Constitution.

The case therefore will be assigned for further hearing.

STATE v. LAWRENCE.

(Supreme Court of Rhode Island. Dec. 14, 1908.)

CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REQUEST—POINTS COVERED.

It is not error to refuse instructions embodying points fully covered by the court's charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Exceptions from Superior Court, Providence & Bristol Counties; Charles F. Stearns, Judge.

Susanna Lawrence was convicted of a public offense, and she brings exceptions. Exceptions overruled, and case remitted for sentence.

William B. Greenough, Atty. Gen., and Harry P. Cross, Asst. Atty. Gen., for the State. Cooney & Cahill, for defendant.

PER CURIAM. The verdict of the jury, approved by the court, is sustained by the evidence. The charge set out in the complaint and bill of particulars was properly proved to the satisfaction of the jury. The charge of the court fully covered the points contained in the defendant's requests.

The defendant's exceptions are overruled, and the case is remitted to the superior court for sentence.

(108 Md. 627)

WERNER et al. v. CLARK.

(Court of Appeals of Maryland. Nov. 14, 1908.)

1. APPEAL AND ERROR (§ 15*)—ORDERS APPEALED FROM.

Where an order was allowed on June 4th dismissing exceptions to a ratification of a resale of mortgaged property, and on the same day the resale was confirmed, since the two orders, though separate, covered the same transaction, and could have been signed together, an appeal "from the order of June 4th" will be treated as taken from both orders.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 60; Dec. Dig. § 15.*]

2. MORTGAGES (§ 370*)—FORECLOSURE BY SALE—RESALE—RATIFICATION—PERSONS ENTITLED TO EXCEPT.

Where property was sold under a power in a mortgage, but the purchaser failed to pay the purchase price, so that a resale was ordered, when the property sold for less than at the first sale, the mortgagor could except to the ratification of the resale; he still having an interest in the property in the nature of a vendor's lien to the extent of the difference between what the property was sold for at the two sales.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 370.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
71 A.—20

B. APPEAL AND ERROR (§ 863*)—QUESTIONS CONSIDERED—GROUNDS OF APPEAL.

On appeal from an order dismissing exceptions to the ratification of a resale of mortgaged property, on the ground that the exceptants were not authorized to except thereto, the sufficiency of the exceptions will not be determined.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 863.*]

Appeal from Circuit Court, Howard County, in Equity; Wm. Henry Forsythe, Jr., Judge.

Suit by Louis T. Clark, assignee, against Catherine Werner and others. From an order ratifying a resale made under a power of sale in a mortgage, defendants appealed. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEAROE, SCHMUCKER, BURKE, THOMAS, and HENRY, JJ.

Edgar H. Gans, for appellants. Louis T. Clark, for appellee.

PEAROE, J. This is an appeal from an order of the circuit court for Howard county, sitting as a court of equity, ratifying a sale of mortgaged premises made under powers of sale contained in two mortgages.

The record discloses the following facts. The property in question was the property of one Charles J. Werner, deceased. After his death, intestate, his widow, and six children on April 20, 1894, united in the execution of a mortgage upon a tract of land in Howard county to Gabriella Mackubin to secure a loan to them of \$1,200 payable one year after date with interest. On October 6, 1902, the same parties, together with Louis Werner and Ethel Werner, united in the execution of another mortgage upon the same tract of land, and also upon another tract in Baltimore county, with the German Building Association of Howard county, a body corporate, to secure a loan to them of \$1,000 payable one year after date with interest, and these two mortgages were subsequently duly assigned to the appellee, Louis T. Clark, for foreclosure, after default made thereunder. On September 10, 1907, the appellee filed copies of these two mortgages, together with a bond as required by law, and advertised both said tracts of land for sale under the powers contained therein, but actually sold only the tract in Howard county. His report of sale, filed December 20, 1907, shows that he sold this tract on December 18, 1907, to Miss Catherine Werner for \$3,850, who "elected to pay all cash on final ratification of sale, and gave satisfactory assurances of her compliance." The report also set forth that the proceeds of this sale would be more than sufficient to satisfy both mortgages, and that for this reason the appellee did not offer the other tract for sale. The usual order nisi was published, and on February 1, 1908, this sale was finally ratified and confirmed. On February 24, 1908, the appellee filed a pe-

tition alleging that the purchaser, Miss Catherine Werner, had failed to comply with the purchase and found herself unable to do so, and he prayed for an order upon her "to show cause why an order should not be passed setting aside said sale, and directing an order of resale of said property at the risk of said purchaser." On the same day, the court passed an order requiring "Catherine Werner to show cause on or before March 11, 1908, why said sale made in the above-entitled cause should not be set aside, and a resale ordered at her risk," provided a copy of said petition and order be served on her on or before February 27, 1908. She failed to show cause as required, and on March 20, 1908, in due course of law, an order was passed "that the property mentioned in this cause, and sold by the petitioner, be resold by the said petitioner, Louis T. Clark, assignee, plaintiff in the above-entitled cause, for the payment of the purchase money thereof, viz., \$3,850, as reported in the report of sale filed December 20, 1907, etc., and it is further ordered that said resale be made at the risk of the said Catherine Werner." It will be observed here that this order did not, in terms, provide that said sale should be set aside as prayed in the petition, and as provided in the order to show cause. On April 24, 1908, the appellee filed a report, setting forth that, in pursuance of said order of resale, he did, after due notice and advertisement, offer said property at public sale on April 21, 1908, and sold the same to John G. Rogers for \$2,800, and that said sale was made at the risk of the former purchaser, Miss Catherine Werner. The usual order nisi was again published, and on May 22, 1908, the day before the expiration of this order, two of the mortgagors in each of the two mortgages, Augustus H. and Frederick A. Werner, filed 10 exceptions to the ratification of this sale. On May 29, 1908, the appellee filed a motion to dismiss these exceptions, and that a day be set for the hearing, and on the same day the court set the motion down to be heard on June 4, 1908, after notice to the exceptants. The motion does not state the ground on which it was based, nor does the record disclose the ground, nor whether any hearing was had; but the appellee in his brief states that "this was upon the theory that the exceptants had no standing in court in the proceeding relating to the resale," and there could be no other rational ground for declining to hear the exceptions. On June 4, 1908, an order was passed "that motion to dismiss be sustained, and exceptants be dismissed," and on the same day the resale was finally ratified and confirmed. The appeal was taken "from the order of court dated June 4, 1908." The two orders of that date, though separately signed, cover but one transaction, and might properly have been made effective by one signing, as they

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were evidently concurrent in execution. The appeal will therefore be treated as taken from both orders.

The narrow question thus presented is well stated in the appellants' brief in these words: "When property has been sold under a power in a mortgage, and the purchaser fails to comply with the terms of sale, and a resale of the property is ordered and made, has the mortgagor any standing in court to except to the ratification of the resale?" It is conceded in the brief of the appellee, and could not reasonably have been denied, that Miss Catherine Werner, as the defaulting purchaser, might have excepted to the ratification of the resale, though she was one of the mortgagors; but she did not except. Therefore the concrete facts, as hereinbefore recited, are accurately embraced in the question framed by the appellants' counsel, which must be taken as implying that the excepting purchaser is not one of several mortgagors, who, if the sale to him were ratified, would acquire the interest of the other mortgagors in the property. The appellee rests his case wholly upon the proposition that the effect of the ratification of the original sale was to divest absolutely the title of the mortgagors, and to vest a complete equitable title in the defaulting purchaser, and that upon ratification alone, without more, "the mortgaged real estate became personal property, and the mortgagor's rights and interest in the former were transferred to the fund arising from the ratified mortgage sale." It has certainly never been expressly so decided in this state, and we do not think it could be so held consistently with our decisions involving this question.

Dalrymple v. Taneyhill, 4 Md. Ch. 171, decided in 1853, appears to be the earliest case decided after the passage of the act of 1841, now section 209 of article 16, Code Pub. Gen. Laws 1904, declaring the authority of the court to compel purchasers under a decree to comply with all the terms of sale, by process of attachment or other execution suited to the case, or to direct a resale at the risk of the purchaser. In that case, land belonging to an infant had been sold under a decree for that purpose, and the sale had been ratified. The purchaser having utterly failed to comply with the terms of sale, a resale was ordered at his risk. The infant died October 4, 1852, and on the 12th of the same month the property was resold, and that sale was ratified. The controversy in the case was over the proceeds of this resale. The infant's personal representative claiming the proceeds as personal property, while her heir at law claimed them as real estate; the question being whether there had been a conversion from real to personal estate at the original sale during the life of the infant. Chancellor Johnson held there had been no conversion, and that the proceeds of sale, though actually money, were in legal contemplation real estate, and went to the

heir at law. He supported this conclusion by reference to the cases of *State v. Krebs*, 6 Har. & J. 31, *Leadenham's Ex'r v. Nicholson*, 1 Har. & G. 267, and *Hammond v. Stier*, 2 Gill & J. 81, in which, as he says, "it was held, upon great deliberation," that "the mutation of real into personal estate was complete when the sale was ratified by the court, and the purchaser has complied with the terms of it by paying the money of the sale if for cash, or by giving bonds if the sale is on credit," and the chancellor adds: "No case can be found in which it has been held or intimated that the concurrence of all these circumstances is not necessary to effect the change." The appellee cites the case of *Early v. Dorsett*, 45 Md. 462, in support of his contention above; but we do not so understand that decision. Judge Miller, in the opinion in that case, expressly says: "It has been the settled law of this state since the case of *Leadenham's Ex'r v. Nicholson*, 1 Har. & G. 267, that, where land is sold under a decree like the present, the mutation from realty to personalty is complete when the sale is ratified and the purchaser has complied with the terms of sale as prescribed by the decree." The decree in that case was for sale of real estate devised by will for distribution among the devisees. One of the devisees became the purchaser, and he paid the cash installment and gave bonds with security for the credit payments as prescribed by the decree. While in possession, but before payment in full of the purchase money or obtaining a deed from the trustee, he mortgaged the land to Early. He subsequently defaulted in his payments, and the property was resold at his risk. The auditor stated several accounts distributing the proceeds of resale, in one of which accounts the original purchaser's share was applied to Early's mortgage, and in another to certain persons to whom he had subsequently assigned his share. There was no account showing any distribution of the original purchase money. The court held that, if the sum in controversy represented, exclusively, purchase money under the original sale, it could not be applied to the mortgage, and should be applied to the assignments, and as it did not appear from the record whether any part of the sum in controversy was the surplus proceeds of the resale over and above what was necessary to pay principal, interest, and costs due on the original sale, and costs of resale, the case was remanded to determine that fact. The court said: "Early, in respect of his mortgage, occupies substantially the same position as if he had taken a mortgage of real property, subject to a vendor's lien for unpaid purchase money, and the land had been afterwards sold under a bill to enforce that lien. In such case, if the property does not sell for enough, or only for enough to pay the lien, the mortgagee gets nothing; if it sells for more, he gets the surplus." It is apparent,

from the above examination of *Early v. Dorsett*, supra, that it does not sustain the proposition of the appellee.

Recurring again to the case of *Dalrymple v. Taneyhill*, the observations of the chancellor are so pertinent to the case before us that we may profitably quote further from that case. He said: "The argument pressed now is that one of the circumstances, and that a very important one, which the Court of Appeals say is necessary to work the mutation from real to personal estate, may be dispensed with; that the sale, and the confirmation of the sale by the court, are sufficient for the purpose, though the purchaser may have neglected to comply with the terms, either by paying the money, or giving the bonds, though the appellate court have said, when the question was, what combination of circumstances shall change the nature of real and impress upon it the character of personal estate, that a compliance by the purchaser with the terms is necessary. If the purchaser does not comply with the terms of sale, the thing, which is the equivalent for the real estate sold, does not exist, and may never exist. The land would be gone, or its nature changed, and neither money, or security for the money to be paid for it, brought into existence. * * * If real estate is converted into personalty, it should be into something tangible and substantial, and the mere bid of an irresponsible man, though that bid may have been accepted by the court, cannot be permitted to have such an effect. Acts 1841, c. 216, under which the proceeding for resale was had, gives no countenance to the idea that a noncomplying purchaser is regarded as the owner of the estate sold by the trustee. It authorizes a resale of the property at his risk, but not as his property. On the contrary, the order which the court is authorized to pass by this act, and the order which was in fact passed in this case, is a revocation of the order confirming the sale, and destroys any inchoate title which the first purchaser may have acquired by the confirmation."

We cannot discover that this clear and emphatic language of the chancellor has ever been questioned or criticised in any decision of this court, nor do we think it can be said that the principle announced by him has been disapproved in any such decision. It is true that in *Mealey v. Page*, 41 Md. 183, 184, the court said: "The property was sold as that of the original purchaser, and at his risk, he being entitled to any excess in the proceeds of sale over and above the costs and expenses of the resale, the commissions on the amount of the proceeds thereof, and the amount of the purchase money due on the former sale." But the last clause of the sentence just quoted, which we have underlined, shows conclusively that the distinguished judge who wrote that opinion did not mean to be understood as saying that the defaulting purchaser was to be regarded as the own-

er of the property, but that he meant that in any event the proceeds of the resale, after payment of costs and commissions properly allowable, were to be applied to the amount of the purchase money due on the former sale, without regard to whom such amount was due. In other words, that any one interested in the property when the original sale was made, the purchaser not having fully complied with the terms of sale, still continued to be interested in the property, when resold by reason of default by the original purchaser. Or, as expressed in the passage quoted above from *Early v. Dorsett*, the purchaser at the original sale, after a resale for his default, occupies substantially the same position as one who purchases property subject to a vendor's lien. Or again, as expressed in the appellant's brief, upon making the first sale, there was a vendor's lien for the whole purchase money. This lien followed the property, under the resale, and inured to all the mortgagors equally, after satisfying the mortgage debt interest and costs. What we have said as to *Mealey v. Page*, supra, is equally applicable to the case of *Aukam v. Zantzinger*, 94 Md. 421, 51 Atl. 93, which the appellee claims to be conclusive in his favor. In both these cases, the property brought more at the resale than at the original sale, and the question presented in the case before us did not arise, and was not dealt with. The vendor's lien for the original purchase money was fully satisfied out of the proceeds of the resale, and when that was done, but not until then, the original purchaser was entitled to the surplus, because the interest of the former owners of the property was then extinguished. This consideration shows why the court, in *Aukam v. Zantzinger*, not only held that the first purchaser was entitled to except to the resale, but also why it held that the mortgagor was not so entitled. Here the conditions are reversed, and the same reason which required the court in that case to hold that the first purchaser could except to the resale requires us to hold that the mortgagor in this case is entitled to except to this resale. There is an outstanding vendor's lien in this case for \$1,050, the difference between the two sales, and this difference, after deducting costs, etc., represents the interest of the mortgagors in the property.

The case of *State v. Second Nat. Bank of Hoboken*, 84 Md. 325, 35 Atl. 889, proceeds upon the principle announced in *Dalrymple v. Taneyhill*. The local law of Baltimore City provided that all real estate sold at public auction in said city should be subject to a certain tax, "each and every time it should be struck off," and this court held that this provision applied only to "completed and consummated sales, and payment of purchase money." In that case the property was sold for \$68,200, and this sale was confirmed by the court; but the purchaser failed to comply with the terms of sale, and the property

was resold by an order of court, bringing only \$55,300. The auditor allowed the tax on each sale, and on exception the court below disallowed the tax on the first sale, and on appeal this court affirmed the decision, saying that "while, under a judicial resale, the property is in fact again put under the hammer, it is put there, not as a new distinct independent procedure, but as a means, and solely as a means, to realize the money which the original but defaulting purchaser failed to pay. The resale takes place under the original decree, supplemented by an order, * * * and is made with a view to pay off the same indebtedness for the payment of which the property was sold in the first instance, and the money realized by it is always applied precisely as would have been applied the money bid at the original sale had that money been paid by the first purchaser. The resale is simply an execution of the decree for a sale. Its very name imports that it is not such a new sale as to be a distinct proceeding." It is obvious that the above language applies as well to a sale under a power in a mortgage as to sale under a decree.

As what we have said is decisive of this case, it will be unnecessary to consider the other ground for reversal urged in argument. The sufficiency of the exceptions is, of course, not before us on this appeal.

Orders of June 4, 1908, dismissing the appellants' exceptions and ratifying the resale, reversed, with costs to the appellants above and below, and cause remanded.

(108 Md. 663)

FLATER v. WEAVER.

(Court of Appeals of Maryland. Nov. 20, 1908.)

1. APPEAL AND ERROR (§ 78*)—DECISIONS REVIEWABLE—FINALITY OF DETERMINATION.

An unconditional and absolute order of the orphans' court, directing an administrator to pay a fee to an attorney for services rendered the estate, is a final order, from which an appeal lies.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 78.*]

2. EXECUTORS AND ADMINISTRATORS (§ 216*)—ALLOWANCE AND PAYMENT OF CLAIMS—LIABILITIES OF ESTATE—SERVICES RENDERED TO ESTATE.

Where an attorney voluntarily gave advice and information to a prospective administrator in his individual capacity, who was thereby put on inquiry as to the existence of assets, which were discovered by the administrator through information obtained wholly from other sources because of the attorney's refusal to give such information, the attorney was not entitled to compensation as one who had rendered services beneficial to the estate, and his claim therefore could not be allowed by the orphans' court, under the authority conferred by Code Pub. Gen. Laws, art. 93, § 5, providing that an administrator shall be entitled to an allowance "for costs and extraordinary expenses (not per-

sonal) laid out in the recovery of any part of the estate."

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 757; Dec. Dig. § 216.*]

3. COURTS (§ 198*)—COURTS OF PROBATE JURISDICTION—SCOPE OF JURISDICTION.

The orphans' court is restricted to the exercise of powers expressly delegated, which cannot be extended by construction or implication.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 469; Dec. Dig. § 198.*]

Appeal from Orphans' Court, Baltimore County; Melchor Hoshall, E. Clinton Tracey, and H. Seymour Piersol, Judges.

Petition by Henry O. Weaver against Charles J. Flater, administrator of Samuel Flater, deceased, for allowance of a claim for services to the estate. From an order of the orphans' court allowing the claim, the administrator appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

E. L. Painter, for appellant. W. W. Parker, for appellee.

HENRY, J. This is an appeal from a decree of the orphans' court for Baltimore county, passed after plenary proceedings, and the facts of the case can be as briefly stated, and perhaps more clearly understood, by quoting from the record the petition, the answer, and other proceedings in the aforesaid court.

The appellee, Henry O. Weaver, filed in the said court the following petition: "To the Honorable, the Judges of said Court: The petition of Henry C. Weaver respectfully represents unto your honors: That Samuel Flater died in the Baltimore county almshouse some time during the month of July in the year 1906. That before he was taken into the Baltimore county almshouse he was in the hospital for some two or three months, and was an inmate of the county almshouse for a period of about four months previous to his death. That the said Samuel Flater was deceased and buried for a period of six months before any steps were taken by any one of his relatives to have his body buried in any other manner than that prescribed by the rules and regulations for the poor of Baltimore county. That the said Samuel Flater during his lifetime accumulated some money, and executed a last will and testament in due form, and placed the same in the care of one Edward E. Weaver. Some time during the month of February, 1907, it was learned by your petitioner that the said Samuel Flater was deceased, and the said Edward E. Weaver came into possession of his last will and testament, and, about to leave the city for some time, asked your petitioner as to best course to pursue with the will, and he was advised to file

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the same in the register of wills of Baltimore county, and to notify Charles J. Flater to come to your petitioner's office. That, in pursuance of the advice thus given to Mr. E. E. Weaver, your petitioner was requested by telephone to wait one Saturday afternoon at his office until the said Charles J. Flater could get there, and that your petitioner did in pursuance of said message wait until after 5 o'clock, when the said Charles J. Flater sought your petitioner's advice as to what was necessary to be done in order to obtain possession of the worldly goods belonging to the said Samuel Flater, deceased. The said Charles J. Flater specifically asked the question as to whether or not he could be appointed administrator of the estate, and your petitioner, being under the impression that the property has been left to William Flater, and in case of his death to his children, advised the said Charles J. Flater that he was the proper person to take out letters c. t. a. on the estate, and that the said Charles J. Flater promised to return in a week or ten days and apply for letters of administration, during which interval your petitioner had occasion to visit the office of the register of wills at Baltimore county, and, upon inspection of the will, found that the property was left, subject to a bequest of \$150 (one hundred and fifty dollars) to Mary Uhler, to William Flater, who died on April 2, 1907, and that your petitioner notified the Charles J. Flater, the prospective administrator c. t. a., upon his next return to the office of your petitioner, that it would be necessary for the said Charles J. Flater, in order to obtain letters on the estate of the said Samuel Flater, deceased, that he procure renunciation from the brothers and sisters of his father, the late William Flater. That subsequently your petitioner was called over the telephone by one E. Lynne Painter, a member of the bar, who claimed to represent the said Charles J. Flater, as administrator of the estate of Samuel Flater, deceased, and requested your petitioner to inform him as to the whereabouts of the estate of the late Samuel Flater, which your petitioner declined to do, until he should be compensated for the services he had rendered to the said Charles J. Flater in advising him how to proceed in obtaining letters of administration in the estate of said Samuel Flater, deceased, and for bringing to his knowledge the fact that Samuel Flater had died and left an estate. Nothing further was done in the matter, until your petitioner was informed that he must tell where the estate was located, or he would be cited before your honors, and your petitioner again declined to give information, whereupon the said Charles J. Flater, through his said attorney, attempted, through the proceedings of this court, to get from your petitioner and others information as to the estate of the said Samuel Flater. Your petitioner therefore charges and says: That the said Charles J.

Flater, the prospective administrator, at the time when he sought your petitioner's advice, and now the administrator c. t. a. of the estate of the said Samuel Flater, deceased, is now possessed of the sum of \$1,047.55, being the amount of money on deposit to the credit of the said Samuel Flater, deceased, and that the said Charles J. Flater, the aforesaid administrator, came into the knowledge of this fact by and through the information imparted to him by your petitioner, and therefore your petitioner claims to be entitled to compensation for services thus rendered to the distributees of the estate of Samuel Flater, and prays your honors to pass an order directing the said Charles J. Flater, administrator c. t. a. of Samuel Flater, deceased, to pay to your petitioner such compensation as may seem right and just in the matter. And as in duty bound, etc. Henry C. Weaver."

This petition was under affidavit, and annexed thereto was a certificate from two members of the Baltimore county bar that \$150 would be a fair and reasonable fee for the services rendered. Upon the said petition and certificate, the orphans' court, on October 12, 1907, passed an order allowing the petitioner \$100 "for professional services rendered the estate of Samuel Flater." Subsequently, on April 28, 1908, upon the petition of the appellant, this order was rescinded, and the matter was set for a hearing before the court on May 21, 1908, on which date the appellant filed the following answer: "To the Honorable, the Judges of said Court: Charles J. Flater, administrator c. t. a. of the estate of Samuel Flater, deceased, in response to the petition of Henry C. Weaver against him in this court exhibited, says: (1) That said petitioner has not stated in his petition such a case as entitled him to any relief in this court against this respondent. (2) That said petitioner has not stated in his petition such a case as entitles him to any relief in law or in equity against this respondent. (3) That this honorable court has no jurisdiction to hear and determine the matter or claim in said petition against this respondent. (4) That this honorable court has no jurisdiction to grant the relief prayed in said petition against respondent. (5) That said Henry C. Weaver is not an heir nor any relation of the deceased, Samuel Flater, nor has he any distributive share in the estate of the deceased. And, such being the case, any claim against this estate made by the said Henry C. Weaver is triable at law, as provided in section 98 and 99 of article 93 of the Code of Public General Laws of 1904, and this court has no jurisdiction to determine the justice of said claim or enforce its payment. And said honorable court is expressly forbidden from exercising any jurisdiction not expressly conferred by statute (section 260, art. 93), and is expressly enjoined from arbitrating any claim against an estate except by mutual agreement and

consent (section 256, art. 93). And said claim of said Weaver has never been properly probated or exhibited, as required by law (section 90, art. 93), nor entered upon the claims docket, as required by sections 115 and 82 of said article. And said administrator is forbidden by said section from paying any such claim unless so authenticated, except at his own risk, unless a suit be pending. And the jurisdiction of this court is limited to the passing of such claims for the protection of the administrator when properly probated. And said honorable court is expressly estopped from decreeing a payment, but the same may be disputed at law by the administrator, as set forth in sections 98 and 113 of said article. (6) And the time for filing said claim against said estate had long expired when the account of this respondent, administrator as aforesaid, after due notice by advertisement, had been duly filed and ratified by this honorable court on the 25th day of February, 1908. And said account was filed and ratified in good faith by this administrator before he had any notice of the filing of said petition or any knowledge thereof as no claim of the said Weaver appeared on the claims docket, as required by law. Section 112. And said account showed said estate wholly distributed and accounted for. (7) And without waiving any right of demurrer or plea as above set forth, this respondent, answering further, says: That said claim of said petitioner is wholly fraudulent and without merit, and said petitioner rendered no services to the estate of the deceased, as alleged in the petition; but, on the contrary, the said petitioner hindered, delayed, and prevented the discovery of the assets of said estate, and after the positive orders of this court in open court, and in defiance of said order, refused to disclose the nature of the location of the assets, and all such necessary information was thereupon obtained by this respondent wholly from information furnished by other parties. And said refusal to obey the order of this court was based by said petitioner on his demand for an extortionate fee for the furnishing of said information to this court, and to its administrator. (8) And now having fully responded to the petition of the said Weaver, this respondent respectfully prays that said petition be dismissed, and that this respondent be allowed his reasonable costs to be taxed by the register of wills. And as in duty bound, etc. E. L. Painter, Sol. for Respondent."

After hearing the parties and taking testimony on said date, the orphans' court passed the following order: "The matter of the petition of Henry C. Weaver for a counsel fee, filed in this court on the 12th day of November, 1907, coming on for a hearing, both sides being in court, after a protest filed by the said administrator, was overruled, and testimony and hearing of counsel for the respective parties, it is this 21st day of May,

1908, ordered by the orphans' court for Baltimore county that Charles J. Flater, administrator, cum testamento annexo, of the estate of Samuel Flater, late of Baltimore county, deceased, be and he is hereby directed to pay to the said Henry C. Weaver for professional services rendered the estate and distributees of Samuel Flater, deceased, the sum of \$100, with costs. Defendant's objection to testimony overruled."

On the 9th of June following, the appellant entered an appeal from this order to the Court of Appeals, and on the same day the orphans' court signed the following bill of exceptions: "The respondent, Charles J. Flater, administrator, in pursuance of the order of the orphans' court of Baltimore county, dated May 15, 1908, to appear before said court on the 21st day of May, to show cause, did on that day appear with counsel, and filed his response to said petition, which said response the respondent prays may be taken as part of this bill of exceptions. (1) And respondent in said response filed demurred to the jurisdiction of the court for the causes shown in the first, second, third, and fourth paragraphs of said response. (2) And this respondent thereupon deposed the court that the facts alleged in the pleas contained in the fifth and sixth paragraphs of said response were true, other statement of the law, and that the said respondent had no knowledge or notice of the passing of any order for the payment of a fee, until considerable time after passing of his account showing the estate wholly accounted for, and the ratification by this court of said account, duly recorded. And respondent offers said records to show that said account was passed, and that no claim appeared on the claims docket. (3) Whereupon, the respondent not waiving any of his rights as to demurrer and pleas, the orphans' court took the depositions of Henry C. Weaver that the allegations contained in which said petition were true as stated, and the deposition of Charles J. Flater that the matters and facts set up in his response were true, and said Charles J. Flater further deposed that, since his appointment as administrator, he had received no information of any kind from the said petitioner, and further that he visited the office of the said Henry C. Weaver at the request of the said Edward Weaver, who advised him that he solicited for his nephew Henry C. Weaver, who was an attorney, but that he did not visit said office nor receive any advice or information after his appointment as administrator. And said Henry C. Weaver deposed that he had refused to obey the order of the orphans' court when summoned as a witness before said court, and reveal the location of the assets of the estate, for that he contended that he was entitled to compensation before giving such information, although he would furnish said information as a set-

tlement of his claim for services, if paid \$100 by the administrator. And no testimony having been adduced that said petitioner furnished any information, or rendered the estate any services after the appointment of the administrator, the respondent prayed the petition be dismissed. (4) And the respondent objected, as set forth in the decree, to testimony being taken, as the court was without jurisdiction to hear and determine this cause, and further objected to any reference to testimony being taken, in the decree signed by this, the said orphans' court, for the same reasons, and for that the said testimony was not in writing. And all the objections of the respondent being overruled, the court thereupon signed a decree, and defendant gave immediate notice of appeal in open court. We hereby certify the above bill of exceptions, and that the objections were taken as above set forth. E. Clinton Tracey, H. Seymour Piersol, Judges of the Orphans' Court of Baltimore County."

The appellee has filed in this court a motion in writing to dismiss the appeal because the order appealed from determined no right and was not final in its nature. And he further contends that, if such order or decree were the subject of appeal, there can be no doubt of the right of the orphans' court to pass it under authority conferred by section 5, art. 93, of the Code of Public General Laws of 1904, which, in part, provides that an administrator shall be entitled to an allowance "for costs and extraordinary expenses (not personal) laid out in the recovery or security of any part of the estate."

In support of the first proposition, the recent case of Decker, Executor, v. Fahrenholtz, decided by this court at the January term, 1908, and published in 68 Atl. 1048, is cited. In that case the orphans' court of Baltimore City, acting upon a petition filed by an attorney, accompanied by the assent of the executor to the allowance of a reasonable fee, passed an order directing the executor to pay the attorney \$2,000 for his services. Subsequently, this order was rescinded as having been improvidently passed, without finally disposing of the petition, and from the order of rescission an appeal was taken to this court, which held that the order was not final in its character, as the petition was still before the court to be acted upon at some future time. Hence the appeal was dismissed. In the case before us, the order is of a different character. It directs in unconditional and absolute terms the payment of \$100 to the petitioner by the administrator for professional services rendered the estate and distributees of the decedent. It is in terms and in substance a final order, and as such can rightfully be brought on appeal to this court. If the or-

der of April 28, 1908, as set forth in the record, rescinding the previous order of October 12, 1907, were before us, it would present a case parallel to that of Decker v. Fahrenholtz, in so far as the nature of the order is concerned.

The claim itself is without merit. It is not asserted that the claim is a debt against the decedent, nor against the administrator in his representative capacity; but it is advanced as a claim for services which were alleged to be beneficial to the estate of the decedent and to the distributees thereof, and that the orphans' court had authority to allow it under section 5, art. 93, of the Code above referred to. It may have been that Charles J. Flater was put on inquiry by his conversations with the appellee, and given to understand that his uncle left some money; but the record shows that Weaver flatly refused to disclose the character or location of the estate, and, according to the record, this important information was obtained wholly from other sources. Even when brought before the orphans' court, the appellee declined to tell about the estate unless paid \$100 for advice, which he had voluntarily given to Charles J. Flater when, through solicitation, he came to his office before the application for letters testamentary. Such advice was given to Flater in his individual capacity, and it is clear from the record that no services were rendered at the request, express or implied, of the administrator, or of any person interested in the distribution of the estate. As matter of fact, the conduct of the appellee was calculated to delay the settlement of the estate. The claim does not therefore come within the scope of the provision of law relied upon. The orphans' court is restricted to the exercise of powers expressly delegated, which cannot be extended by construction or implication, and we know of no other provision in the testamentary law of this state which, under the facts here presented, would confer the authority to pass the claim in question. Code Pub. Gen. Laws 1904, art. 93, § 260; *Bowie v. Ghiselin*, 30 Md. 553.

The motion to dismiss is overruled, and the order is reversed, with costs to the appellant above and below, and the petition is dismissed.

(108 Md. 693)

MANDRU v. ASHBY et al.

(Court of Appeals of Maryland. Nov. 20, 1908.)

1. EVIDENCE (§ 35*)—JUDICIAL NOTICE—LAWS OF OTHER STATES.

The courts of Maryland do not take judicial notice of the laws of another state, and the same must be proved as any other fact, and in the manner prescribed by Code Pub. Gen. Laws 1904, art. 85, § 53.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 51; Dec. Dig. § 35.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. STATUTES (§ 290*) — DOCUMENTARY EVIDENCE—LAWS OF OTHER STATES.

The mere reading of the law of another state to the court in argument cannot supply the failure to prove the law in the manner prescribed by Code Pub. Gen. Laws 1904, art. 35, § 53.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 389, 390; Dec. Dig. § 290.*]

3. LIMITATION OF ACTIONS (§ 2*) — STATUTES OF LIMITATION—NATURE—WHAT LAW GOVERNS.

A sealed note, made in Ohio, which, according to the laws of that state, is not a specialty, will be treated as a specialty in Maryland, and is subject to the limitation laws of Maryland.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 4; Dec. Dig. § 2; *Contracts, Cent. Dig. § 1559.]

4. CONTRACTS (§ 144*)—ACTIONS FOR BREACH—REMEDY—WHAT LAW GOVERNS.

The lex loci controls the nature, construction, and validity of contracts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 724-727; Dec. Dig. § 144.*]

5. CONTRACTS (§ 325*)—REMEDIES—WHAT LAW GOVERNS.

The remedy on contracts is regulated by the law of the forum.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1558; Dec. Dig. § 325.*]

6. LIMITATION OF ACTIONS (§ 2*)—STATUTE OF LIMITATION—CONSTRUCTION—WHAT LAW GOVERNS.

The defense of limitations, being a matter of procedure, is controlled by the law of the forum.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 4; Dec. Dig. § 2; *Contracts, Cent. Dig. § 1559.]

Appeal from Circuit Court, Prince George's County, in Equity; George C. Merrick, Judge.

Suit by Mary Lovering and others against Ida Ashby and Ida Ashby as executrix. Louisa Mandru intervened. Decree for plaintiffs, and intervenor appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

T. Van Clagett, for appellant.

HENRY, J. The appellant was an intervening petitioner in a creditors' suit instituted in the circuit court for Prince George's county, in equity, by Mary Lovering and others, against the appellee; the bill praying that a deed from Jordan L. Stanley to the appellee be set aside, and that the property conveyed by said deed, or so much thereof as may be necessary, be sold for the payment of the debts of the decedent. The deed was set aside by the court, the property sold, and the claims of the creditors originally suing were satisfied and paid, but the claims of the appellant, who was duly admitted as a co-plaintiff by the court, were rejected, and from the decree she has appealed to this court.

Her claims against the estate of Jordan L. Stanley are based upon two notes, filed as exhibits with her petition, and which are as

follows: "\$241.00. Canton, O., July 8, 1896. Ninety days after date, for value received, I promise to pay to the order of Mrs. Louisa Mandru two hundred and forty-one dollars, with interest at the rate of 8 per centum per annum, at Strausburg, Ohio, interest payable annually, and I hereby authorize an attorney at law to appear in any court of record in the United States, after the above obligation becomes due, and waive the issuing and service or process and confess a judgment against me in favor of the holder hereof for the amount then appearing due together with costs of suit, and thereupon to release all errors and waive all rights of appeal. J. L. Stanley. [Seal.]" The second note was as follows: "\$7.00. September 8, 1892. One day after date I promise to pay to the order of J. Mandru seven dollars at ——. Value received. J. L. Stanley." On the back of this note was the following indorsement: "Pay to the order of Louisa Mandru. Simon Mandru, Executor of Jos. Mandru, without recourse."

It was admitted by the defendants that these notes were duly executed by Jordan L. Stanley, and it was satisfactorily established by proof that no payment had been made on either of them. The defense interposed to each is the plea of limitations, and as to the second of said notes, which is not under seal, it is conceded that such plea is a bar to the right of action. The note for \$241, however, is under seal. The creditors' bill was filed January 21, 1905, and the petition of the appellant was filed August 29, 1905, or less than 10 years after the maturity of the note. The defendants took no testimony of any kind, but, from the opinion of the court (Merrick, J.) printed in the record, we take the following: "These notes were made in Ohio, where, as shown by the statute read to the court, private seals were abolished before these notes were made. Hence the attempt to adopt the printed seal, if the party did so attempt—and there is no proof that he ever did so attempt—he was attempting to do a thing that was against the law of Ohio and illegal. Consequently, the act was absolutely null and void. If void and illegal there, it will be so held here." In this conclusion, we think the learned judge below was in error. In the first place, there was no proof before the court as to the law of Ohio on the subject of seals. Our courts do not take judicial notice of the laws of another state, and the Ohio statute should have been proved as any other fact in the case. Greenleaf on Evidence, vol. 1, p. 8. Section 53, art. 35, Code Pub. Gen. Laws 1904, provides for the manner in which such statutes may be proved, and the mere reading of the law to the court in argument cannot supply this defect in proof. In the absence of such proof, the court should have ignored the Ohio law and based its decision on the evidence in the case according to the law of Maryland.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

But even if the Ohio statute had been properly proved, and it had been shown that by it the use of seals in such state had been abolished, we still think that in Maryland the note in question would have been regarded as a specialty, and subject to the laws of this state on the defense of limitations. In the case of *Trasher v. Everhart*, 3 Gill & J. 234, a suit in assumpsit was brought in Maryland on a note, under seal, made in Virginia, and which, according to the laws of the latter state, was considered a simple contract, and not a specialty. Notwithstanding the Virginia law, our court held that assumpsit was not the proper form of action, as in Maryland the note was to be treated as a specialty. While the *lex loci* controls the nature, construction, and validity of contracts, yet the remedy upon them is regulated by the law of the forum, and throughout the United States it seems to be almost universally established that the defense of limitations is a matter of procedure to be controlled by the law of the place where the suit is instituted. 2 Kent, Com. 462; *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104. The note in this case, though executed in Ohio, by its terms authorizes a confession of judgment in any court of record in the United States, evidently contemplating the contingency of the enforcement of the contract in some other state. The plea is clearly unavailing in this suit, as limitations, under Maryland law, has not closed upon the demand.

So much of the decree appealed from as rejects the claim of the appellant is reversed, with costs to the appellant above and below, and cause remanded for further proceedings.

(108 Md. 620)

LANAHAN v. COCKEY et al.

(Court of Appeals of Maryland. Nov. 12, 1908.)

1. SPECIFIC PERFORMANCE (§ 8*)—NATURE AND GROUNDS OF REMEDY.

Specific performance is not a matter of right, but is one of sound judicial discretion controlled by established principles of equity, and it will be granted or withheld by the court upon a consideration of all the circumstances of each particular case.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18; Dec. Dig. § 8.*]

2. SPECIFIC PERFORMANCE (§ 28*)—CONTRACTS ENFORCEABLE—REQUISITES.

Specific performance will not be decreed, unless the contract is certain and definite in all its provisions, fair and mutual in its terms, and so clearly proved as to satisfy the court that it constitutes the actual agreement between the parties.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61-85; Dec. Dig. § 28.*]

3. WITNESSES (§ 159*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Parol evidence is inadmissible against heirs to supply uncertainty in the terms of the ancestor's contract for a lease, because the statute does not allow a party to the cause to testify

as to any transaction with or statement by the intestate.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 669, 670, 675; Dec. Dig. § 159.*]

4. SPECIFIC PERFORMANCE (§ 28*)—CONTRACTS ENFORCEABLE—CERTAINTY.

A contract for a lease, which is indefinite as to the duration of the term, the length of the term being a mere deduction from the state of an account existing between the parties at the owner's death, is too vague to be enforced in equity.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 63; Dec. Dig. § 28.*]

Appeal from Circuit Court, Baltimore County, in Equity; Frank I. Duncan, Judge.

Suit by William Lanahan against Carrie S. Cockey and another. From a decree for defendants, complainant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HENRY, JJ.

Osborne I. Yellott and Frank Gosnell, for appellant. Randolph Barton and D. G. McIntosh, for appellees.

WORTHINGTON, J. The bill of complaint in this case was filed by the appellant in the circuit court for Baltimore county on the 22d day of April, 1907, for the purpose of enforcing the specific execution of an alleged contract for the lease of certain lands located on Charles Street avenue, in that county. The material averments of the bill are, in effect: That the appellant, being in possession of said lands as tenant, in or about the year 1899, entered into a lawful and binding agreement with the owner thereof, Virginia M. Walters, whereby he was to remain and continue in possession of said lands until the year 1912, as her tenant, at and for the rental of \$100 per year; the tenant to keep the fence around said lands in good repair. That in pursuance of said agreement the complainant had paid to the said Virginia M. Walters, at her instance and request, the rent of said lands in advance, to the year ending May 1, 1912. That he had always kept the fence around said lands in repair, and was ready and willing and able to continue to do so until said 1st day of May. The bill further alleges that said Virginia M. Walters had died in the year 1905 intestate, and that the defendants are her sole heirs at law, to whom said lands had descended, subject to the right of the complainant to occupy the same until the 1st day of May, 1912, under and by virtue of said agreement. The prayers are for a specific performance of the agreement, for an injunction to prevent the defendant from making a conveyance of the lands which would interfere with the right of the complainant to occupy and enjoy the same until said date, and for general relief. The answer admitted that Mrs. Walters was formerly the owner of the lands in question, that complainant was in possession of said lands as tenant of Mrs. Walters, that Mrs.

Walters had died on or about May 6, 1905, seised of the same, and also admitted the descent of the lands to the defendants as the sole heirs at law of the decedent, as alleged in the bill of complaint, but denied that any such an agreement as that set up in the bill of complaint whereby, as alleged, complainant was to remain in possession of said lands as tenant until May 1, 1912, had ever been made or entered into. The principal issue therefore is as to the existence of the alleged agreement of lease.

Testimony to prove the existence of such an agreement was taken before an examiner in equity, and, besides the evidence of certain living witnesses, a number of letters that passed between the complainant and Mrs. Walters, and certain vouchers for money received by her from the complainant, were introduced and admitted in evidence without objection, as was also certain other written evidence showing the terms upon which the complainant originally entered into possession of the property in question. These terms were that he should pay \$100 per year rental and keep the fences in good order; the owner of the land to pay the taxes. This original contract of rental was made, in the first place, by the complainant in May, 1894, with Mr. Edwin Walters, then the owner of the property, who subsequently, in the year 1896, conveyed the same to Mrs. Virginia M. Walters. From correspondence between the complainant and Mrs. Walters, it appears that, for several years after she became the owner of the property, Mr. Lanahan, the complainant, as tenant, paid her regularly \$100 per year in advance as rental for the use of the same. Then for a year or two he paid the taxes on the property, deducted the amount thereof from the annual rent, and remitted to her the remainder by check. On July 15, 1899, Mrs. Walters wrote from New York to the complainant expressing her need for some money, and asking on what terms she could borrow from him. He replied, under date July 24, 1899, as follows: "Dear Madam: I herewith inclose you check for \$200 agreeable to your request, the same to be credited on the rent, to become due in the future, and such taxes as I may be required to pay for you as heretofore. Please sign the inclosed receipt and return to me. Very respectfully yours," etc. "[Signed] Wm. Lanahan." A receipt from Mrs. Walters of the same date, evidently the one mentioned in the letter as inclosed therewith, is as follows: "\$100. No. 458 Twenty-Third St., New York, July 24, 1899. Received of William Lanahan one hundred dollars (\$100), the same to be credited by him against any future rent of the premises occupied by him on Charles Street Avenue, owned by me, and any taxes he may be required to pay on said property for my account. The said Lanahan is to occupy said premises as my tenant until said advance shall be fully paid. [Signed] Virginia M. Walters." Subsequently, on May 11,

1900, Mrs. Walters wrote Mr. Lanahan from Atlantic City as follows: "Dear Mr. Lanahan: Will you send me the tax bill for last year (1899) that you paid for me on the land on Charles St. Ave.? This year's taxes you will please pay and deduct the remainder from the year's rent toward the payment of the two hundred dollars I borrowed of you last July or August? Please fix all up straight and return to me here. Respt. [Signed] Virginia M. Walters." In reply to this, Mr. Lanahan wrote Mrs. Walters, under date of May 16, 1900, inclosing check for \$30.45 and receipted tax bill for 1899, amounting to \$69.55, in payment of the rent of the property to May 1, 1901, saying in his letter: "I have not deducted this from the \$200 loaned you some time since, presuming that it would be more satisfactory to you to have me remit you the balance of the rent." Mrs. Walters acknowledged the receipt of the check and receipted tax bill, and was quite profuse in her thanks, saying in her letter: "For your kindness to me in sending me the check in spite of me owing you money is beyond mere words of thanks."

It further appears from the vouchers and correspondence filed in the case that thereafter the complainant paid the annual taxes on the property and in addition regularly remitted in advance the whole yearly rental of \$100 to Mrs. Walters, down to the time of her death on May 6, 1905; the last payment for rent being for the year from May 1, 1905, to May 1, 1906. At the time of Mrs. Walters' death, the complainant had paid for her in taxes the sum of \$407.55, and \$100 of the sum loaned her on July 24, 1899, was still unpaid. If interest be added to the sum of these two items, the total would be \$610.55. At the annual rental of \$100, this total would pay the rent of the property in advance for a little more than six years from May 1, 1906; that is, to something beyond May 1, 1912, the date alleged in the bill of complaint as that to which the rent had been paid in advance. Upon this state of facts the complainant seeks the aid of a court of equity for the specific enforcement of the contract as set up in the bill of complaint. The lower court refused the relief prayed for and dismissed the complainant's bill. The complainant appeals.

"The principles regulating the exercise by courts of equity of their power to compel the specific performance of contracts are well settled. Specific performance is not a matter of right in the litigant, but is one of sound judicial discretion controlled by established principles of equity, and it will be granted or withheld by the court upon a consideration of all the circumstances of each particular case. The contract sought to be enforced must be certain and definite in all of its provisions, and fair and mutual in its terms, and must be so clearly proven as to satisfy the court that it constitutes the actual agreement between the parties. If any of these ingredients are wanting, specific

performance will not be decreed." *Horner v. Woodland*, 88 Md. 511, 41 Atl. 1079. That the payments for several years of the whole rent by Mr. Lanahan, without any deduction for taxes paid by him, or on account of the loan to her, were not made in pursuance of any agreement between them to that effect, is quite manifest from the correspondence. Besides the letter of May 11, 1900, above set forth, she wrote Mr. Lanahan again on July 15, 1901, acknowledging the receipt of a check from him for \$100 in full of rent for one year in advance, and adding: "You may well imagine my pleasure and surprise at receiving the same." It is quite patent therefore that Mr. Lanahan paid the whole annual rental without any deduction on account of the loan or for taxes paid by him, voluntarily, and purely from motives of liberality in dealing with Mrs. Walters, who seems to have been constantly in need of money.

The question before us is, not whether Mr. Lanahan is entitled to recover the sums so overpaid by him, but whether he has proven such a contract of lease as a court of equity can specifically enforce. We think not. "All agreements to be executed in equity must be certain and defined, equal and fair, and proved as the law requires. It is enough to doubt on any of these points to refuse relief." *Mundorff v. Kilbourn*, 4 Md. 464. All the written evidence in this case, taken together, does not make out a contract certain and definite in its terms, and the parol evidence adduced to supply the deficiency was properly excluded by the lower court, if for no other reason, either because it was mere hearsay, or because, this being a proceeding against heirs at law, no party to the cause is allowed of his own motion, under our statute, to testify as to any transaction had with or statement made by the intestate, unless the testimony of such intestate has already been given in evidence concerning the same transaction or statement, in the same case. As we have before indicated, one important particular in which the alleged contract is uncertain and insufficient is that no definite term of rental is shown to have been agreed on by the complainant and Mrs. Walters. The duration of the term, as set out in the bill of complaint, was a mere deduction from the state of the account existing between them as the time of her death on May 6, 1905. At that time so much had been paid by the complainant for Mrs. Walters for taxes on the property, \$100 were still due him of the sum borrowed by her of him in 1899. By adding interest to the total of these items, and dividing the whole amount thus obtained by the annual rental of \$100, gives 6 as a quotient, and it is only by this process of deduction that the term of 6 years from May 1, 1906, to May 1, 1912, as set out in the bill of complaint, is

ascertained. We think the contract thus made out by the complainant too vague, too uncertain, too indefinite, too obscure, to enable a court of equity to act upon it with safety or propriety.

We do not deem it necessary to extend this opinion by considering the other objections urged against the sufficiency of the contract relied upon by complainant; but, for the reasons already assigned, we will affirm the decree of the lower court, without prejudice, however, to the complainant to assert his rights, whatever they may be, in a court of law.

In their brief, as well as in the oral argument of the case in this court, the attorneys for the appellees attach considerable importance to the discrepancy of \$100, which will be observed between the sum mentioned in the correspondence as having been loaned or advanced to Mrs. Walters on July 24, 1899, and that named in the receipt of the same date; the amount loaned appearing to be \$200, and the amount named in the receipt being \$100, which is the amount of such loan still claimed to be due. In the view that we have taken of the case, it is not material to its proper determination whether this discrepancy was caused by a repayment or gift of part of the loan, or by an error in drawing the receipt. Certain insuperable objections to the contract have already been pointed out, and these objections remain whether we consider the discrepancy mentioned, or not.

Decree affirmed, with costs to the appellee.

(108 Md. 696)

In re WATTS' ESTATE.

(Court of Appeals of Maryland. Nov. 12, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 493*) —SETTLEMENT—COMMISSIONS—COMPUTATION —DISCRETION OF COURT—STATUTORY PROVISIONS.

Code Pub. Gen. Laws, 1904, art. 93, § 5, provides that commissions of executors shall be at the discretion of the court, not under 2 per cent., nor exceeding 10 per cent. on the first \$20,000 of the estate, and not more than 2 per cent. on the balance. Article 81, § 112, imposes a tax on commissions allowed executors and administrators by orphans' courts, and section 113 provides that those courts shall fix such commissions in all cases where letters of administration have been or may be granted, whether commissions are claimed or not, and that the commissions so fixed shall be subject to the tax. *Held*, that it is the duty of the court to fix the commissions, not only where the executor fails to claim them, but in all cases, except where compensation has been bequeathed to the executor, in which, under the express provisions of article 93, § 6, no commissions shall be allowed, unless the compensation appear inadequate, especially in view of previous legislation on the subject. Act 1860, c. 163, Code Pub. Gen. Laws 1860, art. 81, § 107, repealed by Act 1862, p. 19, c. 18.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2140; Dec. Dig. § 493.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. EXECUTORS AND ADMINISTRATORS (§ 496*) —SETTLEMENT—COMMISSIONS—WAIVER.

The executor need not accept the commissions allowed, but may waive all except the amount of tax imposed thereon.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 496.*]

3. EXECUTORS AND ADMINISTRATORS (§ 496*) —SETTLEMENT—COMMISSIONS—ALLOWANCE.

The fixing of executor's commissions within the limits prescribed by the statute resting in the discretion of the court, it will consider the nature and extent of his labor, with the aim of allowing a fair compensation for the services rendered.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2107; Dec. Dig. § 496.*]

4. APPEAL AND ERROR (§ 945*)—REVIEW—DISCRETION OF COURT.

Where a lower tribunal is charged with duties as to which it is vested with discretion, in the absence of clear and satisfactory proof of a refusal, or such arbitrary conduct as amounts to a refusal, to exercise the discretion, its acts, within the limits of the discretion, are not reviewable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3811; Dec. Dig. § 945.*]

5. EXECUTORS AND ADMINISTRATORS (§ 496*) —SETTLEMENT—COMMISSIONS—ALLOWANCE —EVIDENCE AS TO VALUE.

The inventories, list of debts, and reports required by law to be filed in proceedings to settle an estate, and the executor's account of the amount and character of the estate, and, except perhaps in rare cases, the nature and extent of the executor's services, are sufficient to enable the court to determine proper commissions to the executor; and the hearing of testimony as to the value of his services is not required.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2107; Dec. Dig. § 496.*]

6. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTIONS—PROPER EXERCISE OF POWER OF ORPHANS' COURT.

The Court of Appeals must presume, in the absence of a showing to the contrary, that the orphans' court properly exercised its powers in allowing commissions to an executor.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 907.*]

Appeal from Orphans' Court, Baltimore County; Melchor Hoshall, E. Clinton Tracey, and H. Seymour Piersol, Judges.

Proceedings for the settlement of the estate of Gerard S. Watts. From an order refusing to rescind an order allowing commissions to George W. Watts, surviving executor, he appeals. Appeal dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HENRY, JJ.

Joseph C. France, for appellant.

THOMAS, J. It appears from the petition of George W. Watts, surviving executor of Gerard S. Watts (appellant), on pages 4 and 5 of the record, that on the 4th day of December, 1907, he presented to the orphans' court of Baltimore county his first administration account, in which the estate

accounted for was \$246,896.52, and the commissions claimed by and allowed the executor were 2 per cent. on \$20,000, and one-tenth of 1 per cent. on the balance, all of which was waived, except the state tax, amounting to \$64.69; that the account was marked "O. K." by the chief judge, "and that, when said account was presented to the register of wills, that officer took the same back into the court, and the probate of the said account was then and there refused, upon the ground that the commissions allowed were, in the opinion" of the court, insufficient. Subsequently, on the 25th day of March, 1908, the orphans' court passed an order allowing the executor 2 per cent. commissions on the whole estate, and requiring him to state his first account on or before the 8th day of April, 1908, on which day the executor filed his petition in said court, alleging that the commissions of 2 per cent. on the whole estate, allowed by the order of March 25th, were in his opinion "excessive and unjust"; that he had not "performed services that would justify the allowance of such a large sum"; that the fixing of the rate of commissions at 2 per cent. "was error," and that said commissions were fixed "without any evidence having been had by" the court "upon which to predicate said rate," and praying that the order of March 25th be set aside, "and that proper commissions be allowed him, based upon the value of the estate and the amount of services rendered by him as executor thereof." On the same day the orphans' court passed the following order, indorsed on the petition: "Prayer refused this 8th day of April, 1908"—and it is from this order that the appeal in this case was taken.

The learned counsel for the appellant contends (1) that, the executor having claimed commissions within the limits prescribed by section 5, art. 93, Code Pub. Gen. Laws 1904, the orphans' court had no authority to allow larger commissions than he claimed; and (2) that the orphans' court in fixing the commissions, and in refusing to rescind its order of March 25th, acted arbitrarily, and without regard to the value of the services rendered by the executor, and that therefore its action is subject to review by this court.

His first contention is not warranted by the proper construction of the provisions of the Code bearing upon the question. Section 5, art. 93, Code Pub. Gen. Laws 1904, declares that commissions of executors "shall be at the discretion of the court not under two per cent., nor exceeding ten per cent. on the first \$20,000 of the estate, and on the balance of the estate not more than two per cent." Section 112, art. 81, Code Pub. Gen. Laws 1904, imposes a tax, for the benefit of the state, on all commissions allowed to executors and administrators by the orphans' courts, and section 113, art. 81, provides that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the orphans' courts "shall fix such commissions in all cases in which letters of administration have been or may hereafter be granted, whether commissions are claimed by the executors or not"; and that the commissions so fixed shall be subject to the tax imposed by section 112. It is therefore made the duty of the orphans' courts to fix the commissions, not only in cases where the executor fails to claim them, but in "all cases" (not covered by section 6, art. 93) whether he claims them or not, and it is on the commissions so fixed, and not on the commissions claimed by the executor, that the tax is imposed. That this is the meaning of the sections referred to is relieved of any doubt by reference to the previous legislation on the subject. The act of 1860, c. 163, by its second section repealed the section of the Code requiring the orphans' courts to fix commissions in all cases, whether claimed or not, and provided: "That the several orphans' courts shall fix the commissions of executors within twelve months from the grant of administration, and in all subsequent accounts, wherein executors shall charge themselves with further assets; but where an executor shall renounce his commissions or release the same in favor of the widow or next of kin of the deceased, the tax mentioned in the preceding section shall not be charged; and where an executor elects to take less than five per cent. commissions (as he may do) the said tax shall be charged only on the commissions he shall elect to take." Code Pub. Gen. Laws 1860, art. 81, § 107. Under this act the executor could elect to take less than he was entitled to, and when that was the case, there could be no reason why the court should fix the commissions; the tax being imposed on the commission claimed by the executor. But when, two years later, the act of 1860, c. 163 (section 107, art. 81, Code Pub. Gen. Laws 1860), was repealed by act 1862, p. 19, c. 18, which provided, as does section 113, art. 81, Code Pub. Gen. Laws 1904, that the orphans' courts shall fix commissions in all cases, whether claimed by the executor or not, the Legislature manifestly intended that the question of commissions should no longer be left to the election of the executor. He, of course, is not required to accept the commissions allowed, and may waive all or any part thereof, except the amount of the tax imposed by section 112, but the orphans' court is required to fix the commissions, and it is on the commissions fixed by the court that he is required to pay the tax.

In fixing the commissions of an executor the orphans' court properly looks to the nature and extent of the executor's labor, with the aim, of course, of allowing such commissions as will be a fair compensation for his services rendered in the administration of the estate; and, within the limits prescribed by section 5, art. 93, the amount to be allowed is at the discretion of the court.

Where a lower tribunal is charged with the performance of duties, in the discharge of which it is clothed with discretion, in the absence of clear and satisfactory proof of its refusal, or of such arbitrary conduct as amounts to a refusal, to exercise that discretion, its action, within the limits of the discretion vested in it, cannot be controlled or reviewed on appeal. *McCrea v. Roberts*, 89 Md. 238, 43 Atl. 39, 44 L. R. A. 485. In the case of *Wilson v. Wilson*, 3 Gill & J., on page 23, the court said: "The law has fixed a minimum of 5, and a maximum rate of commission of 10, per cent. to be allowed to executors and administrators, with a discretion vested in the orphans' court restricted only by those limits, and, the court in allowing a commission of 7½ per cent. having acted within the scope of that discretion, we do not think we have any power to disturb the decision, or to review what has been done in that respect. The various circumstances determining the amount of commission proper to be allowed cannot appear to this court, and every case must be governed by its own peculiar circumstances, subject only to the restrictions already mentioned." In the case of *Handy v. Collins*, 60 Md. 229, 45 Am. Rep. 725, where the will provided that the executrix should be allowed reasonable commissions, counsel for the appellant earnestly insisted that the testator meant that she should have reasonable compensation for her services, to be determined, not by discretion, but by the facts in the case as shown by evidence, and that the amount to be allowed her should be ascertained by the court in the ordinary way, upon testimony taken before it, and that its finding and judgment should be the subject of appeal and review, but the court held that: "The law declares that commissions to executors and administrators shall be at the discretion of the orphans' court, not under 5, and not exceeding 10, per cent. (Code Pub. Gen. Laws 1904, art. 93, § 5), and it is clearly settled that the rate fixed by that court in the exercise of this discretion, within the prescribed limits, is not a subject of review or appeal." Again, in the case of *Dalrymple v. Gamble*, 68 Md. 156, 11 Atl. 718, where the administrators had passed their account in which they were allowed for certain services, expenses, attorney's fees, and costs, and 10 per cent. commissions, and the orphans' court on application struck out the order of approving the account, and passed an order disallowing the claims for costs, etc., and reducing the commissions from 10 to 7 per cent., on appeal, dealing with the order reducing the commissions, the court said: "When the account was reviewed, the allowance of commissions was stricken down, and fixed at 7 per cent. It is contended that, the rate having been fixed at 10 per cent., the administrator at once accounted with the state and paid tax thereon at that rate, and

that the court could not afterwards alter it. The court, having full power, for good cause appearing to them, to review its action (Re Estate of Stratton, 46 Md. 551), did so, and that question is not reviewable in this court. *Handy v. Collins*, 60 Md. 229, 45 Am. Rep. 725. The question of commissions is entirely in the discretion of the orphans' court, except so far as it is limited by law, and no question is presented of the court's transcending the limit in respect to allowance. If the appellant has paid the state too much, he must take such steps as are open to him to get it refunded." 18 Cyc. p. 1168.

The record in this case does not show that the orphans' court refused to exercise the discretion vested in it by section 5. On the contrary, the appellant states in his petition filed in that court that, when the account was taken back to the court by the register of wills, it refused to pass the account, on the ground that the commissions allowed him were, in the opinion of the court, insufficient. The attention of the court having been directed to the question of commissions, it reviewed its action in indorsing the account "O. K.," and, exercising the discretion given it by law, passed the order fixing the commissions. Nor does it appear from the record that in determining the commissions to be allowed the executor, the orphans' court acted arbitrarily or capriciously, unless we are to conclude that it did so from the fact that the commissions allowed were in excess of those claimed by the executor, or from the fact (as stated in the appellant's petition) that no testimony was heard before it made its decision. As we have said, the law requires the orphans' court to fix the commissions, and in the discharge of that duty it is not limited by the commissions claimed by the executor, and there is no rule of law or practice in this state requiring the orphans' court to hear testimony as to the services rendered by the executor in the administration of an estate, in order to fix the commissions to be allowed him. The inventories, list of debts, and reports required by law to be filed (*Linthicum v. Polk*, 93 Md. 93, 48 Atl. 842), and the executor's account disclose the amount and character of the estate, and, except, perhaps, in rare cases, the nature and extent of the executor's services in the administration of the estate, from which the court can readily determine the proper commissions to be allowed as compensation for such services. We cannot presume that the orphans' court acted arbitrarily, but, as was said in *Ex parte Shipley*, 4 Md. 493: "We must presume that the court properly exercised its powers, until the contrary appears."

The cases of *Ex parte Shipley*, *supra*, *Porter v. Timanus*, 12 Md. 283 (in which the records did not show that the orphans' court

acted arbitrarily, and the appeals were dismissed), and *Consolidated Gas Company v. Baltimore City*, 101 Md. 541, 61 Atl. 532, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584, referred to by counsel, so far as they touch the questions involved in this appeal, are not at all in conflict with the views herein expressed or the authorities we have cited. Assuming that the orphans' court disposed of the executor's petition without hearing testimony (as stated in the appellant's brief, but which does not appear from the record), there is no allegation in the petition of any fact important to be known by the court in fixing the commissions to be allowed, or that required the court to review its action in passing the order of March 25th. The allegations are, in substance, that the court passed the order fixing the commissions without hearing testimony as to the services rendered, and that the commissions allowed are, in the opinion of the petitioner, "excessive and unjust." The court, as stated, was not required to hear testimony as to the services rendered by the executor before fixing the commissions, and the fact that commissions fixed by it were, in the opinion of the executor, excessive is no reason why it should be required to do so, if, after considering the petition, it was satisfied with its previous judgment in the matter.

We see no objections to the order "allowing 2 per cent. commissions on the whole estate"; the allowance being within the limits of section 5, art. 93.

The appeal in this case must be dismissed.
Appeal dismissed.

(223 Pa. 345)

COLLINS v. SOUTH PENN OIL CO.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

1. MINES AND MINERALS (§ 55*)—GRANTS AND RESERVATIONS OF RIGHTS—CONSTRUCTION.

Owners of land executed a 20-year oil and gas lease, and thereafter agreed to extend or make a new lease for 10 years from the expiration of the original lease upon the same terms. Subsequently, they executed a deed reserving to themselves all the oil and gas from the date of the deed to the expiration of the extension of the original lease, and also the right to execute a new lease, upon the same terms as the original lease, for 10 years after its expiration. *Held*, that the reservation made by the owners was for the purpose of retaining the rights which they had in the lease until the expiration of the original lease, and then to extend the same for 10 years.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 154; Dec. Dig. § 55.*]

2. MINES AND MINERALS (§ 53*)—CONTRACT TO LEASE—CONSTRUCTION.

One of the lessees in a lease of oil lands parted with all interest therein, and thereafter purchased a fourth interest in the fee of land other than that covered by the original lease. Thereafter the owner of the land covered by the original lease contracted in writing with the owner of the one-fourth interest in the other land, in which it was recited that he was a part

owner in such land, and agreed that, when he became owner of the three-fourths of such land, he would extend the original lease to the owner of the quarter interest, and the latter agreed to surrender a certain interest in the oil produced as provided by the original lease. *Held*, that such agreement referred only to the fourth interest in the land purchased, and not to the land covered by the original lease in which the lessee had no further interest.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 83.*]

Appeal from Court of Common Pleas, Forest County.

Ejectment by Truman D. Collins against the South Penn Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The court charged in part as follows:

"On September 30, 1875, John Taggart and others made a lease to J. B. Agnew for the purpose of exploring for oil and gas, and perhaps other minerals, for the term of 20 years, which would make the lease expire on September 30, 1895. Some time in 1890, these same lessors entered into an agreement with the North Penn Oil Company; the company having acquired in the meantime the interest of J. B. Agnew. This agreement is dated in 1890. The day and month is left blank, but it is acknowledged on November 6, 1890, and recorded June 6, 1891. I may state at this time that this agreement was for the extension or making of a new lease, extending this original lease made September 30, 1875, to J. B. Agnew. This agreement was to extend or make a new lease, extending the time 10 years beyond the 20 years which it had to run. On December 3, 1892, Thomas M. Armstrong, trustee, and Andrew J. Armstrong, and others, made a conveyance of the interests which they had in the land that was described, or certain parts of the land which was described in the original lease, to J. B. Agnew, and in that they make a reservation which I will allude to a little later. And I may state here that all the other owners, or their heirs or assigns that are named as the grantors in the original lease to J. B. Agnew, made a conveyance similar to the one to which I have called your attention, to Mr. Collins, the plaintiff in this case. In all but one of those conveyances, the exception and reservation is the same as contained in the deed to which I have just called your attention, dated in 1892. The exception in that deed is as follows: 'Excepting and reserving unto the said parties of the first part, their heirs, executors, administrators and assigns, all the oil and gas in said premises, with the right to bore, explore, dig, produce and remove the same, from this date up to and including September 30, 1905, with the right and privilege in said parties of the first part to receive all rents, royalties, issues and profits due or to become due by reason of a certain lease heretofore executed by the then owners of the land, namely, John Taggart et

al., to J. B. Agnew, dated September 30, 1875, and recorded in Forest county, in Deed Book, vol. 12, p. 57, subject to which this deed is made.' So far this reservation is plain and clear, and reserves to the grantors in this deed all the rights which they had when they made the lease to J. B. Agnew, and the right to receive one-eighth of the oil that might be produced under that lease. But it goes on to state: 'And also, the right in said parties of the first part to execute a new lease or leases to the present owner of said lease or any other person or persons they may desire, upon the same terms and conditions contained in said lease of September 30, 1875, at any time, for the term of ten years after the expiration of said last-mentioned lease, in which said new lease or leases the rents, royalties, profits and benefits shall likewise accrue to and be payable to said parties of the first part hereto, their heirs, executors, administrators and assigns.'

"You will observe, gentlemen, that in this clause the parties reserve the right to execute a new lease or leases to the present owner of said lease or any other person or persons. Now, by the terms of their agreement which they made in 1890, they agreed to extend or make a new lease for the period of 10 years from September 30, 1895, the date upon which the lease above described will expire. This agreement recites: 'Now therefore this agreement witnesseth that the said parties of the first part, for and in consideration of the sum of one dollar to them in hand well and truly paid, by the North Penn Oil Company at and before the sealing and delivery hereof, the receipt of which is hereby acknowledged and of the purchase by said company of the interest of the parties of the first part in the leasehold above described, have covenanted and agreed, and by these presents do covenant and agree, to demise and lease to the said North Penn Oil Company, its successors and assigns'—and then goes on to describe. Now, Gentlemen, the parties in making this reservation, and surely the person drawing the reservation, had in mind, and he was drawing it for the grantors named in the deed, and they had in mind, the fact that they had agreed to make a lease extending the time from September 30, 1895, for the period of 10 years, and were careful, in my opinion, to reserve the right to do what they had agreed to do in 1890, when they made the agreement with the North Penn Oil Company. This deed was made in 1892, two years later, and in the judgment of the court, when they made this reservation, this language was for the purpose of retaining to themselves the right to do what they had agreed to do in that agreement, and they probably had in mind at that time that it was incumbent upon them by the terms of that agreement to make a lease when 1895

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

should arrive, the time of the expiration of the lease. It was perhaps not necessary that that should be done—this agreement might be treated as an extension. But in our judgment that is what the parties meant when they made that reservation. They go on to say: 'Upon the same terms and conditions contained in said lease of September 30, 1875, at any time for the term of 10 years after the extension of said last-mentioned lease.' Here again the allusion is to the 'last-mentioned lease,' and the expiration of that lease—the expiration of the time which that lease has to run—ends September 30, 1895, and it is to be 10 years from the expiration of that lease. Therefore we are clearly of the opinion that this reservation made by the grantors in those deeds, with the one exception, is for the purpose of retaining the rights which they had in the lease until September 30, 1895, and then for the purpose of extending the time for the period of 10 years. This is very clear, in our judgment, and it is the duty of the court to construe written instruments. However much we would desire to throw this duty upon the jury, we cannot. It is our duty to construe written instruments, and it is our opinion that the extension of time mentioned in this reservation is for the period of 10 years after September 30, 1895.

"This brings us to the consideration of the contract between T. D. Collins, the plaintiff, and J. B. Agnew, made on December 10, 1895. This contract is not so clear to our mind as the others. The meaning is more obscure. The preamble in the contract recites an ownership by the parties in 213 acres in the northeast corner of warrant No. 3,197. The next paragraph of the contract proper alludes to this same lease which was made to J. B. Agnew, September 30, 1875, and expired on September 30, 1895, and that the extension would not expire until September 30, 1905. This part of the agreement alludes to that contract, as we have said. I may as well read the paragraph, and you will get it more clearly: 'Now this agreement witnesseth: That the said T. D. Collins, in consideration of the sum of one dollar, agrees that as soon as he shall become in possession as owner of the full three-fourths of the above-described 213 acres of land, that he will then either extend the above said lease according to the terms and conditions thereof or make a new lease according to the terms of the said original lease to the said J. B. Agnew, from and after September 30, 1905, for so long a period as oil is procured on said premises, and the conditions of said lease are complied with, reserving to himself the same royalty and rights reserved to said first parties in the original lease, being one-eighth of all the oil produced on said lease.' He had succeeded to the ownership of the land of the lessors

in that original lease, and this clause which I have just read to you would seem, taking its terms literally, to renew or to agree to renew or make a new lease. We, however, are unable to come to the conclusion that that was the meaning of the parties. One reason that leads to that conclusion is the last paragraph, in which J. B. Agnew agrees that Mr. Collins shall have three-fourths of the one-eighth royalty reserved. That would give him more than J. B. Agnew had the power to give. If the intention was a renewal of the lease or making a new lease, according to the terms of that original lease, which would cover the 213 acres in the northeast corner of 3,197, then Agnew had power to make such an agreement, but he had not the power to make the agreement giving that amount to Mr. Collins in the other lands covered by that original lease. And taking the whole paper into consideration, the recitation of the land in the preamble, which would seem to be the land that they were contracting about, we are constrained to hold that this agreement relates only to the 213 acres in the northeast corner of warrant 3,197."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. E. Rice, A. C. Brown, W. D. Hinckley, and J. H. Alexander, for appellant. Peter M. Spear, T. F. Ritchey, M. A. Carringer, and J. W. Kinnear, for appellee.

PER CURIAM. The judgment is affirmed on the charge of the learned judge below.

(104 Me. 78)

MITCHELL v. EMMONS.

(Supreme Judicial Court of Maine. March 7, 1908.)

1. NEW TRIAL (§ 113*)—MOTION—WHERE MADE—"COURT."

A motion under Rev. St. c. 84, § 53, to set aside a verdict on the ground of newly discovered evidence, in order to be properly before the law court, must be made in court, and the term "court," as applied to actions at law, means court in session. A justice in vacation is not the court.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 113.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1672-1682; vol. 3, p. 7622.]

2. NEW TRIAL (§ 157*)—MOTION—HEARING—"JUSTICE."

When a motion is made under Rev. St. c. 84, § 53, to set aside a verdict on the ground of newly discovered evidence, the statute requires that the testimony respecting the allegations of the motion "shall be heard and reported by the justice," meaning the justice presiding at the term when the motion is filed.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 317; Dec. Dig. § 157.*]

For other definitions, see Words and Phrases, vol. 4, p. 3906.]

3. NEW TRIAL (§ 157*)—ORDER TO TAKE EVIDENCE.

Rule 17 of the Supreme Judicial Court provides, among other things, that "when a motion

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for a new trial is made for any other cause" than that the verdict is against law or evidence, "the evidence in support thereof shall be taken within such time and in such manner as the court at the next ensuing term shall order, or the motion will be regarded as withdrawn." No power is conferred upon a justice in vacation to make such order.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 317; Dec. Dig. § 157.*]

4. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

The rule governing a motion to have a verdict set aside on the ground of newly discovered evidence is that, before the court will grant a new trial upon this ground, the newly discovered testimony must be of such character, weight, and value, considered in connection with the evidence already in the case, that it seems to the court probable that on a new trial, with the additional evidence, the result would be changed; or it must be made to appear to the court that injustice is likely to be done if the new trial is refused. It is not sufficient that there may be a possibility or chance of a different result, or that a jury might be induced to give a different verdict. There must be a probability that the verdict would be different upon a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 226; Dec. Dig. § 108.*]

5. SALES (§ 897*)—BREACH OF WARRANTY—EVIDENCE.

In the case at bar, which was an action to recover the purchase price of a pair of horses sold by the defendant to the plaintiff, the trade having been rescinded by the plaintiff because of breach of warranty by the defendant, the verdict was for the plaintiff, and the defendant filed a motion for a new trial. *Held* that, while the evidence at the trial was contradictory, yet the jury were justified in finding a warranty on the part of the defendant and a breach of the same.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1136; Dec. Dig. § 897.*]

6. NEW TRIAL (§ 104*)—NEWLY DISCOVERED EVIDENCE.

Also, in the case at bar, the defendant filed a motion for a new trial on the ground of newly discovered evidence. This motion was not properly before the law court, but for reasons stated in the opinion the law court concluded to consider the newly discovered evidence. *Held*, that the newly discovered evidence was merely cumulative on the question of breach of warranty, and, had the same or its equivalent been offered at the trial, it is not probable that a different verdict would have been rendered.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 218; Dec. Dig. § 104.*]

(Official.)

On Motion from Supreme Judicial Court, York County.

Action by William A. Mitchell against John Collins Emmons. Verdict for plaintiff. Motions by defendant for new trial. Overruled and judgment on the verdict.

Assumpsit to recover \$300, the purchase price paid by the plaintiff to the defendant for a pair of horses; the trade having been rescinded by the plaintiff because of a breach of warranty by the defendant.

The first and principal count in the plaintiff's declaration was as follows:

"In a plea of the case, for that the plain-

tiff, at said Kennebunk, heretofore, to wit, upon the 10th day of May, A. D. 1906, paid to the defendant a certain sum of money, to wit, \$300, and received into his possession a certain pair of horses. That previous to the payment of the said money and the receipt of said horses, said defendant claimed to be the owner of said horses, to have worked them upon his farm doing all sorts of work, such as hauling and backing loads, plowing, and other farm work, and previous to said sale of said horses to the plaintiff the defendant represented and warranted to the plaintiff that said horses were sound and all right in every respect, that they would work on any spot or place, that they had done all kinds of ordinary work for the defendant, and that they were indeed and truly worth a much larger sum, to wit, \$400, than defendant required plaintiff to pay therefor. That the plaintiff, expressly relying upon the aforesaid statements and warranties concerning said horses made by the defendant, took said horses into his possession and paid the defendant therefor said sum of \$300, and then and there believed, on account of the said statements and warranties of the defendant, that said horses were well worth \$300, that they were sound in every respect, would ordinarily work in any spot or place and do and perform the ordinary labor and services that work horses usually perform. The plaintiff says that the statements and warranties of the defendant were false and fraudulent and false misstatements, inasmuch as one of said horses was balky and would not pull, would not work at all, although the plaintiff many times and in every way possible tried to cause said horse to work and perform ordinary services such as a work horse usually performs. And the plaintiff alleges that thereafter, to wit, upon the 29th day of May, A. D. 1906, after negotiations and conversations with the defendant, he, said plaintiff, rescinded said sale and offered to return and deliver to the defendant at his barn in Kennebunk said horses, and at the same time demanded the return of said \$300, but that said defendant refused to accept said horses or to return to the plaintiff said sum of \$300. And the plaintiff alleges that by reason of all of the foregoing an action has accrued to him to have and recover of said defendant said sum of \$300 and interest thereof from the said 29th day of May, A. D. 1906."

The declaration also contained an omnibus count of the common form, together with a statement of what the plaintiff would offer to prove thereunder, which, in substance, was the facts alleged in the first count.

Plea the general issue, with brief statement, as follows:

"That he, the defendant, never represented and warranted to the plaintiff that said horses were sound and all right in every re-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

spect or that they would work in any spot or place.

"And the defendant further says that, when said plaintiff received said horses at the home of the defendant in Kennebunk, said horses would work in any spot or place, were in good working condition, except being tired from a hard day's work, and had done all kinds of ordinary work for the defendant; and if said horses will not work now it is the result of the plaintiff's treatment of said horses, or from some other cause for which the defendant is in no way to blame or responsible."

Tried at the January term, 1907, Supreme Judicial Court, York county. Verdict for plaintiff. The defendant then filed a general motion to have the verdict set aside. Afterwards, to wit, October 16, 1907, the defendant also filed a motion for a new trial on the ground of newly discovered evidence, and October 19, 1907, a justice of the Supreme Judicial Court, in vacation, issued the following order thereon:

"It is ordered that the above motion be allowed and filed, and that testimony be taken not later than November 9, A. D. 1907, before Bessie M. Harmon at the office of Judge Cleaves, Biddeford, Me."

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

Cleaves, Waterhouse & Emery, for plaintiff. John G. Smith, for defendant.

CORNISH, J. Action to recover \$300, the purchase price of a pair of horses; the trade having been rescinded by the plaintiff because of breach of warranty by defendant. The verdict was for the plaintiff. The defendant filed two motions for a new trial; one on the ground that the verdict was against the evidence, and the other based on newly discovered evidence.

The alleged warranty, which was oral, did not relate to the soundness of the horses, but to their willingness to work; the representation being that "they were good horses, all right, and would work anywhere." The defendant denied both the warranty and the breach. Was there a warranty? The testimony on this point is necessarily meager. The plaintiff affirmed it. The defendant denied it. The only testimony outside their respective statements is that of Head, who corroborates the plaintiff to some extent. The jury believed the plaintiff, and we think they were justified. The plaintiff bought the horses for working purposes solely, and, as there was no representation as to their soundness, it is hardly probable that he would have paid the liberal sum of \$300 without some satisfying representation and assurance as to their ability and willingness to work, and without even making inquiry as to the fact, as the defendant claims. The jury did not err in accepting the plaintiff's version.

As to the breach of the warranty, the evidence was more voluminous. Three witnesses beside the plaintiff testified to the balkiness of one horse immediately after the plaintiff brought the team home. The defendant met this with seven witnesses, besides himself, who testified to the work the horses had done while owned by the defendant and the absence of balkiness, and with a veterinary surgeon and three other semi-experts, who testified to the cause and effects of laminitis, to which they attributed the horse's unwillingness to pull, after having had a hard day's work, an all-night drive, and one day's absolute rest.

This was a question peculiarly within the experience and judgment of the jury, and we see nothing in the evidence to cause us to disturb their finding. The plaintiff apparently acted in good faith. He wrote the defendant immediately after he had worked the horses and discovered the difficulty and offered to return them, but the defendant's reply, while denying all charges, was of that evasive and unsatisfactory nature that fails to inspire confidence in the author. The first motion cannot be sustained.

The second motion is not properly before us. The statutory provision in relation to motions for new trial is as follows:

"When a motion is made in the Supreme Judicial Court to have a verdict set aside as against law or evidence, a report of the whole evidence shall be signed by the presiding justice; when the motion is founded on any alleged cause not shown by the evidence reported, the testimony respecting the allegations of the motion shall be heard and reported by the justice, and the case shall then be marked law." Rev. St. c. 84, § 58.

The motion based on newly discovered evidence falls within the latter part of this section, but, like that governed by the first part, it must be made in court, and the term "court," as applied to actions at law, means a court in session. A justice in vacation is not the court.

The distinction is carefully observed throughout the statutes, and any powers to be exercised by a justice in vacation are granted in express terms. The following are illustrations: Application for a writ of habeas corpus may be made "to the Supreme Judicial or superior court in the county where the restraint exists, if in session; if not, to a justice thereof; and when issued by the court it shall be returnable thereto; but if the court is adjourned without day, or for more than seven days, it may be returned before a justice thereof and be heard and determined by him." Rev. St. c. 101, § 6. The writ itself may be issued by the Supreme Judicial Court, or either of the superior courts, or any of the justices thereof. Rev. St. c. 101, § 4. "A petition for a writ of mandamus may be presented to a justice of the Supreme Judicial Court in any county in term time or vacation." Rev. St. c. 104,

§ 17. Notice of a petition for review "may be ordered by any justice of the Supreme Judicial Court in term time or vacation." Rev. St. c. 91, § 2. And "on presentation of a petition for review, any justice of said court may in term time, or in vacation, stay execution on the judgment complained of, or grant a supersedeas." Rev. St. c. 91, § 5.

The same distinction is recognized with reference to filing in the clerk's office documents material in a pending suit (Rev. St. c. 84, § 22) and the ordering of notice upon proceedings to quiet the title to real estate (Rev. St. c. 106, § 47, and Pub. Laws 1907, c. 62, § 1).

The general power of ordering notices is conferred by Rev. St. c. 84, § 1, in these words:

"When it appears that the defendant has not had sufficient notice, the court may order such further notice as it deems proper.

"Any justice of the Supreme Judicial or either superior court may order notice concerning any civil proceeding in or out of term time, directing how it shall be given, and such order, when made in vacation, shall be indorsed on the process."

This power of ordering notices in vacation was conferred by chapter 32, p. 29, Pub. Laws 1875, prior to which time it vested in the court alone.

The term "civil proceeding or process," as here employed, is "a generic term for writs of the class called judicial." It does not embrace mere motions in a pending cause. Rule 17 of this court also provides that: "When a motion for a new trial is made for any other cause (than that the verdict is against law or evidence), the evidence in support thereof shall be taken within such time as the court shall order, or the motion will be regarded as withdrawn." No power is conferred upon a justice in vacation to make such order. All of these requirements, both of statute and of rule, were ignored in the present case. The motion was not filed in court, but presented to a justice in vacation, after two terms had intervened since the trial, and the order of the justice that the motion be allowed and filed, and the evidence taken before a designated stenographer prior to a given date, was made in vacation.

Moreover, the statute requires that the testimony respecting the allegations "shall be heard and reported by the justice," meaning the justice presiding at the term when the motion is filed (Rev. St. c. 84, § 53); or, as the earlier statute had it, "shall be heard, examined and reported by the judge" (Rev. St. 1840-41, tit. 10, c. 115, § 101). In harmony with this is section 46 of chapter 79, which specifies among the only cases that can come before the law court "cases in which there are motions for new trials upon evidence reported by the justice."

No certificate of the justice accompanies the report of the evidence in this case, and no order sending it forward to the law court.

It is signed simply by the stenographer, and no testimony appears to have been heard or reported by the justice, as the law requires. *Bartlett v. Lewis*, 58 Me. 350.

For these reasons this court might with propriety decline to entertain the motion as not properly before it.

Inasmuch, however, as this point was not raised by the opposing counsel, and as evidence under the motion was introduced by both parties, it may be more satisfactory to consider this evidence on its merits.

By agreement of parties, immediately after the trial held at the January term, 1907, the horses were sent to Boston to be sold at public auction. Without the knowledge of the plaintiff, they were bid in by the defendant on February 6, 1907, for \$100, and were at once shipped to the defendant's farm in West Kennebunk, where they have since been kept.

The newly discovered evidence seeks to attack the verdict along two lines: First, by showing the pitiable physical condition of the horses at the time they were bought at auction by the defendant, as tending to explain the reason why they did not pull on January 13, 1907, at a test made by the plaintiff during the trial in the presence of witnesses who testified to the fact; and, second, by showing that since the repurchase they had never balked, but had been faithful workers. The new evidence is bulky, covering 150 pages, while the testimony taken at the trial covers only 62, and it comes from 9 witnesses produced by the defendant and from 6 produced by the plaintiff. It all relates to conditions existing and facts occurring subsequent to the trial, including a test made in the presence of both parties on November 6, 1907, 1½ years after the original sale on May 10, 1906.

While such evidence may in certain cases be regarded as newly discovered, as in *State v. Terrio*, 98 Me. 17, 56 Atl. 217, where the evidence of certain mechanical experiments with rifle and shells was introduced by the state at the trial, without sufficient opportunity for the defense to meet it, and after conviction, upon a motion for new trial, another expert was authorized to make an exhaustive study of the question in order to test the accuracy of the conclusions reached by the expert for the state; but the force of such evidence, which might be termed newly occurring, instead of newly discovered, depends upon the circumstances of each particular case, the nature of the inquiry, and the kind of evidence submitted. Facts of a scientific nature might stand upon a different footing from ordinary testimony.

The new testimony here is merely cumulative on the question of breach of warranty. We fail to see why the most of it, or evidence equally forceful, could not have been produced at the trial. The test made by the defendant in November, 1907, the result of which is left in doubt, could probably have been arranged while the horses were in the

plaintiff's possession at some time between the sale in May, 1906, and the trial in January, 1907.

Nor are we greatly impressed with the weight of the new evidence. Had it or its equivalent been offered at the trial, we do not think it probable that a different verdict would have been rendered.

The rule governing such motions has been laid down in a recent case in these words: "The true doctrine is that, before the court will grant a new trial upon this ground, the newly discovered testimony must be of such character, weight, and value, considered in connection with the evidence already in the case, that it seems to the court probable that on a new trial, with the additional evidence, the result would be changed; or it must be made to appear to the court that injustice is likely to be done if the new trial is refused. It is not sufficient that there may be a possibility or chance of a different result, or that a jury might be induced to give a different verdict. There must be a probability that the verdict would be different upon a new trial." *Parsons v. Railway*, 96 Me. 503, 52 Atl. 1006.

Applying this rule to this particular case, with that discretion which is actuated "by a desire, upon the one hand, to put an end to litigation when the parties have fairly had their day in court, and, upon the other, to prevent the likelihood of any injustice being done," it is the opinion of the court that the entry should be:

Motions overruled.

Judgment on the verdict.

(77 N. J. L. 223).

TRAVELERS' INS. CO. v. WATKINS, Com'r.
ÆTNA LIFE INS. CO. v. SAME.

(Supreme Court of New Jersey. Dec. 1, 1908.)

1. INSURANCE (§ 138*)—INCLUSION OF LIFE AND ACCIDENT INSURANCE—AUTHORITY—STATUTORY PROVISIONS.

A policy of life insurance containing provisions that, in case of bodily injuries to the insured which shall prevent his pursuing any gainful occupation, the company will pay for him the premiums afterward accruing on the policy, is in violation of the statute of this state which forbids the inclusion of life insurance and insurance against bodily injury or death by accident in the same policy. P. L. 1902, p. 407 (P. L. 1907, p. 128).

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 138.*]

2. So, also, is a policy containing besides the usual life insurance contract, a provision that in case of bodily injury to the insured causing permanent total disability to perform any work or follow any occupation for compensation or profit, or in case of loss by accident of eyesight, hands, or feet, the insured, in lieu of continuing the policy, may at his option receive in his lifetime its face value in 20 annual installments, or a life annuity of a stipulated amount, to be ascertained by a table embodied in the policy.

(Syllabus by the Court.)

The Ætina Life Insurance Company and the Travelers' Insurance Company, having, respectively, submitted to one Watkins, commissioner of banking and insurance, proposed forms of policies as required by Laws 1907, p. 133, c. 72, and having received notice of his disapproval of the same, brought writs of certiorari to review his action. Ruling of the commissioner affirmed.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

R. V. Lindabury, for prosecutors. Nelson B. Gaskill, Asst. Atty. Gen., for defendant.

PARKER, J. Section 4 of a supplement to the general insurance act, being chapter 72, p. 136, Laws 1907, provides that "no form of policy of life insurance shall be issued by any domestic company, or be issued or delivered within this state to any resident thereof by a foreign life insurance company, until after such form shall have been filed with the commissioner of banking and insurance. If the commissioner shall at any time notify any company of his disapproval of any such form, as contrary to law, specifying particulars, it shall be unlawful for such company thereafter to issue any policy in the form so disapproved. Such disapproval of the commissioner may be reviewed by a writ of certiorari." Pursuant to this statute, the Ætina Life Insurance Company and Travelers' Insurance Company, respectively, submitted to the commissioner proposed new forms of policy, and, having received notice of his disapproval of the same, have brought these two writs of certiorari to review his action.

The two forms submitted, one by each company, were not identical, but were both rejected on the same ground, viz., that each policy combined a contract for life insurance with one for insurance against bodily injury by accident, contrary to the prohibition of our statute. The present inquiry is whether the commissioner erred in this finding. Section 1 of the "act to provide for the regulation and incorporation of insurance companies and to regulate the transaction of insurance business in this state" (P. L. 1902, p. 407), as amended in 1907 (P. L. p. 128), specifies 13 general classes of insurance for which companies may be formed in this state. Those pertinent to the present discussion are classes 3 and 4, viz.: "(3) Upon the lives or health of persons, and every insurance appertaining thereto, and to grant, purchase or dispose of annuities. (4) Against bodily injury or death by accident (and upon the health of persons)." The clause in parenthesis was added by the amendment of 1907. Section 2 provides that "no company shall be formed for the purpose of engaging in any other kind of insurance than that specified in some one of the subdivisions of the preceding section, or more kinds of insurance than are specified in a single subdivision, except

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that a company may be formed * * * (2) for the purposes specified in subdivisions third and fourth; * * * contracts for each of the kinds of insurance specified in the subdivisions of the preceding section shall be in separate and distinct policies, except that the same policy may embrace risks specified in subdivisions fourth and fifth." This exception does not affect the present case. The two prosecuting companies were not organized in New Jersey, but were admitted to do business here under other provisions of our law. Their admission by section 58 of the act is limited to the transaction in this state of "any class or classes of insurance authorized by this act to be transacted by an insurance company of this state," and it is not pretended but that all the restrictions of section 2 apply to the prosecutors. It will be seen that while section 2 does not forbid, but in fact expressly allows, the same company to issue both life and accident policies, it prohibits life and accident risks to be joined in the same policy.

This brings us to a consideration of the frame of the policies in question and especially the clauses therein which were held by the commissioner as indicating a violation of the prohibition. The sample form submitted by the Travelers' Company is for \$10,000 payable to the beneficiary in 20 annual installments of \$250 each, and one year after the last installment a final payment of \$5,000. It calls for an annual payment of \$186.60 for 20 years. After various provisions relating to loans, change of beneficiary, non-forfeitable privileges, and so on, comes the clause specifically ruled on by the commissioner, as follows: "Premiums on contract paid by company if insured is wholly disabled, as follows: After one full annual payment shall have been made and before a default in the payment of any subsequent premium, if the insured shall furnish satisfactory proof that he has become wholly disabled by bodily injuries or disease and will be permanently, continuously and wholly prevented thereby for life from pursuing any and all gainful occupations, the company by an indorsement in writing upon this contract will agree to pay for the insured the premiums, if any, which shall thereafter become payable during the continuance of such disability. In any such case the premiums so paid shall not be a lien on this contract and the cash loans and the values of this contract in the schedule on the second page hereof shall increase in the same manner as if the premiums were being paid by the insured. If however, the insured shall recover so as to be able to engage in any gainful occupation during the premium paying period the company's obligation to pay the premiums shall cease and the insured shall resume payment of premiums in accordance with this contract on the first premium date following such recovery. On any anniversary

of this contract this provision may be canceled by the insured, in which event the subsequent annual premiums will be reduced twenty-five cents for each one thousand dollars of insurance hereunder and such reduction will be indorsed hereon." In the agreed state of the case as submitted by this company it is stipulated, among other things: That no additional premium is charged for a policy containing said clause to that charged for the policies not containing it, but said clause is offered as a gratuitous privilege or advantage to the insured, and that the privilege conferred upon the insured by the said disability clause to cancel the same on any anniversary date of the said policy and the reduction upon subsequent premiums of 25 cents for each \$1,000 of insurance was incorporated as a part of the said disability at the request of the insurance department of the state of Ohio, to be used by said department in a measure to ascertain the present worth of future contingent obligations assumed by the company under the disability provision in addition to those measured by the mortality tables.

Counsel for prosecutors, however, in their brief say that "one more benefit or contingency is added, the cost of which is undoubtedly capable of calculation, and is, of course, embraced in the premium." In other words, while making no reduction of premium on a policy not containing this special clause, the company finds the premium on such policy sufficient to compensate it for any increased hazard arising from the "benefit or contingency" covered by the clause in question. When we analyze this "benefit or contingency," we find it to be this: That the first year's premium is accepted by the company as compensation for two risks—one, that the insured may die within the year and the additional term of automatic extension, in this case one month; the other, that the insured may be disabled by disease or bodily accident thereafter at some time during the twenty years during which premiums are to be paid, in which case the company agrees to pay for his benefit all future premiums on the policy during the continuance of the disability. In an extreme case this would be 19 premiums or a total in the sample policy of \$3,545.40 which the company pays for his benefit or excuses him from paying, which amounts to the same thing. Any postponement of the accident decreases both the chance and the amount of risk, but we cannot make of it anything but a risk to one party and a benefit to the other. To the contingency of disease no objection was raised by the commissioner, doubtless on the theory that, as subdivision 3 includes both life and health insurance, no objection exists to the incorporation of both risks in one policy. But we do not see how the insurer can undertake in case of accident to surrender its right to future premiums without taking and insuring the risk of accident pro tanto, nor

how this risk to the insurer, calculated and allowed for, can be aught but a benefit secured to the insured by his contract and paid for in the premium. Certainly if the agreement was to pay to the beneficiary by annual installments in case of such accident an amount equal to the premium, it would be clearly an accident risk; but there is no difference in the result to the company. While it may fairly be presumed that the company did not assume this additional risk from purely altruistic motives, we recognize fully that the provision under consideration is from some points of view highly beneficial to the insured and the beneficiary by tending to avoid lapsing of life insurance policies for nonpayment of premiums due to the misfortune of the assured in meeting with accident. No very satisfactory reason is assignable, so far as we can learn, for the prohibition of this combination of risks in one policy. The explanation that it is intended for the convenience of the insurance departments in calculating reserves fails to satisfy. Perhaps the statute under such circumstances should not be extended by implication; but this in our judgment is not a case of implication but of coming within an express provision. However, we note that the prohibition is not a new one; in fact, the old law was more stringent than at present. The insurance law of 1852 (Revision 509, § 15) provided that "no company making insurance on the health or lives of individuals shall be permitted to take any other kind of risks." This has been relaxed so as to permit the same company to write accident risks as well as life risks (subdivisions 3 and 4), so all that remains of the restriction in this particular case is the requirement that separate policies shall be written. In this view of the case the supposition that this restriction has no rational basis and should be confined to cases plainly within its terms, loses much of its force, for a statutory life of full half a century implies some good reason for the statute. We conclude, then, that the commissioner was right in refusing his approval to the Travelers' form of policy submitted.

The Aetna policy also in our opinion contravenes the law in the same way as the Travelers', though differently drawn. The disability provisions are as follows: "Total and Permanent Disability: If proof is received by the company that by reason of bodily injuries or disease originating after the issue of this policy the insured has become wholly, continuously and permanently unable to perform any work or follow any occupation for compensation or profit, this insurance will, if all premiums previously due have been paid, continue in full force for twelve months from the time the next premium falls due without payment of premium. At the expiration of that time the company will, upon the request of the life beneficiary, and assignee, if any, pay in full settlement of this policy and in lieu of all

other benefits and privileges herein provided either one-twentieth of the sum insured, and will pay the same amount annually thereafter until the entire sum insured has been paid, or will pay the amount of annuity shown by Table E for the age of the insured at the last birthday preceding the approval of such proofs and the same amount annually thereafter during the lifetime of the insured, provided that at every such annuity payment satisfactory proof is furnished that the insured is then living. In either case any indebtedness to the company against the policy will reduce the annuity payment by the company in the same proportion that such indebtedness bears to the sum insured. If neither of the above installment payments is requested, the insurance may, at the expiration of said twelve months, be continued under its original conditions by the payment within the days of grace of the premium then due, or the policy will be entitled to the non-forfeiting values herein provided. If the policy has reached the condition where by its terms it has become full-paid at the expiration of the twelve months above described, it may then enter upon the disability benefits and privileges herein provided upon request of the life beneficiary and assignee to that effect. The company will also extend the privileges and benefits for total and permanent disability above described to cover the irrevocable loss of the entire sight of both eyes, or the total and permanent loss by removal or disease of the use of both hands, or of both feet, or of such loss of one hand and one foot, all occurring after the issue of this policy and before default in the payment of the premium. If the insured shall recover from the total disability above described before the expiration of the said twelve months the payment of premiums hereon may be resumed with the premium falling due next after such recovery and the insurance will continue as originally issued; or if such recovery occurs and premiums are not resumed then the policy shall be regarded as lapsing with the non-payment of the first premium due after such recovery, and entitled to the non-forfeiting values hereinbefore described, subject to the total indebtedness hereon. Any benefit for total and permanent disability within the meaning of this policy is conditioned upon the company being permitted to examine the insured when desired within one year from the receipt and approval of the proof."

From this somewhat voluminous agreement we gather that, in case the insured is deprived by accident or disease of his earning power, he will be entitled under the policy to the following benefits not otherwise available to him:

(1) A continuance of the policy for one year without payment of premium.

(2) At the end of that time, if insured does not recover, these options in lieu of all other benefits of the policy: (a) Payment of the

face of the policy in 20 annual installments, or (b) an annuity for life as per table appended; (c) to continue the policy in force by the insured renewing his payment of premiums.

If at the time of disability the policy is paid up, the options A and B take effect at once. Loss of eyesight, or of both hands, or of both feet, or of one hand and one foot, give the same rights as total disability. It thus appears that the company takes the risk and the insured receives the benefit in case of accident within the terms of the policy of exercising the option of having it turned into a mature endowment policy, or an annuity, or continuing it in force. It cannot be denied that a valuable right is conferred. The *Ætna* policy is therefore also in our judgment within the prohibition of the statute forbidding life and accident risks to be joined in one contract. It follows that the ruling of the commissioner in both cases will be affirmed.

The Supreme Court of Massachusetts appears to have reached a similar conclusion respecting these policies under the statute of that state. *Ætna Insurance Co. v. Hardison*, 199 Mass. 181, 85 N. E. 407.

(76 N. J. L. 627)

MORRIS CANAL & BANKING CO. et al. v. STATE BOARD OF ASSESSORS.

(Court of Errors and Appeals of New Jersey. Nov. 16, 1898.)

1. TAXATION (§ 247*)—EXEMPTION—NATURE OF PRIVILEGE.

Immunity from taxation is sometimes a personal privilege and sometimes a privilege annexed to property as an appurtenant, and, when it is a personal privilege, it is incapable of transfer without express statutory direction, but, when it is annexed to property, it passes with the grant of the property as an appurtenant to it.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 326; Dec. Dig. § 247.*]

2. TAXATION (§ 204*)—EXEMPTION—CONSTRUCTION OF CONTRACT.

While a contract of exemption from taxation is valid, it is in derogation of public right, and its provisions are to be construed most strongly against the one claiming the benefits, and can never be permitted to extend either in scope or duration beyond what the terms of the concession clearly require.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 322; Dec. Dig. § 204.*]

3. TAXATION (§ 247*)—EXEMPTION—CONSTRUCTION OF CONTRACT.

Morris Canal & Banking Company's charter (Act Dec. 31, 1824 [P. L. p. 160] § 4) provided that no taxes should be imposed upon the company or upon the stocks and estates which might become vested in them under the charter, but that the exemption should not extend to any other property of the company than such as was possessed, occupied, and used by it for the actual and necessary purposes of canal navigation under the charter. A supplement to the charter (Act March 14, 1871 [P. L. p. 444]) gave the company power to lease its canal with all its property and franchises, and made it

lawful for the lessee under the lease to use and enjoy it for the term of the lease. *Held* that, there being no provision in the legislative authorization to lease that the privilege of exemption from taxation should pass to the lessee, the privilege so far as it was personal was not transferred.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 327; Dec. Dig. § 247.*]

4. TAXATION (§ 247*)—EXEMPTIONS—CONSTRUCTION OF CONTRACT.

The charter providing that the exemption should not extend to property, except that possessed, occupied, and used by the company for the actual and necessary purposes of canal navigation the property of the company was relieved from taxation only while possessed, occupied, and used by the company, and a lease by the company passing to the lessee the possession of the property with the full right to occupy and use it operated to suspend the exemption whether personal or annexed to the property.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 327; Dec. Dig. § 247.*]

Error to Supreme Court.

Certiorari by the *Morris Canal & Banking Company* and another against the *State Board of Assessors* to review assessments for taxes made by the state board. From a judgment affirming the assessments (67 Atl. 672), relators bring error. Affirmed.

William H. Corbin, for plaintiffs in error. Robert H. McCarter, Atty. Gen., Bennet Van Syckel, and John R. Hardin, for defendants in error.

GUMMERE, C. J. The judgment brought before us by this writ of error sustains the validity of a tax levied by the state board of assessors upon the canal and its appurtenances of the *Morris Canal & Banking Company* under the railroad and canal tax act of 1884 (Act April 10, 1884 [P. L. p. 142]) and its supplements. The sole question for determination is whether the property taxed is exempt under the taxing provision contained in the charter of the company. That provision is found in the fourth section of the charter (Act Dec. 31, 1824), and is as follows: "No state, county, township, or other public assessments, taxes or charges whatsoever shall at any time be laid or imposed upon the said canal company, or upon the stocks and estates which may become vested in them under this act; but this exemption shall not extend to any other estate or property of the company than such as is possessed, occupied and used by the said company for the actual and necessary purposes of said canal navigation under this act, according to the true intent and meaning thereof." P. L. 1824, p. 160. That this charter provision constituted a contract between the state and the corporation which cannot be annulled or altered by the state, without the consent of the corporation, is conceded by the Attorney General and his associates. In the year 1871 the canal company leased its property and franchises to the *Lehigh Val-*

ley Railroad Company in perpetuity, under authority of a supplement to its charter passed in that year, which provided that "it shall and may be lawful for the Morris Canal & Banking Company, by and with the consent of a majority in interest of the stockholders of said company, expressed in writing and duly authenticated by affidavit and filed in the office of the Secretary of State, to lease the canal of said company, or any part thereof, with all or any of its boats, property, works, appurtenances, and franchises, to any person or persons, or corporation, either perpetually or for such shorter time, and upon such terms and agreements as may be agreed upon between the said contracting parties; and it shall be lawful for the lessee, or the lessees, under said lease, to use and enjoy the said property and franchises so demised for the term in said lease mentioned." Act March 14, 1871, p. 444. The lease itself not only demised the canal with its appurtenances, and all the corporate franchises of the canal company, except that of the incorporation, but also assigned all of the corporate rights and privileges then held, or thereafter to be acquired, by the canal company.

The contention on the part of the state is that the effect of this lease was to put an end to the immunity from taxation theretofore enjoyed by the Morris Canal Company upon its canal and appurtenances, and to subject that property thereafter to the operation of such general laws as should impose taxes upon railroad and canal property. On the other hand, the plaintiffs in error deny that this was the effect of the lease, and assert that this instrument by the clause assigning to the lessee all corporate rights and privileges of the canal company preserved that immunity in its completeness, and transferred its enjoyment to the Lehigh Valley Railroad Company. Immunity from taxation is sometimes a personal privilege, and sometimes a privilege annexed to property as an appurtenant to it. When it is a personal privilege, it is incapable of transfer without express statutory direction. *Morgan v. Louisiana*, 93 U. S. 223, 23 L. Ed. 860. When it is annexed to property, it passes with the grant of that property as an appurtenant to it. *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. Ed. 303. The charter provision now under consideration exempts both the canal company and the stocks and estates which may become vested in it, and so would seem to confer a privilege, not only personal, but also annexed to the property of the company. So far as it is personal, the clause in the lease to which we have referred did not in our judgment operate to transfer it to the lessee company, for we find nothing contained in the legislative authoriza-

tion to the canal company to lease its property and franchises which can be construed into a consent by the state that this personal privilege granted to the canal company should be passed by it to its lessee. Nor does it seem to us that this immunity passed to the Lehigh Valley Company as an appurtenant to the property leased to it. Although a contract of exemption from taxation is valid, yet its provisions are to be construed most strongly against him who claims the benefit of it. Where it exists it is to be rigidly scrutinized, and never permitted to extend either in scope or duration beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all. *Tucker v. Ferguson*, 89 U. S. 527, 22 L. Ed. 805; *Memphis Railroad Co. v. Commissioner*, 112 U. S. 617, 5 Sup. Ct. 299, 28 L. Ed. 831; *State Board of Assessors v. Morris & Essex R. R. Co.*, 49 N. J. Law, 199, 7 Atl. 826; *Sisters of Charity of St. Elizabeth v. Cory, Collector*, 73 N. J. Law, 699, 65 Atl. 500. The present charter contract does not provide for a perpetual immunity from taxation. It declares that the "exemption shall not extend to any other estate or property of the company than such as is possessed, occupied and used by the said company for the actual and necessary purposes of canal navigation." The meaning of this limitation, in view of the principle thus quoted, seems to us to be clear. By force of it the property of the company is relieved from taxation only so long as it is possessed by the company, occupied by the company, and used by the company. When any one of these three conditions ceases to exist, the immunity from taxation granted by the charter comes to an end. The effect of the lease to the Lehigh Valley Railroad Company was to pass to it the possession of the leased property, with the full right to occupy and use the same. Since that lease went into effect the Morris Canal Company has neither possessed, occupied, or used any part of that property, and, so long as that property remains out of its possession, so long as it ceases to occupy and use it, the immunity from taxation conferred upon it and its property by the charter provision under consideration is suspended. Whether in case the lease should be terminated by the default of the lessee or otherwise, and the property should thereby revert to the lessor, and be thereafter occupied and used by it, this grant of immunity will be revived, is not before us for determination. It is enough to say that under present conditions the Morris Canal, with its appurtenances, is subject to taxation under the railroad and canal tax act of 1884.

The judgment under review will be affirmed.

(77 N. J. L. 48)

MAYOR, ETC., OF CITY OF NEWARK v. HATT et al.

(Supreme Court of New Jersey. Dec. 17, 1908.)

1. MUNICIPAL CORPORATIONS (§ 386*) — VACATING STREETS—COMPENSATION.

The right of a property owner to damages for the vacation of a street, when his property is not deprived of all access, depends upon the statutory provisions for compensation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 929; Dec. Dig. § 386.*]

2. MUNICIPAL CORPORATIONS (§ 386*)—VACATING STREET—DAMAGES.

Under the supplement to the charter of Newark (Act March 28, 1862, P. L. p. 333), property owners are not entitled to damages for the vacation of a street, when the vacation does not deprive the property of all access.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 929; Dec. Dig. § 386.*]

(Syllabus by the Court.)

Certiorari by the Mayor and Common Council of the City of Newark against George T. Hatt and others to review an award of commissioners. Award set aside.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

Francis Child, Jr., and Malcolm McLearn, for prosecutors. Chandler W. Riker, for defendants Kilburn & Osborne. Joseph A. Beecher, for defendants Hatt & Brown.

SWAYZE, J. The city of Newark, in pursuance of a contract with the Pennsylvania Railroad Company and the Central Railroad Company of New Jersey, vacated certain streets, near to, but not abutting upon, the lands of the defendants. There was still access to the lands from the city, except by way of the portion of the streets vacated. One of the streets on which the properties of Kilburn and Osborne abutted was made a cul-de-sac. The circuit court held that the true rule for estimating damages was the direct and substantial depreciation of the market value of land, consequent upon such vacating, and that such depreciation was the test of whether an award or assessment of damages should be made, whether such land did or did not front on the vacated street or the vacated part of a street, and that, in this matter, damages resulting from the said vacating, and from the elevation of the said tracks and building or the structures necessary therefor, and the operation of the said railroads thereon, should be considered by the commissioners, and directed the commissioners to award to the objectors such damage as had resulted by reason of the vacating of the streets, and also the damage resulting from the elevation of the tracks and the building of structures in connection therewith, or incident thereto, and also the damage resulting from the operation of the railroads upon the elevated structures.

In pursuance of this order, the commissioners reported that they had estimated and assessed the damage which the defendants had sustained by the vacating of the streets, and by reason of the elevation of the tracks, and the building of structures in connection therewith and incident thereto upon the said streets, and of the operation of the said railroads upon the said elevated structures.

In response to a rule of this court, the commissioners have certified that they found that the properties were injured and the market value thereof decreased by the elevating and the erecting of the structures across the part of the streets vacated, but found that the abutment of the railroad did not interfere with the properties getting the amount of air and light they respectively got before such elevation, and that the operation of the railroads did not injure the property.

The report of the commissioners makes no distinction between damages arising out of the act of the city in vacating portions of the streets, and those arising from the erection of the walls necessary to carry the elevated structure. Although nothing was awarded by reason of the obstruction to light and air, we cannot say that the obstruction caused by the elevated structures was the same that would have been caused by the mere act of vacation. The circuit court and the commissioners seem to have thought that different elements of damage might be involved, and this may well be. The vacation affected only the public right. The owners of the lands may still have had some private rights of passage which were cut off by the act of the railroad companies in building their structures, and, even if no such private rights of passage were involved, it may be, for aught we can tell from the record, that temporary damage, caused by the necessary inconvenience due to the building of the structures was included in the award. For such damages the city is not liable. The authority to award damages for vacating streets in Newark is found in the act of March 28, 1862 (P. L. p. 333). This act provides that: "Whenever the common council shall determine by ordinance to vacate any street, and any land will be taken by such vacating, the council are authorized to agree with the owner or owners of such land, as to the amount of the damages, and pay the same." This obviously relates only to the act of the city, and not to the act of the landowner in subsequently building upon the portion vacated. We need not consider whether the liability of the city was increased by reason of the fact that the vacation was in pursuance of a contract with the railroad companies which had for its object the elevation of the tracks. That contract did not purport to bind the city to pay all damages, but one-half was to be paid by the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

companies. It was manifestly intended only to provide for an adjustment of this item of liability between the contracting parties, and not to confer legal rights upon others. As to third parties, the city and the railroad companies remained liable, each for its own acts. Counsel for the defendants argued that the cases in the Court of Appeals of New York arising out of the elevation of the tracks of the New York & Harlem Railroad Company established a different rule. Most of these cases were suits against the railroad company, and not against the city; but it appears from the report of *Lewis v. New York & Harlem Railroad Company*, 162 N. Y. 202, 56 N. E. 540, and *Sander v. State*, 182 N. Y. 400, 75 N. E. 234, that the work of building the elevated structure in that case was done by a board appointed by the mayor, which was directed to take the entire charge and control of the improvement, and that by statute the property owners were authorized to present their claims for damages for allowance to the court of claims of the state of New York. This presents a very different situation from the present case, in which the only act of the city was the vacation of the streets, and all that was done subsequently, was done by the railroad companies themselves, upon their own responsibility. The charter of Newark contains no such provision as the New York act. It authorizes the common council to pay only when land is damaged by the vacation.

The more important question in the case is whether owners of land that does not abut upon the portion of the street vacated are entitled to damages where the access to their lands is not wholly destroyed. "The vacation of a street," we have said, "does not in the least impair private rights. It is only a surrender or extinction of the public easement." *United N. J. R. R. Co. v. National Docks, etc., Co.*, 57 N. J. Law, 523, 31 Atl. 981, citing *Dodge v. Pennsylvania R. R. Co.*, 43 N. J. Eq. 351, 11 Atl. 751; *Id.*, 45 N. J. Eq. 366, 19 Atl. 622; *Read v. Camden*, 54 N. J. Law, 347, 374, 24 Atl. 549. It is only because no private property rights of the landowner were affected that the rule denying damages in such cases, in the absence of a statute, could be sustained under our constitutional provisions. That rule found its justification in the necessity of intrusting to the public authorities the power to determine whether the public should continue to bear the burden of maintaining any particular highway. That was as much a matter of public administration as the paving of streets. The property owner may suffer special damage if the municipal authorities refuse to pave or neglect to keep a pavement in repair, just as he may suffer if they neglect to maintain a highway which gives more convenient access to his property. To hold that the landowner has a property right which would be injured by the abandonment of the public easement would prevent the municipal authorities from

vacating the most useless highway and substituting a better one, without incurring liability to landowners, and would unduly hamper the administration of public affairs, by substituting in effect the judgment of a jury in an action at law for the judgment of the municipal authorities. The damages arising from the vacation of a street, like the damages from a sewer, are incidental damages resulting from the proper exercise of the functions of the municipality, for which it is not responsible. *Simmons v. Paterson*, 60 N. J. Eq. 385, 388, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642. Such incidental damage is *damnum absque injuria*. *Marcus Sayre Co. v. Newark*, 60 N. J. Eq. 361, 367, 45 Atl. 985. It was considerations of this character that led to and justified the common-law rule exempting the municipality from liability to damages caused by the vacation of a street at least in cases where access to property was not wholly destroyed. The reasons are well stated, with ample citation of authorities, in *Cooley on Constitutional Limitations* (6th Ed.) 251, 253, and 1 *Hare's American Constitutional Law*, 380. The rule has been adopted in this court (*Kean v. Elizabeth*, 54 N. J. Law, 462, 24 Atl. 495), and by the Court of Chancery (*Dodge v. Pennsylvania R. R.*, 43 N. J. Eq. 351, 355, 356, 11 Atl. 751). Both cases were affirmed by the Court of Errors and Appeals. The principle was carried to an extreme in some jurisdictions, and as population increased, and the difference between urban streets and rural highways became better understood, statutes were enacted, of which the act of 1862, amending the charter of Newark, is an instance. The right of the defendants to damages depends upon that act. It provides only for the payment for damages to land. This excludes personal damages to the individual arising out of the less convenient access to his property from certain parts of the city—a distinction well stated by Chief Justice Gibson in the *Philadelphia & Trenton R. R. Co. Case*, 6 *Wharton* (Pa.) 35, 44, 36 Am. Dec. 202. We think, upon a fair construction, it excludes also incidental damages arising from the proper execution of a municipal undertaking, as in *Simmons v. Paterson* and *Marcus Sayre Co. v. Newark*. Personal damages and incidental damages to property may be special and justify the person injured in questioning the municipal proceedings by certiorari, as in *Morris & Cummings Dredging Co. v. Jersey City*, 64 N. J. Law, 142, 45 Atl. 917, and *Beecher v. Newark*, 64 N. J. Law, 475, 46 Atl. 166, and may still not be such damages to land as the act of 1862 provides for. In the present case, the defendants probably have suffered by the vacation of a portion of the street a depreciation of the value of their property, because it has a less convenient means of access to certain portions of the city, and is situated upon only one thoroughfare, instead of upon two; but this loss is

the same in character that would be caused by the failure of the city to pave the street or to keep the pavement in good repair. It is a loss arising out of the probable diversion of traffic, and hence incidental only. The defendants naturally might anticipate a continuance of the street, and the probability of continuance added value to their land; but their legal right was to have it continued only so long as the city authorities might find it to be the public interest. They have lost the advantage which they anticipated, but their anticipation, however reasonable it may have been, is not a property right for which the city ought to compensate, unless compensation is required by the statute. The history of the law and the analogy of the cases we have cited lead us to the conclusion that the only damages to land in the view of the Legislature were those direct damages which may arise to an owner whose access is completely cut off. Such was the view taken by the New York Court of Appeals in a similar case (*Coster v. Mayor of Albany*, 43 N. Y. 399), which was subsequently followed in a case which seems quite on all fours with the case at bar (*Fearing v. Irwin*, 55 N. Y. 486). A similar result was reached in *Stanwood v. Malden*, 157 Mass. 17, 31 N. E. 702, 16 L. R. A. 591. We have considered the reasons given for a different conclusion in Pennsylvania (*In re Vacation of Part of Melon St.*, 182 Pa. 397, 38 Atl. 482, 38 L. R. A. 275), but prefer the views expressed in Massachusetts and New York. In construing a statute it is important to adopt a workable rule, and we must assume such was the legislative intention. The act of 1862 authorizes the common council to agree with the owner of the land which will be damaged as to the amount of damages, and, in case no agreement is made, provides for the appointment of commissioners to estimate and assess the damages. The Legislature could only have had in view such landowners as the common council could see would be damaged. If they meant only those whose access to their land would be cut off, the determination by the common council of those with whom it was bound to treat was a simple matter. If, however, they meant all landowners who might be incidentally damaged, the ascertainment of the persons would be most difficult, and in some cases impossible. We can readily imagine a case where every property owner in Newark might suffer incidental damage by the vacation of a small part of one of its main streets, and in every case the damages must shade off imperceptibly from those whose property is much depreciated, through those who suffer less and less, up to the vanishing point. It certainly could not have been the intention to impose upon the common council the decision of so nice a question about which men's

opinions as to the existence of any damage would inevitably differ. There is nothing in the statute to suggest that there is any limitation to landowners within the same block or to those whose lands are left along a cul-de-sac, and we must adopt the broad and quite impracticable construction that extends the right to all who are damaged, even incidentally, unless we limit it to those who are directly damaged by being deprived of access to their land. We prefer the latter construction. The loss which it entails is no greater than the loss suffered by those who are injured by the lawful operation of a railroad, for which no action will lie. *Beseman v. Pennsylvania R. R. Co.*, 50 N. J. Law, 235, 13 Atl. 164, where Chief Justice Beasley vindicated the results by a similar course of reasoning to that adopted by us.

The proceedings, so far as they award damages to Hatt, Brown, Kilburn, and Osborne, should be set aside.

(71 N. J. E. 297)

KLEMMER v. KERNS.

(Court of Errors and Appeals of New Jersey.
Nov. 19, 1906.)

MORTGAGES (§ 280*) — SALE OF MORTGAGED PROPERTY—ASSUMPTION OF DEBT.

Though the assumption of a mortgage debt by a subsequent purchaser is absolute and unqualified in the deed of conveyance to him, it will be controlled by a collateral contract between him and his grantor, not embodied in the deed, and the mortgagee cannot enforce the contract of assumption appearing in the deed unless the grantor could.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 280.*]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Action by Cecelia Klemmer against Edgar L. Kerns. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Vice Chancellor Bergen filed the following conclusions:

"As this case has been fully argued, and is in a very narrow compass, I think that I will dispose of it now. The bill is filed for the purpose of requiring the defendant, Kerns, to pay a deficiency existing between the amount due on a mortgage and the price for which the property sold under foreclosure of it. The claim is based upon a clause in a deed made by Charles E. Napp to E. L. Kerns, in which the grantee assumes the payment of a mortgage indebtedness upon the property, part of which is represented by the foreclosed mortgage. I have before me the case of *Crowell v. Hospital of St. Barnabas*, reported in 27 N. J. Eq. 650, and will read a part of the opinion to be found on page 658 of 27 N. J. Eq.: 'But the right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the acceptance by the subsequent

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

purchaser of the conveyance of the mortgaged premises, or from the obligation of the grantee to pay the mortgage debt as between himself and his grantor. Though the assumption of the mortgage debt by the subsequent purchaser is absolute and unqualified in the deed of conveyance, it will be controlled by a collateral contract made between him and his grantor which is not embodied in the deed. These words, I think, establish the rule which must control this case. It appears, and I think I would not be justified in any other finding under this evidence, that Mr. Napp, the owner of the property, and who had assumed the payment of this mortgage indebtedness, conveyed it to the defendant, Kerns, not as an absolute conveyance, but as between themselves, to secure to Kerns the payment, not only of a debt then existing and due to him from the grantor, Napp, but for such other moneys as he might disburse in the holding and protection of the property for Mr. Napp. So we have this situation: That, as between Mr. Napp and Mr. Kerns, there was a collateral agreement, by the terms of which Mr. Kerns was to hold this property for an indebtedness due or to accrue from Mr. Napp to him, and assumed the payment of the mortgage debt, although the conveyance was absolute on its face. Manifestly, under such a condition, Mr. Napp could not enforce this assumption by a bill on his own behalf against Mr. Kerns, nor compel him to pay the deficiency, even if, because of his prior assumption, he had been compelled to pay the money. That being the situation, I am at a loss to see how the present complainant's position, whose right is only one of subrogation, would be any greater or higher than that of Mr. Napp. If Mr. Napp could not enforce it, naturally the complainant has no other or greater right.

"The result of which is that I feel constrained to advise that this bill must be dismissed, and the defendant allowed a decree."

John S. Van Dike, for appellant. George W. MacPherson, for respondent.

PER CURIAM. The decree appealed from will be affirmed, for the reasons set forth in the opinion filed in the Court of Chancery by Vice Chancellor Bergen.

(76 N. J. L. 715)

ANDERSON v. PENNSYLVANIA R. CO.
(Court of Errors and Appeals of New Jersey.
Nov. 18, 1908.)

NAVIGABLE WATERS (§ 26*)—COLLISION OF YACHT WITH BRIDGE—QUESTIONS FOR JURY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

Plaintiff's yacht, on approaching a draw-bridge and desiring to pass through, received a warning signal, whereupon plaintiff lay to in a safe place until another signal was given, interpreted by those on the boat as a signal to come on. The bridge had begun to open, and

continued to open, though slowly, until the collision, which finally occurred. The boat was under sail, but the sail not drawing, and she was going with the tide, though it was inferable from the testimony that steerage way might have been gained at any time by trimming sheet. At 150 or 200 yards, according to the testimony, another signal was given from the bridge, indicating the left span as the one to pass through. At about 50 feet from the bridge, the tender called out that they must go back, and could not get through. It was then too late to avoid collision. *Held*, on these and the other circumstances as testified to, that the existence of negligence on the part of the bridge tenders, and of contributory negligence of the navigator of the boat, were both questions for the jury, and that a nonsuit was error.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 164; Dec. Dig. § 28.*]

Gummere, C. J., and Reed, Voorhees, Min-turn, Vredenburgh, Gray, and Dill, JJ., dissenting.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Artillas A. Anderson against the Pennsylvania Railroad Company. Plaintiff was nonsuited, and brings error. Reversed, and a venire de novo awarded.

Samuel W. Shinn and John W. Wescott, for plaintiff in error. Gaskill & Gaskill, for defendant in error.

PARKER, J. The plaintiff in error, who was plaintiff below, was the owner of a sailing yacht, and sued the defendant company for damages caused by collision of the said yacht with a swinging draw of the defendant's railroad bridge over Rancocas creek in the county of Burlington. At the trial in the Supreme Court circuit, motion was made to nonsuit the plaintiff on two grounds: First, because no negligence of defendant's servants in the management of the bridge had been shown; secondly, because of contributory negligence in the management of the boat. From the remarks of the court in disposing of the motion, we infer that the nonsuit which was entered was granted on the ground of contributory negligence. The case is here on writ of error to the judgment then entered; and, if a nonsuit was justified on either ground, it should stand.

Rancocas creek at the place in question, which is just at its mouth, is quite a wide stream, which might well be described as a river, running east and west. On the north or right bank is the village of Delanco; opposite, on the south bank, Riverside. These two places are connected by a county bridge, east of which, at a distance of about 400 yards or more, is the defendant's railroad bridge, running, as indicated by the official maps, nearly northeast and southwest, while the county bridge runs nearly north and south. By bearing these details in mind an apparent inconsistency in the testimony is fully explained, and the case will be more readily understood. The accident occurred on May 25, 1905, at about 6:45 p. m., it being

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

still light. Shortly prior to that time plaintiff's boat, with plaintiff aboard, and having one Parker to navigate it, came up the Delaware river, and entered the mouth of Rancocas creek on the way to Hainesport, near Mt. Holly. There was a strong tide setting up the stream. The wind was light, and the boat, sailing free, passed through the draw of the wagon bridge. After going about one-third the distance to the other bridge, plaintiff and Parker, who was steering, saw the bridge tender on the railroad bridge wave a red flag for them, and a white flag for an approaching train which was just leaving the Riverside station. Parker accordingly headed for the power house at Riverside, and lay to in a position out of the tide, about 400 yards from the railroad bridge. They waited there, according to Parker's testimony, until "the train had gone on towards Delanco, and they had started to turn the draw." The bridge tender waved his white flag, and shouted something which Parker and plaintiff could not make out because of the wind. Parker called out, "We are coming through." The draw continued to turn; and presently he got under way, turning first, as he says, toward the wagon bridge, then let the boat pay off toward the boathouses on the Delanco side until it reached mid stream. Then he seems to have headed for the bridge, and slacked off the sheet so that the sail should not draw, moving by the tide alone. It is not certain just what sail this was, as the testimony is vague as to the exact type of the boat. She is described, in Parker's testimony, as a "two-masted sloop, with a jib." Plaintiff says she was 42 feet long and 14 feet beam, so that she might have been a small schooner, or what is known as a "yawl," having a mainmast forward and a smaller one at the stern. But only one sail was hoisted, "the forward sail," or inferably the foresail.

When within 150 or 200 yards of the railroad bridge, still in a place of safety so far as the case shows, the bridge turning all the while, but slowly, the bridge tender, according to plaintiff's testimony, "waved his hand, and showed them which side of the draw to take," indicating the northerly or Delanco end, which was to their left, and was swinging away from them. Parker's testimony as to what followed is as follows: "Q. How near open was the draw, then? A. The bridge was open very nearly far enough for the boat to go through, but they seemed to take so many turns around to make it open at all; seemed to open slowly. And when I got within 50 feet of the slip he halloed for me. He says, 'You can't get through; you will have to turn.' Well, I couldn't. The tide was against me, the wind was against me, and I was simply there, and I held her just as close as I could to make her go through, thinking perhaps she might, but the stay ropes from the mast caught in the sleepers on the end of the draw as it

was opening, and there was just about that much space [indicating]. If it had been about that much further [indicating], it would have gone through. Of course that pulled the mast over, bent the mast clean over, and broke the top of it off, and of course opened her seams. Q. Then you were helpless, I suppose? A. Yes, sir. As soon as I seen I couldn't do no better, I dropped the sail and took away everything, and tried to stop it, but it was utterly impossible. Q. And the draw lacked about how much of being opened wide enough to let you through? A. If it had been opened two feet wider I could have gone through. Q. How many were working on the bridge when they were trying to turn it, did you see? A. I don't just recollect; three or four." The colloquy between the court and plaintiff's counsel on the motion to nonsuit indicates the view of the trial judge as to the inferences to be drawn from the signals: "The Court: The signal to the plaintiff in this case has been testified to have been 400 yards away. At that time the draw of the bridge was not open. Mr. Wescott: Was being opened. It was testified to. The Court: Well, they had started to turn it, according to the testimony. But it was obviously and palpably before the eyes of the plaintiff that the passageway was not then clear. He started the boat, and undertook to go into what seems to be to the court an obvious danger which he himself ought to have seen. In addition I don't see that there can be any inference drawn from the defendant's invitation to come through the draw that the draw was then in a safe condition to pass, as the plaintiff's own eyes indicated that he clearly observed that it was not. A nonsuit will be entered." The court seems to have overlooked the testimony of Anderson as to the proper channel being pointed out when they were 150 yards away; and to have taken the view that plaintiff was guilty of negligence in law by getting under way at all before the draw was sufficiently open to allow his boat to pass through, though plaintiff was entitled to infer that he was invited to come on. We think the nonsuit was erroneous; that a case for the jury was presented, both on the question of the negligence of the servants of the railroad company, and the contributory negligence, if any, of the plaintiff or his servant Parker. The general rules in regard to the duties and liabilities of those in charge of drawbridges over navigable streams, and those passing through them, are stated in 29 Cyc. 316-318, with the authorities, which may advantageously be examined in some detail.

In St. Louis, etc., Packet Co. v. Keokuk Bridge Co. (C. C.) 81 Fed. 755, the rule was laid down that a pilot navigating a stream over which a drawbridge is erected is only obliged to use ordinary care and skill in passing through the draw, and the question, under all the circumstances, whether he did so

is for the jury. In *Clement v. Metropolitan West Side Elevated Railway Co.*, a case in the Circuit Court of Appeals, reported in 123 Fed. 271, 59 C. C. A. 289, a steamer 254 feet long was navigating the Chicago river at night, and passed safely through a number of bridges, but on reaching the next bridge 135 feet away, at a speed dead slow, it was seen that the bridge was not opening, so full speed astern was ordered, but without avail. It was held that the vessel was not in fault, and that the burden was on the defendant, owner of the bridge to explain the failure to open it. In *Central R. R. of N. J. v. Penna. R. R.*, 59 Fed. 192, 8 C. C. A. 86, a tug with a tow in Newark bay whistled for the draw of the Central Railroad bridge to open, receiving no reply, though the whistle was repeated several times. The tug and tow slowed up as much as possible to avoid collision, and the draw was held closed some minutes until a freight train was allowed to pass over. The draw then opened, but too late to prevent collision of the tow with a pier of the bridge. The owner of the bridge was held liable on the ground that it owed the duty of reasonable care, not only not to impede safe navigation, but to avoid unnecessary delay. The case of *Manistee Lumber Co. v. Chicago* (D. C.) 44 Fed. 87, presented a situation very similar to that in the case at bar. A schooner in tow of a tug was traversing the Chicago river. Whistle was blown to open a draw, and a bell was rung from the bridge to signify that it would be opened. This signal was intended to warn passengers on the bridge, but the court held that plaintiffs' servants were entitled to regard it as an intimation, for their benefit. The draw tender found the locking mechanism out of order, and instead of signaling the tug at once to stop, began an investigation of the trouble, and found out too late that he could not get the bridge open. The court expressly held that the tug was not in fault for not slackening speed as soon as it discovered that the draw was not swinging, and the city was therefore solely liable for the resulting collision. *Boland v. Bridge Co.* (D. C.) 94 Fed. 888, presents a case of a steamer descending the Missouri river, sustaining other damage by trying to avoid collision with a draw-bridge which was not opened. Navigation was evidently intermittent at the time, as the steamer people had sent word to the bridge tender the night before to be ready for them. They had the draw in sight for two miles, and saw men on it, who, as it happened, were not the ones to open it. The steamer advanced on the bridge until it was evident that the draw was not going to open, and then tried too late to make shore, and ran into some obstruction and was damaged. In a suit against the bridge company the defense of contributory negligence was raised, and the court held that it was a reasonable supposition that the men in charge would commence to open the bridge in time, and

that no negligence was chargeable to the navigators of the boat. In *Chicago v. Mullen*, 116 Fed. 292, 54 C. C. A. 94, it was held to be negligence, on the part of the bridge tender, to swing the draw too far as a schooner in tow passed through, and that the latter was not bound to wait until the bridge was locked. The case of *Edgerton v. Mayor* (D. C.) 27 Fed. 230, arose out of a collision in the Harlem river. Though it was held to be negligence in the pilot of a tug to approach the draw span at an angle, this course resulting in the collision, still it was held contributory negligence in the bridge tender not to favor the passage of the tug by revolving the draw beyond the middle line, as was customary, and under the admiralty rule the damages were divided. The general rule of conduct in such cases is very fully, and we think, accurately, stated by Jenkins, Circuit Judge, in *Clement v. Metropolitan Railway*, 123 Fed. 271, 59 C. C. A. 289, already cited. The following is the language of the opinion: "A bridge spanning a navigable river is an obstruction to navigation, tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition therefor. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights, giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge, and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (*City of Chicago v. Mullen*, 116 Fed. 292, 54 C. C. A. 94), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened (*Manistee Lumber Company v. City of Chicago* [D. C.] 44 Fed. 87; *Central Railroad Company of New Jersey v. Pennsylvania Railroad Company*, 59 Fed. 192, 8 C. C. A. 86), when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern."

Counsel have referred us to no case outside of this state, nor on an independent investigation do we find any, of collision between a sailing vessel under sail and a drawbridge which throws any light on the matter in hand. It is worthy of remark that the two reported cases in this state on the general subject are of just this character. In *Ripley v. Freeholders*, 40 N. J. Law, 45, in the Supreme Court, the accident occurred at the draw of the county bridge over the Passaic at Bridge street, Newark, and was due to the failure of the freeholders to keep the bridge in repair, so that it sagged and worked so slowly that the draw tender could not get it open in time. This failure was held to be negligence. In the case of *Mattlage v. Freeholders*, 63 N. J. Law, 583, 44 Atl. 756, decided by this court, the collision took place at the Paterson Plank Road bridge spanning the Hackensack river. In that case, as in this, the vessel was sailing free, and the tide running in her favor three miles an hour. The wind was fresh. The mate blew a horn as a signal, and the crew took in the foresail and lowered the mainsail to the third reef, dropped the peak and hauled in the boom. The schooner was then under jib and close-reefed mainsail, practically all her sail being the jib, and this necessarily making it impossible, in case of emergency, to bring her up into the wind. At 600 yards the bridge tenders were seen working on the draw as if to open it. At 200 feet, the bridge tender waved his hat, but it was then too late, for the heavily laden schooner, moving six miles an hour, under headsail almost entirely, could not put about or anchor, and an accident was inevitable. It turned out that the bridge was jammed by the expansion of the trolley rails with the heat. It was held that from this condition, which had persisted for some time, the jury was entitled to infer negligence of the freeholders in failing to use proper care in keeping the bridge in repair. It was also argued, but unsuccessfully, that contributory negligence had been conclusively established by comparison of the alleged time that was usually required for the bridge to open and the speed of the schooner, as indicating that the latter was still in a place of entire safety when it became evident that the bridge was not to be open in time. Other testimony, inconsistent with this, was held to raise a jury question. There is no testimony in the case at bar, however, that indicates the time usually required to open the bridge in question, so that a discussion of contributory negligence from that point of view is unnecessary.

From the testimony that, on coming through the wagon bridge and heading for the draw of the railroad bridge, signal was made with a red flag to the boat, and a white flag to an approaching train, and that plaintiff changed his course and lay to until the train had passed and a white flag was then waved, and the draw began to open, when he again head-

ed for the draw, and was allowed, without signal, to approach within 150 or 200 yards, that the draw continued to open all that time, and that at that point the particular course of the plaintiff was indicated to him from the bridge, and no objection made to his proceeding further until within some 50 feet of the bridge, we think it was clearly inferable by a jury that the bridge tenders were aware of plaintiff's intention, invited him to come on, and gave him to understand that the draw would be open for him; that their failure to open it in time was due, either to a miscalculation of the time required to open it, of which they were the sole judges, or of the force of the tide, of which they could judge as well as plaintiff, or both; and that from their conduct, either in inviting the plaintiff too soon, or not warning him back till too late, or tardiness in opening the draw, negligence on their part was a legitimate inference. The duty of railroad companies to maintain and operate drawbridges over navigable streams and provide bridge tenders thereon, and to open the draws for free passage of vessels, is declared by statute. P. L. 1903, p. 655, §§ 16, 17.

As to the conduct of the plaintiff himself, the question of his negligence was as clearly a jury question. If the tide was running 3 miles an hour, and he had 400 yards to go, it would take him at that speed, not using his sail, $4\frac{1}{2}$ minutes to reach the draw—apparently ample time for any ordinary draw to open. At a distance of 150 yards he was still $1\frac{1}{4}$ minutes away. The court cannot undertake to fix as a matter of law a limit within his zone of safety, at which, in the absence of a signal from the draw, he should have realized that it would not open in time. Nor can it be said that he was negligent as a matter of law in passing out of the area of safety before the bridge was open or it was absolutely certain that it would be. Vessels are constantly advancing upon bridges, as the reported cases show, and as everyday experience tells us, without waiting for them to open; and on the proper and legal assumption that the tenders will do their duty and give the vessel the right of way to which it is entitled. On this point the remarks of Judge Jenkins already quoted are most pertinent. Nor can it be said, as a matter of law, that Parker was negligent in losing control of the boat. As we read the testimony, the wind was not dead aft as they entered Rancocas creek, but slightly quartering from the south. At least this inference is permissible. After passing the first draw, they came to off Riverside, under the shore. In getting under way again, they started off toward the west, which would be on the port tack, and in turning up the river, either went about or gybed, and with the slight change of course required by the different angle of the railroad bridge must have had the wind nearly or quite abeam. This explains the

testimony that Parker slacked off the sheet to let the wind out of the sail. The situation was then such that the boat would instantly gather steerage way by merely trimming the sail, so that it would fill, and up to within a comparatively short distance of the bridge, might be put about and saved from collision. So far as the tide and other circumstances were concerned, the situation was not of Parker's making. He had to take them as he found them, and do the best he could. If, as the United States Courts hold, and we think is the law, he was entitled to assume, in the first instance, that the bridge would be opened in time, and a jury might fairly find, as we think they might have found, that he proceeded on that assumption, carefully, at a slow speed, and received no warning signal, and it did not appear in reasonable view of the situation that the bridge would not be opened until too late to turn back, he cannot be held guilty of contributory negligence. All these matters of fact a jury might on the evidence have found in his favor.

The first section of Bridge Act 1833, as amended in 1894 (Gen. St. 1895, pp. 313, 314, §§ 41, 47), imposing a penalty on commanders of vessels for failure to lower their sails on approaching drawbridges, which was discussed in *Ripley v. Freeholders*, *ubi supra*, was not adverted to in the court below, nor mentioned in the briefs of counsel in this court, so perhaps it needs no notice here. It may as well be said, however, that the "lowering of the sails" required, was held by the Supreme Court in the *Ripley* Case, to be such as in the language of the statute would "enable the vessel to pass gently through." We see no reason for questioning at this time the propriety of that decision; and if, as was testified in this case, the sail had no effect on the speed of the boat, it was immaterial whether it was raised or lowered, and no negligence could be predicated on a failure to lower it, especially in view of the defendant railroad's claim that, in effect, it was negligence not to keep the sail full.

We conclude, therefore, that both defendant's negligence and plaintiff's contributory negligence were questions for the jury, and that the nonsuit was wrong. The judgment of the Supreme Court will therefore be reversed and a venire de novo awarded.

GUMMERE, C. J., and REED, VOORHEES, MINTURN, GRAY, DILL, and VREDENBURGH, JJ., dissent.

(74 N. J. E. 339)

SCHLICHER v. WHYTE.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

EVIDENCE (§ 354*)—BOOKS OF ACCOUNT—PARTNERSHIP LEDGERS.

On accounting between partners, the partnership ledgers kept by bookkeepers are com-

petent original evidence; the bookkeepers being regarded as agents of each partner to keep his account with the firm.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1470, 1474; Dec. Dig. § 354.*]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Suit for an accounting by Peter Schlicher against John R. Whyte. Decree for complainant, and defendant appeals. Affirmed.

Frank S. Katzenbach, Jr., for appellant.
George O. Vanderbilt, for respondent.

PARKER, J. This is a suit for an accounting between former partners. It was before this court in another aspect, on appeal from the decision of Vice Chancellor, now Justice, Reed, reported in 61 N. J. Eq. 158, 47 Atl. 448; affirmed on appeal, 65 N. J. Eq. 404, 54 Atl. 1125. The present appeal brings up the decree entered on report of a master, adjudging that the complainant below is entitled to recover from the defendant \$2,071.76, and overruling certain exceptions to the master's report, which will be taken up in the order in which they are discussed by appellant's brief.

The third exception is that the master admitted in evidence the partnership ledgers without the production of books of original entry. The fourth exception is that the master based his report upon entries in the ledgers without proof of the handwriting therein. The fifth exception is that the master charged the defendant with items of cash shown on the ledgers without other proof. The point made by appellant is, in substance, that the ledgers were not available as evidence without the daybooks or other books of original entry. The proof shows that the parties as partners kept partnership books by paid bookkeepers, and that these books consisted of memorandum daybooks called "blotters" and "ledgers." The blotters seem to have disappeared. The ledgers were fully identified as those of the partnership. Counsel rely upon the cases in our reports holding that, as between tradesmen and their debtors, the books of account or original entry are admissible, but that other books in which these original entries are posted are admissible only as supplementary to the books of original entry, so that the whole of the account should appear, and that the ledgers without the books of original entry are not admissible. *Bonnell v. Mawha*, 37 N. J. Law, 198; *Rumsey v. New York & New Jersey Telephone Co.*, 49 N. J. Law, 322, 8 Atl. 290; *Dianfent v. Collyer*, 66 N. J. Law, 295, 49 Atl. 445, 808. These decisions undoubtedly indicate the law of this state on that subject, but in our view are not applicable to this case. The parties here were partners, so that each partner was an agent for all the others as to partnership transactions. So also the bookkeepers employed by them from time to time

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were agents for every partner as against the others, and therefore entry in the ledgers by a bookkeeper in the course of his employment, constituting a charge against one partner in favor of the others, amounted to an admission by the partner against whom it was charged. In this view of the case the ledgers were properly admitted.

The next point made by the appellant is based upon the question of construction of the partnership agreement. The original firm consisted of Whyte and a man named Vogel, who had accounts on their books for collection at the time of the partnership agreement now in question, which was executed on the 22d day of September, 1897, and under which the complainant, Schlicher, came into the firm. One of these accounts was against Whyte, mostly for cash advanced to him or paid for his use. The partnership agreement provided that Whyte and Vogel should contribute certain chattels belonging to the old firm, at a valuation, and that Schlicher was to pay a sum in cash to offset this contribution. Said Whyte and Vogel also contributed to said copartnership the book accounts "on their books from the 22d day of September, 1897." The appellant contends that this clause means that the book accounts accruing after the 22d day of September, 1897, are meant. The master held, and the court below held, its meaning to be that the old accounts then standing on the books were the ones referred to, and were to be regarded as assets of the new partnership, and not the property of the old partners. In other words, that the word "from" was an inadvertence, and should be construed to mean "prior to." We concur in this view. The clause in question is meaningless if read literally, for the accounts arising after September 22, 1897, are those of the three partners. What was evidently meant is that accounts then standing on the books should inure to the new firm, so that, on collection and division of the same, Schlicher would get his share. The importance of this construction lies in the fact that among these accounts was the one against Whyte himself to a considerable amount. This account, in our judgment, was properly included in the finding of the court below, and was admissible on the same principle already laid down with reference to other items in the ledgers.

The third point made by appellant is that the master failed to state an account. It is true that the master did not annex to his report and finding any account with items. He found and reported, among other things, that the net worth of the firm of Schlicher and Whyte, on September 1, 1899, was \$3,391.99, one-third of which belonged to Whyte, and two-thirds to Schlicher; that Whyte owed the firm \$3,202.42; that Whyte's interest in the firm was one-third of the first amount

mentioned, or \$1,130.66, so that the balance due from Whyte to Schlicher was \$2,071.76. He annexed to his report the testimony taken before him, and also copies of the books, so far as the entries in the same related to the determination of the matter.

We do not think it was necessary for the master to go further than he has done in the matter of stating the account. The decree did not direct him so to do. It required him "to take a mutual account of all dealings and transactions between the complainant and defendant as partners," with power to examine witnesses * * * and to report what, upon said accounting, should appear to be due from each of said parties to the other, and also the balance which upon the said account shall appear to be due from either party to the other. The master seems to have fully complied with the requirements of this decree. The appellant complains that the master does not show how he arrives at the figures of the net worth of the firm, that the result cannot be obtained from the evidence, and that the master evidently intended to adopt the figures submitted by Schlicher, which are \$59.22 less than the net worth as reported by the master. All that need be said as to this is that, if the master made an error of \$59.22 in the net worth, it resulted in an increase of \$19.74 in Whyte's share of the assets, thereby reducing the balance due from Whyte to that extent, so no harm has been done the appellant.

The annexation of an itemized account as a schedule to the report was, under the circumstances, a matter of form, as the figures substantially appeared in the depositions.

The decree appealed from will be affirmed.

(75 N. J. E. 104)

CRANE v. GURNEE.

(Court of Chancery of New Jersey. Nov. 5, 1908.)

1. ATTORNEY AND CLIENT (§ 126*)—OFFICE OF ATTORNEY—REGULATION OF PROFESSIONAL CONDUCT—SCOPE.

Attorneys and solicitors are officers of the court, and the court may deal summarily with breaches of duty and privilege on their part; but, the relation between a party and the opposite party's solicitors not being that of solicitor and client, a controversy between them would not justify the exercise of the summary jurisdiction.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 267; Dec. Dig. § 126.*]

2. COSTS (§ 148*)—SETTLEMENT OF ACTION—AGREEMENT BY PARTIES.

It is established practice in settling pending suits for parties to agree upon the taxable costs without a taxation by the clerk, and the court should always support the settlements, unless they are affirmatively shown to be unjust, oppressive, or illegal, or to have been induced by unfairness.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 575; Dec. Dig. § 148.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. COSTS (§ 71*)—TAXATION—WAIVER.

One entitled to a taxation of costs may waive his right.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 297-303; Dec. Dig. § 71.*]

4. COSTS (§ 71*)—TAXATION—WAIVER.

Where complainant's solicitors furnished the amount of their charges to defendant's solicitor, upon negotiations to settle the suit, and offered to have their costs taxed by the clerk, and defendant's solicitor did not accept the offer, but agreed that the amount should be paid by his client, the failure to accept the offer was a waiver of the right to have the costs taxed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 297-303; Dec. Dig. § 71.*]

Bill by William N. Crane against Charles P. Gurnee. On petition to fix solicitor's fees and charges. Dismissed.

W. J. St. Lawrence, for the motion. El. J. Luce, opposed.

HOWELL, V. C. The bill in this case was filed to foreclose a mortgage covering lands of the petitioner. The respondents are the complainant's solicitors. When the suit had reached the stage of an order for substituted service of process on nonresident defendants, the petitioner made a sale of the mortgaged premises and sought to have the foreclosure suit ended. He directed his own solicitor to ascertain the amount of the fees and charges of the complainant's solicitors. These were reported to him by the complainant's solicitors to be the sum of \$114.22. This included the total charge for taxable costs, fees for searches, and the counsel fees and expenses of the complainant. Petitioner's counsel agreed that this amount should be paid by his client. He expressly waived his right to have the costs taxed. The arrears of interest on the mortgage were \$107.98. Some days after the consummation of the sale of the land, the purchaser paid to the complainant's solicitors out of the purchase money these two sums, aggregating \$282.20. After the payment had been made, the petitioner conceived that the complainant's solicitors' charges were excessive, and he sought to have some portion of the amount repaid to him by them. The solicitors declined to accede to his request, and this petition was then filed appealing to the summary jurisdiction of the court over its solicitors, and praying that the excessive charges might be awarded to him. The motion was heard on petition and answering affidavits.

It will be observed that this is not a contest between the petitioner and his lawyer. The relation between the petitioner and the complainant's solicitors was not that of solicitor and client, and the summary proceeding which the court may exercise over its solicitors cannot apply to this controversy. The reason is obvious. Attorneys and solicitors are officers of the court. They are part and parcel of the equipment of the judicial system for the administration of justice. They have been specially admitted to their

offices as persons qualified to transact the business of the public in the courts. They hold themselves out for engagements by clients, and the courts recognize their special privileges. The relations between them and their clients are those of trust and confidence, so much so that communications between solicitor and client are protected from disclosure and publicity, and the strictest fidelity to their retainers must be observed. It is owing to this private and confidential relationship that the courts have undertaken to deal summarily with breaches of duty and privilege by solicitors. If the relationship were less close, or lacked the element of confidence and trust in an officer of the court, the court would undoubtedly remit all cases between solicitor and client to the ordinary remedies by action at law. *Lynde v. Lynde*, 64 N. J. Eq. 736, 52 Atl. 604, 58 L. R. A. 471, 97 Am. St. Rep. 692. Mr. Justice Dixon says, in *Strong v. Mundy*, 52 N. J. Eq. 834, 31 Atl. 612: "Attorneys and solicitors are officers of the court, and there is no doubt of the authority of the court to proceed summarily against them for their misconduct; but the behavior which will justify the exercise of this summary jurisdiction must be such as is dishonest or oppressive or clearly illegal. If it appears that there exists between a lawyer and his client a fair dispute, which can be decided only on the settlement of doubtful questions of fact or law, the court should not exercise its summary power, but should leave the parties to their ordinary remedies." See *Tate v. Field*, 60 N. J. Eq. 42, 46 Atl. 952; *In re Knapp*, 85 N. Y. 284; *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992; *In re Dakin*, 4 Hill (N. Y.) 42; *In re Kennedy*, 120 Pa. 497, 14 Atl. 397, 6 Am. St. Rep. 724; *Koenig v. Harned* (N. J.) 13 Atl. 236. It is therefore quite evident that the summary proceeding which has been adopted in this case does not apply; but, inasmuch as the respondents have not urged this defense, I will disregard it and will discuss the case on its merits.

It is inveterate practice in this state in the settlement of pending suits for parties to estimate and agree upon the amount of taxable costs without the trouble and expense, small though it be, of having a regular taxation by the clerk, and hardly a solicitor can be found who has not had such experiences. It is not only sanctioned by inveterate usage, but it is favored by the courts in order that parties may speedily settle their controversies out of court and without all the formalities that might be lawfully insisted upon.

The court should always support these settlements, unless they are affirmatively shown to be unjust, oppressive, or illegal, or that the settlement was induced by pressure or other unfair means. The following authorities—controversies between solicitor and cli-

ent—support this position: In *Re Whitcombe*, 8 Beav. 140, Lord Langdale, M. R., sustained the principle that an agreement by a solicitor to take a gross sum from his client in lieu of costs was not void, but that on account of the peculiar relation which exists between solicitor and client the court would regard all such adjustments with jealousy. In *Stedman v. Collett*, 17 Beav. 608, Sir John Rommelly, M. R., sustained a settlement of a solicitor's bill by the client for an estimated fixed sum and refused to disturb it, for the reason that it had been entered into fairly and with proper knowledge on both sides. In *Morgan v. Higgins*, 1 Giff. 270, Sir John Stuart, Vice Chancellor, set aside a mortgage which had been given by a client to his solicitor to secure (1) a gross sum agreed to be paid for professional services, and (2) an amount claimed to be due on the settlement of accounts, for the reason that the evidence showed that the client from his situation as to ill health was unable to take an active part in managing his own affairs, and there was no evidence on the part of the solicitor of any proper statement or examination of the accounts. There the mortgage was held to stand as security only for what should be found to be justly due on a taxation of the bills of costs and on account of all the dealings and transactions between them. The fact that these cases are instances of controversies between solicitor and client make strongly in favor of the rule as between strangers or adversaries.

These cases were decided since the English statutes relating to solicitors' compensation, but an examination of them will show that the points decided were not controlled by the statute. The relation between the solicitors of the complainant and the petitioner is not that relation of trust and confidence which necessarily exists so obviously between solicitor and client. Here the parties dealt with each other at arms length. The complainant's solicitors owed no special duty to the petitioner, nor is he entitled to look to them for advice or protection. Besides, I do not find that the charges made by the complainant's solicitors are excessive. They estimated their taxable costs at \$89.22. On the argument they furnished me with a taxation made by themselves, which I have examined, and which appears to be correct. It amounts to \$86.80. The difference is too small to be the subject-matter of a litigation in this court. The other charges are charges for which the complainant's solicitors are not in any way responsible. They are charges for which the complainant himself is answerable, if any one is. Again, there is no doubt but that one entitled to a taxation of costs may waive his right. *Hinckley v. Boardman*, 3 Calnes (N. Y.) 134. It appears to be the testimony in this case that, when the complainant's solicitors furnished the

amount of their charges to the petitioner's solicitor, they offered to have their costs taxed by the clerk. This offer was not accepted by the petitioner's solicitor, and his failure to so accept it was a waiver of his right to have the costs taxed.

I must therefore hold that the petitioner has no occasion to proceed against the respondents, and that the petition must be dismissed.

(71 N. J. E. 283)

**COUNTRY HOMES LAND CO. et al. v.
DE GRAY.**

(Court of Errors and Appeals of New Jersey.
Nov. 19, 1906.)

1. PARTITION (§ 17*)—DISPUTED TITLE—ESTABLISHMENT AT LAW.

On a partition bill, if it appear that complainant's title is disputed by a co-tenant, and that the objection made is not illusory, he will be required to establish it at law before he can proceed to a decree in equity. The bill will, in general, be retained until he does so.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 53, 55; Dec. Dig. § 17.*]

2. EASEMENTS (§ 38*)—EFFECT OF GRANT.

An easement works no dispossession of the owner.

[Ed. Note.—For other cases, see *Easements*, Dec. Dig. § 38.*]

3. QUIETING TITLE (§ 12*)—POSSESSION NECESSARY.

Under the act to quiet titles, the possession essential to the jurisdiction of equity is actual, as contradistinguished from constructive possession. The possession of a tenant in common in actual possession, claiming in hostility to the complainant, another tenant in common, whose title is, in part only, denied, is not, for the purposes of this act, the possession of such other tenant.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 44; Dec. Dig. § 12.*]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by the Country Homes Land Company and others against William M. De Gray. Decree for defendant, and complainants appeal. Affirmed.

The following is the opinion of Stevens, V. C., on the hearing in the court below:

"By his will, admitted to probate on April 17, 1891, Richard I. De Gray devised as follows: 'All that lot of land and the buildings, erections, structures, machinery thereon and appurtenances thereto belonging, which I have called the mill pond and mill lot, * * * and which property is now leased to or held by the Paterson Silk Dyeing & Finishing Company or Mr. Claude Greppo, I give, devise and bequeath to my son Wm. M. De Gray, my son Richard De Gray, and my grandson, Richard D. Dater, absolutely and in equal shares, together with the said lease or leases, the reversions thereof and the rentals that may become due thereon after my death, and the benefits of the covenants thereof, subject, of course, to the said lease

or leases and the covenants thereof; but I direct, and this devise to my said sons and grandson is subject to this express condition—that said property shall not be subject to partition, or be sold by my said children and grandchild, the devisees thereof, or any of them, until the expiration or sooner determination of the said lease or leases, and then shall only be sold at private auction and among my said three devisees to the highest bidder of them [in case of the death of a devisee, his heirs at law or devisees of realty shall exercise his right to bid], and upon such auction and sale my executors, or the others, or survivors of them, as the case may be, shall execute a conveyance thereof in fee to such highest bidder.’ Richard D. Dater died before the testator, and left the two defendants Frederick H. Dater and William D. Dater. The lease mentioned in the will gave a term of 10 years to the Paterson Silk Dyeing & Finishing Company, commencing on May 1, 1890. The testator died on April 6, 1891. On September 11, 1903, Frederick H. Dater, being then of age, entered into an agreement to sell the above-mentioned lot and other property to the complainant. The agreement referred to the above-mentioned will and required Dater, inter alia, at the option of the vendee, to call for a private auction, to bid for the property in accordance with its provisions, and to execute further conveyances. On October 6, 1903, Frederick H. Dater executed to complainant a deed for (inter alia) an undivided one-sixth interest in the property in question. Complainant thereupon commenced this partition suit. He afterwards amended the bill by inserting in its third paragraph a clause to the effect that, since its purchase ‘it has been and is now in the peaceable possession of the equal, undivided one-sixth interest and estate in fee-simple absolute in said tract of land and premises.’ On this allegation it prayed for a decree removing the cloud created by the provisions of the above devise, as well as for a decree in partition. The question is whether the complainant is entitled to partition until a court of law has passed upon its title. The complainant claims that the devise to Richard Dater was absolute and in law unconditioned, the restraint upon alienation being, as he insists, void. The defendant contends that the restraint is valid, being only a partial restraint, both as it respects persons and modes of alienation, and being limited in point of time.

‘It is entirely settled that, if title to land is in dispute, and the validity or nonvalidity of the title claimed must be determined by the application of legal, as contradistinguished from equitable, rules, the complainant will be required to establish it at law before he can proceed here, but this court will, in general, retain the bill until he does so. *Vreeland v. Vreeland*, 49 N. J. Eq. 325, 24 Atl. 551; *Stockbower v. Kanouse*, 50 N. J. Eq. 481, 26 Atl. 333. The rule itself is not dis-

puted, but it is said that, if the court can see that there is no valid objection to the title—that the objection made is an illusory one—it may proceed to decree partition. This is doubtless true. There must be a real question, to be determined by a court of law, if the complainant is to be required to go there. But there is such a question here. Counsel differ both as to the proper construction of the clause in question and as to the law. Complainant’s counsel says that the clause restrains a sale by all three devisees together, and not a transfer of his interest by one of the devisees to an outsider. Defendant’s counsel says it restrains a sale in toto, and this latter view would seem to be more in accordance with testator’s intention. I am certainly unable to say that complainant’s construction is so clear that there can be no fair doubt about it. Again, the restraint appears to be limited in point of time. It would seem not to extend beyond the period of three lives in being. If it does, it does not obviously do so. This raises the question whether a general restraint, limited to a period of less than 10 years, and a partial restraint, limited to a period not exceeding three lives in being, is contrary to the public policy of this state, and this question, it is admitted, has not been passed upon.

‘Furthermore, the partial restraint thus limited in time is also limited in respect to the mode of sale, viz., private auction, and of the persons who may buy, viz., the three devisees and their heirs. The question is whether the sale may be legally limited to a class of persons less than the whole number of possible buyers, and if so, whether the class here specified is too narrow. The very elaborate and exhaustive briefs of counsel prove, almost to the point of demonstration, that these questions are not to be solved offhand, that no decree can be made without a very careful consideration of them. In *Doe v. Pearson*, 6 East, 173, the devise was to A. and H. and their heirs, as tenants in common, on condition that, in case they or either of them should have no issue, they or she having no issue should have no power to dispose of her share, except to her sister or sisters or their children. In *re Macleay*, L. R. 20 Eq. 186, the devise was ‘to my brother J., on condition that he never sells out of the family.’ Both of these devises were sustained. The elaborate opinion of Sir George Jessell in the latter is cited, and without disapproval by Chancellor Magie in *Felt v. Richards*, 64 N. J. Eq. 16, 53 Atl. 824. See, also, *Den v. Blackwell*, 15 N. J. Law, 386; *Cornelius v. Ivins*, 26 N. J. Law, 376, 385. On the other hand, *Doe v. Pearson* and *re Macleay* have been criticised both in England and America. *Gray*, Res. Al. §§ 31, 47 et seq. Late English cases are: *re Roshier*, 25 Ch. Div. 801; *Dugdale v. Dugdale*, 38 Ch. Div. 178; *re Elliot*, 2 Ch. Div. (1896) 353. In this state of the authorities it is apparent that a real question has been raised by the answer. But

It is said by counsel that, even if there be such a question, complainant's title is equitable, and that consequently this court is competent to decide it. It seems to me too clear for argument that what we are here dealing with is a legal, and not an equitable, title. If complainant has not a legal title, he has no title. If the restraint on alienation be bad, complainant has a perfect legal title to one-sixth. If it be good, either the attempt to alien was entirely nugatory, or else Frederick has forfeited the interest devised to him, and has only that undivided one thirty-sixth to which he would become entitled as one of the heirs at law of the one-sixth interest so forfeited.

"It is further contended that this is not only a partition bill, but one to quiet title under the act (Gen. St. 1895, p. 3486), the allegation of the bill being that complainant is in peaceable possession. It appears, as already stated, that a part of the land was leased by the testator in his lifetime to the Paterson Silk Dyeing Company by a lease which expired on May 1, 1900. Prior to its expiration it was renewed by the De Grays, by Frederick H. Dater (then a minor), and by the guardian of William D. Dater, for a further term of years not yet expired. After Frederick H. Dater had executed the deed to the Paterson Silk Dyeing Company, that company paid Frederick's share of the rent to complainant, although notified by the De Grays not to do so. The contention is that the possession of a tenant for years is the possession of the owner of the freehold (4 Kent Com. *886), and that consequently the complainant, being now in possession of the rents, is constructively in peaceable possession of the land, and is thus qualified to avail itself of the procedure given by the above statute. I do not think it necessary to decide whether this contention is sound, nor whether, if sound, complainant is incapacitated from suing in ejectment under our act, which extends in terms to suits brought by tenants in common (2 Gen. St. 1895, p. 1285, § 24), for the rule established by our court of last resort, requiring legal questions to be solved by a legal tribunal, is imperative in all cases which admit of its application. Here the tract given by the will consists of 13.52 acres, while the land leased consists of only 2.75 acres, to which is attached certain water rights. The complainant has never been in actual possession of so much of the land as is not leased. The evidence shows that the De Grays have exercised acts of ownership over that part to the exclusion of the complainant, whose title they deny. There is not the least difficulty in complainant bringing an action of ejectment in respect to that, and such an action will finally settle the question in controversy between the parties. The defendants say that Frederick Dater's one-sixth share was given on a condition which was forfeited, and that the share went to the heirs at law, of which Dater is one. They admit that on this basis

he is entitled to an undivided one thirty-sixth. It is obviously a case in which the bill should be retained to enable complainant to establish the title which he claims in a court of law."

On application for rehearing Vice Chancellor Stevens said:

"Application for a rehearing has been made to me in this case on the ground that I have misconceived both the law and the facts. The application was argued with so much apparent conviction that it seems proper, in denying it, to state, as briefly as possible, the reasons for doing so, as far as they are not stated in the opinion already written. I think the opinion shows very clearly that the question involved is an unsettled question of title to land, and that it is a purely legal, and not on equitable, question. From this it follows, as a matter of course, that it must be determined by a court of law (*Hart v. Leonard*, 42 N. J. Eq. 416, 7 Atl. 865), unless the complainant is able to maintain the jurisdiction under the act to quiet titles. The jurisdictional fact, under this act, is peaceable possession. Accordingly, it is contended that peaceable possession by complainant of the entire locus in quo has been established by the proofs. I say entire because there is an effort apparent throughout complainant's argument to identify the land leased to the silk dyeing company with that devised by the eleventh paragraph of Richard De Gray's will. It seems to me quite clear that the plots are not identical. The lease, in terms, demises 2.75 acres. The will gives 13.52 acres, of which the 2.75 acres are a parcel. Both parcels of land are described by metes and bounds, and those metes and bounds are wholly different. There is not the slightest difficulty in plotting them on the ground. It is true that the will inaccurately states that the plot devised is 'now leased to or held by' the silk dyeing company, but this is a manifest mistake—a case for the application of the maxim '*falsa demonstratio non nocet*.' *Evens v. Griscom*, 42 N. J. Law, 579, 36 Am. Rep. 542. It would not be for the interest of either side to contend otherwise. It is clear that this falsa demonstratio has no effect whatever upon the leasehold interest granted several years previously.

"Now, just at this point comes in the fallacy which, as it seems to me, pervades the whole of the argument. The tenant, it is said, has attained to complainant for an undivided one-sixth of the land because it has paid one-sixth of the rents. Possession of the rents, even against protest, is equivalent, it is said, to actual peaceable possession of the land. Being in such peaceable possession, complainant cannot therefore bring ejectment. Conceding this argument to be sound as to the demised land, it obviously must be limited to that which is demised. This is so plain that counsel is forced to contend that the lessor in fact demised the whole of the 13.52 acres, although he in terms demised only 2.75 acres. His specific conten-

tion is that, because the lessor gave certain easements in that part of the 13.52 acres not in terms demised, and particularly an easement in the water lying on and flowing through the larger tract, he really demised the whole. The cases that he cites prove just the opposite. Thus, in *Perrine v. Bergen*, 14 N. J. Law, 355, 27 Am. Dec. 63, Justice Ford says: 'Even an easement works no dispossession of the owner. The possession still remains in him, as much as if the easement did not exist.' And in *Burnet v. Crane*, 56 N. J. Law, 285, 28 Atl. 591, 44 Am. St. Rep. 395, an ejectment suit, the Chancellor, speaking for the Court of Errors and Appeals, says: 'The right to a fee and the right to an easement in the same estate are rights independent of each other, and may well subsist together when vested in different persons. Each can maintain an action to vindicate and establish his right,' etc. This last case is conclusive authority on the point that ejectment may be brought notwithstanding the existence of an easement. Now I am quite unable to find in the lease anything that gives more than an easement in so much of the entire tract as is not the subject of specific demise. This being so, I do not see why ejectment may not be brought in respect of the land not included in the demise. The practice act makes provision for the case of a person suing for an undivided part. If complainant sues for an undivided one-sixth of the land not demised, and is able to prove his title to it, he will have judgment. Section 24 of the ejectment act (2 Gen. St. 1895, p. 1285), requires the defendant, if he denies ouster, to admit the right of the plaintiff to an undivided share, stating what share. If the admission is made in terms satisfactory to the plaintiff, he attains the object of his suit, and may then proceed with his case here. If the admission is only of a less interest than plaintiff claims, the case will be tried at law, and the court of law will determine the amount of the interest. 'The plaintiff,' says Justice Haines, in *Combs v. Brown*, 29 N. J. Law, 36, 44, 'can only recover such part of the premises as his proofs have shown him entitled to, and if it appears that he is entitled to an undivided part, he shall have verdict and judgment for such part.'

"But the complainant says, further: 'We are in possession for the reason that the defendants are in possession. The possession of one tenant in common is the possession of all. Being in possession, we cannot bring ejectment.' If possession always followed the title, then ejectment would not be possible as between tenants in common—a proposition, of course, untenable. The fact in this case is undeniable that, aside from its constructive possession of that part which has been under lease the complainant has had no possession in fact. Actual possession is essential to the jurisdiction under the act to quiet title. Said Justice Depue, in *Shep-*

pard v. Nixon, 43 N. J. Eq. 632, 13 Atl. 617: 'Under this statute, possession in fact, as distinguished from that constructive possession which in ejectment suits arises in virtue of the legal title, is essential to the jurisdiction of the court.' And, further on, he says: 'The defendant having in his answer made denial of possession by complainant, it was incumbent on complainant to establish that fact by proof.' Here the complainant has not attempted to establish possession in fact of the part not demised. It has not been in the joint occupation of the land, and it has not participated in the issues of it. The proofs, if they show anything, show that defendants have, as far as lay in their power, excluded complainant from the possession and refused in any way to recognize its title. Under these circumstances it seems to me that for this court to assume jurisdiction would be to disregard the rule laid down by the Court of Errors and Appeals in *Shepard v. Nixon*. As complainant's title depends upon the proper construction of the will of Richard I. De Gray, and does not appear to hinge on any disputed question of fact, it might be a convenient thing for this court to construe this will, just as it might have been a convenient thing for this court, in the first instance, to have construed the deed in the *Pipe Line Case* (*Pipe Line Co. v. Delaware, Lackawanna & Western Railroad Co.*, 62 N. J. Law, 254, 41 Atl. 759), but, acting under the well-settled rule it declined to take jurisdiction until the legal question was first settled. After that was done, it applied the equitable remedy. *Delaware, Lackawanna & Western Railroad Co. v. Breckenridge*, 57 N. J. Eq. 154, 41 Atl. 966; *Breckenridge v. Delaware, L. & W. R. Co.*, 58 N. J. Eq. 581, 43 Atl. 1097. No distinction has been taken in this state between questions of construction of documents and questions of fact in dispute. The Court of Errors and Appeals has very recently applied the rule to partition cases (*Stockbower v. Kanouse*, 50 N. J. Eq. 481, 26 Atl. 333), and the Chancellor, in a still later case (*Hanneman v. Richter*, 62 N. J. Eq. 366, 50 Atl. 904), had under consideration a partition depending upon the construction of a will.

"I am at a loss to see why the cases cited do not apply to this case. If I am wrong in my conclusions, the court of review will have before it all the facts, and can finally dispose of the whole matter."

Preston Stevenson and Gilbert Collins, for appellants. John B. Humphreys, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion delivered in the court of chancery by Vice Chancellor Stevens, on the hearing of the cause, and in the supplemental opinion delivered by him on the application for a rehearing of the cause.

(76 N. J. L. 509)

**VALENTINE v. CITY OF ENGLEWOOD
et al.**(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)**1. MUNICIPAL CORPORATIONS (§ 745½*)—ACTS
OF OFFICERS—GOVERNMENTAL OR CORPORATE
FUNCTIONS.**

A municipal corporation is not liable for the acts of a board of health created by public statute for the public benefit, even though its members are appointed by the municipal authorities.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1568; Dec. Dig. § 745½.*]

**2. HEALTH (§ 18*)—BOARDS OF HEALTH—LIA-
BILITIES—ESTABLISHMENT OF QUARANTINE.**

The members of a board of health, acting in performance of a public duty under a public statute to prevent the spread of an infectious or contagious disease, are not personally liable in a civil action for damages arising out of their acts in establishing a quarantine, even where the disease does not actually exist, provided they act in good faith.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. § 16; Dec. Dig. § 18.*]

**3. CONSTITUTIONAL LAW (§ 209*)—PERSONAL
LIBERTY — ACTIONS AGAINST BOARD OF
HEALTH.**

Section 15 of the board of health act (Gen. St. 1895, p. 1638), which forbids suits against the board, its officers or agents, unless upon proof that the board acted without reasonable and probable cause to believe that the alleged cause of disease was in fact prejudicial and hazardous to the public health, does not infringe the constitutional provisions protecting private property and individual liberty.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 209.*]

**4. HEALTH (§ 19*)—BOARDS OF HEALTH—AC-
TIONS AGAINST.**

Section 15 of the board of health act (Gen. St. 1895, p. 1638) in effect gives an action against the board upon proof of the facts therein set forth, but in such suits the question of reasonable and probable cause is for the court.

[Ed. Note.—For other cases, see *Health*, Dec. Dig. § 19.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by Daniel W. Valentine against the City of Englewood and others. Judgment for defendants, and plaintiff brings error. Affirmed.

The declaration contains counts in trespass *quare clausum fregit*, for false imprisonment, and for libel. The defendants plead in justification that there were 30 cases of scarlet fever in the city of Englewood, and that the board of health had reasonable and probable cause to believe that the plaintiff's daughter was ill of the disease, and thereupon caused the plaintiff to be notified that they had declared his house quarantined, and that he had the option to place his child and her attendant in strict quarantine in a separate room, and to have the contents of the house fumigated by the board of health, or to have the entire house and occupants quar-

antined. The replication denied that the board of health had reasonable and probable cause to believe that the plaintiff's daughter was suffering from scarlet fever, and tendered issue thereon.

At the trial, upon the plaintiff's opening that the board of health acted without any authority at all of the city, a nonsuit was ordered in favor of the city of Englewood. The case proceeded against the board of health and the individual defendants.

The evidence showed that the city physician, one of the defendants, reported to the board of health a case of scarlet fever at the plaintiff's residence; and that at a consultation between Dr. Currie, of Englewood, and Dr. Bulkley, of New York City, the two latter stated that the case was not scarlet fever; that four local physicians were of opinion, from a statement of symptoms and without seeing the patient, that the case was scarlet fever. The city physician informed the plaintiff, at first by verbal notice, that the house was to be quarantined, and apparently gave the plaintiff the option to have a strict quarantine of the whole house established, or a quarantine of his daughter and her attendant in one room of the house. The plaintiff, in order to secure proof as to who was responsible, demanded a written notice; and thereupon such a notice was served, signed by the secretary of the board of health, in which the option of having the child and her attendant quarantined in a separate room, or of having the entire house and occupants quarantined, was again given to the plaintiff. He declined to avail himself of the option, a card was placed upon his office door indicating that there was scarlet fever on the premises, and measures were taken by the board of health to fumigate the house. There seems to have been nothing further done by way of enforcing the quarantine. When the plaintiff was asked what kept him in quarantine, what was done, and who did it, his only answer was that the health inspector came and fumigated the house.

The board of health had adopted ordinances, pursuant to the statute, providing that persons affected by certain diseases, of which scarlet fever was one, should be isolated, quarantined, or removed to such a locality as the board might order and direct; and that buildings and property, which might become infected, should be disinfected or destroyed; and that the board might establish such separation and isolation or domestic quarantine of the sick from persons not necessary as attendants as should be needed in order to prevent the spread of the disease.

Adolph L. Engelke, Harry B. Brockhurst, and Peter W. Stagg, for plaintiff in error. Albert C. Wall and Charles W. Hulst, for defendants in error.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

SWAYZE, J. (after stating the facts as above). We find it convenient to deal first with the liability of the city of Englewood.

The precise question involved is new in this court. In *Kehoe v. Rutherford*, 74 N. J. Law, 659, 65 Atl. 1048, there was active wrongdoing by the municipal authorities in collecting surface water and discharging it so that it injured the plaintiff's land, but that act was the act of the corporation itself for a special corporate purpose. A distinction is made in the cases in other jurisdictions between such acts and acts done in performance of a governmental function in execution of powers of a public and general character, delegated to the municipality for the welfare and protection of its inhabitants or the general public. Of the numerous cases collected in 28 Cyc. 1257, it will suffice to refer to *Daly v. New Haven*, 69 Conn. 644, 38 Atl. 397; *Colwell v. Waterbury*, 74 Conn. 583, 51 Atl. 530, 57 L. R. A. 218; *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487; *Hafford v. New Bedford*, 16 Gray (Mass.) 207; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Manners v. Haverhill*, 135 Mass. 165; *Clark v. Easton*, 146 Mass. 43, 14 N. E. 795; *Maxmillian v. Mayor*, etc., of New York, 62 N. Y. 160, 20 Am. Rep. 468. These cases have been followed by our Supreme Court in *Tomlin v. Hildreth*, 65 N. J. Law, 438, 47 Atl. 649. A more recent case is *Cunningham v. Seattle*, 42 Wash. 134, 84 Pac. 641, 4 L. R. A. (N. S.) 629; 7 Am. & Eng. Ann. Cas. 805, in a note to which numerous cases as to the nonliability of a municipality for acts of its firemen are collected.

The principle has been frequently applied to the acts of boards of health. *Summers v. Davless County*, 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512; *Mitchell v. Rockland*, 52 Me. 118; *Nicholson v. Detroit*, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601; *Bryant v. St. Paul*, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31; *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 983. It seems to be founded in reason.

The acts complained of by the plaintiff were in performance of a governmental function imposed upon the board of health by the Legislature, under a special statute relating to boards of health, for the benefit of the public at large. The duty was quite independent of any provisions of the city charter, and was in no way for the benefit of the city in its corporate capacity, or as the owner of property. The only connection, under the statute, between the city and the board of health, is that the members of the board of health are appointed by the governing body of the city. This, however, did not make them the servants or agents of the city; they were public officers, notwithstanding the method of their appointment. *Hafford v. New Bedford*, 16 Gray (Mass.) 207; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Murphy v. Inhabitants of Needham*, 176 Mass. 422, 57 N. E. 689; *Maxmillian v. Mayor*, etc.,

of New York, 62 N. Y. 160, 20 Am. Rep. 468; *Felch v. Weare*, 69 N. H. 617, 45 Atl. 501.

The city could only be held by applying the rule respondent superior, and that rule has no application in a case where the persons who commit the act complained of are neither the servants nor agents of the municipal corporation, nor acting in the performance of any corporate duty. So far as their act is outside the limits of the corporate duty of the municipality, it cannot be considered the act of the municipality. 2 Dillon (3d Ed.) §§ 968-974. The case is not altered by the fact that the court excluded the question whether the records of the common council showed any action on their part in regard to the quarantining of the plaintiff. At that time the nonsuit had already been ordered, and nothing was said to indicate that the offer was to show anything that would conflict with the statement of plaintiff's counsel in his opening that the board of health acted without any authority from the city. It is not necessary, therefore, to consider whether the liability of the city would have been different if express authority had been shown. The evidence, moreover, becomes quite immaterial in view of other considerations to be stated.

No liability of the city was shown, and in that respect the nonsuit was right.

The statute creating the board of health authorizes it to adopt ordinances to prevent the spreading of dangerous epidemics or contagious diseases, and to maintain and enforce sufficient quarantine when it deems necessary. Gen. St. 1895, p. 1644, § 49. The board is required by section 13 to examine into all causes of disease injurious to the health of the inhabitants, and to cause the same to be removed and abated. Section 15 enacts that no suit shall be maintained in any of the courts of this state to recover damages against any such board, its officers or agents, on proceedings had by them to abate and remove a cause of disease, unless it shall be shown in such suit that the cause of disease did not exist, was not hazardous and prejudicial to the public health, and that the board acted without reasonable and probable cause to believe that such cause was in fact prejudicial and hazardous to the public health.

The evidence in the present case justified an inference on the part of the jury that scarlet fever did not in fact exist; and, as the trial judge nonsuited the plaintiff, his ruling cannot be vindicated, if the actual existence of the disease is essential to the justification of the defendants. The issue joined upon the pleadings was only whether there existed reasonable and probable cause to believe that the defendant's daughter was sick with scarlet fever, but it would be taking too narrow a view of the case to decide it upon this question of pleading only. We prefer to rest the decision upon broader grounds.

In the case of *American Print Works v.*

Lawrence, 21 N. J. Law, 248, and on appeal 21 N. J. Law, 714, 47 Am. Dec. 190, and 23 N. J. Law, 590, 57 Am. Dec. 420. It was held in the Supreme Court, in a very able opinion by Chief Justice Green, that the defendant, who, as mayor of New York City, had destroyed real and personal property in order to stop the spread of a great fire, was not to be held responsible, since he acted in pursuance of a duty imposed upon him by statute, and not for private emolument or for his individual benefit. Chief Justice Green said: "It is a well-settled principle that where a person in discharge of a public duty, not acting for private emolument, unwittingly injures another in the performance of the act, while acting with due skill and caution, he is not answerable for damages." The judgment was reversed in this court, upon the ground that the statutes of New York provided no compensation for the personal property destroyed, that the facts amounted to a taking of property for public use without compensation, and the case was therefore within the prohibition of our state Constitution. The case afterwards came before the Supreme Court on a demurrer to amended pleas, and the judgment there rendered in favor of the defendant was affirmed in this court. 23 N. J. Law, 590, 57 Am. Dec. 420. Justice Carpenter, in the course of his opinion took occasion to say, at page 600 of 23 N. J. Law (57 Am. Dec. 420): "A public officer, acting in good faith, upon a sudden and alarming emergency, under the sanction of a constitutional and valid law in a matter of public duty, is not to be held responsible for the unavoidable and necessary result of such act of duty. An injured party may have a right to resort to the public for satisfaction, but the law has ever held that the officer, himself, not exceeding his power and not guilty of oppression or bad faith, is not personally liable." He quotes with approval what was said by Justice Nevius in *Sinnickson v. Johnson*, 17 N. J. Law, 150, 34 Am. Dec. 184, where a distinction was drawn between acts done exclusively for the public interest by agents appointed by public authority acting within the scope of that authority, and acts done for a private and individual interest. Justice Carpenter limits the exemption of public officers to acts done under the sanction of a constitutional and valid law, but, at the same time, quotes Chancellor Kent as extending the exemption to acts done under statutes which were, *prima facie*, good; a view which seems to be sustained by the opinion expressed by this court in *Lang v. Bayonne*, 74 N. J. Law, 455, 68 Atl. 90, 15 L. R. A. (N. S.) 93. It is, however, unnecessary for us to go to that extent in the present case, since we think the act constitutional for reasons to be hereafter stated. Nor is it necessary for us to go to the full extent justified by Justice Carpenter's language. He does not limit the exemption to officers acting judicially, and exercising their best judg-

ment upon a state of facts, the conclusion from which may be doubtful or difficult.

In the discussion which arose after the decision of the famous case of *Ashby v. White*, 1 Smith's Leading Cases (7th Am. Ed.) 455, it was expressly stated in the argument prepared by the committee of the House of Lords, which was principally drawn up by the Lord Chief Justice, that fraud and malice were the gist of the action. The language quoted on page 484 is: "There is no danger to an honest officer that means to do his duty; for where there is a real doubt touching the party's right of voting, and the officer makes use of the best means to be informed, and it is plain his mistake arose from the difficulty of the case, and not from any malicious or partial design, no jury will find an officer guilty in such a case, nor can any court direct them to do it, for it is the fraud and the malice that entitles the party to the action." In that case fraud and malice were averred in the declaration. Some American courts have gone so far as to hold that the officer is exempt even in a case of corruption and malice. *Spalding v. Vilas*, 161 U. S. 483, 493, et seq., 16 Sup. Ct. 631, 40 L. Ed. 780, which was an action against the Postmaster General. *Weaver v. Devendorf*, 3 Denio (N. Y.) 117, which was an action against an assessor for loss caused by an illegal assessment. Where there is no fraud or malice, the overwhelming weight of authority is in favor of the exemption of the public officer from civil action, and the cases are not limited to officers acting in a judicial capacity, but reach the case of all who are called upon in behalf of the public to exercise their judgment. Thus it was held in *Otis v. Watkins*, 9 Cranch, 339, 3 L. Ed. 752, that a collector of a port detaining a vessel under the embargo law of 1808 (Act Cong. April 25, 1808, c. 66, 2 Stat. 499) need not show that his opinion that the vessel was about to violate the law was correct, nor that he used reasonable care and diligence in ascertaining the facts upon which his opinion was formed. It was said to be enough that he honestly entertained the opinion upon which he acted; and, although Chief Justice Marshall dissented, he did not question this general principle, but placed his dissent upon entirely different grounds. The same view was expressed in *Kendall v. Stokes*, 3 How. 87, 11 L. Ed. 506. In New York, it was held, in *Williams v. Weaver*, 75 N. Y. 30, that assessors were not liable in a civil action for an unlawful levy. The court said: "That class of public officials is charged with duties which require the exercise of judicial functions, and, when they are called upon thus to act, they are protected from the consequences which may flow from any error they may commit. Surrounded as these officers are by great difficulties in the discharge of their official duties, the law shields them when acting within their jurisdiction. In order to establish an individual liability, it

must be made to appear against the assessors, not only that the assessment was erroneous, but that such assessors had no jurisdiction whatever in laying the tax." The case subsequently went to the Supreme Court of the United States (100 U. S. 547, 25 L. Ed. 708), and Justice Miller said, in speaking of the decision of the Court of Appeals of New York upon this point: "Whether that court decided that question correctly or not, it is not a federal question, but one of general municipal law, to be governed either by the common law or the statute law of the state. In either case it presents no question upon which this court is authorized to review a judgment of the state court." This case was decided in 1880, long after the discussion arising out of the fourteenth amendment had become familiar; and it is, therefore, not only authority for the exemption of public officers, but for the proposition that such exemption does not contravene the fourteenth amendment.

The principle was held applicable in *Teall v. Felton*, 1 N. Y. 537, 49 Am. Dec. 352, to the case of a postmaster who assumed to charge letter postage on a newspaper, but it was held in that particular case that the postmaster did not act in a judicial capacity. The rule has been applied in the case of health officers. *Whidden v. Cheever*, 69 N. H. 142, 44 Atl. 908, 76 Am. St. Rep. 154.

The exemption of officers from liability extends only to matters in which they have jurisdiction under the statutes, and it may be said that the board of health has no jurisdiction unless a cause of disease actually exists. This view is too narrow. The principle which was adopted by this court, and vindicated in an able opinion of Chief Justice Beasley in *Grove v. Van Duzen*, 44 N. J. Law, 654, 43 Am. Rep. 412, is applicable. It is enough if the matter is colorably, though not really, within their jurisdiction.

A different view has been expressed in Massachusetts. *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850, which was followed in *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113, and in *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942, 68 L. R. A. 907, 102 Am. St. Rep. 983. The reasons are well stated by Mr. Justice Holmes, but are combated with equal force by Justice Devens, and the case is weakened as an authority by the fact that it was decided by a bare majority of the court. Upon principle, we cannot distinguish the case from those above cited, where administrative officers were held exempt when called upon to act judicially. If a postmaster general, or a postmaster, or a collector of a port, or an assessor of taxes are to be immune when their error in judgment causes the loss of another's liberty or property, we think a board of health is entitled to a like immunity. A justice of the peace is immune if he acts in a matter colorably within his jurisdiction. The underlying reason is not the

judicial character of the officer, but the judicial character of the act, and the public necessity that public agents engaged in the performance of a public duty, in obedience to the command of a statute, should not suffer personally for an error of judgment which the wisest and most circumspect cannot avoid. It is not quite accurate to say that in such cases a man is deprived of liberty or property without compensation. As Justice Devens pointed out "the individual is presumed to be compensated by the benefit which such regulations confer upon the community of which he is a member, or by which his property is protected." The case may, however, be looked at in another light. The board of health is acting for the public in the exercise of the police power of the state. For an error in the exercise of that power, no doubt the state ought to answer. Just as in an action for malicious prosecution, the principal who instigates the prosecution may be held although the justice and the constable are immune, so in a case of an error in judgment by the board of health it is the state which ought to answer for the default of its agent acting in obedience to its statutory command. The state does not, it is true, answer in an ordinary action at law in this or any other case, but there is the same remedy in all cases—an appeal to the justice of the state. A different view from that of the Massachusetts court prevailed in *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3, and in *Beeks v. Dickinson Co.*, 131 Iowa, 244, 108 N. W. 811, 6 L. R. A. (N. S.) 831, a case decided after the cases last cited.

Miller v. Horton was decided in the absence of a statute such as ours forbidding an action against the board unless lack of reasonable and probable cause can be shown. The same distinguished court has vindicated the right of the Legislature to require all imported rags to be put through a disinfecting process at the expense of the owner, whether actually infected or not (*Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113), upon the ground that the Legislature had the power to pronounce imported rags, not yet disinfected, nuisances in themselves, or, as Justice Holmes said in the later case, because the danger was too great to permit discrimination. What our Legislature has done in the health act is in substance to say that anything which may possibly be a cause of disease is subject to the regulations of the board of health, when that board has reasonable and probable cause to think it to be in fact a cause of disease. Under such a statute the cases above cited from Massachusetts, Illinois, and Wisconsin are not in point, and there is no reason why the ordinary rule exempting public officers from private action should not be applied. The board of health was acting for the benefit of the public at large, and pursuant to a duty imposed upon it by a public statute. There is not only no proof of malice, but the board

acted with care, and not hastily, for it decided only after a conference between its own physician, a reputable physician of Englewood called in by the plaintiff, and a specialist from the city of New York. The doctors disagreed, at least in a measure; and the board of health was called upon to decide. They may have decided erroneously, but the matter was colorably within their jurisdiction.

The only difficulty which arises is that caused by the first opinion of this court in *American Print Works Company v. Lawrence*. We there held that the mayor and aldermen of New York could not be exempted from civil liability where their act resulted in what this court held to be a taking of private property for public use contrary to our Constitution. In view of the subsequent opinion of the court in that case, and the eminence of the judges of the Supreme Court, whose opinion was reversed in the first case, we think that although we are bound by the actual decision of this court reported in 21 N. J. Law, 248, we ought not to extend it further than the exact point decided requires. It was limited to a case where private property was taken for public use; and it was held that destruction to prevent the spread of a conflagration was such a taking. In the present case there was no taking of private property for public use. The acts of the defendant amounted to a mere trespass. It is urged, however, that the same principle ought to be applied because of the fourteenth amendment to the federal Constitution, which prohibits a state from depriving a citizen of liberty without due process of law. To this we think there are two answers: In fact, the defendant was not deprived of his liberty; and the conduct of the defendants constituted due process of law, as that term is used in cases of this character. He was not deprived of his liberty, because the option was given to him to quarantine his daughter in a room of the house, if he so chose. He elected the alternative of having the whole house quarantined, but that was his voluntary choice; and there seems to have been no show of force to prevent his going and coming as he chose. Whatever may be argued as to the imprisonment of his daughter, that is not now in question. His personal liberty does not seem to have been restrained. We were careful to say in *Hebrew v. Pulis*, 73 N. J. Law, 621, 64 Atl. 121, 7 L. R. A. (N. S.) 580, 118 Am. St. Rep. 716, that although constraint might be caused by threats, as well as by actual force, the words or conduct must be such as to induce a reasonable apprehension of force, and the means of coercion must be at hand. The latter element is lacking in the present case. The real injury of which the plaintiff complains is the destruction of his business by posting --- his office door a notice that there was

scarlet fever in the house. This, if false, may have been a libel, but it was not a deprivation of liberty.

Again, in cases affecting the public health, due process of law does not always require notice and a hearing. *People v. Board of Health*, 140 N. Y. 1, 35 N. E. 820, 23 L. R. A. 481, 37 Am. St. Rep. 522. Where the board of health is required to act upon an emergency, due process of law requires only that they should be liable to an action in case they act wrongfully; but the action to which they are liable is only such action as the law gives. In this case the common law, as we have already shown, gave no right of action if the matter upon which the board decided was colorably within its jurisdiction. The object of the fourteenth amendment was not to give parties remedies which did not exist at the common law, but to protect them against hostile action by the state depriving them of the existing remedies. *U. S. v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588.

There is nothing in *Hutton v. Camden*, 39 N. J. Law, 122, 23 Am. Rep. 203, inconsistent with our view. The alleged nuisance in that case consisted in the fact that the defendants' lot lay below the grade of the street, so that water collected there, and the order of the board of health was to fill the lot to grade. Obviously, this presented no such emergency as required immediate action. There was opportunity for notice and a hearing. That case was a suit by the city to recover the cost of filling the lot to grade; and a distinction is to be made between the adjudication of the board of health as a defense to civil liability on their part, and as the basis of an action against the party alleged to maintain a nuisance. If the action had been by Hutton against the board of health, or their employees, for trespass in filling the lot up to grade, the case would have been similar to the present. This distinction is carefully pointed out by the Supreme Court of Massachusetts in *City of Salem v. Eastern Railroad Company*, 98 Mass. 431, at page 449, 96 Am. Dec. 650, where the court said: "When there appears to have been no notice to the parties to be affected, and no opportunity afforded them to be heard in defense of their rights, whatever operation the adjudication may have upon the rest, and however conclusive it may be held for the protection of those who act, or derive rights, under it, the adjudication itself can have no valid operation against parties who may be named in the proceedings. If it proceeds to declare any obligation, or impose any liability, upon such parties, they may, in any subsequent suit to enforce it, deny the validity of the judgment, and controvert the facts upon which it was based."

Hutton v. Camden was a case where it was attempted to make the adjudication of

the board of health that a nuisance existed final and conclusive, not only for the protection of the board against an action of trespass, but as basis of a legal liability of the landowner. In the present case, the Legislature has itself undertaken in effect to make a nuisance of what the board of health shall upon reasonable and probable cause determine to be a cause of disease. It is unnecessary to cite the numerous cases decided by the United States Supreme Court justifying such a legislative exercise of the police power. In *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, a statute declaring all places in which intoxicating liquors are manufactured, sold, bartered, or given away to be common nuisances was sustained, although the effect was to destroy the value of property. In *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, the eight-hour law of Utah was sustained, although it interfered with the freedom of contract. In *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, the compulsory vaccination act of Massachusetts was sustained, although it interfered with a man's personal liberty. These cases are but illustrations of the extent to which the highest tribunal has gone in vindication of the principle that the individual must yield somewhat of his personal rights to society in return for the benefits of society which he enjoys. We think it not unreasonable to require him in a case like the present to depend for redress upon the sense of justice of the public rather than upon a right of action against public officers who have acted as they thought for the public weal in a matter of public duty.

The common-law rights of the plaintiff are protected by the Constitution, but the Legislature has by the health act given the plaintiff a right of action against the board as such where he can show that the cause of disease did not exist, that it was not hazardous and prejudicial to the public health, and that the board acted without reasonable and probable cause to believe that it was in fact prejudicial and hazardous to the public health. Gen. St. 1895, p. 1638, § 15. Although the language of the section is in form that no suit shall be maintained against the board of health unless these facts are established, the necessary implication is that, if the facts are established, a suit may be maintained.

In giving this action, the Legislature had the right to determine what facts should be necessary to sustain it. They imposed no novel or unreasonable condition. The provision requiring that the plaintiff should show that the board of health acted without reasonable or probable cause is in line with the existing common law in cases of this character. By common law an officer was justified, in certain cases, in making an arrest, where he had reasonable and probable cause for belief in the guilt of the person de-

tained; and, in actions for libel, a communication, fairly made by a person in the discharge of some public or private duty, whether legal or moral, is privileged, in the absence of proof of malice. The principle underlying these cases is applicable to the present case. By the act of March 24, 1903 (P. L. p. 96), it is made a crime for any person, having reason to believe that he is affected with scarlet fever, to appear in any public place, and for any person knowingly to subject another, without the latter's knowledge, to exposure to the infection of any such disease. We do not mean to say that this statute reaches the present case; but it can hardly be libelous for the board of health, in good faith, to give notice of the existence of scarlet fever, when it is a crime for one who has reason to believe that he is affected with the disease to appear in public; and it must be within the power of the Legislature to give the right of restraint, amounting to imprisonment, to public officers who have reasonable and probable cause to believe that the crime denounced by the act of 1903 has been, or is likely to be committed. It is, at any rate, enough for the present purpose that in providing for this action the Legislature has made the want of reasonable and probable cause essential to the maintenance of the action.

The question remains whether a case is made out under this statute against any of the defendants. As to the board of health, it is clear that they acted upon the advice of their own physician, supported by the report made to them of the opinion of four other local physicians. We think that they were not bound to accept the opinion of the physician called by the plaintiff, and the specialist called from New York, but were justified in relying upon the advice of their own officer.

The case as to the physician himself is somewhat different. Prior to establishing the quarantine he had, at the conference with the other physicians, expressed himself as satisfied with their diagnosis, and it may be that this evidence would be sufficient to carry the case to a jury as to Dr. Bradner, if the question were properly a jury question. At the time this statute was adopted, the words "reasonable and probable cause" were a familiar expression in the law, arising most frequently in actions for malicious prosecution; and, however anomalous the rule may be, it was well established that the question of existence of reasonable and probable cause, in an action for malicious prosecution, was a question for the court, where, as in this case, the facts are undisputed. *McFadden v. Lane*, 71 N. J. Law, 624, 60 Atl. 365, citing with approval *Bell v. Atlantic City Railroad Company*, 58 N. J. Law, 227, 33 Atl. 211; *Magowan v. Rickey*, 64 N. J. Law, 402, 45 Atl. 804. In our judgment the case failed to establish a want of reasonable and probable cause as against Dr. Bradner. The evidence of what Bulkley said to him, or what

Currie said as to the antecedent family history of the patient, would not change this result, and its exclusion was not injurious error. Dr. Bradner seems to have been a reputable physician, acting according to his best light, in a case which four of his fellow physicians, to whom the symptoms were described, pronounced to be scarlet fever. Whether it was so or not, he had reasonable and probable cause to think it so.

In an action for false imprisonment, where the arrest is justified on the ground of reasonable and probable cause, the question is for the court, where the facts are not disputed. *Lister v. Perryman*, L. R. 4 H. L. 521, 39 L. J. Exch. 177.

Middleton, the inspector, seems to have acted only in carrying out the order of the board whose servant he was, and comes within the words of the statute exempting officers or agents of the board from suit.

For the reasons stated, we think the trial judge was right in directing a nonsuit, and the judgment should be affirmed, with costs.

(71 N. J. E. 66)

BRANT v. BRANT.

(Court of Chancery of New Jersey. May 11, 1906.)

1. DIVORCE (§ 90*)—AFFIDAVIT OF NONCOLLUSION.

The affidavit of noncollusion required by section 5 of the divorce act (P. L. 1902, p. 504), must be annexed to a petition which seeks divorce from bed and board, under the provisions of section 3 (page 503) of that act.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 90.*]

2. DIVORCE (§ 79*)—ORDER OF PUBLICATION—NOTICE.

The notice of the order of publication to be served on an absent defendant is required to state the object of the suit; and, if the notice undertakes unnecessarily to assert the grounds upon which relief is sought, it must state grounds which give jurisdiction to the court to decree relief.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 79.*]

(Syllabus by the Court.)

Bill by Estelle A. Brant against Arthur Brant. Order of reference denied.

George H. Bruce, for petitioner.

MAGIE, C. There are two questions raised upon the petition and its accompanying affidavit, and one upon the proofs of service of a notice under an order for publication.

The first question is whether the affidavit of noncollusion, required by section 5 of the divorce act (P. L. 1902, p. 504), must be annexed to a petition which seeks divorce from bed and board under the provisions of section 3 of that act. Under the heading "Causes for Divorce," the act includes section 3, and thereby enacts that divorce from bed and

board, forever or for a limited time, may be decreed for "extreme cruelty." When by section 5 the Legislature declared that the court should not exercise the jurisdiction, previously granted, in any cause for divorce unless an oath or affirmation of noncollusion is annexed to the bill or petition, the provision obviously included the case of a divorce from bed and board for extreme cruelty, for the act before provided that for extreme cruelty there might be such a divorce. It is true that complainant or petitioner is thereby required to swear or affirm that the complaint is not made by collusion for the purpose of dissolving the marriage, and a divorce from bed and board, it is well settled, does not dissolve the marriage. While the relief for the cause of extreme cruelty is a perpetual or limited separation, and no more, yet our legislation has characterized the judicial act which affords relief as a divorce. It is so designated in the divorce act, passed February 16, 1820 (Laws 1820, p. 43; Rev. Laws 1821, p. 667); in the revised act of April 15, 1846 (Rev. Laws 1847, p. 922); in the revised act of March 27, 1874 (Rev. St. 1874, p. 254)—and each of said acts requires an oath of no collusion for the purpose of dissolving the marriage. From this long course of legislation providing for divorce from bed and board for extreme cruelty, and yet requiring an affidavit of no collusion for the purpose of dissolving marriage before jurisdiction can be exercised for that cause, I conclude that the language of the required affidavit, in its application to a bill or petition for a divorce from bed and board, must have been intended, and must be construed, as referring to a dissolution of the marriage relation pro tanto, by a separation decreed for a time limited or for life. The affidavit required by section 5 must be annexed to any bill or petition which seeks divorce for extreme cruelty, and no jurisdiction will be acquired over the cause without it.

The next question is whether the affidavit attached to this petition is such as is required by section 5. Such an affidavit may probably be sufficient if it expresses the matter so required, although not expressed in the precise language of that section. The petitioner therein swears that the "petition" is not made by any collusion between her and the defendant "for the purpose of procuring a separation."

The affiant departs from the requirements of section 5 in two particulars: First, she fails to aver that her complaint is not made by collusion, and substitutes for it an averment that the petition is not made by collusion; second, she substitutes for the statutory phrase "dissolving the marriage" the words "procuring a separation." It is obvious that the legislative purpose in requir-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing an affidavit annexed to the bill or petition as a *sine qua non* of jurisdiction was to exact from the suitor seeking divorce, at the very outset of the cause, a solemn declaration that the relief was not sought by collusion. What is required to be sworn to is plainly set out in the act. A departure from its requirements induces suspicion. One not in conformity to the language of the act ought not to be passed, unless it contains substantial equivalents thereto. The affidavit attached to this petition induces suspicion. The act requires it to assert that the complaint is not made by collusion. The complaint in such cases is the statement of the causes on which divorce is sought. That complaint is contained in the bill or petition. An affidavit made in the language of the act plainly avers that the assertion of those causes for divorce is not collusive. When the affiant in this affidavit substituted "petition" for "complaint," did she make oath that her complaint was not made by collusion? As the petition contains the complaint and asserts the causes for which relief is sought, as well as asks relief, I have, after some hesitation, concluded that the affidavit, in this respect, is a substantial compliance with the requirement of the act. But I am inclined to think that the language of the act does not find a substantial equivalent in the averment of noncollusion for the purpose of procuring a separation. Petitioner seeks a divorce, and that kind of a divorce which produces a limited dissolution of the marriage relation. Procuring a separation does not seem to me to express that idea with sufficient accuracy. In this respect the affidavit seems to be defective.

Another question arises with respect to the effort to bring the defendant into court so as to justify further proceeding. Jurisdiction to proceed against this absent defendant depends upon the service of a notice to him, and the question is whether it is such as is required by rule 58 and the statute. Service of the order of publication or of a copy of the petition cannot be of any avail to give jurisdiction to act upon the defendant. In this case the notice of the order of publication which was served on the defendant declares that the action is brought for a separation (not divorce) on the ground of cruel and inhuman treatment of the petitioner by defendant, and not for extreme cruelty, which the act declares to be cause for divorce. The notice is required to state the object of the suit (P. L. 1903, p. 122; Rules 58, 61), and that object is divorce. The form or precedent given by Colonel Dickinson indicates that the notice may specify what kind of divorce is sought. Dick. Ch. Prec. 31. If the notice undertakes, unnecessarily, to assert the grounds upon which relief is sought, it must state grounds which, by the statute, give jurisdiction to the court to decree re-

lief. In my judgment, this notice is defective (1) because it does not state the object of the suit to be divorce; and (2) because no jurisdiction to divorce is conferred for cruel and inhuman treatment, but only for extreme cruelty.

An order of reference cannot be made in this cause.

(76 N. J. L. 479)

STATE v. BROWN.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

CRIMINAL LAW (§ 1110*)—APPEAL—AMENDMENT OF RECORD—REVIEW.

Defendant having been convicted in the quarter sessions, after trial by jury, and having reviewed the conviction in the Supreme Court on ordinary bills of exceptions and assignments of error, without availing himself of the more extensive review permitted by section 136 of the criminal procedure act (P. L. 1898, p. 915), and having thereupon sued out a writ of error from this court to review the judgment of the Supreme Court, and having applied here upon the argument for leave to amend the record or to have it remitted to the court below for amendment in such manner as to enable him to have the benefit of the review permitted by section 136, *held*, that the application comes too late.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1110.*]

(Syllabus by the Court.)

Error to Supreme Court.

T. W. Brown, Jr., was convicted of misdemeanor, and brings error. Affirmed.

Matthew Jefferson and John W. Wescott, for plaintiff in error. Lewis Starr and Harry S. Douglass, for the State.

PITNEY, Ch. The plaintiff in error was indicted by the grand jury of Cape May county upon eight indictments. Two of these were for assault and battery upon two of his children, and the remaining six were for violating, with respect to each of his six children, the act of March 24, 1903 (P. L. p. 92, c. 59), which declares that whoever, having the care, custody, or control of any child, shall willfully cause or permit the life of such child to be endangered or its health to be injured, or who shall willfully cause or permit such child to be placed in such situation that its life may be endangered or its health injured, etc., shall be guilty of a misdemeanor. By consent the eight indictments were tried together, with the result that the accused was found guilty upon the six indictments under the act of 1903, and acquitted upon the two indictments for assault and battery. Sentence having been imposed upon five of the convictions, and suspended upon the sixth, the five convictions were brought under review before the Supreme

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Court upon a single writ of error. The propriety of this omnibus review is not now under consideration.

The case came up on ordinary bills of exceptions and assignments of error, the defendant not having seen fit to avail himself of the more extensive review permitted by section 136 of the criminal procedure act (P. L. 1893, p. 915). In the Supreme Court there was a judgment of affirmance, and that judgment is brought under review by the present writ of error. The burden of the argument here is that the verdict of the jury was contrary to the clear weight of the evidence. It is hardly necessary to say that this court cannot properly reverse upon that ground.

Upon the few questions of law that are open to discussion, we agree in the main with the views expressed in the per curiam opinion of the Supreme Court. It is to be noted, however, that the case does not require a decision of the question whether the act of 1903, properly construed, makes it a misdemeanor to willfully cause a child to be placed in such a situation that its life may be, but

is not, endangered, or its health may be, but is not, injured, for the trial judge in his instructions to the jury placed the case before them upon a construction of the act that required actual danger to the life or injury to the health of the child as an essential element of the offense charged. Some of the questions of law that were raised in argument here were not made the subject-matter of any bill of exceptions in the trial court. Upon this circumstance being called to the attention of counsel for the plaintiff in error, they asked that the record might be amended, or that it might be remitted to the court below for amendment, in such manner as to enable plaintiff in error to have the benefit of the review permitted by section 136 of the criminal procedure act. What action the Supreme Court might have taken if a similar application had been presented to it while the case was there pending is not for us to say. We think the application now comes too late.

The judgment under review should be affirmed.

(81 Conn. 467)

MORELLI v. NOERA MFG. CO.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

MASTER AND SERVANT (§ 244*)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—DEFECTIVE MACHINE—PROXIMATE CAUSE.

An experienced employé was engaged in operating a drop press, and had been repeatedly warned as to the manner of operating it, and had twice been warned and threatened with discharge for disobeying the warning on the day he was injured; and he was injured in disregarding the instruction. *Held*, that he was guilty of such contributory negligence, which was the proximate cause of the injury, as precluded recovery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 776-777; Dec. Dig. § 244.*]

Appeal from Superior Court, New Haven County; Milton A. Shumway, Judge.

Action by Angelo Morelli against the Noera Manufacturing Company for injuries sustained from a drop press. From a judgment for nominal damages in favor of plaintiff, plaintiff appeals. No error.

The plaintiff was employed by the defendant to operate a drop press. The operation of the press involved the insertion of a metal shell upon a die and the release, after such insertion, of a punch or hammer, which fell with force upon the shell thus placed upon the die. The plaintiff, when employed by the defendant, had had long experience in this class of work, and in the use of the particular make of press upon which he went to work for the defendant, and he informed the defendant that he had had such experience, was competent and skillful in that employment, and understood the function and operation of the press upon which he was set to work. The defendant's superintendent then, and frequently thereafter, instructed and directed him as to the manner in which he should hold the shell when he placed it upon the die, and particularly instructed and directed him never, under any circumstances, to put his finger, or fingers, on the top of the shell when placing it on the die, and never, under any circumstances, to put his finger, fingers, or hand beneath the punch or hammer when the power was on, warning him that, if he disobeyed, he would be liable to have his hand cut off, as the punch might come down on his hand or fingers. On the day of the injury to the plaintiff he was engaged in operating a press, and these instructions and orders were twice repeated to him on that day by the superintendent. Upon the last occasion the plaintiff had been observed by the superintendent to act in disobedience of his instructions and orders, and the latter then told him that, if he was ever again seen to disobey, he would be discharged on the spot. Shortly afterward the superintendent observed the plaintiff again placing his fingers on top of the shell when in the

act of placing it upon the die, and thus putting his hand beneath the hammer. Instantly thereafter, and before the superintendent could call out or act, the hammer suddenly came down and cut off the index finger of the plaintiff's right hand. It is a peculiarity of presses of this type, even when in perfect order, that an unexpected descent of the hammer is liable to occur at any time when the power is on, without any act of the operator setting it in motion. This may result from different causes. The instructions and directions of the defendant to the plaintiff were reasonable and proper ones; and, if they had been obeyed by the plaintiff, he could not, under any circumstances, have been injured by the fall of the hammer. The press at the time of the accident was out of order, in that a set screw, whose function was to hold in place a set pin, which in turn controlled the action of the hammer, was missing, and the pin was jarred out upon the floor. The fall of the hammer was due, in part, to the absence of this pin. An inspection of the press would have disclosed that the screw was missing. Such an inspection was not made. Whether the defendant was negligent in this regard is not found, since the question of the defendant's negligence was not passed upon by the court. The plaintiff was found guilty of contributory negligence, and the judgment for nominal damages rendered in consequence.

Francis P. Guilfoile, for appellant. Wilton H. Pierce, for appellee.

PRENTICE, J. (after stating the facts as above). The plaintiff persistently and willfully disregarded the warnings, and disobeyed the reasonable and proper instructions and directions, repeatedly and emphatically given to him by the defendant's superintendent with respect to his safety, in view of the particular source of danger specifically pointed out to him which occasioned his injury. His disobedience, thus deliberately persisted in, exposed him to this injury, which otherwise would not have befallen him. Under such conditions it cannot be said that the court below was not justified in finding, as it did, that he was guilty of negligence, and that this negligence directly contributed to produce his injury. *Hyde v. Mendel*, 75 Conn. 140, 144, 52 Atl. 744; *Cavanaugh v. Windsor Cut Stone Corporation*, 80 Conn. 585, 592, 69 Atl. 345; *Smithwick v. Hall & Upson Co.*, 59 Conn. 261, 268, 21 Atl. 924, 12 L. R. A. 279, 21 Am. St. Rep. 104. The plaintiff, however, insists that this is not a correct synopsis of the situation, and that by his disobedience he assumed no other risks than those which were incident to the fall of the hammer when the machine was in perfect working order, and did not assume those which would attend its fall from the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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defective condition of the machine. The distinction thus attempted to be drawn necessarily rests upon the assumption that the warnings, instructions, and directions given the plaintiff were intended for his protection against a danger arising in the first-named way and not against one arising in the second way. *Smithwick v. Hall & Upson Co.*, 59 Conn. 261, 268, 21 Atl. 924, 12 L. R. A. 279, 21 Am. St. Rep. 104; *Gillmore v. American T. & S. Co.*, 79 Conn. 498, 506, 66 Atl. 4. There is no basis for this assumption. The danger which threatened was one which would result to the operator from the unexpected fall of the hammer. Whether the ultimate cause of this fall was the inadvertent action of the operator, some feature of the machine in order, some defect in it, or some cause from without, the resultant phenomenon was the same, and its dangers the same. In each situation the hammer would unexpectedly fall, endangering what might chance in its way. It was the untimely hammer fall whose consequences were to be feared, and it is inconceivable that, when the defendant, recognizing this danger, sought to secure the safety of its employes, and incidentally its own protection, by warnings, instructions, and directions adequate to that end, they were given in view of anything less than the apparent source of danger, and were not intended as a warning and protection against all danger from that source without differentiation or distinction. The danger was from a single immediate source presenting a uniform outward aspect, whatever the ultimate cause; it was a danger easy to see and appreciate; it was one which could, under all circumstances, be avoided by simple means. The defendant prescribed these means to its employes, including this plaintiff. It is only by a refinement of reasoning that it could be said upon the facts found that these means were designed to meet a situation less comprehensive than the single, apparent source of the common danger.

The plaintiff relies upon the two cases last cited. The first one presents few analogies to the present case. The second possesses a greater similarity in its facts. In that case, however, the trial court had found the plaintiff free from contributory negligence, and the question presented was whether this conclusion was without justification as a matter of necessary inference from the subordinate facts found. It was held that there was no such necessary inference, since it was evidently the ordinary and obvious danger arising from the inadvertent act of the operator, and not the danger resulting from the broken belt, against which, in that case, the warning was intended to be given.

There is no error. The other Judges concurred.

(81 Conn. 338)

CZARNECKI et al. v. DERECKTOR.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of a question which is merely preliminary affords no ground for exception.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4187; Dec. Dig. § 1056.*]

2. HUSBAND AND WIFE (§ 138*)—CONTRACTS OF WIFE—AGENCY OF HUSBAND.

Where a wife voluntarily executed a deed conveying a right of way over her property with full knowledge of its contents, it was immaterial whether she authorized her husband to make the contract consummated by such instrument or not.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 524-537; Dec. Dig. § 138.*]

3. EVIDENCE (§ 143*)—MATERIALITY.

Evidence offered to prove an immaterial issue was properly rejected.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 424; Dec. Dig. § 143.*]

4. WITNESSES (§ 330*)—CROSS-EXAMINATION—INCONSISTENT POSITION.

Where, in a suit to set aside a conveyance of a roadway to defendant, one of the complainants testified that there was no intention to convey the driveway, he was properly asked on cross-examination whether for months after the conveyance was executed he made no demand on the defendant except to move a certain barn, because witness believed that defendant was the owner of the land on which the barn stood, and that it was obstructing the driveway.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1106; Dec. Dig. § 330.*]

5. DEEDS (§ 208*)—RIGHT OF WAY—FRAUD—EVIDENCE.

Where plaintiffs claimed to have learned two or three days after the execution of a writing that it conveyed a right of way to defendant, the fact that, with such knowledge, for months thereafter they made no claim that the writing was the result of misrepresentation or fraud, but insisted on defendant's performance of his part thereof, was admissible to rebut their subsequent claim that the contract was fraudulent.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 609; Dec. Dig. § 208.*]

6. EVIDENCE (§ 99*)—RELEVANCY.

Where there was no claim that plaintiffs had acquiesced in a fraud alleged to have been perpetrated on them, evidence that they had not with knowledge of their rights acquiesced in the fraud was irrelevant.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 99.*]

Appeal from Superior Court, New Haven County; Milton A. Shumway, Judge.

Action by Frank Czarnecki and another against Esedore Derektor. Judgment for defendant, and plaintiffs appeal. Affirmed.

Charles S. Hamilton and William C. Mueller, for appellants. Robert C. Stoddard, for appellee.

THAYER, J. The only question between the parties upon the pleadings was whether the defendant by fraud and deceit procured the plaintiff Anna Czarnecki to sign the writing which is made a part of the complaint.

They owned adjoining lots situated on Veteran street, in the city of Meriden. The defendant's lot was south of the plaintiffs' and had a building upon it located near the boundary line between them. The plaintiffs' lot had a barn upon it in the rear, and a house in front so located that there was a vacant strip of land upon each side of it. Just prior to signing the writing, Anna Czarnecki had broken ground upon the strip south of her building for the foundation of a contemplated addition thereto, which, if constructed, would to some extent exclude the light and air from the north windows of the defendant's building. This being the situation, the allegation is that, having obtained from the plaintiffs an oral agreement that they would construct the addition upon the north side of their house, and have their driveway and access to their premises on the south side so that light and air would not be excluded from the defendant's building, the latter caused the writing in question to be drawn up, and falsely and fraudulently represented and stated to the plaintiffs that said paper (which, in fact, purports to convey to the defendant a right of way 10 feet wide over the plaintiffs' premises) was simply an agreement on the part of the plaintiff Anna Czarnecki that her driveway should be placed on the southerly side of her premises to thereby give the defendant the privilege of light and air to the windows on the northerly side of his building, and that the plaintiffs, being unable to read and understand the writing, and relying upon and being deceived and misled by said statements and misrepresentations, abstained from reading and obtaining a translation of the writing and signed the same, and that they never agreed nor intended to agree to grant the defendant a right of way over the premises. The plaintiffs are foreigners, but have been in this country some years. The suit is brought in the interest of Anna Czarnecki, who is sole owner of the land affected by the writing in question. The court has found that both of the plaintiffs can understand and speak English, that the terms and conditions of the agreement were fully explained to Anna Czarnecki in the presence of her husband, and that she signed it voluntarily with full knowledge of the meaning and terms thereof. Thereafter she built an addition to her house upon the north side thereof and constructed a driveway upon the south side. The defendant on the day the writing was signed paid her \$75, and later, at his own expense, caused the barn upon the rear of her lot to be moved as she directed; this being the consideration agreed upon.

The only errors assigned relate to the admission and rejection of evidence. Frank Czarnecki, one of the plaintiffs, was asked upon his examination in chief four questions, which, upon objection, were excluded, the plaintiffs duly excepting. One of the ques-

tions was merely preliminary, and its exclusion affords no ground for exception. Two of the remaining ones were, in substance, whether his wife had ever authorized or permitted him to make an agreement with the defendant for a right of way across her land; and the other was whether he had ever communicated to her that the defendant had bargained for or was to have a right of way across the southerly side of her lot. It appears in the record that the agreement for the change in the location of the addition, and for the right of way, was negotiated between this witness and the defendant, and that afterward both went to the plaintiffs' attorney to have it reduced to writing and that both then stated it to him to be as it was afterward written. The witness, therefore, was not deceived or defrauded in the matter. If it were true that his wife had not previously authorized the making of such an agreement, and that the witness had not communicated to her that he had made it, these facts could not affect her act in personally executing the instrument voluntarily and with full knowledge of its contents. By that act it became her deed, and it was immaterial whether she had authorized the witness to make the agreement or not, or had knowledge that he had made it. There was an allegation in the complaint, denied in the answer, that she had never authorized any one to agree in her behalf for a right of way over her premises. The plaintiff claims that the rejected evidence was admissible to prove this allegation; but there was no claim that the writing was executed in her behalf, either by the defendant or any third party. The issue thus raised was an immaterial one, and evidence when offered to prove such an issue is always properly rejected.

The same witness, upon cross-examination, was asked whether it was not true that months after the paper was signed he made demand upon the defendant to move the barn, because, as the witness claimed, it was occupying a part of the driveway, and whether this was not the only claim he had made concerning this agreement up to the commencement of the suit; and also whether he did not bring the suit on account of the barn not having been moved as he wanted it, and because he believed that the defendant was owner of the 10 feet of land. The witness was permitted to answer these questions against the objection of the plaintiffs. The questions were proper upon cross-examination for the purpose of showing conduct on the part of the witness which was inconsistent with his claims and testimony in chief. The record shows that the plaintiffs claimed to have learned two or three days after the execution of the writing that it conveyed a right of way to the defendant. If after he had knowledge of the contents of the writing and believed that it conveyed to the defendant an interest in the right of way,

the witness for months made no claim that the writing misrepresented the bargain which had been made, but insisted upon the defendant performing his part of it, this would be conduct inconsistent with his present attitude that there was no bargain for a right of way and that the writing had been fraudulently obtained. Upon his redirect examination the same witness, having testified that the defendant had said that he did not want a right of way, that he only wanted light, and would put the barn where the witness wanted it, was asked whether he believed the defendant, and whether later the witness learned that the defendant was claiming a right of way. The questions were claimed to show that the witness had not, with knowledge of his rights and knowing how he had been swindled, acquiesced in the fraud. As there was no claim that he had acquiesced in a fraud, the evidence was properly rejected for the purpose for which it was claimed.

There is no error. The other Judges concurred.

(81 Conn. 333)

CURRIE v. CONSOLIDATED RY. CO.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. STREET RAILROADS (§ 113*)—OPERATION—NEGLIGENCE—HEADLIGHT—EVIDENCE.

Where an action for the negligence of an electric street railway company in colliding with a vehicle on the track at night is based on the insufficiency of the headlight, excessive speed, and not giving signals, it is error to exclude testimony of a civil engineer, experienced in the construction of electric railways, that at the date of the accident searchlights of considerable illuminating power had been in use and proved satisfactory, and their use and value generally understood, since it was material in deciding the negligence alleged.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 235; Dec. Dig. § 113.*]

2. STREET RAILROADS (§ 81*)—OPERATION—USE OF HIGHWAY—DUTY.

The use of a highway for electric street cars imposes no new servitude upon the soil, and the owner of the car in running it is therefore governed by the same rules which apply to the management of other vehicles, and, being of greater size and weight than they commonly are and capable of being moved at a very high speed, the car must at all times be kept so well in hand as not to expose others to unreasonable hazard.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 172; Dec. Dig. § 81.*]

3. STREET RAILROADS (§ 81*)—OPERATION—HEADLIGHT—SUFFICIENCY.

Street cars running at night must be provided with such means of illumination as may be requisite, in connection with the light, if any, to be expected from other sources, to enable the motorman to see far enough ahead to do whatever ordinary care may demand in order to avoid collision with any other vehicle on the railway track.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 173; Dec. Dig. § 81.*]

4. HIGHWAYS (§ 177*)—USE BY VEHICLES—SPEED.

The speed at which any vehicle can be driven over a highway at night must be determined partly in view of the distance ahead at which travelers upon or approaching the same highway would become visible.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 177.*]

5. STREET RAILROADS (§ 81*)—OPERATION—HEADLIGHT—SUFFICIENCY.

A street railway company is not necessarily bound as respects other travelers to equip its cars with a particular kind of light, known, used, and approved by those engaged in conducting the same business under like conditions, as it may be using one that is better.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 173; Dec. Dig. § 81.*]

6. EVIDENCE (§ 500*)—HEADLIGHT—OPINION EVIDENCE.

In an action for the destruction of a vehicle in a collision with a street car, a question to a witness, who stated that he had made observation as to how far one could see ahead from the platform of a trolley car on a clear night when the moon was not shining and the headlight was a single incandescent bulb, as to what that distance was, was properly excluded in the discretion of the court, as the question did not state the candle power of the bulb, and the witness was not an expert.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 500.*]

7. TRIAL (§ 69*)—RECEPTION OF EVIDENCE—OPENING CASE.

The denial of plaintiff's motion to recall a witness after defendant moved for a directed verdict and the motion was heard and argued, and the court having announced his intention to grant it, is not an abuse of discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 165; Dec. Dig. § 69.*]

8. TRIAL (§ 139*)—DIRECTION OF VERDICT.

A verdict should be directed for the defendant only when the evidence for the plaintiff is so weak that, if the verdict were rendered in his favor, it would be proper to set it aside.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 341; Dec. Dig. § 139.*]

9. NEGLIGENCE (§ 90*)—IMPUTED NEGLIGENCE—BAILOR AND BAILEE.

A livery stable keeper hired out a horse and wagon to his employé, and, while in his hands, it was run into and injured by a street car. Suit was brought by the livery stable keeper for damages for destruction of the wagon. Held, that the negligence of the bailee, if any, could not be imputed to the owner.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 140; Dec. Dig. § 90.*]

Appeal from Court of Common Pleas, New Haven County; William L. Bennett, Judge.

Action by David E. Currie against the Consolidated Railway Company for the loss of a wagon. From a judgment for defendant entered on a directed verdict, plaintiff appeals. Error found, and new trial ordered.

George E. Beers and Frank S. Bishop, for appellant. Harry G. Day and Thomas M. Steele, for appellee.

BALDWIN, C. J. The plaintiff introduced evidence tending to prove these facts: He

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

keeps a livery stable in New Haven, and one Munson had been in his employ for a year or two as a driver of a coupé. About 2 o'clock on April 26, 1906, Munson hired from the stable a light "runabout" wagon containing but one seat, to which he hitched one of the plaintiff's horses, and drove off. About nine hours later the wagon was struck in the rear and wrecked by an electric car of the defendant. The place of the collision was on Dixwell avenue about four miles from the center of the city in a comparatively thinly settled part of Hamden. The avenue at this place was level, and ran straight north and south for a considerable distance in each direction. The middle was macadamized for a width of 19 feet. West of this came a strip 16 feet wide, on which some grass was growing. Immediately east of it was the single-track railway of the defendant. The car was a long and heavy one, equipped with air brakes and having a single bulb, incandescent electric headlight, which enabled the motorman to see an object in front for a distance of but about 25 or 30 feet. There were no passengers on board. No gong was sounded before the collision. That was attended by a loud crash. The night was a clear, starlight one. When the car was brought to a stop after the collision, Munson's body lay bleeding on the macadam pavement, and 10 or 12 feet west of the middle of the car. The horse had disappeared. There were impressions on the earth between the railway tracks indicating that the wagon had been driven northwards for a distance of about 130 feet, with its right wheel half way between the rails, before reaching the point where the collision took place. The pressure of air in the brakes of the car was about 60 or 70 pounds.

One of the plaintiff's witnesses was Alexander Cahn, a civil engineer, who testified that he had had experience in the construction and equipment of electric railways. He was then asked questions adapted to bring out answers to the effect that long prior to the date of the accident searchlights of considerable illuminating power had been in use on such railways and proved satisfactory, and their use and value were generally known and understood by those interested in the equipment of railroads. These questions were put in connection with the claim that the defendant had been negligent in not equipping such of its cars as were to be run at night on country roads with searchlights of that description. They were excluded, and error is well assigned upon that ruling. In the complaint negligence was charged, among other things, in giving no signal of the approach of the car; in running at an excessive rate of speed; in not having a "headlight of suitable illuminating power for the character of the road on which said car was operated"; in not maintaining a proper lookout; and in not stop-

ping the car sooner. These averments were denied. The use of a highway for electric street cars imposes no new servitude upon the soil. It is simply a new form of the original use. The owner of the car in running it is therefore governed by the same rules which apply to the management of any other vehicles. Being of greater size and weight than they commonly are, and capable of being moved at a very high rate of speed, the car must at all times be kept so well in hand as not to expose others to unreasonable hazard. *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 87 Atl. 379, 37 L. R. A. 533. When running at night, it must be provided with such means of illumination as may be requisite, in connection with the light, if any, to be expected from other sources, to enable the motorman to see far enough ahead to do whatever ordinary care may demand in order to avoid a rear-end collision with any other vehicle upon the railway track. See *Joyce on Electric Law*, § 463. The speed at which any vehicle can be driven over a highway at night must be determined partly in view of the distance ahead at which travelers upon or approaching the same highway would become visible. It was therefore material for the plaintiff to show, if he could, that the headlight on the defendant's car was insufficient. The testimony which he sought to introduce from Cahn would have been relevant to that point. 1 *Wigmore on Evidence*, § 461. A street railway company is not necessarily bound, as respects other travelers, to equip its cars with a particular kind of light, known, used, and approved by those engaged in conducting the same business under like conditions. It may be using one that is much better. But evidence of what they commonly do and approve in that respect has a legitimate and not unimportant tendency to show that ordinary care would call for its conformity to an established practice.

Another witness, having testified that he had frequently made observations to ascertain how far one on the front seat or platform of a trolley car could see ahead on a clear, starlight night, when there was no moon and the headlight was a single, incandescent bulb, was asked to state what that distance was. This question was excluded. It did not state the candle power of the bulb, and the witness was not an expert. Under these circumstances, this ruling was fairly within the discretion of the trial court. If the testimony from Cahn had been admitted, and had proved to be such as the plaintiff claimed that he would give, there would have been sufficient evidence of the defendant's negligence to entitle him to go to the jury. He could then have insisted with some force that if the car were proceeding at a high rate of speed, although the light cast upon objects in front, including that shining from the stars, made no

objects visible which were more than 30 feet away, the company was negligent in not providing other means of illumination; while if, on the other hand, the rate of speed were so slow that, if a wagon were seen on the tracks 30 feet ahead, the car could have been stopped by the proper use of the brakes within that 30 feet, it was for the jury to say whether it ought not to have been so stopped; and, if by the aid of the starlight, the plaintiff's wagon could have been seen for a distance of much more than 30 feet, it was for them to say whether the car could not, by proper effort, have been brought to a stand before traversing this greater distance. Whatever the rate of speed, it was also the duty of the company to give reasonable warning of its approach by proper signals to any who were or might reasonably be expected at that hour to be ahead of the car on the railway tracks or travelers on the avenue. If the motorman saw the plaintiff's wagon before it was struck, or ought to have seen it, in time to sound the gong, and if, had it been sounded, Munson's attention would probably have been attracted in time to turn off from the tracks, this was a matter for the jury to consider in determining whether, under all the circumstances, reasonable care had been exercised by the defendant, since there was evidence that no such signal was given.

The defendant offered no evidence, but moved for a direction to the jury to return a verdict in its favor. This motion having been argued by counsel for both parties, and the court having announced its intention to grant it, the plaintiff asked and was denied leave to recall the motorman, whom he had already examined as a witness, but only as to certain points, for further examination. This request came at so late a stage of the cause that its denial was well within the discretion of the trial court. The jury were then instructed to return a verdict for the defendant because (1) the plaintiff had not made out proof of its negligence; nor (2) disproved contributory negligence on his own part.

Had the testimony of Cahn been received, there would have been, as above stated, sufficient prima facie evidence of the defendant's negligence to require the submission of the cause to the jury for its decision. A verdict should be directed for a defendant only when the evidence for the plaintiff is so weak that, if a verdict were rendered in his favor, it would be proper to set it aside. *Bradbury v. South Norwalk*, 80 Conn. 298, 300, 68 Atl. 321. The error assigned in excluding the questions put to Cahn, therefore, requires a new trial, and it is unnecessary to inquire whether, in view of their exclusion, the charge on this point was correct.

As respects the second point, there was

nothing in evidence to show or to raise a presumption of contributory negligence on the part of the plaintiff. He had let the wagon which was injured by the collision to an experienced driver. While it is true that the latter was in the plaintiff's regular employ, the only evidence as to how he came in possession of it was that he took it away, not as a servant, but as a bailee under a contract of hire. If chargeable with negligence, therefore, the court was not warranted in imputing it to the plaintiff. *Little v. Hackett*, 116 U. S. 366, 371, 6 Sup. Ct. 391, 29 L. Ed. 652; *Robinson v. New York Central R. Co.*, 68 N. Y. 11, 23 Am. Rep. 1.

There is error, and a new trial is ordered. The other judges concurred.

(31 Conn. 345)

LOOMIS v. NORMAN PRINTERS' SUPPLY CO.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. SALES (§ 81*)—CONSTRUCTION—TIME OF DELIVERY—REASONABLE TIME.

Under a contract to deliver goods sold "about June, 1906," delivery may be made during the month of June, or in a reasonable time thereafter.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 217; Dec. Dig. § 81.*]

2. SALES (§ 88*)—CONDITIONAL SALES—BREACH—TIME OF DELIVERY—QUESTION FOR JURY.

Where, under a sale contract, delivery may be made within a reasonable time, the determination of what is a reasonable time is for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 249; Dec. Dig. § 88.*]

3. TRIAL (§ 139*)—QUESTIONS OF FACT OR LAW—SUBMISSION TO JURY.

Questions of fact upon which but one conclusion is reasonably possible need not be submitted to the jury for its determination, but the court may assume or declare to the jury the conclusion which could not be reasonably avoided by them, and which, if not made, would justify the court in setting aside its verdict, since whether there is any evidence is for the judge, and whether the evidence is sufficient is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 338; Dec. Dig. § 139.*]

4. SALES (§ 416*)—CONDITIONAL SALES—BREACH—TIME OF DELIVERY—EVIDENCE—ADMISSIBILITY.

In an action for the breach of a contract of sale under the terms of which, the contract being indefinite, defendant had a reasonable time to make delivery, evidence of a conversation between plaintiff and defendant's agent when the contract was signed as to the time when delivery was contemplated, of directions as to delivery, and as to an explanation why indefinite language was used in fixing the date of delivery, was admissible as determining what was a reasonable time to make delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1171; Dec. Dig. § 416.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. SALES (§ 87*)—CONDITIONAL SALES—BREACH—TIME OF DELIVERY—EVIDENCE—ADMISSIBILITY.

In an action for the breach of a contract of sale of machinery, under the terms of which, the contract being indefinite, defendant had a reasonable time to make delivery, evidence that preparatory to shipment certain work was required to be done on or about the machinery, was admissible on what the parties contemplated as to time of delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 240; Dec. Dig. § 87.*]

6. SALES (§ 421*)—CONDITIONAL SALES—BREACH—DAMAGES—COUNTERCLAIM.

A contract of sale was made and then rescinded, and a new contract made which provided that the buyer should deliver, in part consideration of machinery to be delivered, certain goods and supplies, and the rest of the price to be satisfied by notes. The goods and supplies were all substantially delivered by the buyer. A portion of the consideration of the new contract was \$250 due to the seller on the surrendered contract. *Held*, in an action by the buyer for a breach of the contract, that while the first contract was merged in the second contract, and the \$250 could not be recovered by the seller as a counterclaim in the buyer's action for damages for breach of the second contract by the seller as due on the first contract, still the failure of the court to instruct as to defendant's claim to the \$250 due on the former contract and interposed as a counterclaim, and to point out its bearing on the situation, was error.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1203; Dec. Dig. § 421.*]

7. SALES (§ 442*)—BREACH OF WARRANTY—INTEREST.

On a recovery in an action for breach of a contract of sale, interest is allowable from date of breach, and not from date of contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1293; Dec. Dig. § 442.*]

8. WITNESSES (§ 198*)—COMPETENCY—ATTORNEY—PRIVILEGE.

Counsel for a party to a cause may call counsel for the adversary and examine him as to matters which are not privileged, if there be a reasonable necessity for such action.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 753; Dec. Dig. § 198.*]

9. EVIDENCE (§ 208*)—EFFECT AS EVIDENCE—ADMISSIONS—EFFECT OF WITHDRAWAL.

The paragraph of an answer which has been withdrawn is competent evidence in the suit on the part of plaintiff as an admission by the defendant in the same manner as any other admission of the same purpose would have been.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 718, 719; Dec. Dig. § 208.*]

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action by Edwin F. Loomis against the Norman Printers' Supply Company for breach of a contract of conditional sale. From a judgment for plaintiff, defendant appeals. Error found, and new trial ordered.

September 16, 1905, the defendant made a conditional sale to the plaintiff of two printing presses and a paper cutter. June 2, 1906, and before the terms of this contract had been fully executed, it was by mutual agreement rescinded and a new contract of that date entered into. This contract, like

the former, was a conditional sale of certain presses, printers' machinery, and equipment, whose rental and purchase price was fixed at \$970. The defendant claimed that into this amount there entered the sum of \$250, agreed by the parties to have been due the defendant under the surrendered contract. This sum of \$970 was to be paid to the extent of \$645 by goods sold and to be delivered by the plaintiff to the defendant, and the plaintiff was to give the defendant his monthly installment notes, 13 in number, each for \$25 and payable on the 9th day of each of the following months, beginning with July 9, 1906. The contract provided that the defendant should make delivery of its articles "boxed on cars at its factory about June, 1906." The notes were given as agreed, and the articles to be received from the plaintiff were all sent to and received by the defendant, excepting one press. The articles which the defendant agreed to deliver to the plaintiff have never been delivered. July 6, 1906, the plaintiff's attorney wrote the defendant a letter, duly received, in which the defendant was charged with a breach of the agreement by reason of its delay in delivery, and informed that the plaintiff declined to accept the goods, and would not receive them if shipped. The letter demanded payment of the \$645 and threatened suit. The defendant claimed to have shown that immediately upon the execution of the contract it commenced to put the machinery ordered into condition for shipment; that on June 8, 1906, it received a telegram, followed by a letter, directing that shipment be withheld and requesting changes in the contract; that, when the letter of July 6th was received, the goods were ready for shipment; and that by reason of the plaintiff's refusal to accept the goods therein contained, which has been since persisted in, they have, save a single small article, remained unshipped and in the defendant's hands subject to the contract. The plaintiff testified that in June, and subsequent to the 8th, he wrote to the defendant a number of unanswered letters requesting shipment. Upon the trial the plaintiff claimed that the defendant had broken the contract by not delivering according to its terms. The defendant claimed that the period within which it was entitled to ship the goods pursuant to the contract had not expired when the letter of July 6th was received; that it was thereby prevented from carrying out its terms, which it stood ready to carry out and otherwise would have carried out; and that the plaintiff's unlawful conduct alone has been responsible for the nonexecution by the defendant of the terms of the contract. None of the notes have been paid. The defendant filed a counterclaim in which it was set up that at the time of the execution of the contract in suit the plaintiff was indebted to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the defendant, as the parties agreed, in the sum of \$250 under the terms of the previous contract which was canceled, that this sum was included as a part of the consideration of the later contract, and that the same had not been paid. Judgment for the recovery of this sum or of so much thereof as was in excess of the plaintiff's claim was asked. The requests to charge and instructions given, in so far as they are involved in the questions discussed, are sufficiently stated in the opinion.

Richard H. Tyner, for appellant. George E. Beers and Charles H. Harriman, for appellee.

PRENTICE, J. (after stating the facts as above). Numerous errors are assigned. Only those relating to a few subjects, however, call for consideration.

The court was asked to instruct the jury, in substance, that the words "about June, 1906," used in the contract between the parties to define and limit the time within which the defendant was to make delivery of the printers' machinery and equipment which were the subject of the contract, in the absence of a peculiar trade meaning to be attached to them, were to be taken in their ordinary meaning, that this meaning fixed the time as any time in June, 1906, or a reasonable time thereafter, and that any time during the succeeding month of July might be and was to be regarded as such reasonable time, so that if the defendant was ready and willing to make the delivery at any time within the latter month and was prevented from so doing by the plaintiff's refusal to accept the goods, the plaintiff could not recover. The court charged that by the terms of the contract the defendant had the month of June and a reasonable time thereafter within which to make the delivery, and left to the jury the determination of the question of what was a reasonable time in view of all the circumstances. The court did not err either in declining to charge as requested or in charging as it did. What is a reasonable time under the circumstances in any given case is for the jury. *Tomlinson Carriage Co. v. Kinsella*, 81 Conn. 268, 273; *Cohen v. Pemberton*, 53 Conn. 221, 235, 2 Atl. 315, 5 Atl. 82, 55 Am. Rep. 101; *Oley v. Miller*, 74 Conn. 304, 310, 50 Atl. 744. Although a question for the jury, it is not to be understood that a period of time might not be so short or so long that a court would under proper conditions, be justified in declaring it unreasonable. *Kellogg v. Denslow*, 14 Conn. 411, 426; *Maher v. People*, 10 Mich. 212, 224, 81 Am. Dec. 781. Questions of fact upon which but one conclusion is reasonably possible need not be submitted to the jury for its determination. The court may in such case assume or declare to the jury the conclusion which could

not be reasonably avoided by them, and which, if not made, would justify the court in setting aside its verdict. In so doing the province of the jury is no more invaded than it is when a verdict is directed. *Currie v. Consolidated Ry. Co.*, 81 Conn. 383, 71 Atl. 356. "Whether there be any evidence is a question for the judge. Whether sufficient evidence is for the jury." *Company of Carpenters v. Hayward*, 1 Doug. 375; *Regina v. Smith*, O. C. 607. So, under the circumstances of the present case, had the defendant asserted that the reasonable time succeeding June 30, 1906, within which it was entitled to perform its undertaking, justified it in delaying delivery for one, five, or ten years, it would be idle to say that the court could not have dismissed the claim as palpably beyond the limits of reason; and, on the other hand, a claim might conceivably have been made which was so narrow in its limitation of reasonable time that the court would have been justified in giving it its true character. *Kellogg v. Denslow*, 14 Conn. 411, 426. Here the court was asked to say that the reasonable time in the situation presented gave the defendant the whole month succeeding June. Clearly it could not have complied with the request without withdrawing from the jury a question upon which the latter reasonably might have reached a contrary conclusion. What the court properly might have said with respect to shorter periods pertinent to the case we have no occasion to inquire, since error will not ordinarily be imputed to a failure of a court to exercise the full measure of its powers under such conditions.

But the court made certain rulings excluding evidence offered by the defendant which had a direct bearing upon a determination of the question of what was this reasonable time which it had for delivery under the contract. The question was one which was to be determined by all the circumstances. Among the circumstances thus to be taken into consideration was anything which tended to indicate the intention, expectation, or understanding of the parties, including any conversations between them upon the subject, agreements, directions, acts, or conduct. *Tomlinson Carriage Co. v. Kinsella*, 81 Conn. 268, 273. Other relevant circumstances were the subject-matter, the conditions existing, and the nature, character, and extent of the things involved in the undertaking. The defendant offered evidence of a conversation between the plaintiff and the defendant's president and representative upon the occasion when the contract was signed as to the time when delivery was contemplated; of directions then given by the plaintiff as to the delivery, and as to an explanation then made why indefinite language was used in fixing the date of delivery. All this evidence, which might have been very significant of what was to be regarded as a reason-

able time following June 30th within which the defendant might ship the goods, was wrongfully excluded. The defendant also offered to show that preparatory to shipment certain work was required to be done on or about the articles specified in the contract, a part of which is described therein as rebuilt and re-equipped presses and machinery. This evidence was not received. It would, however, have been distinctly pertinent had it appeared that this work was of considerable magnitude, and of such a character that the parties must have contemplated it and contracted with reference to it. The court was evidently laboring under the mistaken impression that the effect of the excluded evidence would be to vary the written agreement. Its real importance as an aid to interpretation was overlooked to the defendant's harm.

The defendant complains of certain of the instructions of the court with respect to its right to recover upon its counterclaim in the event that it should be found that the plaintiff and not the defendant broke the contract in suit. The court was right in so far as it told the jury that the defendant's rights under the former contract, including that to the \$250, if due thereunder as claimed, became merged in the new contract, that the sum in question entered into this substituted contract as a part of its consideration on the defendant's part, and that the defendant's rights arising from the plaintiff's breach of its terms were confined to the damage resulting therefrom, and did not extend to a recovery of any sum which might have been due to the defendant upon the original contract at the time of its cancellation as such. It was also right, save in one respect hereafter noticed, when it charged, in effect, that the plaintiff, in the event of a breach of the contract by the defendant, was entitled to a verdict for the value of the articles agreed to be delivered to the plaintiff by the defendant, and not delivered, less the amount of the notes, together with interest from June 2, 1906. The fact that the defendant claimed that the nominal price of the goods contracted for, to wit, \$970, included the sum of \$250, representing a balance due to the defendant by the plaintiff upon a former contract, was, however, one to which the attention of the jury should have been called, and its bearing upon the situation pointed out. The failure to do so evidently led the jury into the rendition of a mistaken verdict, which it was afterward sought to correct by the filing of a remittitur. Upon a retrial the jury should be so instructed that a repetition of the error will be avoided. No complaint is made of the instruction that the plaintiff, in event of recovery, would be entitled to interest from June 2, 1906, the date of the contract. Interest would not begin to run until the date of breach.

Counsel for the plaintiff were within their rights in calling counsel for the defendant as a witness to testify to matters not of a confidential or privileged character. The impropriety which is recognized in the conduct of an attorney who volunteers to aid the cause of his client as a witness in his behalf is one which attaches to himself and is not present when he is requisitioned by his adversary. A due recognition, however, of the status of an attorney representing his client in the trial of a cause demands that he be not required by adverse counsel to take the witness stand unless there be a reasonable necessity for such action. The paragraph of the original answer which had been withdrawn was competent evidence on the part of the plaintiff as an admission by the defendant in the same manner as any other admission of the same purport would have been. 2 Wigmore on Evidence, § 1007; *Boots v. Canine*, 94 Ind. 408, 416; *Pfister v. Wade*, 69 Cal. 133, 138, 10 Pac. 369. It is not altogether clear what pertinent fact the plaintiff sought to establish by the admission. It is unnecessary, however, to determine this matter, since we understand that the objection is primarily addressed to the use of the pleading as evidence, and the statement of the law in this regard will suffice as a guide to the court upon a new trial.

There is error, and a new trial is ordered. The other Judges concurred.

(31 Conn. 408)

PHILLIPS v. CITY OF STAMFORD.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. DEDICATION (§ 45*)—ACCEPTANCE—QUESTION OF LAW AND FACT.

The question of public acceptance of land dedicated for a highway is a mixed one of law and fact, being a question of law so far as it involves questions as to the nature of the acceptance, the source from which it must come, and the matters indicative of it, and a question of fact so far as it involves inquiries as to whether the requisite acts and things have been actually done.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 88; Dec. Dig. § 45.*]

2. DEDICATION (§ 37*)—ACCEPTANCE BY PUBLIC—NATURE AND SUFFICIENCY.

The only public acceptance of land dedicated for a highway which is efficient is by the unorganized public, which can only be disclosed by acts and conduct of the individual members thereof; or as organized into some public organic group; and, where the public, by the acts of those most likely to be cognizant of a proffered gift of a way for public use, has shown its recognition of its usefulness and its approval of the gift by any of a variety of recognized acts and conduct, the conditions of an acceptance are fully satisfied.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73, 74; Dec. Dig. § 37.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. DEDICATION (§ 35*)—ACCEPTANCE BY PUBLIC—EVIDENCE—WORKING OF LAND FOR HIGHWAY.

That a traveled way has or has not been wrought by the local authorities on land dedicated for a public way, that repairs have or have not been made for the accommodation of travel, are facts of significance as evidence of acceptance by the public, but their importance is only evidentiary, as neither original working nor subsequent repairing will create an acceptance, and it may be shown in other ways.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 75; Dec. Dig. § 35.*]

4. DEDICATION (§ 37*)—ACCEPTANCE—LAND DEDICATED FOR PUBLIC HIGHWAY.

The acceptance of land leading to a beach for a public highway, the user of which would naturally be limited mostly to the summer time and to foot travel, may be effectively shown by its use by pedestrians during the summer.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73, 74; Dec. Dig. § 37.*]

5. DEDICATION (§ 37*)—ACCEPTANCE—LAND DEDICATED FOR PUBLIC HIGHWAY—NUMBER OF PERSONS USING.

It is not essential to the creation of a highway by dedication and acceptance that large numbers of the public use it, or that the user result in a large volume of travel, but it is sufficient if those who would be naturally expected to enjoy it have done so at their pleasure.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73, 74; Dec. Dig. § 37.*]

6. DEDICATION (§ 37*)—ACCEPTANCE—LAND DEDICATED FOR PUBLIC HIGHWAY—EVIDENCE.

A 200-foot strip of land leading from an existing highway to a beach was dedicated for a public highway. It was located in a remote part of a city, in a vicinity which was being settled by shore residences, to none of which the land would serve as a natural or necessary means of access, and was intended to furnish access to the beach for those who did not own land upon it. It had never been worked as a roadway, though the grass on it had been cut occasionally. The travel over it was mostly on foot and in the summer time; it appearing that from 50 to 80 persons a year passed over it. Held, that the user was sufficient to show a public acceptance of the dedication, considering the location and purpose of the road.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73, 74; Dec. Dig. § 37.*]

Appeal from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Action by John B. Phillips against the City of Stamford for trespass to land. Judgment for defendant, and plaintiff appeals. **Affirmed.**

Moses Rogers died in 1824 possessed of a large tract of land comprising Shippan Point in Stamford, and distant about two miles from the center of the present city of Stamford. This point extends out into Long Island Sound, is bordered by the waters of the Sound and Stamford Harbor on every side except the northerly end. This tract Rogers by his will placed in the hands of trustees. In 1859 the trustees caused the land to be surveyed, laid out into building lots, with suitable highway approaches and parks and a map of this lay-out to be filed

in the town clerk's office. This was done with a view to the development of the property for residential purposes. At that time there were few, if any, houses on the land, and the single highway by which it could be reached was but little traveled. The highways thus laid down on the map were dedicated to the public use, and most of them, including Ocean Drive, had before July, 1886, become accepted highways, and with others since accepted are now so used. Ocean Drive skirts the easterly shore of Stamford Harbor at a distance of approximately from 200 to 400 feet therefrom, and then continues its course around the point in general conformity to the shore, leaving building lots between it and the shore. Before July, 1886, the trustees conveyed to various persons certain of the lots, retaining the unsold portions of the property, and houses and other buildings had been erected upon the lots sold. The lots thus built upon were for the most part confined to the section between Ocean Drive and the harbor and the drive and the Sound at the southern end of the point. July 3, 1886, the trustees, who retained title to the locus, executed and recorded an instrument setting apart and dedicating it and another strip of land to the use of the public as and for streets and highways. The locus in controversy thus dedicated is a strip 50 feet in width, and extends from Ocean Drive westerly to the waters of the harbor at high-water mark. It is not shown on the map of 1869 as a projected street, but is included in lot No. 271. It has never been worked as a roadway, but it has been allowed to remain in its natural state, except that the grass upon it has been cut from time to time, and there have never been visible traveled paths over it. There are trees within its limits, not interfering with its use. It has at all times afforded a safe and feasible passage for public travel, whether on foot or in vehicles. It furnished a means of easy access to the beach and harbor, and from the time of its dedication continuously to the present time many of the public have availed themselves of it for this purpose. Its use has been principally, but not entirely, by pedestrians, and has been chiefly confined to the summer time. It has increased as the population in the vicinity has increased. It has been used to some extent by people with conveyances driving upon it, and hitching their horses to the trees standing upon it. The court found that there had been sufficient user by the unorganized public to constitute an acceptance of the highway, and that the premises had by such acceptance been a public highway for at least 15 years. In 1904 the trustees parted with the title to the unsold lots in said tract, which immediately passed to a land company, which has caused the property to be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

greatly developed and improved, and many lots have been sold upon which many and expensive houses have been erected for use as summer homes. Reference to the evidence which has been certified to this court for a correction of the finding discloses that the court, in finding that many of the public had used the way for purposes of travel to and from the beach, did not use that language to convey the impression that the number of users was a very large one or the volume of travel heavy. One of the defendant's witnesses, who testified that he lived near to the locus during the four or five years following the dedication, estimated that he saw some 50 wagons each season. Another, who said that he had lived in the immediate neighborhood ever since the land was dedicated, but worked elsewhere, estimated that the average number of persons whom he had seen using the way was from 50 to 80 annually.

Robert A. Fosdick, for appellant. Stanley T. Jennings, for appellee.

PRENTICE, J. (after stating the facts as above). This record presents only one general question which calls for consideration. The remaining questions are subsidiary to it. The plaintiff charges the defendant with having committed a trespass upon a strip of land 50 feet wide and about 200 feet long, extending from a highway to high-water mark of Stamford Harbor. The defendant sets up, in justification of its acts, that the locus was a public highway as the result of its dedication to highway uses by its owner, and the acceptance by the public of it for the purposes for which it was dedicated. It is conceded that, if the land was a highway, the conduct of the defendant which is complained of was within its rights. It is admitted that the land was in 1886 dedicated for public use as a highway, as claimed. The acceptance by the public is denied. The court has found that there was such an acceptance within a reasonable time. If this conclusion was justified by the facts, the judgment cannot be disturbed. The admission of the dedication of the land for the purposes of public travel removes from the case a question which has been a fruitful source of difficulty where the existence of highways as the result of dedication and acceptance has been in dispute. We have to deal only with the question of public acceptance. This question is one of mixed law and fact. It is one of law in so far as it involves questions as to the nature of this acceptance, the source from which it must come, and the acts and things which may be indicative of it. It is one of fact in so far as it involves inquiries as to whether or not the requisite acts and things have been done so that legal requirements have been met. *Hall v. Meriden*, 48 Conn. 416, 428. The legal principles which the trial court

applied clearly appear in the record, and they are the correct ones. The subordinate facts found, when subjected to these principles, are sufficient to justify the conclusion reached.

The acceptance which, and which alone, is efficient is one on the part of the unorganized public, who by the circumstances of the situation cannot express themselves by vote or other formal action. It can only be disclosed by acts and conduct on the part of the individual members of the public as such, or as organized into some public organic group. *Makepeace v. Waterbury*, 74 Conn. 360, 362, 50 Atl. 876. We have said that where the proffered way is shown to be one of common convenience and necessity, and therefore beneficial to the public, acceptance will be presumed, that for the purpose of showing that it is beneficial, a variety of acts and conduct on the part of the municipality, or of individual members of the public, indicating a recognition of its usefulness and tending to show an approval of the gift by the members of the community immediately cognizant of it, are of importance, and that of all the things thus important as evidence of the beneficial character of the dedication, the actual use of the way as a highway by those who have occasion to use it holds the highest place. *Guthrie v. New Haven*, 31 Conn. 308, 321; *Green v. Canaan*, 29 Conn. 157, 163. Whether or not this statement embodies in all respects a correct analysis, certain it is that, when the public, by the acts and conduct of those of its members who are most likely to be cognizant of a proffered gift of a way for the public use, has shown its recognition of its usefulness and beneficial character and its approval of the gift by any one or more of a variety of recognized acts and conduct, the conditions of an acceptance are fully satisfied, that if the dedication appears to be one of common convenience and necessity, and therefore beneficial to the public, the conditions arising from the acts and conduct of the public will the more readily be regarded as satisfied, and that to the user of the way by those who have occasion to use it special importance attaches as an indication of the public attitude. *Guthrie v. New Haven*, 31 Conn. 308, 321; *Hall v. Meriden*, 48 Conn. 416, 431; *County of Wayne v. Miller*, 31 Mich. 447, 450; *Abbott v. Cottage City*, 143 Mass. 521, 525, 10 N. E. 325, 58 Am. Rep. 143.

The facts of the present case disclose no working of the land for highway use. This, however, is not a matter of vital moment. *Street v. Leeto*, 79 Conn. 352, 357, 65 Atl. 373. That a traveled way has or has not been wrought by the local municipality, that repairs have or have not been made at the public charge, or otherwise for the accommodation of travel, are facts which naturally possess significance, and oftentimes great significance, as evidence tending to show ac-

ceptance by the public of a dedicated way, but the only importance to be attached to such facts is that which bears upon their evidential value for the purpose indicated. Neither original working nor subsequent reparation possess binding force as creating an acceptance, and acceptance may be shown in other ways. *Green v. Canaan*, 29 Conn. 157, 165; *Guthrie v. New Haven*, 31 Conn. 308, 321; *Sherwood v. Weston*, 18 Conn. 32, 51. The facts also disclose that the use of the way has been in large part by persons on foot, and been confined chiefly to the summer season. Neither of these facts is of controlling significance. The attitude of the public toward the proffered gift for its benefit could be as effectively disclosed by foot travel, if that was, as here, the kind which would naturally be chiefly accommodated, as by any other; and a user limited to the summer season, if that was the user to be anticipated, and for the accommodation of which the way was under the circumstances suited, would be as significant as any could reasonably be expected to be.

The user of this locus as a highway does not appear to have been an extensive one, or one participated in by large numbers of the general public. But that fact is not one fatal to the court's conclusion. It is not essential to the creation of a highway by dedication and acceptance that large numbers of the public participate in the user, or that the user be one which results in a large volume of travel. Each situation must be judged in relation to its own surroundings and conditions, and with a regard for the number of persons who would have occasion to use the way. *Guthrie v. New Haven*, 31 Conn. 308, 321. It is only necessary that those who would be naturally expected to enjoy it have done so at their pleasure. 13 Cyc. 406. Here the dedicated way was a short one leading from an existing highway to the shore. It was located in a somewhat remote portion of Stamford, and was surrounded by property which in the beginning had been sparsely settled and had continued to be in the process of development as property suited to shore residence and life. Houses had been built upon near-by land, but there were none for which the 200-foot strip would furnish a natural or necessary means of access. The service for which it was intended and adopted was that of furnishing a way of access to the beach and harbor for those who, not owning land upon them, might wish to reach them. This service was one which, in view of its connection with the highway system and the present and prospective appropriation and use of the neighboring land, the public might well regard as a beneficial one. The court has found that from the time of the dedication in 1886 many of the public have used the locus for high-

way purposes and as a means of access to the beach, and that this user has been sufficient to constitute an acceptance of the dedication of the land for highway purposes. The plaintiff seeks a correction of the finding in respect to these conclusions and certain matters involved therein. An examination of the evidence discloses a reasonable foundation for the findings made in respect to both the subordinate facts stated and, under the principles of law already discussed, the ultimate conclusion reached. Certain of this testimony was received under objection, and this action of the court is assigned as error. It was admissible as tending to show the character and extent of the user of the public, and the public's approving attitude toward the gift of the way for its use and its beneficial character.

There is no error. The other Judges concurred.

(81 Conn. 230)

FAY v. HARTFORD & S. ST. RY. CO.†

(Supreme Court of Errors of Connecticut. Dec. 18, 1903.)

1. STREET RAILROADS (§ 112*)—INJURIES TO TRAVELERS—BURDEN OF PROOF.

In an action for death of a traveler by being struck by a street car, defendant having denied negligence and pleaded plaintiff's contributory negligence, the burden was on plaintiff to show that defendant was negligent, and that plaintiff exercised due care at the time he was injured.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 228; Dec. Dig. § 112.*]

2. STREET RAILROADS (§ 114*)—INJURIES TO TRAVELER—NEGLIGENCE—EVIDENCE.

In an action for the death of plaintiff's intestate who was struck by a street car and injured as he was about to cross the track while driving a team, evidence held not to show that defendant was negligent.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 114.*]

3. STREET RAILROADS (§ 99*)—INJURIES TO TRAVELER—DEATH—CONTRIBUTORY NEGLIGENCE.

Intestate was struck and killed while driving along the side of a street car track where he knew or was bound to know that, if a car passed, it would be liable to strike him. Up to the instant he was struck, he made no effort to ascertain whether a car was approaching nor to move from his perilous position, and, if he had looked and listened, he would have seen or heard the approaching car, and could have stepped away from the track in time to have avoided the danger. Held, that intestate was negligent as a matter of law, notwithstanding the rule that a failure to look and listen before crossing a street car track is not negligence per se.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 210–215; Dec. Dig. § 99.*]

Appeal from Superior Court, Hartford County; Milton A. Shumway, Judge.

Action by Katherine E. Fay, as administratrix of the estate of Thomas Walsh, deceased, against the Hartford & Springfield

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† For opinion on application to correct mandate, see 71 Atl. 734.

Street Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Charles E. Perkins and Ralph O. Wells, for appellant. Hugh M. Alcorn and Benedict M. Holden, for appellee.

HALL, J. On September 24, 1907, between 4 and 5 o'clock in the afternoon, the plaintiff's intestate, Thomas Walsh, 65 years of age, was struck by the defendant's electric street railway car on Main street, in Windsor Locks, and received injuries resulting in tetanus, from which he died nine days afterward.

The complaint alleges that, when he was injured, Walsh was walking southerly on the right-hand side of the traveled portion of the highway, driving his horse and wagon; that the place where he was injured was dangerous for the passage by each other of teams and cars by reason of the location of the defendant's tracks and the narrowness of the highway; that Walsh was lawfully upon the highway; and that his death was caused by the negligence of the defendant in running the car at an excessive rate of speed, in failing to give proper warning of the approach of the car, in failing to have the car under control, and to bring it to a stop upon overtaking Walsh, and in failing to exercise proper care in the operation of the car in order to avoid injuries to persons and vehicles lawfully upon the highway.

One of the errors assigned in the defendant's appeal is the failure of the court to instruct the jury, as requested, that since there was no allegation in the complaint that the defendant was negligent in failing to equip the car with a sand box, or to sand the rails to prevent the car from slipping on the track, they should disregard all evidence offered upon that subject. The finding states, and there has been no request to correct it, that, without objection, evidence was offered by the plaintiff to prove that the car was not equipped with a sand box, but that subsequently "the court, of its own motion, told the jury that this evidence, under the pleadings, was wholly immaterial, and should not be considered by them in determining the issues in the case." While we are of opinion that it would have been better, and especially after a written request to do so, for the court to have stated in its charge what it had already said during the trial, the failure to repeat it does not upon the facts found furnish a sufficient ground for a new trial.

But the principal questions of the case are raised by the defendant's two assignments of error: (1) The refusal of the court to direct a verdict for the defendant when requested; and (2) the denial of the defendant's motion to set aside the verdict as against the evidence, both of which were based upon the claim that, upon the ques-

tion of the alleged negligence of the defendant and due care of the plaintiff's intestate, there was not sufficient evidence to support a verdict for the plaintiff. A careful examination of the evidence before us fails to disclose any very serious conflict of testimony concerning the circumstances under which the plaintiff's intestate was injured. At the point where the accident occurred, Main street runs practically north and south, and for some distance north and south of that point the defendant's single track is upon the east side of the highway. East of the trolley tracks are the tracks of the New York, New Haven & Hartford Railroad, and between the trolley tracks and the right of way of the steam railroad is a narrow space upon which there are trees and trolley poles, which is unsuited to drive over. West of the trolley tracks is the traveled public roadway about 22 feet wide. The grade of the trolley track descends at this place slightly toward the south. On the day in question Walsh, as an employé of the town, was engaged in cleaning the street gutter on the west side of the road, and was with his horse and dump cart carrying the surface dirt and dumping it along on the east side of the trolley tracks. He was walking with his horse and cart southerly along the road west of the trolley track, and as he turned toward the east, probably to cross the track and dump his cart, he was struck by the running board and perhaps by other parts of the defendant's open passenger trolley car, which was running toward the south. A bone of his left leg was broken, and he sustained other injuries. The spokes of the left or near wheel of the cart were broken. There was a thunderstorm approaching at the time, and the tracks were wet and slippery. The car was not equipped with a sand box or other device to prevent the wheels from sliding when the track was slippery. The motorman who was controlling the car testified that, when Walsh was struck, he was walking on the east side (of the cart), and driving with the lines in his hands. In this he was corroborated by one of the only two witnesses of the plaintiff, both passengers on the car, who saw Walsh just before the accident. The other, a girl 10 years old, in answer to the question, "What did Mr. Walsh do that morning when you saw him?" said, "He had his horse up near the mouth, and he was walking along." Twice during his charge the trial judge stated to the jury that it was an undisputed fact that Walsh was struck as he was driving his team along the highway and walking beside it. All the witnesses who saw Walsh at the time he was struck say, in substance, that he was walking near the west rail of the track with his back toward the approaching car; that he did not stop or look back or appear to hear the gong, or the approaching car, or to be attending to whether one was coming, or to be sensible

of its approach. His own statement after the accident was that he thought he was struck by an automobile. As to the alleged failure of the defendant to give proper warning of the approaching car, the motorman testified, in substance, that he sounded the gong violently and continued to sound it as soon as he saw Walsh turn in toward the track. As to the sounding of the gong, he was corroborated by three other witnesses of the defendant, two of whom were conductors on the car, and the other a passenger, the latter testifying also that he saw the motorman's foot on the gong, and also by three of the six passengers, called as witnesses by the plaintiff, two of whom testified that they saw the motorman "jumping up and down on the gong." One of the remaining three of said six witnesses of the plaintiff testified that she could not hear the gong inside the car with the shower, and when they were giving their attention to getting the curtains down; another that he did not remember of hearing it, but that it might have occurred without his noticing it; and the third that she did not notice it. If the gong was sounded, as testified to by seven or eight witnesses, Walsh, if he heard it, had ample time and opportunity to get out of the way of the car without injury. The motorman testified that the last thing he did was to call out as loudly as he could to Walsh, "Look out there!" Regarding the efforts made to stop the car, the motorman testified that he put on the air brake gradually in order to prevent the wheels from sliding by being stopped suddenly, and that that was the only proper way to apply the brake when the tracks were slippery. One of the conductors testified that he felt the wheels slide, and the other that he felt the brakes. Most, if not all, of the other passenger witnesses testified that they did not notice, or that they did not feel the brakes. One of plaintiff's witnesses said she thought they stopped as quickly as they could. Regarding the speed of the car, the motorman and the two conductors testified that they were running at ordinary speed. Three of plaintiff's six passenger witnesses, the passenger called by the defendant, and a witness of the defendant who saw the car pass, testify, in substance, that they noticed nothing unusual in the speed of the car. At least three of the plaintiff's witnesses who were passengers testified that the car was going fast, or pretty fast.

The two main questions at the trial were: Was Walsh's injury caused by the defendant's negligence as described in the complaint? Did Walsh's own negligence essentially contribute to cause his injury? Under the denials of the answer, the burden of proving the alleged negligence of the defendant and the due care of Walsh rested upon the plaintiff. The question, therefore, for our consideration is: Could the jury upon the evidence presented have reasonably con-

cluded that there was a preponderance of proof of such negligence of the defendant and of such care by the deceased? The law does not require direct evidence of these facts. They may be inferred from the facts and circumstances of the case; but these must have a bearing upon the questions, and must be such as fairly and reasonably support and justify the inference of negligence and of due care. A jury is never at liberty to merely guess or surmise the existence of the alleged negligence, or the exercise of due care, from facts or circumstances which do not fairly show it. *Ryan v. Bristol*, 63 Conn. 26, 32, 27 Atl. 309; *Wood v. Danbury*, 72 Conn. 69, 73, 43 Atl. 554. Applying this rule to the present case, the verdict cannot be sustained. First. It is difficult to find the requisite evidence of defendant's alleged negligence. At the place where Walsh was injured he had ample room to drive along the roadway. It does not appear that the motorman when he first saw Walsh, about 400 feet ahead of him, or before he saw him pull in toward the track, had any reason to suppose that he might attempt at this point to cross over to the east side of the track where there was no roadway. It does not appear that the car was going at an unlawful or dangerous rate of speed for such a place. The defendant was not required to run its car so slowly as to always be able to stop it in time to avoid striking persons who, in the possession of their sense and having the ability and opportunity, and whose duty it is, to move away from the track upon the sound of the gong, might carelessly continue to walk dangerously near the track. But, if it can be said that there was some evidence of defendant's negligence, we regard it as clear that there was none which could justify the inference of due care upon the part of the deceased. Walsh had placed himself in a position where he knew, or was chargeable with knowing, that, if a trolley car passed, it would be liable to strike him. Up to the very instant he was struck, he appears to have made no use whatever of his sense to ascertain whether a car was approaching, nor any effort to move from his perilous position. Had he looked or listened, he would have seen or heard the approaching car, and could have stepped away from the track in time to avoid all danger. The evidence shows no circumstances to excuse him for continuing to walk in a place of such known danger without looking or listening for an approaching car. But the plaintiff says that the failure to look and listen before crossing the track of a street railway is not negligence per se; citing *Lawler v. Hartford Street Ry. Co.*, 72 Conn. 74, 43 Atl. 545, and *Norris v. New York, N. H. & H. R. Co.*, 78 Conn. 314, 61 Atl. 1075. While this is true, the failure to use one's senses to avoid a known danger, when the facts show no excuse for such failure and that a rea-

(81 Conn. 474)

sonable use of one's faculties might have enabled him to avoid injury, is always negligence. *Snow v. Coe Brass Mfg. Co.*, 80 Conn. 63, 70, 68 Atl. 881. It is further to be remembered that the question concerning contributory negligence in the present case is not whether the facts found prove that the deceased was negligent, but whether they prove that he exercised due care. That Walsh failed to stop, look, and listen was admissible in evidence upon the question of his negligence. That these facts did not prove his negligence does not render them evidence of due care.

The cases of *Lawler v. Hartford Street Ry. Co.*, 72 Conn. 74, 43 Atl. 545, and *Norris v. New York, N. H. & H. R. Co.*, 78 Conn. 314, 61 Atl. 1075, cited by plaintiff, have but a slight bearing upon the questions involved in this case. Those cases were hearings in damages under the then existing law by which a defendant, in an action of that kind, by suffering a default and assuming the burden of proving either that he exercised due care as to the alleged causes of the injury, or that the plaintiff did not, might require the damages to be assessed by the court instead of by a jury. In those two cases, and in many others thus heard, the plaintiff's favorable judgment was based largely upon the fact that the entire burden of proof, except as to the extent of the injury, was upon the defendant. In availing himself of the present law, which enables him to secure a trial of the entire case to the jury, and which practically does away with the former method of trial by hearing in damages, the plaintiff now assumes the burden of proving the averments of the complaint, which were before qualifiedly admitted by the default. In deciding a case tried as this was, under an answer of denials, the same rule as to the effect of assuming the burden of proof, which in hearings in damages was applied to the defendant, must now be applied to the plaintiff, namely, that the party having the burden of proof must always fail if he has not established by a preponderance of evidence the facts which he so assumed the burden of proving. The plaintiff in this case assumed the burden of proving due care upon the part of Walsh. The record before us contains no evidence that Walsh exercised proper care or any care to avoid the injury he sustained. In so far as the evidence before us proves anything regarding his conduct in avoiding the injury, it shows that he was negligent in failing to use his senses to avoid an apparent danger.

The trial court should have directed a verdict for the defendant, as requested. Having failed to do so, it should have granted the motion to set aside the verdict as against the evidence.

There is error, and a new trial is ordered. The other Judges concurred.

ALLEN v. CHASE.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. PLEADING (§ 418*)—DEMURRER—WAIVER.

By filing a substituted answer, defendant waived all right to thereafter question the correctness of a ruling sustaining a demurrer to the original answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1403, 1406; Dec. Dig. § 418.*]

2. PARTIES (§ 25*)—PARTIES DEFENDANT—JOINDER.

A defendant may not bring in third parties in order to litigate with them matters not connected with the suit.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 31; Dec. Dig. § 25.*]

3. PLEADING (§ 250*)—AMENDMENT—DISCRETION.

Clerical amendments to the complaint which do not change the issues, but merely increase the amount demanded, may be permitted at any time before verdict at the court's discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 732; Dec. Dig. § 250.*]

4. CONTINUANCE (§ 12*)—ABSENCE OF PARTY.

A case having been called for trial, defendant's counsel applied for a continuance, because defendant, who was an important witness, was too ill to attend, and produced a physician's certificate. The court suggested a postponement to the following day, when a physician to be named by plaintiff might examine defendant and report. Defendant then asked for a postponement for two days, agreeing that the cause should then proceed whether defendant was present or not, and that in the meantime, if he could not be present, his deposition should be taken. On the cause being again called for trial, the deposition not having been taken, defendant again applied for a continuance, and produced a physician's certificate, but did not produce the physician. This motion being denied, defendant's counsel prepared an affidavit sworn to by himself, wherein he stated that he believed if defendant was present, he would swear to the facts stated, and asked that the cause be continued, unless plaintiff's counsel consented that the affidavit should be introduced as evidence, which he declined to do. *Held*, that the denial of the application was not error.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 42; Dec. Dig. § 12.*]

Appeal from Court of Common Pleas, Fairfield County; Carl Foster, Judge.

Action by Anjeannette Allen, as administratrix, etc., against Prentice W. Chase. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert J. Woodruff, for appellant. Samuel A. Davis, for appellee.

THAYER, J. By filing a substituted answer the defendant waived all right to thereafter question the correctness of the ruling sustaining the demurrer to the original answer. *Mitchell v. Smith*, 74 Conn. 125, 127, 49 Atl. 909; *Burke v. Wright*, 75 Conn. 641, 643, 55 Atl. 14.

The defendant moved that *Sturges Whitlock* be cited in as a party defendant, basing the motion, apparently, upon the facts set up in the substituted answer. Those facts

do not show that Whitlock's presence as a party was in any way essential to a proper determination of the controversy between the plaintiff and defendant, or that he had, or claimed to have, any interest in that controversy. A defendant is not permitted to bring in third parties for the purpose of litigating with them matters in no way connected with the suit. *State v. Wright*, 50 Conn. 580, 583; *Carroll v. Weaver*, 65 Conn. 76, 84, 31 Atl. 489; *Lowndes v. City National Bank*, 79 Conn. 693, 696, 66 Atl. 514. The motion was therefore properly denied.

The amendments to the complaint were clerical ones which did not change the issues, and an increase of the amount named in the *ad damnum* clause. Such amendments are permitted at any time before verdict, at the discretion of the court, and their allowance in the present case affords the defendant no just cause for complaint.

When the case was called for trial on April 28, 1908, the day for which it was assigned, counsel for the defendant moved for its continuance upon the ground that the defendant, who was an important witness, was confined to his house by illness and produced a certificate of a physician as to the illness. The cause had already, on more than one occasion, been continued on motion of the defendant, and a judgment by default had once been entered against him because of his failure to appear, either in person or by attorney, or in any way to explain his nonappearance. The default had been opened and the case had been pending for some years. It was the last case to be tried by the jury in attendance. The court suggested that the case be postponed to the following day, before which time a reputable physician to be named by the plaintiff might examine the defendant and report his condition to the court, and the defendant might produce in court the physician whose certificate had already been presented. Thereupon counsel for the defendant moved that the cause be continued until Thursday, April 30th, agreeing that the cause should then proceed to trial whether the defendant was present or not, and that if it should appear that the defendant was to be prevented by illness from appearing in court his counsel would, on April 29th, notify counsel for the plaintiff and on that day take the defendant's deposition. The plaintiff's counsel agreed to this, and the court continued the case to April 30th. Counsel for the defendant did not take his deposition, or notify counsel for the plaintiff, but on April 30th appeared and moved for the continuance of the cause upon the same ground as before, producing a physician's certificate sworn to before a notary public but did not produce the physician. The court denied the motion. Thereupon counsel for the defendant prepared an affidavit, signed and sworn to by himself, wherein he stated what he believed the defendant would swear to if he were in court,

and moved that the cause be continued, unless counsel for the plaintiff would consent that said affidavit be introduced as evidence in the case. The plaintiff's counsel declined to consent to the admission of the affidavit in evidence and objected to the same. The court then overruled the motion for a continuance, and ordered that the parties proceed with the trial of the case. It is assigned as error that the court abused its discretion in thus refusing to grant a continuance. After the case had been postponed for two days, upon the agreement of the defendant's counsel that he would then be ready to proceed, it was his duty to have been ready, or to offer some explanation for his failure to be so. So far as the record discloses no excuse was given, or attempted, for failing to keep that agreement. Had the deposition been taken the trial could have proceeded. If the defendant was unable to give the deposition, that excuse could have been offered. The defendant's counsel, without such excuse, renewed his original motion that the case be continued because of the illness of the defendant. The court upon these facts was entirely justified in refusing to continue the case.

Section 187 of the rules under the practice act is for the benefit of the party opposing a motion for a continuance. If he requires it, a motion for a continuance on account of the absence of a material witness must be supported by an affidavit stating the name of the witness and the particular facts which it is believed can be proved by him, with the grounds of such belief. If the party opposing the motion will admit that the absent witness would, if present, testify to the facts stated in the affidavit, and will agree that the same shall be received in evidence on the trial, the court may refuse to continue the cause. Trial courts upon such applications for a continuance have doubtless in some cases, upon their own motion, required counsel to prepare a statement of what the absent witness would testify if in court, and upon the refusal of the opposing counsel to admit that the witness would so testify have granted a continuance of the case. Where the court or the party opposing the motion thus require the statement, it is for the purpose of avoiding a continuance of the cause, and such is the purpose of the rule; but in the present case the defendant volunteered the statement manifestly for the purpose of obtaining a continuance. To permit a party to do this would be an abuse of the rule. The defendant's counsel knew in the present instance that the plaintiff was entitled to better proof of what the defendant would testify to. He had promised two days before that, if the defendant was unable to be in court, his deposition should be taken upon notice to the plaintiff, so that he could be present and cross-examine. Having failed to keep this agreement, and offering no explanation of his conduct, the defendant was in no

position to claim a continuance upon the ground that the plaintiff refused to agree that the statement should be received in evidence. The court upon the facts appearing in the record was justified in believing that the motion was made solely for purposes of delay, and it was no abuse of discretion to refuse a continuance.

In view of what has been said it is unnecessary to consider the defendant's claim that the court's conduct in denying a continuance was a denial of justice, and violated the defendant's rights under section 12, art. 1, of the Constitution of the state.

There is no error. The other Judges concurred

CAMPBELL v. CAMPBELL et al.

(Supreme Court of Rhode Island. Dec. 18, 1908.
On Motion to Dismiss, Jan. 20, 1909.)

1. EXCEPTIONS, BILL OF (§ 9*)—SETTLEMENT.

In settling a bill of exceptions the trial justice struck from an exception to the exclusion of testimony a reference to affidavits supporting the exception. The exception also referred to the transcript of the testimony for support. In excluding the testimony the justice had stated that he would hold exceptant's counsel to an agreement made by him. Exceptant relied on the affidavits and the transcript to show that the agreement was made under coercion by the court. There was no exception to the ruling requiring the agreement to be made, and the circumstances surrounding the making of the agreement appeared in the transcript. Held, that the justice properly struck out the reference to the affidavits.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 9.*]

2. EXCEPTIONS, BILL OF (§ 55*)—PROCEEDING TO ESTABLISH EXCEPTION—DISMISSAL.

Since the truth of an exception was not affected by the trial justice striking from it a reference to affidavits supporting it, a petition to establish the truth of the same must be dismissed.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 55.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Proceeding by Elisha J. Campbell against George E. Campbell and others to establish the truth of an exception. Petition denied and dismissed.

Green, Hinckley & Allen, for plaintiff.
James Harris and Irving Champlin, for defendants.

PER CURIAM. No one has questioned the truth of any exception which the plaintiff seeks to establish in this proceeding; but objection was made to his attempt to support by affidavits, in addition to the transcript of testimony, the exception taken to the ruling referred to in the second exception, which reads as follows: "To the ruling of said justice, at the trial of said action, not permitting a certain witness to testify, as shown on pages 602, 603, 610, 611, and 612 of said transcript of testimony filed herewith, and

the affidavit of Mr. Waterman and Mr. Van Slyck filed herewith." The justice of the superior court before whom the case was tried and who acted upon said bill of exceptions struck out the words making reference to said affidavits in the second exception and allowed the bill of exceptions so altered.

The appellant claims that he is aggrieved by said alteration and has brought this proceeding to establish the bill of exceptions as filed by him. The ruling in question appears on page 612 of the transcript, as follows: "By the Court: I shall hold you to your agreement, Mr. Waterman. Mr. Waterman: Will your honor note my exception? By the Court: I note your exception." The other pages of the transcript of the testimony and the affidavits referred to in the second exception are relied upon by the plaintiff to show the circumstances in which the agreement mentioned in the ruling was made, that it was an agreement made under compulsion, and that the plaintiff's counsel was coerced by the court into making the agreement. It does not appear, and it is not claimed, that any exception was taken to the ruling of the court requiring the agreement to be made. The truth of the exception does not depend upon the affidavits. That it is true that such an exception was taken fully appears from the transcript, and we are not now concerned with the validity of the exception. Moreover, the statements of counsel concerning the circumstances surrounding the making of the agreement are set out in the transcript. The justice of the superior court did not err in making the alteration aforesaid.

As the truth of the exceptions was not affected by the action of the superior court, this petition to establish the truth of the same must be denied and dismissed, and the bill of exceptions allowed by the superior court will stand as allowed.

On Motion to Dismiss.

We are of the opinion that the motion to dismiss should be denied. The case will stand for hearing upon the petition for new trial and such evidence as may be offered thereon.

KRIKORIAN et al. v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Dec. 21, 1908.)

STREET RAILROADS (§ 117*)—DEATH OF PEDESTRIAN—ACTIONS—EVIDENCE.

Where, in an action for the death of a pedestrian by a street car, there was no evidence as to the cause of decedent's death, nor any evidence connecting the accident with her death, occurring several months thereafter, a verdict for defendant was properly directed.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 117.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by Sarkis Krikorian, for himself and others, against the Rhode Island Company, for the death of plaintiff's decedent, alleged to have been caused by the negligence of defendant street railway company. There was a verdict for defendant, and plaintiffs bring exceptions. Overruled, and cause remitted for judgment on the verdict.

Julius L. Mitchell, for plaintiffs. Joseph C. Sweeney, for defendant.

PER CURIAM. This is an action of trespass on the case for the death of Annie Krikorian, alleged to have been caused by the wrongful act of the defendant. There is proof that said person is dead; but there is no evidence concerning the cause of her death, and there is a failure of proof connecting the accident, which happened on August 21, 1905, with her death, which occurred January 1, 1906. The judge who presided at the trial properly directed the jury to return a verdict for the defendant.

The plaintiffs' exceptions are overruled, and the case is remitted to the superior court for judgment on the verdict.

(104 Me. 85)

THOMPSON et al. v. SHAW.

(Supreme Judicial Court of Maine. March 12, 1908.)

1. BANKRUPTCY (§ 9*)—EFFECT OF BANKRUPTCY ACT ON STATE LAW—ASSIGNMENT FOR CREDITORS.

When an assignor makes a common-law assignment of all his property, not exempt from attachment and execution, for the benefit of such of his creditors as may, after notice of the assignment, assent thereto, and a reasonable time is provided in the assignment for such assent, and the assignee accepts the trust, then such assignment, if bona fide, is lawful, and until assailed by some one claiming rights against it under the provisions of the United States bankruptcy law it stands as a valid transfer of the property described as conveyed therein.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 9; * Assignments for Benefit of Creditors, Cent. Dig. § 88.]

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 193*)—OPERATION—RIGHTS OF CREDITORS.

When a common-law assignment for the benefit of creditors assenting thereto has been lawfully made and creditors have been notified of such assignment, any creditor may assent to the assignment and secure a pro rata part of the property with the other assenting creditors, or may attack the assignment through bankruptcy proceedings against the assignor, or may attach by trustee process the property in the hands of the assignee, and thereby secure so much thereof as would not be needed to satisfy the debts of previously assenting creditors.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Dec. Dig. § 193.*]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 210*)—ADMINISTRATION OF ASSIGNED ESTATE—DUTY OF ASSIGNEE.

When an assignee accepts an assignment lawfully made to him by an assignor for the benefit of such of the assignor's creditors as may assent thereto, he thereby assumes the duty

towards assenting creditors to administer the trust according to its provisions. But, as to nonassenting creditors, he owes no such duty, and they cannot legally complain if he gives up the trust and returns the property to the assignor, unless he does it with the intent and purpose thereby to defraud such nonassenting creditors.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Dec. Dig. § 210.*]

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 44*)—ASSENT OF CREDITORS—DUTY TO SECURE.

When a common-law assignment has been lawfully made, and creditors have been seasonably notified of the assignment and have an opportunity to assent thereto, then no special duty rests on either the assignor or the assignee to secure such assent.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Dec. Dig. § 44.*]

5. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 256*)—ASSIGNEE—ACCOUNTING—COUNSEL FEES.

When a common-law assignment has been lawfully made, the assignee has a right to employ counsel, and, when the assignment so provides, he may lawfully pay out of the trust funds in his hands all reasonable and necessary counsel fees.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Dec. Dig. § 256.*]

6. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 193*)—ADMINISTRATION OF ASSIGNED ESTATE—PAYMENT OF BONA FIDE CLAIMS.

When a common-law assignment has been lawfully made and a nonassenting creditor by trustee process attaches the property in the assignee's hands, such assignee will not be held chargeable for sums paid by him, prior to the service of the writ, to the bona fide creditors of the assignor in settlement of their just demands.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Dec. Dig. § 193.*]

7. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 193*)—ADMINISTRATION OF ASSIGNED ESTATE—RETURN OF PROPERTY TO ASSIGNOR.

When a common-law assignment has been lawfully made and a nonassenting creditor by trustee process attaches the property in the assignee's hands, such assignee will not be held chargeable for property returned by him to the assignor prior to the service of the writ, unless he returned it with the intent and purpose to defraud nonassenting creditors.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Dec. Dig. § 193.*]

8. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 161*)—VALIDITY—FRAUD—EVIDENCE.

An intent to defraud creditors, especially such creditors as have not assented to the provisions of a common-law assignment for their benefit, is not to be inferred from successful efforts to compromise the claims of creditors after such assignment has been made.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Dec. Dig. § 161.*]

9. SUFFICIENCY OF EXCEPTIONS.

When the bill of exceptions in an action of scire facias founded upon an original trustee process indicates that the whole case is to be considered by the law court, the exceptions need not specify the extent to which the law court may examine the case.

10. APPEAL AND ERROR (§ 497*)—BILL OF EXCEPTIONS—SUFFICIENCY.

Rev. St. c. 88, § 79, providing that, "whenever exceptions are taken to the ruling and decision of a single justice as to the liability of a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

trustee, the whole case may be re-examined and determined by the law court, and remanded for further disclosure or other proceedings, as justice requires," applies alike to scire facias and original proceedings in trustee process, and, when exceptions are taken in an action of scire facias founded upon an original trustee process and the exceptions indicate that the whole case is to be considered, the law court has authority to correct any error in the judgment rendered by the court below whether of law or of fact.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 497.*]

11. VALIDITY OF COMMON-LAW ASSIGNMENT FOR BENEFIT OF CREDITORS.

In the case at bar, *held*, that the common-law assignment to the defendant was not fraudulent, and that prior to the service of the original trustee writ upon him he had lawfully discharged himself of all the property received by him from the assignor except \$182.66, and for that sum only the plaintiffs should have judgment.

(Official.)

Exceptions from Supreme Judicial Court, Washington County.

Scire facias founded upon an original trustee process by Cyrus Thompson and others against Minnie A. Dyer, as principal defendant, and Frank L. Shaw, as trustee. Judgment for plaintiff against defendant trustee, and the trustee excepts. Exceptions sustained.

Scire facias founded upon an original trustee process brought by the plaintiffs against one Minnie A. Dyer, as principal defendant, and Frank L. Shaw, trustee. The question of the trustee's liability upon his attempted disclosures in the original suit was before the law court in Thompson et al. v. Dyer, 100 Me. 421, 62 Atl. 76, in which he was charged generally as trustee. In the scire facias proceedings the defendant was allowed to disclose anew. See Rev. St. c. 88, § 72.

The common-law assignment, referred to in the opinion, is as follows:

"Know all men by these presents, that I, Minnie A. Dyer, of Milbridge, in the county of Washington and state of Maine, doing business under the firm name of Dyer's Grocery, as party of the first part, in consideration of one dollar paid by Frank L. Shaw, of Machias, in said county, party of the second part, and of the trust herein expressed, do grant and assign to the said party of the second part all my property, estate, rights, and credits of every description, both individual property and property of said firm of Dyer's Grocery, except such as is by law exempt from attachment and execution, to have and to hold the same to the said Frank L. Shaw in trust to sell and dispose of the said property to the best advantage, and collect and convert into money said debts and demands, and to proceed with said property according to law, and make a proportional distribution of the net proceeds thereof among such creditors of said party of the first part as shall become parties to this assignment, as

parties of the third part, within sixty days of the date hereof, and after the payments above mentioned, and hereinafter stated and made to pay the surplus to the party of the first part.

"And it is further agreed that the said trustee shall out of the trust estate pay all the costs and expenses of carrying out the trust herein declared, including a reasonable compensation for the trustee herein named, and for the services of an attorney when such services become necessary, and to pay all claims entitled to priority under the insolvent laws of Maine, in so far as such laws are not repugnant to or have not been superseded by, the bankrupt laws of the United States.

"And said Frank L. Shaw agrees to accept said trust and execute the same according to the provisions of this instrument and agreeably to law. And the creditors, whose names are hereunto subscribed, agree to said assignment, and to receive their proportional part of said property in full of all their claims against said party of the first part, and upon payment thereof to relieve and forever discharge said party of the first part from their respective claims. To the covenants and agreements hereof the respective parties bind themselves and their legal representatives.

"In testimony whereof, we the said parties of the first, second, and third parts hereunto set our hands and seals on the sixth day of October, A. D. 1899, the said parties of the third part adopting and using one common seal. The signature of any duplicate copy hereof of the same tenor to be of like effect as if signed hereto.

"Minnie A. Dyer. [Seal.]

"Frank L. Shaw. [Seal.]"

This assignment was duly acknowledged by Minnie A. Dyer before Joseph W. Leathers, a justice of the peace.

Heard at the April term, 1907, Supreme Judicial Court, Washington county. After hearing, the presiding justice rendered judgment against the defendant trustee for the amount of the plaintiff's judgment against Minnie A. Dyer, the principal defendant in the original suit, to wit, \$404.57 and costs, and thereupon the defendant trustee excepted.

The case appears in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, and KING, JJ.

Howard R. Ives, for plaintiffs. William R. Pattangall, for defendant.

KING, J. This is an action of scire facias founded upon an original trustee process brought by the plaintiffs against Minnie A. Dyer, as principal defendant, and Frank L. Shaw, trustee.

The facts and circumstances leading up to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

these proceedings in scire facias, as shown by the record, briefly stated, are as follows:

Prior to October 6, 1899, Minnie A. Dyer, of Millbridge, Me., owning a store and stock of merchandise, was carrying on business under the immediate management of her husband. Domestic difficulties resulted in a separation. Investigation revealed to her that her liabilities exceeded her assets.

An attachment against her property was made, and other suits and attachments were threatened.

In this situation, after conference with her attorneys, Messrs. Pattangall & Leathers, she made on the 6th day of October, 1899, a written assignment of all her attachable property to the defendant for the benefit of such of her creditors as should assent thereto within 60 days. This assignment Mr. Shaw accepted and signed. The defendant left the detailed management and disposition of the property so assigned to him, and the settlement with Mrs. Dyer's creditors to Messrs. Pattangall & Leathers, with whom, however, he frequently consulted and fully approved and adopted what his attorneys did in the premises. The plaintiffs were seasonably notified of the assignment, but did not assent thereto.

None of the creditors appear to have formally assented to the assignment. The property was converted into money amounting to \$3,780. An effort was made to effect a settlement with the creditors on a percentage basis, and all claims, except that of the plaintiffs, appear to have been settled either by compromise or as the result of prior suits.

On February 9, 1900, the plaintiffs served their original trustee process upon the defendant as trustee of Minnie A. Dyer. The principal defendant was duly defaulted. The question of the trustee's liability upon his attempted disclosures in that original suit was before this court in *Thompson v. Dyer*, 100 Me. 421, 62 Atl. 76, in which he was charged generally as trustee.

It was there held that a statement of information received from his attorneys as to their doings in connection with the property as signed could not properly be considered as facts disclosed by him, because he had not adopted such statement as his own on oath in his disclosure, and that the deposition of his attorney was not admissible because the facts sought to be proved by the deposition had not been alleged as required by statute. The court said: "The result is that upon the disclosure to which we are confined Mr. Shaw must be charged generally as trustee. If, in fact, he had no goods, effects, or credits of Mrs. Dyer in his hands either actually or constructively at the date of the service of the writ upon him, he has not yet shown it by legal evidence adduced in the manner provided by law. He has not yet stated discharging facts in his disclosure, nor has he yet opened any door for the statements of other persons.

"Upon scire facias he will undoubtedly have the opportunity to make as full and clear and detailed a disclosure as may be required, or as he may desire, and to make the statements of Mr. Pattangall a part of that disclosure, or to open a door for their admission otherwise."

In answer to these scire facias proceedings, the defendant has made a full disclosure under oath in which he states the amount of money received from the property assigned to him, and specifies in detail to whom and in what amounts it has been disbursed. Although his disclosure reveals that he relied upon information furnished him by his attorneys as to many of the details and facts disclosed by him, yet he states on oath his belief in the truth of that information, adopts it as his own, and declares those details and facts to be true.

He has now, we think, properly disclosed those facts as to the disbursement of the funds received by him as assignee which the court could not consider in his former disclosure.

At the April term, 1907, after hearing upon this disclosure, the presiding justice rendered judgment against the trustee for the amount of the plaintiffs' judgment against the principal defendant, \$404.57, and costs. The case is before this court on exceptions to that judgment.

The plaintiffs in support of the judgment below claim that the assignment was fraudulent and void as to the assignor's creditors, and that under the provisions of Rev. St. c. 88, § 63, the trustee is chargeable with the full amount of their judgment against the principal defendant.

Nothing appears in the assignment to indicate fraud. It is in the usual form of a common-law assignment for the benefit of creditors. By it all the assignor's property, not exempt from attachment and execution, was conveyed to be divided pro rata among all of her creditors who should assent thereto, and reasonable time for such assent was provided for. Such an assignment, if bona fide, is lawful. It is not contra bonos mores. Until assailed by some one claiming rights against it under the provisions of the bankruptcy law, it stands as a valid transfer of the property described as conveyed therein. *Pleasant Hill Cemetery v. Davis*, 76 Me. 289.

But the plaintiffs contend that this assignment was not made bona fide, that the assignor intended thereby to place her property beyond the reach of her creditors for her advantage, and that such fraudulent intent is discovered from the circumstances out of which the assignment proceeded and the subsequent conduct of the assignor and assignee in relation to the property assigned.

They urge, in argument, as acts showing a want of good faith in the assignment, that the assignee did not devote his personal attention to the performance of all the duties imposed upon him by the assignment, but

permitted his attorneys, who were acting also for the assignor, to attend chiefly to the details of the business; that no effort was made to secure the assent of the creditors to the assignment, but, instead, a compromise settlement was solicited; that some of the money received from the property was turned back to Mrs. Dyer; and that the attorneys were allowed by the assignee too liberal compensation for their services.

This position of the plaintiffs that the record here shows that the assignment was made with a fraudulent intent is untenable, we think. The situation and conduct of the assignor at the time it was made, and the provisions of the assignment itself, refute and disprove it. Mrs. Dyer was insolvent, creditors were attaching, she could not pay them, and in this extremity she placed all of her property in the hands of a trustee for the benefit of all of her creditors without favor or preference, reserving nothing for herself, even for her immediate necessities. Her act did not put the property beyond the reach of her creditors. It was still subject to attachment by trustee process in the hands of the assignee by any nonassenting creditor, who would by such attachment reach all of such property then held by the trustee, and not needed to satisfy the debts of any previously assenting creditors.

Neither do we perceive in the subsequent conduct of the parties, as suggested by the plaintiffs, any substantial proof of an original fraudulent intent, or actuating motive, to hinder, delay, or defraud creditors. The assignee had a right to employ others to assist him in the execution of the trust, for whose acts, however, he became in law fully responsible. If the creditors were seasonably notified of the assignment, and had an opportunity to assent thereto, and it appears that the plaintiffs were so notified, then no special duty rested on either the assignor or assignee to secure such assent.

An intent to defraud creditors, especially such creditors as have not assented to the provisions of a common-law assignment for their benefit, is not to be inferred, we think, from successful efforts to compromise the creditors' claims after such assignment is made.

We find, therefore, nothing in the assignment itself or in the situation or conduct of the parties thereto to justify the plaintiffs' claim that the assignment was fraudulent and void as to the assignor's creditors.

When notified of the assignment, the plaintiffs might have assented thereto, and secured a pro rata part of the property with other assenting creditors, or they might have attacked the assignment through bankruptcy proceedings against the assignor, or, lastly, they might have attached by trustee process the property in the hands of the assignee, and thereby secured so much thereof as would not be needed to satisfy the debts of previously assenting creditors, if any. They

did nothing, however, for four months, and then summoned the assignee as trustee of the assignor. The rights of the parties in this trustee process must be determined by the conditions as they existed at the time of the service of the writ, February 9, 1900. *Pleasant Hill Cemetery v. Davis*, supra.

The plaintiffs did not assent to the assignment, and therefore the defendant owed no contractual duty to them as such assignee.

If, prior to the service of their writ upon him, he had discharged himself of the trust by delivering back to the debtor in good faith the property received, or by paying the proceeds thereof to her bona fide creditors in settlement of their just demands, then the plaintiffs would have no legal cause to complain of his acts. *Thomas v. Goodwin & Trustees*, 12 Mass. 140.

An examination of the disclosure and other evidence in the record shows that prior to February 9, 1900, the date of plaintiffs' attachment, the defendant had paid from the \$3,780 received from the property that Minnie A. Dyer assigned to him by her orders to her bona fide creditors and to herself \$3,381.51, leaving an actual cash balance in his hands of \$398.49. But there had been a prior trustee process served upon him in favor of Swift et al., creditors of the assignor, in which prior proceedings he was finally adjudged trustee for \$215.83, and which judgment was afterward paid by him from the \$398.49, leaving but \$182.66 attachable in his hands February 9, 1900.

It is unnecessary to consider here the fact that after the service of the plaintiffs' attachment the defendant also paid \$420 to S. W. Thaxter & Co., previous attaching creditors, because the defendant now admits that he must personally lose the benefit of that payment; the same having been made without the statutory demand upon execution necessary to fix his liability therefor as against a subsequent attaching creditor.

The plaintiffs suggest that it does not sufficiently appear that the defendant's liability, as trustee in the suit of Swift et al., was legally fixed so as to afford him the benefit of that payment.

From the whole disclosure, and all the evidence in the record, we think it does appear that the payment to Swift et al. was made because the defendant was legally required so to do. The plaintiffs do not deny this in their allegations.

It appears that he paid it after a contest and hearing in court.

In answer to a question whether that payment was made "to protect you from liability," he answered "Yes."

Again, the plaintiffs contend that the defendant is chargeable for the amounts paid back to Mrs. Dyer. This contention would prevail if the plaintiffs had become parties to the assignment.

An assignee, accepting such an assignment, assumes the duty towards assenting

creditors to administer the trust according to its provisions. But, as to nonassenting creditors, he owes no such duty. They cannot legally complain if he gives up the trust and returns the property to the assignor, unless he does it with the intent and purpose thereby to defraud such nonassenting creditors. The plaintiffs here did not become parties to this assignment. They are not in a position to complain because the assignee prior to their attachment permitted Mrs. Dyer to use some of the property assigned to him, unless that was done by him to defraud them. The record does not disclose any such intent to defraud. Mrs. Dyer turned over to the assignee all of her property not attachable. She was without any means of support. Domestic difficulties resulted in divorce proceedings by her against her husband. The assignee permitted her to have from time to time for her support and expenses money from the property she had turned over to him, amounting in all to \$550. We do not think he is chargeable for that sum in this subsequent trustee process by nonassenting creditors.

Still again the plaintiffs contend that the counsel fees paid by the assignee should not be considered a proper disbursement. This contention is not maintainable. The assignee had a right to employ the services of counsel. The property was attached before it was assigned. Other suits were brought in which the assignee was summoned as trustee. The husband's rights in the property were an incumbrance upon it, to be removed in some way.

It therefore does not appear unreasonable that defendant did employ counsel. The assignment provided for the payment of necessary counsel fees. It appears that the counsel employed performed substantially all the detailed business connected with the settlement of the affairs, looked after all the litigation which has followed, and that the assignee charged nothing for his services. In view of all this, it cannot be said that the amount paid for these services is excessive, or that its payment by the assignee indicates an intent to defraud the plaintiffs.

Lastly, the plaintiffs question the authority of this court, under the exceptions, to pass upon the correctness of the judgment below because the bill of exceptions, does not indicate whether the decision was erroneous in fact or in law.

The exceptions in the case at bar provide that the "writ, evidence, including admissions made at said hearing and decree of the presiding justice, are to be annexed hereto and made a part of the bill of exceptions," thus indicating that the whole case was to be considered by the law court. But the exceptions need not specify the extent to which the law court may examine the case. Chapter 88, § 79, Rev. St., provides: "Whenever

exceptions are taken to the ruling and decision of a single justice as to the liability of a trustee, the whole case may be re-examined and determined by the law court, and remanded for further disclosure or other proceedings, as justice requires." This statute applies alike to scire facias and original proceedings in trustee process. *Brainard v. Shannon*, 60 Me. 342, was an action of scire facias. Under the exceptions this court has authority, we think, to correct any error in the judgment below whether of law or of fact.

Our conclusion is that the defendant has shown by his disclosure that prior to February 9, 1900, the date of the service upon him of the plaintiffs' original trustee writ, he had lawfully discharged himself of all the property received by him from Minnie A. Dyer except the sum of \$182.66, and for that sum only the plaintiffs should have judgment.

Accordingly the entry should be:

Exceptions sustained.

Judgment for plaintiffs for \$182.66.

(104 Me. 96)

CUTTING et al. v. HARRINGTON.

(Supreme Judicial Court of Maine. March 17, 1908.)

1. EXECUTION (§ 335*)—SALE—RETURN.

When a levy of execution upon land is made by sale instead of by extent, a return of such upon the execution itself is not required by the statute, and is not essential to the purchaser's title.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1011; Dec. Dig. § 335.*]

2. EXECUTION (§ 319*) — SALE — SHERIFF'S DEED.

The recitals by the officer in his official deed to the purchaser of land at execution sale are evidence of his doings in advertising and making the sale.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 935; Dec. Dig. § 319.*]

3. EXECUTION (§ 319*) — SALE — NOTICE TO DEBTOR.

A recital by an officer in such deed that he "sent a notice (to the judgment debtor) by mail" fairly and sufficiently imports that he prepaid the postage as required by the statute. Rev. St. c. 78, § 33.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 935; Dec. Dig. § 319.*]

(Official.)

Report from Supreme Judicial Court, Sagadahoc County.

Action by Herbert W. Cutting and others against James H. Harrington. Case reported, and judgment for plaintiffs.

Real action to recover a certain lot or parcel of land at "Rising Sun or Log Landing," in the town of Phippsburg. Plea, the general issue, with brief statement that the defendant "claims title to two undivided third parts of said demanded premises and no more."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

This action came on for trial at the December term, 1906, Supreme Judicial Court, Sagadahoc county, at which time the facts were agreed upon, and then, by agreement of the parties, the case was reported to the law court for that court to render such judgment as the law and the evidence required.

In 1874 one Thomas M. Reed was seised of the demanded premises and remained seised of the same until his death, and then, under his will, admitted to probate in 1882, the title to the same passed to his three nephews, Franklin Reed, Edwin Reed, and Andrew F. Reed, in equal shares.

On September 2, 1897, the Bath National Bank recovered a judgment against said Franklin Reed, then and thereafterwards a resident of Boston, Mass., in the Supreme Judicial Court, Sagadahoc county, for the sum of \$2,366.97, debt and costs, and on September 27, 1897, it seized upon the execution issued thereon all the right, title, and interest which the said Franklin Reed had on November 24, 1894, the date when the same was attached on the original writ in and to certain parcels of real estate in Sagadahoc county, among them being the demanded premises, and on October 30, 1897, the right, title, and interest of the said Franklin Reed in and to the demanded premises was sold at sheriff's sale upon said execution and bid in by the said Bath National Bank, a deed thereof being executed and delivered by the sheriff to said Bath National Bank October 30, 1897.

On August 25, 1898, the said Bath National Bank recovered a judgment in the said Supreme Judicial Court against said Andrew F. Reed, then and thereafterwards a resident of Boston, Mass., for the sum of \$2,529.53, debt and costs, and on September 22, 1898, it seized upon the execution issued thereon all the right, title, and interest which the said Andrew F. Reed had on September 13, 1895, the date when the same was attached on the original writ in and to certain parcels of real estate in Sagadahoc county, among them being the said demanded premises, and on October 31, 1898, the right, title, and interest of the said Andrew F. Reed in and to the demanded premises was sold at sheriff's sale upon said execution and bid in by the said Bath National Bank, a deed thereof being executed and delivered by the sheriff to said Bath National Bank October 31, 1898.

The defendant's title to the two undivided thirds of the demanded premises depended upon the validity of the two aforesaid execution sales; the plaintiff contending that there was not sufficient legal evidence that the sheriff gave to the judgment debtors the personal notices of the sales provided by statute.

The sheriff's return of sale on the execution against said Franklin Reed, so far as the same relates to the personal notice given to said Franklin Reed, is as follows: "And on the same 27th day of September, A. D. 1897, being more than thirty days before the time appointed for the sale hereafter mentioned, I sent to the said Franklin Reed a

notice in writing that said right, title, and interest would be sold by public auction on the 30th day of October, 1897, at 10 o'clock in the forenoon at the sheriff's office in Bath, in said county," etc. The execution against said Andrew F. Reed was not returned to the office of the clerk of courts, and the record does not disclose that the sheriff ever made any return of sale thereon.

The sheriff's deed of the demanded premises sold on the execution against the said Franklin Reed, so far as the same relates to the personal notice of sale given to the said Franklin Reed, contains a recital, as follows: "And whereas, on the twenty-seventh day of September, A. D. 1897, I sent to the said Franklin Reed a written notice by mail that on the thirtieth day of October, A. D. 1897, at 10 o'clock in the forenoon, at the sheriff's office in the city of Bath, in the said county of Sagadahoc, said right, title, and interest of the said Franklin in and to the real estate aforesaid would be sold at public auction, said notice having been given at least thirty days before said time appointed for the sale." The sheriff's deed of the demanded premises sold on the execution against the said Andrew F. Reed also contains a similar recital differing only in the necessary change in name and dates.

Rev. St. c. 78, § 33, prescribing the notices to be given by the officer when real estate has been seized on execution and is to be sold at public auction, reads as follows: "The officer in such case shall give written notice of the time and place of sale, to the debtor in person, or by leaving the same at his last and usual place of abode, if known to be an inhabitant of the state, and cause it to be posted in a public place in the town where the land lies, and in two adjoining towns, if so many adjoin; and if the land is situated in two or more towns, then in each of those towns, and in two towns adjoining each of them; and if the land is in two or more counties, an officer in either county may sell the whole right. When the land is not within any town, the notice shall be posted in two public places of the shire town of the county in which the land lies, instead of the posting aforesaid. When the debtor is not a resident of such county, the personal notice may be forwarded to him by mail, postage paid; all to be done thirty days before the day of sale. The notice shall also be published for three weeks successively before the day of sale, in a newspaper printed in whole or in part in such county, if any, otherwise in the state paper."

The case is stated in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

Staples & Glidden, for plaintiffs. George E. Hughes, for defendant.

EMERY, C. J. Real action on report. The controversy is over two undivided thirds

of the demanded land which the defendant claims under levy of execution. The judgment and the execution are admitted to be valid. The levy was by sale of the land under what is now Rev. St. c. 78, § 82 et seq. The only objection urged against the validity of the sale and its efficacy to pass the title to the purchaser is that there is not sufficient legal evidence that the officer gave to the judgment debtor the notice of sale provided by the statute.

The plaintiffs claim that the only competent evidence of such notice is the return of the officer upon the execution, which return in this case may be conceded, arguendo at least, not to show sufficient notice. But, as was said by this court in *Caldwell v. Blake*, 69 Me. 458, at page 470: "Where an extent is made upon lands, the return of the officer must be seasonably made and recorded. Not so where property is sold upon execution. The statute does not require it, and the decisions are that 'the purchaser's title is not dependent on the performance of this duty by the officer. The purchaser has no control over the officer, and is not prejudiced by a deficient or incorrect return, nor by the entire absence of any return whatever.'" The giving the notice of sale, and how given, may be proved, *prima facie* at least, by the officer's recitals in his official deed to the purchaser. *Wigmore on Evidence*, § 1664.

In his official deed in this case the officer recited that he "sent to the [judgment debtor, naming him] a written notice by mail" of the time and place of sale; the debtor not being a resident of the county in which the land lay. The statute (section 33) provided that in such case the notice might be "forwarded to him (the debtor) by mail, postage paid." The plaintiffs contend that, even if the recitals are evidence, the omission of the words "postage paid" from the recital is fatal, and that because of that omission the purchaser acquired no title.

In cases of levy upon land by extent (where, instead of being sold at public sale after public notice, the land was transferred direct to the judgment creditor, as was formerly the practice in Maine and other New England states), it was generally held that the officer's return of his doings must be drawn with fullness and exactness. Inferences and presumptions were allowed little, if any, force. Such has been the rule of construction in this state in such cases. We do not think, however, that those decisions control the decision of cases like this, where the land is sold at public sale after ample public notice. Indeed, it is very generally held in the other states that, when a sale upon execution is actually made and a deed executed and delivered to the purchaser, no evidence of notice of the sale having been given need be adduced by him in support of his title. In *Freeman on Executions* (3d Ed.) § 286, the learned author, with many citations of authorities, says: "A very de-

cided preponderance of the authorities maintains this proposition: That the statutes requiring notice of the sale to be given are directory merely, and that the failure to give such notice cannot avoid the sale against any purchaser not himself in fault. This rule has been applied in cases where the purchaser was aware of the deficiency of the notice, and seems applicable in all cases in which the absence of the notice was not occasioned by some fraud or collusion of which the purchaser had notice, or in which he participated." The theory seems to be that, while the officer is responsible to any party harmed by the absence or insufficiency of the prescribed notice of sale, the sale itself cannot be collaterally avoided thereby. Section 339. The purchaser at an execution public sale or his grantee is not in the same relation to the judgment debtor as is the judgment creditor taking the debtor's land direct to himself by extent. Their titles are different in origin and nature. The purchaser may have the benefit of reasonable inferences and presumptions in reading the officer's recitals of his doings without conflicting with the strict rule in cases of levy by extent. Section 339 of *Freeman on Executions*. Thus in *Wood v. Morehouse*, 45 N. Y. 368, where one question was whether the officer had given the proper notice of an execution sale, the court held that, in the absence of evidence to the contrary, it was to be presumed, under the maxim "*Omnia præsuntur rite esse acta*," that the officer gave the proper notice. Other cases to the same effect are cited by *Freeman* in the section 339 above cited.

In this state, also, the strict rule applied to returns of levy by extent has been relaxed in cases of levy by sale. In *Bailey v. Myrick*, 50 Me. 171, the statute required the notice of sale to be published in some "public newspaper." The officer returned that he had published the notice in "a newspaper," omitting the word "public." The court held that it sufficiently appeared that the statute was complied with; that the word "newspaper" imported publicity. In *Millett v. Blake*, 81 Me. 531, 18 Atl. 293, 10 Am. St. Rep. 275, the judgment debtor was described in the execution as residing in Lagrange. In his recital of sending a notice by mail the officer did not state that he directed it to the debtor at Lagrange. The court held that such a direction could be inferred, saying (page 535 of 81 Me., page 294 of 18 Atl. [10 Am. St. Rep. 275]). "Something may be inferred as to the correctness of the action of a public officer when the law requires him to do a certain act."

In the case at bar, as already stated, the statute provided that the notice to the debtor might be "forwarded to him by mail postage paid." The officer recited he "sent to the said [debtor] a written notice by mail." Taking into account the legal presumption "as to the correctness of the action of a public officer when the law requires him to do a cer-

tain act," as was done in *Millett v. Blake*, supra, we think it a fair, and even obvious, inference that the officer prepaid the postage. It was at the time (1897 and 1898) well known that under the postal laws and regulations mail matter would not be forwarded without prepayment of postage. It had then, as now, become a fixed habit, especially among business men and officials, to prepay postage by means of affixing a stamp. Any one then asserting he had "sent by mail" a letter or document would have been universally understood as asserting that he had done everything required to insure its being forwarded, including prepayment of postage as well as depositing the letter in the proper post-office receptacle. If convinced that, in fact, he had not prepaid the postage, he would have retracted his assertion that he had "sent" the letter. The single word "mailed," as used by a notary in his certificate, is held to imply that the requisite postage was prepaid. *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404, 69 S. W. 51. The words "sent by mail" would seem to be of as strong import in any connection.

We find no previous decision of this court in cases of levy by sale compelling us to construe the officer's recitals in this case so strictly and technically as the plaintiffs would have us. In *Pratt v. Skolfield*, 45 Me. 386, where the officer's deed was held defective for want of sufficient recitals, the defects are not stated. Hence that case is no guide. Even in the cases of levy by extent, no return has been adjudged insufficient because of an omission like this. Granting that the court should be critical in construing official returns to see that all essentials are fully stated or clearly implied, or presumed by law, yet it would be hypercritical to hold at this day that an official recital by an officer that he had "sent a written notice by mail" does not import that he affixed the usual stamp, thus prepaying the postage (that being his official duty), as well as that he deposited the document in the proper post-office receptacle.

No other objection is made to the deed or recitals in the deed and none is perceived. It must be held, therefore, that the defendant has the better title to two-thirds, and that the plaintiffs can only have judgment for one-third of the land.

Judgment for the plaintiffs for one undivided third only of the demanded land.

(75 N. H. 107)

BANK COM'RS v. SECURITY TRUST CO. et al.

(Supreme Court of New Hampshire. Hillsborough. Nov. 4, 1908.)

1. BANKS AND BANKING (§ 73*) — BANKING CORPORATIONS—CAPITAL STOCK—NATURE—RIGHTS OF CREDITORS.

The capital stock of a corporation doing a banking business is in the nature of collateral

security, and is for the benefit of all the creditors of the company.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 155; Dec. Dig. § 73.*]

2. BANKS AND BANKING (§ 317*)—TRUST COMPANIES—INSOLVENCY—DISTRIBUTION OF ASSETS—SAVINGS DEPOSITORS—STATUTES—CONSTRUCTION.

Pub. St. 1901, c. 165, § 18, provides that trust companies, etc., transacting the business of a savings bank shall conduct the business as a separate department, and be amenable to the laws governing savings banks. *Held*, that the Legislature intended to create funds for the special benefit of depositors in savings departments, and that where a trust company authorized to do a general banking and savings bank business failed, and its assets consisted of securities held under said section 18, securities deposited with trustees to secure the payment of debenture bonds, and unpledged assets, the relation between the different classes of claimants of the funds in the hands of the assignee and the trust company was that of debtor and creditor, and that the depositors in the savings department as well as the holders of debenture bonds were entitled to share with the unsecured creditors in the distribution of the unpledged assets as to so much of their claims as were not satisfied out of the special funds created for their benefit.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 1222; Dec. Dig. § 317.*]

3. BANKS AND BANKING (§ 317*)—INSOLVENCY—EXPENSES OF ADMINISTRATION.

Securities set apart for the benefit of depositors in the savings department of an insolvent trust company doing a banking business must bear the expense incident to administering them, and the same is true of securities deposited for the benefit of holders of debenture bonds issued by the company.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 1222; Dec. Dig. § 317.*]

Transferred from Superior Court, Hillsborough County; Stone, Judge.

Proceedings by the Bank Commissioners against the Security Trust Company and others. Petition for instructions as to the distribution of assets. Case discharged.

The following questions were transferred to the Supreme Court:

- (1) How shall the funds be distributed?
- (2) How shall the expenses of administration be apportioned?

The Security Trust Company was incorporated in 1889 (Laws 1889, p. 158, c. 175), and was authorized, among other things, to do a general banking and a savings bank business. At the time of its failure in 1896 its assets consisted of (1) securities held under the provisions of section 18, c. 165, Pub. St. 1901; (2) securities deposited with trustees to secure the payment of several issues of debenture bonds; and (3) unpledged assets. There are three general classes of creditors: (1) Depositors in the savings department; (2) holders of debenture bonds; and (3) unsecured creditors. The amount realized from the assets of the saving department is insufficient to satisfy the claims of the depositors, the amount realized from the securities deposited with trustees is insufficient to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

satisfy the claims of bondholders, and the amount realized from unpledged assets is insufficient to satisfy the claims of unsecured creditors.

Edwin G. Eastman, Atty. Gen., for petitioners. George B. French, for trustees and others. Taggart, Tuttle, Burroughs & Wyman, for Walter M. Parker and others.

YOUNG, J. 1. The relation between the different classes of claimants of the funds in the hands of the assignee and the trust company is that of debtor and creditor. *Bank Commissioner v. Banking Co.*, 74 N. H. 292, 67 Atl. 583. Therefore the depositors in the company's savings department, as well as the holders of debenture bonds, are entitled to share with the unsecured creditors in the distribution of the unpledged assets as to so much of their claims as are not satisfied by the application of the special funds created for their benefit. *Bank Commissioners v. Trust Co.*, 70 N. H. 536, 539, 49 Atl. 113. The defendants, however, contend that the rule which permits secured creditors whose security is insufficient to pay their claims in full to share with the general creditors as to the balance of their claims has no application in this case in so far as these depositors are concerned, because, as they say, when the Legislature enacted section 18, c. 165, Pub. St. 1901, it made two distinct institutions of every trust company engaged in the savings bank business—a savings bank and a trust company—and the rights of the creditors of one of these institutions to share in the assets of the other is similar to the right of preferred shareholders to participate in the distribution of the corporate assets. If this was the legislative purpose, it follows that, when a trust company sets apart securities having an estimated value about equal to the amount due the depositors in the savings department, all the rest of the company's assets, including not only the capital stock and the profits from the general banking business, but also the profits from the savings department, constitute a fund for the special benefit of the general creditors. It is clear that this is so; for under such a construction of the section the depositors in the savings department of such an institution are not permitted to share in the distribution of the general assets until after the claims of general creditors are satisfied. In other words, if the contention is sound, the section was enacted for the special benefit of general creditors of such institutions.

The major premise upon which the defendants rest their contention that such is the proper construction of the section above cited is the proposition that the depositors in the savings department of such an institution do not contribute anything toward the general assets; and that "natural justice" requires that those who do not contribute to a fund should not share in its distribution until

after the claims of those who helped to create it have been satisfied. The minor premise is that there is a presumption the Legislature intends to do what natural justice requires should be done. Hence they say that, since these depositors did not help create the general assets, there is a presumption the Legislature did not intend they should share in their distribution; for to permit them to do so would not be in accordance with the dictates of "natural justice." There are several answers to this contention. One is this: The minor premise overlooks the fact that "natural justice" requires that not only those who help create a fund, but also those for whose benefit it is created, should share in its distribution. All corporations which engage in the banking business have a paid-up capital. One purpose of this capital is to create a fund available to pay the claims of all those who have dealings with such companies. In other words, one purpose of the paid-up capital of such an institution is to create a fund in the nature of collateral security, and this fund is for the benefit of all the creditors of such an institution—not for the benefit of a particular class. According to the view of the general creditors, however, their claims must be paid in full out of this fund before any of it is available to pay the claims of depositors in the savings department of such an institution. Another fatal objection to this contention is that the proposition on which it rests is not in accordance with the fact. The profits of the savings department of such an institution go into and become a part of the general assets just as much as the profits of the general banking business. Consequently, since "natural justice" requires that those who help create a fund and those for whose benefit it is created should share in its distribution, the Legislature must have intended that the depositors in the savings department of a trust company should share in the distribution of the general assets in the same way and to the same extent as the company's other creditors. Although in this case, as in the case of all other insolvent concerns, the losses more than equal the capital paid in by the shareholders, it is not fair to any particular class of creditors to say that as to that class it is the capital stock which is lost, however it may be as between the creditors and the shareholders. *Bank Commissioners v. Banking Co.*, 74 N. H. 292, 67 Atl. 583. As has been seen, the capital stock is in the nature of collateral security, and is for the benefit of all the creditors of the company. Consequently, when it comes to the distribution of the assets of such a corporation among its creditors, the capital stock is treated as an existing fund, in so far as the unpledged assets are sufficient for that purpose. When the Legislature enacted section 18, c. 165, Pub. St. 1901, it did not intend to make two separate institutions of such trust companies

as were engaged in the savings bank business, but did intend to create funds for the special benefit of the depositors in their savings departments. That this is so seems perfectly clear from an examination of the legislation in respect to savings banks. Pub. St. 1901, c. 165; Laws 1893, p. 42, c. 52; Laws 1895, pp. 449, 464, 474, cc. 92, 105, 114; Laws 1899, pp. 312, 314, cc. 72, 74; Laws 1901, p. 616, c. 114; Laws 1905, p. 419, c. 32. Such an examination discloses a legislative purpose to protect such depositors, even at the expense of the general creditors of such institutions. Since this is so, there is a presumption that section 18, c. 165, Pub. St. 1901, was enacted to protect them; and, as there is nothing to rebut the presumption, it must be held that that was the purpose for which it was enacted. Consequently the securities set apart under the provisions of the section should be treated just as they would be if the company had deposited them with a trustee to secure the payment of the claims of these depositors.

2. It is the general rule that the expense incident to administering a special fund is a charge upon it. There is nothing to show that the Legislature intended a different rule should apply in the case of funds created by banks for the special benefit of a class of their creditors. Since this is so, the securities set apart for the benefit of the depositors in the savings department of the trust company must bear the expense incident to administering them, and the same is true of those deposited with the trustees for the benefit of the holders of debenture bonds.

Case discharged.

BINGHAM, J., did not sit. The others concurred.

(75 N. H. 536)

DRISCOLL v. ROLFE et al.

(Supreme Court of New Hampshire. Merri-mack. Nov. 4, 1908.)

MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—FAILURE TO WARN AND INSTRUCT—NEGLECT—SUFFICIENCY OF EVIDENCE.

Plaintiff, an inexperienced employé, 12 years old, was placed at work, without warning or instruction, on a sanding machine, and while attempting, in the performance of what he reasonably thought to be his duty, to clean a roll while the machine was in motion was injured by his hand being caught in a cylinder. *Held*, that a finding of negligence on defendants' part was justified.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

Exceptions from Superior Court, Merri-mack County.

Case for negligence by David F. Driscoll against C. M. & A. W. Rolfe. There was a verdict for plaintiff, and the case was transferred from the superior court, on defendants' exceptions to the denial of their mo-

tions for a nonsuit and the direction of a verdict in their favor. Exceptions overruled.

The evidence tended to prove that the plaintiff, a boy 12 years old, small of his age, and of no experience with machinery, was taken by one of the defendants from the work he had been doing, and put at work taking panels away from a sanding machine. Rolfe said to Worthley (the man in charge of the sander), "Here is a boy for you to work on the sander, look out for him," showed the boy how to take panels away, and then left. The panels came through scratched, and Worthley stopped the machine to clean the front top roll. The plaintiff supposed he must do the same, and got upon the machine and cleaned the rear roll. The panels continued to come through scratched, and Worthley began work on his top roll while the machine was in motion. The plaintiff again supposed it was his duty to follow his superior's example, and while he was attempting to clean the rear roll his hand was caught by the revolving sand cylinder, which was located just below the roll. Up to the time of the accident he had never seen a sandpaper cylinder, and did not know that there was any danger in doing the work as he attempted to do it.

Mitchell, Foster & Lake and Martin & Howe, for plaintiff. Streeter & Hollis, for defendants.

PEASLEE, J. The case is not distinguishable in principle from *Bennett v. Warren*, 70 N. H. 504, 49 Atl. 103. The plaintiff was inexperienced, did not know of the concealed danger, and was in the performance of what he reasonably thought to be a part of his duty. It might well be found that it was negligence to set a child at this work without any instruction or warning. The motions for a nonsuit, and that a verdict be directed for the defendants, were properly denied.

Exceptions overruled. All concurred.

(75 N. H. 116)

KEEFE v. SULLIVAN COUNTY R. R.

(Supreme Court of New Hampshire. Cheshire. Nov. 4, 1908.)

1. EVIDENCE (§ 244*)—ADMISSIONS—CORPORATE AGENTS.

Declarations of a person, made when acting as foreman in charge of the track and fences of a railroad company, as to the location of the boundary of the right of way, are inadmissible as admissions binding on the company.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

2. EVIDENCE (§ 274*)—HEARSAY EVIDENCE—DECLARATIONS—ADMISSIBILITY.

Declarations of a deceased person, having the means of knowledge, without interest to misrepresent, are competent on the question of the boundary of land, whether such person was at the time the owner of the land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1129-1134; Dec. Dig. § 274.*]

3. EVIDENCE (§ 309*)—PROOF—PRELIMINARY EVIDENCE—DECLARATIONS.

The fact that a person, since deceased, who made declarations as to the boundary of land, had means of knowledge essential to render the declarations admissible, may be shown by other evidence than his ownership of the land at the time the declarations were made.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 309.*]

4. EVIDENCE (§ 274*)—HEARSAY EVIDENCE—DECLARATIONS—ADMISSIBILITY.

The declarations of a deceased person made when acting as foreman in charge of the track and fences of a railroad company, while on the premises, as to the boundary of the right of way, are competent on the issue of the boundary on the theory that he knew where the boundary was.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1129-1134; Dec. Dig. § 274.*]

5. EVIDENCE (§ 274*)—HEARSAY EVIDENCE—DECLARATIONS—ADMISSIBILITY.

Declarations of a deceased person, made when acting as foreman in charge of the track and fences of a railroad company as to the boundary of the right of way, are not inadmissible because made while such person was off the premises, and the boundary was not pointed out.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1129-1134; Dec. Dig. § 274.*]

6. EVIDENCE (§ 274*)—HEARSAY EVIDENCE—DECLARATIONS—ADMISSIBILITY.

Declarations of a deceased person as to the boundary of land are not inadmissible on the issue of boundary because he, at the time the declarations were made, owned adjacent land, the objection of interest going only to the weight of the declarations.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1129-1134; Dec. Dig. § 274.*]

7. BOUNDARIES (§ 35*)—EVIDENCE.

Where, on the issue of the boundary of a railroad right of way it did not appear that stone bounds, alleged to have been set along a center line of the right of way, were set along a line as surveyed, or that the line, as surveyed, was the center line of the right of way, and it was not shown that the track was so constructed that its center line coincided with the center line of the right of way, the evidence as to the setting of stone bounds was immaterial.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 35.*]

8. EVIDENCE (§ 505*)—OPINION EVIDENCE.

The location of the boundary of a railroad right of way and the place where a curve in the original lay-out of the main line began are not subjects concerning which an expert may give his opinion, and an engineer, though possessing expert knowledge and knowledge of data furnished, is not competent to give his opinion, but the data and details of a survey are sufficient to enable the jury to determine the question.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 505.*]

9. EVIDENCE (§ 470*)—OPINION EVIDENCE—ADMISSIBILITY.

When it is supposable that jurors can form a correct judgment without the aid of the opinion of others from facts stated, the opinions of others are not as a general rule admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 470.*]

10. EVIDENCE (§ 505*)—OPINION EVIDENCE—ADMISSIBILITY.

Where an expert had made a survey for the purpose of ascertaining the location of a disputed boundary, and in testifying he stated the data made use of in his survey, and the work done in pursuance thereof, and the survey shows the location of the boundary on the ground, his opinion as to the location of the boundary is inadmissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 505.*]

11. APPEAL AND ERROR (§ 842*)—REVIEW—OPINION EVIDENCE—QUESTIONS REVIEWABLE.

Whether a given subject is one concerning which an expert may express an opinion is a question of law.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 842.*]

12. EVIDENCE (§ 546*)—OPINION EVIDENCE—EXPERT TESTIMONY.

What qualifications are necessary to entitle a witness to testify as an expert is a question of law, but the question whether a witness has such qualifications is a question of fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2363; Dec. Dig. § 546.*]

13. EVIDENCE (§ 174*)—BEST AND SECONDARY EVIDENCE.

A copy of a plan embodying the results of a survey to establish a boundary is inadmissible without showing that the original could not be produced.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 561, 569; Dec. Dig. § 174.*]

14. BOUNDARIES (§ 35*)—EVIDENCE—ADMISSIBILITY.

The testimony of a witness that he set out an elm tree a specified number of feet from fence posts on a line is admissible to show the location of such fence.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 35.*]

Transferred from Superior Court, Cheshire County; Chamberlin, Judge.

Writ of entry to recover land by James Keefe against the Sullivan County Railroad. There was a verdict for defendant, and the cause was transferred from the superior court. Exceptions sustained, and verdict set aside.

Joseph Madden, Leonard J. Wellington, and Davis & Davis, for plaintiff. John E. Allen and Albin & Sawyer, for defendant.

BINGHAM, J. The plaintiff and the defendants are adjoining owners of land. The location of the easterly line of the plaintiff's lot and the westerly line of the defendants' right of way is in dispute. The plaintiff claims it is located some four to six feet east of the line where the defendants built a high fence in 1904, and the defendants claim that the high fence is on the true line. The right of way was surveyed and laid out in 1847. Its westerly line as then surveyed is the plaintiff's true east line. There was evidence that in 1870 the defendants built a fence some six feet east of the one which they erected in 1904; that they were maintaining it at that place when the plaintiff

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

purchased his lot in 1882; that they continued to do so down to 1888, when they double tracked their road, and put in a side track and two switches opposite the plaintiff's property; and that it was then broken down or buried in the process of raising the tracks and widening the roadbed. In 1874 one Torpey was foreman in charge of the fences and tracks on the section which passes the plaintiff's land. He was then about 60 years of age, and had been foreman for some 5 years. At this time he owned the premises now owned by the plaintiff, and in the presence of one Wessul, a witness for the plaintiff, stated that the fence (meaning the one put up in 1870) was the west line of the right of way. At the time of the trial Torpey was dead, and the plaintiff offered his declaration in evidence as that of a person who was familiar with things pertaining to the defendants' property and likely to know where the boundary line was, and as an admission; but upon the suggestion of the defendants' counsel that the statement concerned the declarant's own land, and that the Central Vermont Railroad was then operating the defendants' road as lessee, the court excluded the testimony until it should be shown that the party making the declaration had authority to make it. It also appeared that for a series of years just before and after the plaintiff purchased his land one Powers was foreman in charge of the fences and roadbed on this section, and at the time of trial was dead; and the plaintiff offered to show that before he purchased his land Powers, when upon the premises of the defendants, pointed out to him the fence erected in 1870 as the west line of the right of way. This evidence was offered upon the ground that the declaration was that of a person having knowledge of the boundary made while upon the property and in charge of it. It was excluded, and the defendant excepted.

The defendants now contend that the evidence above referred to was properly excluded, and for the following reasons: (1) Because the declarations were offered solely as admissions, and could not be received as such for the reason that neither Torpey nor Powers was shown to be an agent of the defendants, and, if they were, that it did not appear they possessed authority to bind the defendants; (2) because neither of them was shown to be an owner of land as to the boundaries of which their declarations related and were material evidence—that the declarations of deceased owners only were admissible. But the first position, that the declarations were offered solely as admissions, cannot be sustained. It clearly appears that the offers were made upon two distinct grounds: (1) As declarations of deceased persons who presumably knew where the division line between the plaintiff's and defendants' property was; and (2) as admissions binding upon the defendants. As ad-

missions, the plaintiff does not now contend but that they were properly excluded, and such is undoubtedly the law. *Clough v. Company*, 75 N. H. —, 71 Atl. 223. But, as declarations of deceased persons, he contends that both were admissible; that proof of ownership of land by the declarant is material only as bearing upon the question whether the person making the declaration presumably knew the location of the boundary in regard to which he undertook to speak and which was material to the issue; that such proof is but a species of evidence bearing upon the question of knowledge, the want of which may be supplied by other evidence of equal weight; that as to Torpey the defendants' counsel admitted at the trial that he was the owner of the land now owned by the plaintiff, from which it would follow that he presumably knew its bounds, independently of the proof that he was the person in charge of the defendants' roadbed and fences; and that, as to Powers, proof of ownership was unnecessary, it appearing that he had for many years had charge as foreman of the defendants' roadbed and fences on their right of way past the plaintiff's premises, and therefore presumably knew its bounds.

In *Adams v. Stanyan*, 24 N. H. 405, 417, the law upon this question is stated as follows: "The declarations of deceased persons who were so situated as to have the means of knowledge, and had no interest to misrepresent, are competent evidence upon a question of boundary, whether the same pertains to public tracts or private rights." It is true that in this case the declarant was the owner of land, and that the location of one of its bounds was material evidence upon the question of the location of the line between the parties to the suit; but it is apparent that the court regarded the fact of ownership merely as evidence disclosing that the declarant was "so situated as to have the means of knowledge." The same view is presented in *Lawrence v. Tennant*, 64 N. H. 532, 541, 15 Atl. 543, 546, where Judge Blodgett says: "The interests of F. Sanborn and B. M. Towle, as the respective owners of adjacent lots, the common boundary of which was unquestioned, showed a strong probability that they had knowledge of that boundary." And in *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591, it was held that the declarations of a testator as to the contents of a lost will were admissible to prove its contents, clearly recognizing that proof of probable knowledge on the part of a declarant may be satisfied by other evidence than the ownership of land. Judge Parsons there says (page 281 of 68 N. H., page 396 of 44 Atl. [73 Am. St. Rep. 591]): "The objection to the evidence is that it is hearsay, not open to cross-examination, and not given under the sanction of an oath. The declaration, however, is that of a person now deceased, having the means of knowledge with-

out interest to misrepresent, and is the best evidence of which the case is capable. *Betts v. Jackson*, 6 Wend. (N. Y.) 173. It is difficult to see on what ground the reason of the admission of the evidence of declarations of deceased persons in cases of disputed boundary, which is put upon the ground that it is the best evidence of which the case is capable, does not apply to cases like the present. *Lawrence v. Tennant*, 64 N. H. 532, 15 Atl. 543; *Nutter v. Tucker*, 67 N. H. 185, 30 Atl. 352, 68 Am. St. Rep. 647. To admit the declaration of a deceased person in one class of cases because it is the best evidence of which the case is capable, permitting the jury to judge of the interest of the declarant as bearing upon the weight of his testimony (*Lawrence v. Tennant*, *supra*), and to exclude the declaration of the deceased person in this case, would be to establish a particular rule of evidence for a special class of cases, for which no good reason can be given." To the same effect, see *Smith v. Powers*, 15 N. H. 546, 563; *Lawrence v. Haynes*, 5 N. H. 83, 20 Am. Dec. 554; 2 Wig. Ev. § 1563; 1 Gr. Ev. § 140a. The declaration of Torpey was not rendered inadmissible because it was made off the land and the boundary referred to was not pointed out (*Lawrence v. Tennant*, 64 N. H. 542, 15 Atl. 543; *Smith v. Forrest*, 49 N. H. 220, 237), nor on the ground of interest because he was a former owner of the plaintiff's land. The objection of interest goes to the weight of the evidence, and not to its competency. *Nutter v. Tucker*, 67 N. H. 185, 30 Atl. 352, 68 Am. St. Rep. 647; *Wood v. Fliske*, 62 N. H. 173; *South Hampton v. Fowler*, 54 N. H. 197, 200.

In 1847 a line of road known as the "Bellows Falls Branch," connecting with the main line of the defendants' road several hundred feet south of the plaintiff's premises and extending southwesterly across the Connecticut river to Bellows Falls, Vt., was constructed. In 1881 stone bounds were set along the road on lines claimed by the defendants to be the center lines of the rights of way as surveyed and laid out in 1847 and 1849. They were set 1,000 feet apart, beginning with the branch line at the northeasterly end of the bridge over the Connecticut river, thence in a northerly direction along that line to the main line, and thence on the main line several miles north of the plaintiff's premises. In support of their contention, and subject to the plaintiff's exception, the defendants called one Clark, who worked for them as a civil engineer in 1881 on these lines; and in reply to the question, "Did you set bounds—what did you do with reference to setting bounds along the line of the Sullivan County Railroad?" he answered: "I made a survey from what is now the iron bridge, along the track through what they call 'Chapin's switch,' along up by Dutchman's crossing, following the track up to Charlestown and ultimately continuing it to Windsor." The

witness also testified that the center line of the new bridge is on the center line of the old one, and that the center line of the bridge is the center line of the track, except for a distance at the south end of the bridge, which is on a curve. The materiality of this evidence is not apparent, and, unless supplemented by other evidence, it would seem that its only effect must have been to mislead and confuse the jury. It does not appear that the stone bounds were set along the line which the witness surveyed, or, if they were, that the line he surveyed was the center line of the defendants' right of way on the branch laid out in 1849, or of the right of way on the main line as laid out in 1847; and, while the tracks may have been so constructed that their center lines coincided with the center lines of the rights of way, the fact whether they were so constructed past the plaintiff's premises depends upon proof, of which, so far as this case discloses, there was none.

There was a curve in the original lay-out of the main line, known in the case as the "230 curve," and one of the questions in dispute was as to where it commenced. The plaintiff's evidence was that prior to the time he bought his land, and, when the road had but a single track, the curve began some distance south of the southeast corner of his land and at Elm street, and that later, when the double track was put in, it was changed, and began further north and opposite the southeast corner. Upon this question the defendants called certain witnesses, who qualified as civil engineers, and were allowed to testify, subject to the plaintiff's exception, where in their judgment the point of curvature commenced, and also whether in their judgment the fence erected in 1904 was upon the true line between the plaintiff's land and the defendants' right of way. This was error. The location of the true line between the parties and the place where the curvature began were not subjects in regard to which the opinions of engineers could be given in evidence. Although an engineer's knowledge gained from study and experience in his profession, taken in connection with the data furnished by the plan of 1847, would aid him in making a resurvey of the defendants' right of way and in ascertaining the location of its west boundary, nevertheless it is difficult to see why a jury may not be capable of judging whether the bound thus located is the true bound without the aid of the opinion of the engineer upon the question, the data, and details of the resurvey having been laid before them. And what is true of the location of the west boundary is true of the point of the commencement of the curve.

In *Leighton v. Sargent*, 31 N. H. 119, 133, 64 Am. Dec. 323, it is said: "When it is supposable that jurors can form a correct judgment or opinion without the aid of the opinion of others from facts stated, the opin-

ions of others are not as a general rule to be received in evidence." We think this is the rule applicable to this case, and we are confirmed in this view of the law by the method commonly pursued in the examination of witnesses who have qualified as engineers. According to this practice, an engineer who has made a survey for the purpose of ascertaining the location of a disputed boundary is required to state the data made use of in his survey, the work done in pursuance thereof, and where his survey shows the bound or point in question to be located upon the ground. Where such a course has been pursued, it would not seem that a jury would be likely to prove incapable of forming a correct judgment as to the location of the true bound without the aid of the opinion of the engineer. The finding of fact in the superior court that the subject-matter in regard to which the engineers were allowed to give their opinions as experts was such as to make expert testimony admissible is unimportant. Whether a given subject is one concerning which an expert may express an opinion is a question of law. *Jones v. Tucker*, 41 N. H. 547, 549; *Dole v. Johnson*, 50 N. H. 452, 458. In the latter case it is said: "When a witness is offered as an expert, three questions necessarily arise: (1) Is the subject concerning which he is to testify one upon which an opinion of an expert may be received? (2) What are the qualifications necessary to entitle a witness to testify as an expert? (3) Has the witness those qualifications? The first two questions are matters of law. The third is matter of fact." Prior to 1904 one Williams made a survey of the railroad in front of the plaintiff's land, and embodied his work in a plan. The introduction of a copy of this plan against the plaintiff's objection and without showing that the original could not be produced was error. The testimony of Tidd that in 1890 or 1891 he set out an elm tree 21 feet west of the fence posts on the line between his land and the defendants' west line of their right of way was properly received as tending to show where the old fence was located.

It is not deemed necessary to consider the other questions in the case, as they are not likely to arise at another trial.

Exceptions sustained. Verdict set aside. All concurred.

(71 N. J. E. 595)

BEAR LITHIA SPRINGS CO. v. GREAT BEAR SPRING CO.

(Court of Chancery of New Jersey. May 22, 1906.)

1. CORPORATIONS (§ 49*)—CORPORATE NAME—ADOPTION.

A corporation may adopt a corporate name if not in conflict with the corporation act, but such adoption gives it no greater right to use it

to the injury of another than if an individual should so act. A corporation cannot appropriate the name or trade-marks of another, and thus obtain its business by any simulation or deceit.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 137; Dec. Dig. § 49.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 58*)—INFRINGEMENT.

Where the complainant had first adopted as a trade-mark or symbol the figure of a black bear, the defendant's subsequent use of a polar bear as a trade-mark or symbol is not an infringement.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 67; Dec. Dig. § 58.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 85*)—FRAUDULENT USE OF TRADE-NAME—RELIEF OF INFRINGER.

If the commodity which the complainant is selling under a trade-name, trade-mark, or symbol is offered to the public under a misrepresentation or falsehood, he has no standing in a court of equity, nor can he successfully call upon that court to aid him in preserving to him the right to deceive the public without interruption.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 94; Dec. Dig. § 85.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 85*)—INFRINGEMENT—FRAUD OF COMPLAINANT.

The complainant's advertisement of its water as "bottled at the spring," when in fact it was bottled at a city warehouse, and also the declaration in such advertisement that such water is a cure for certain diseases named therein, contrary to the truth, are such misrepresentations as will induce the court to refuse the complainant any relief.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 94; Dec. Dig. § 85.*]

(Syllabus by the Court.)

Bill by the Bear Lithia Springs Company against the Great Bear Spring Company. Bill dismissed.

See, also, 68 Atl. 86.

Collins & Corbin, for complainant. Weller & Lichtenstein, for defendant.

BERGEN, V. C. The issue presented in this cause is the alleged infringement by the defendant of complainant's trade-name and symbol. The complainant advertises its potable water under the name "Bear Lithia Water," and a symbol which is the representation of a black bear, with the words "Bear Lithia Water" printed across its body. It appears that recently some of the advertising matter of the complainant contains figures or representations of various kinds of bears, including one of a polar bear, but such use was made for the purpose of illustrating the printed matter, and not with the intention of adopting them as a trade symbol. The symbol used by the complainant upon all of its labels, and which it relies upon as its adopted trade-mark, is a black bear standing upon four feet, with the words above mentioned printed across its body. The de-

fendant advertises its potable water and offers it to the public under the name of "Great Bear Spring Water," and is using as a trade symbol the figure of a polar bear standing on a cake of ice in some cases, and in others partly on a cake of ice and partly in the water in which the ice is floating. The complainant claims priority in the use of a bear as a symbol, and of the word "Bear" as descriptive of the origin and ownership of the articles sold, and charges that in using the polar bear as a symbol, and the words "Great Bear Spring" as descriptive, the defendant has created a confusion in the marketing of goods of the respective parties, resulting in unfair competition, besides misleading the unwary purchaser, and prays that the defendant be restrained from using the word "Bear," or the figure of a bear of any description, in connection with its business. The water sold by the complainant comes from springs at Elkton, Va., located on lands owned by a family named Bear as long ago as 1778, and which, at least since 1860, have been known in the neighborhood of Elkton as "Bear Springs" a name undoubtedly accorded because the lands were owned by the Bear family. While the testimony shows that this water was sold prior to 1885, such sales were confined to a very limited area, and were not of sufficient moment to have any weight in settling the merits of this controversy, but in the latter year an analysis of the water was made by Professor Mallet, of the University of Virginia, which disclosed the presence in the water of twelve one thousandths of a grain of lithia per gallon, and from that time the name "Bear Lithia Water" was adopted to describe the water, and a copy of the analysis has since then been printed on the labels used by the complainant on one of its packages. The analysis of the water made by the defendant for the purposes of this suit varies so little from that made in 1885 that I am justified in assuming that the earlier analysis was substantially correct. From 1888 the complainant and its predecessors in title have extensively advertised this water as "Bear Lithia Water," in connection with the figure of the black bear above described as a symbol, until it has become well known in the market under that name. The testimony also shows that the defendant did not put its goods on the market under the name and symbol it now uses until after the complainant had, to some degree, established a name and reputation for its water under the trade-name "Bear Lithia Water," in connection with its trade symbol of a black bear with the name of the water printed across its body.

The defendant's use of its name and symbol, of which complaint is made, originated as follows: Near Fulton, N. Y., there existed a spring, known for many years in that

locality as the "Great Bear Spring." It was situated in a section of country which for several miles adjacent to the spring contained numerous other springs, some of which were appreciably affected by the drawing of the water from the Great Bear Spring, for a public water supply. In 1885 a water company was organized to furnish the city of Fulton with a public water supply, and for that purpose the Great Bear Spring was appropriated by that company and artificially enlarged, so that its capacity was increased at the expense of other smaller springs in the immediate vicinity. In 1890 a partnership was formed by persons at Fulton under the name of the "Pure Water Supply Company," which at first purchased water from the Fulton Water Company, taken from the Great Bear Spring, and sold it in Syracuse, N. Y., as a table water. This business so increased that in 1894 the partnership established a branch in Jersey City, and began supplying potable water to purchasers in New York City, as well as in other cities adjacent. The water distributed from Jersey City does not come from the original Great Bear Spring, but from other springs located in the same district or watershed some distance from it. The defendant undertook to show that the spring from which the water they are selling is taken was known in the neighborhood as one of the Great Bear Springs, but in my opinion the preponderance of the evidence does not favor that claim, and my conclusion is that the water which they are thus selling does not come from the Great Bear Spring, nor is it one of a group sufficiently near the Great Bear Spring to be classed as a feeder to that spring, because it has an outlet of its own, and has no subterranean connection with the Great Bear Spring, since it has not been depleted or affected by the demands made upon the greater spring. On the 18th day of April, 1899, the defendant was incorporated under the laws of this state, assuming the name of "Great Bear Spring Company," which corporation succeeded to the property and rights of the Pure Water Supply Company, and has since conducted its business under the new name. The complainant corporation was also incorporated under the laws of this state, in August, 1899, as "Bear Lithia Springs Company," succeeding to the corporate rights of the Bear Lithia Water Company, a corporation organized under the laws of Virginia. While the water sold by the defendant was always advertised, since 1890, as "Great Bear Spring Water," the use of the polar bear as a trade emblem does not appear much earlier than 1894, at least not to an extent sufficient to indicate any intention to appropriate it for such a purpose. The complainant by its bill of complaint prays for an injunction restraining the defendant from using the word "Bear" as a

part of its corporate name, from applying the word "Bear" to the water sold by it, and from using the figure of a bear of any description in advertising or selling its table water. The defendant insists that, because it was chartered by this state to use its present corporate name, this court cannot restrain such use. This proposition has not the sanction of the best authority. A corporation may adopt a corporate name if not in conflict with our corporation act, but such adoption gives it no greater right to use it to the injury of another than if an individual should so act. A corporation cannot appropriate the name or trade-marks of another, and thus obtain its business by any simulation or deceit. *C. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769.

The first question presented is, Has the defendant, by the adoption and use of a corporate name, including the word "Bear," and by advertising its goods as "Great Bear Spring Water," unlawfully infringed the rights of the complainant, resulting in unfair competition and probable confusion of business? There is no pretense that the defendant has simulated the labels or packages of the complainant other than in the use of the figure of a polar bear. The labels otherwise are so distinct in size, shape and color as to negative any charge of attempted simulation. They are so different that no person of sufficient intelligence to warrant the court in entertaining his complaint on that score could possibly mistake the package if depending upon its appearance as an assistance to the character of his purchase. The question under this branch of the case is reduced to the charge of unfair competition in business arising from the confusion of the names of the "Great Bear Spring Water" and "Bear Lithia Water." In support of this claim the complainant has shown that it has received from its customers communications through the mails, variously addressed to "Great Bear Spring Company," "Great Bear Lithia Water Company," and "Great Bear Spring Water Company," which it insists shows that the confusion among its customers is great, and that the defendant is unfairly benefited, at complainant's expense, in the competition for business between them. The evidence in this cause leaves no doubt in my mind that, to a certain extent, the use of the word "Bear" in the two names is confusing to some of complainant's customers, and that the similarity between the names of the two corporations is so great that the ordinary purchaser may be easily confused and misled to send his order to the defendant, when it was his intention to buy from the complainant; but I am also of the opinion that the confusion shown by the testimony is not, to any appreciable extent, caused by the symbols used by these parties, but is confined entirely to the difficulty in distinguishing

between the corporate names, and that the use of the word "Bear" in the two names is the principal cause of the confusion, for it is not shown that such condition existed while the defendant was marketing its water as the "Pure Water Supply Company," but only arose after the defendant had adopted its present corporate title. This title it adopted with full knowledge that the complainant was then in the market, selling its water under the title of "Bear Lithia Water Company," and it is to be charged with the knowledge that, in adopting a name with the word "Bear" in it, confusion would be likely to arise, especially as the business it was engaged in was substantially the same as that then being carried on by its competitor. It might have continued to carry on its business of selling Great Bear Spring water under the name of the "Pure Water Supply Company," and have thus avoided the confusion in business proven to exist in this case. It chose to do otherwise, and the result which it should have apprehended would follow now exists, and if this question alone controlled this cause, the complainant would be entitled to the relief sought on this particular branch of the case.

The next ground of complaint is that, the complainant having adopted as a trade symbol the figure of a black bear, the defendant should be enjoined from using as a trade symbol the polar bear. I am not disposed to accede to this claim. The animals represented, while of the same genus, are so dissimilar in appearance, and the labels upon which they are used so unlike in color, shape, and size, that any one relying upon the label and the symbol as indicative of the character of the article he desired to purchase could not be misled, nor could the goods of one of these contestants be sold as the goods of another by an unscrupulous dealer to any person of ordinary intelligence who relied upon the character of the symbol. In *Popham v. Cole*, 66 N. Y. 69, 23 Am. Rep. 22, it was held that the use of a small, lank, and lean wild boar was not in infringement upon the representation used by another of a large, fat, well-conditioned domestic animal of the same genus, the court saying that they were "so entirely dissimilar that the one can hardly be said to be an imitation of the other, and clearly not a fraudulent or deceptive imitation." In the case now under consideration the complainant's symbol is a black bear with the words "Bear Lithia Water" printed across it. The symbol used by the defendant is a large polar bear, white in color, and unless we are to hold that the use as a symbol of a black bear prevents another from using as a symbol any other of the bear genus of an entirely distinct type and color, then the complainant's contention on this point must fail, and in my judgment the use made by the complainant of the black bear, with large letters across

it, does not give it the exclusive right to the use of every other figure of a bear.

The defendant also interposes as a reason why relief should not be afforded to the complainant that it does not come into court with clean hands. It was shown that on all of the labels used on carbonated water by the complainant is the statement that the water is "bottled at the springs." This statement was proven to be untrue. The water is not bottled at the springs, but is brought from the springs in large glass-lined tank cars to New York City, where it is siphoned by a pipe or hose into a tank in the warehouse, and from thence bottled. The complainant seeks to meet this charge by the argument that, as they bring the water from the springs in glass-lined tanks, for all essential purposes it is bottled at the springs. This argument does not appeal to me, if there is any merit in having the water put in the bottles at the springs, and that there is merit is to be inferred from the fact that the complainant keeps that statement constantly before the eyes of its purchasers. In my judgment this statement is material in inducing the public to purchase what the complainant offers for sale. It may be fanciful; it may be that just as good results are reached by bringing the water in glass-lined car tanks and bottling it in New York City as if it was bottled at the springs—but the purpose of the advertisement is to induce the sale of the water, and when the public are buying potable water because they supposed it to be bottled at the source or spring, and thus kept pure and less subject to contamination, and therefore more healthful than that furnished through the ordinary public water supply or other local sources, they have a right to be furnished with what it is represented to them they are buying, and it does not answer the purpose to be told that some other method of bottling is just as good. The complainant, during the progress of the trial, when this point was made by the defendant, gave orders to discontinue the use of the labels containing the false statement, but in my judgment repentance came too late to be entitled to any consideration in the determination of this cause. The condition existed when the bill of complaint was filed, and the discontinuance of the misrepresentation when discovered and exposed is entitled to but little consideration in determining the bona fides of the complainant's position when it applied for equitable assistance.

The second objection urged by the defendant in this point is that the complainant has falsely represented to the public the curative property of Bear Lithia Water, and that such representation was known to the complainant to be untrue. The evidence shows, beyond doubt, that as long ago as 1893 the complainant's circular advertisements and all letterheads used by it contained the follow-

ing representations referring to Bear Lithia Water: "Nature's own remedy. Cures kidney and bladder troubles, uric acid, gout and rheumatism, phosphoric deposits, inflammation of the bladder, dropsical affections, brick dust deposits, gravel, and all forms of dyspepsia." The advertisement on the letterheads included malaria as one of the ills curable by the use of this water, but this statement was not embraced in the circular. The letterheads of the complainant now in use still advertise that the water cures, not only the foregoing list of ailments, but, in addition thereto, "Albuminuria, cholera infantum, malaria, and all forms of dyspepsia." It is proper to say that all of complainant's advertisements do not make the broad claim above set out, but the general trend of them all is an appeal to those suffering from the enumerated troubles to use the water with a confident expectation of cure in all cases which are supposed to be derangements likely to yield to lithia when prescribed as a medicine, and the information sought to be conveyed by these advertisements is that the presence of lithia in the Bear Lithia Water makes it an antidote in cases of that class. The testimony shows that the minimum dose of lithia usually prescribed by a reputable physician for the relief of a disease for which that medicine in its commercial form is usually given is three grains each, three times a day, and in order to administer a like quantity by using Bear Lithia Water, the patient would have to drink at least 1,000 gallons of water in 24 hours. The testimony of three most reputable physicians called by the defense shows very clearly that the water, used as freely as human capacity will permit, not only will not cure, but will not afford, any benefit beyond such as would come from the use of any ordinarily pure drinking water. The complainant produced some witnesses as experts who had no experience in the use of the water, but their testimony proves nothing beyond the claim that from a chemical standpoint the analysis was not inconsistent with the possibility that the water might have a beneficial effect upon the diseases it was claimed it would cure. One of the witnesses gave it as his opinion that "its mineralization does not preclude its being of medicinal value," and that the possibility would be enhanced if there was present a recently discovered agent, which he described as "radio activity," but there was no evidence that "radio activity" was present in the water. The testimony of these experts as a display of learning is very interesting, but does not meet the question at issue, for none of the experts or physicians called by either side pretend that this water would cure any of the diseases named, except Dr. Smith, who did say that acute rheumatism, resulting from a gouty affection, might be cured by the use of a proper remedy, and

that such a result might be reasonably expected from the use of this water, but that it would cure rheumatism generally he did not assert.

The credulity of a court cannot be expected to extend beyond a reasonable limit, and when testimony is given which is opposed to common knowledge and the experience of mankind, as well as reliable medical evidence, hypothetical testimony which seeks to lead to a contrary result must be rejected as of no value. It is testimony, but not evidence. That this water will not cure the ill it is promised by the complainant that it will is in accord with the evidence in this cause and with common sense. There may have been isolated cases where the user supposed his recovery was aided, or perhaps produced, by the use of this water, for conditions may have existed in some cases which made it appear to the person benefited that it was the result of the use of this water, but that is the case with every quack medicine, as the numerous testimonials obtainable and published in such cases testify, but that this water will cure all the human ills it is advertised to do no sane person can for a moment believe, and, assuming, as we must in the absence of contrary evidence, that the managers of the complainant corporation were and are in that class, they were, in advertising for sale their commodity, making a statement which they know to be false. The question is thus presented: Do such representations justify this court in refusing the relief asked for? In considering this question I disregard all claims of the complainant to the effect that the defendant has been guilty of like conduct, without passing upon the question whether such conduct has been proven, for the complainant is the suppliant for aid, and it is its position, and not that of the defendant, which must be established to be such as to appeal to a court of conscience. In cases of this class the complainant, to be entitled to equitable relief, must show an honest property right in the trade-mark or label for which he is seeking protection, and the rule is well settled that, if the commodity which the complainant is selling under a trade-name, trade-mark, or symbol is offered to the public under a misrepresentation or falsehood, he has no standing in a court of equity, nor can he successfully call upon that court to aid him in preserving to him the right to deceive the public without interruption. *Manhattan Company v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706; *Worden v. California Fig Co.*, 102 Fed. 334, 42 C. C. A. 383, and cases there cited and discussed. An advertisement, "The great small-pox and diphtheria cure and preventive, cures the worst cases without marking," etc., was held to be such a misrepresentation as to require the court to withhold its aid from the party using it. *Houchens v. Houchens*, 95

Md. 37, 51 Atl. 822. The doctrine that the complainant must come into court for relief, in causes of this class, with clean hands, and that, if any misrepresentation is used by the complainant to enhance the sale of his product, it will induce the court to withhold its decree, is so well supported by authority that a citation of them is unnecessary. This complainant has advertised its water as bottled at the spring. The ordinary and proper interpretation of this language, and the one intended to be conveyed by the complainant, is that the water in the bottle upon which the label is pasted was put in that bottle at the spring, and thus kept free from any possible contamination that might affect it during transportation to the buyer, and he is justified in relying upon that statement, a statement not true, and known to the complainant to be false. In *Krauss v. Peebles & Son* (C. C.) 58 Fed. 585, 594, Judge Taft said: "The manifest advantage which 'distillery' bottling has in the bottled whisky trade arises from the improbability that a distiller, bottling whisky at his own distillery warehouse, would bottle any whisky but that which he has distilled"—and he refused the injunction upon the ground that this advertisement was a misrepresentation. The argument used by Judge Taft applies with equal force to water, and bottling it in a warehouse in New York City is not bottling it at a spring.

The declaration that the Bear Lithia Water is a cure for the diseases named is not an expression of opinion as to the possible or hoped-for effect, but a positive statement of a fact which is not and cannot be true. The care with which all courts have protected the public against imposition, so far as they have had the power, should be rigorously exercised when the misrepresentation is calculated to mislead those seeking a restoration to health, and any conduct which leads people to believe that a remedy will effect a cure, when it is known that it will not, is a menace to the community that cannot be too severely condemned, and the court should hasten to declare its determination not to aid in its perpetuation.

There will be a decree dismissing the bill of complaint.

LAMSBACK v. LAMSBACK.

(Court of Chancery of New Jersey. Nov. 25, 1908.)

HUSBAND AND WIFE (§ 299*) — SEPARATE MAINTENANCE—DECREE—MODIFICATION.

Where a husband was denied personal intercourse with his wife, the privilege of calling on her or endeavoring to effect a reconciliation, which he sincerely desired, and his conduct at no time had been such as to deny him the status of a husband entitled to a future hope of reconciliation, he was entitled to the termination of an order requiring weekly pay-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ments of alimony to the wife for her separate maintenance.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 299.*]

Action by Grace Lamsback against Charles Frank Lamsback. On petition to modify a decree for alimony. Granted.

William T. Boyle, for petitioner. Lewis Starr, for respondent.

LEAMING, V. C. (orally). It is possible and altogether probable that Mrs. Lamsback is receiving better attention and care where she is with her parents, who appear to be supplying her with the best medical attention that can be procured, than she would be with her husband, whose income is so much limited, but that is not the controlling element that we meet at this time.

The limit of the power of this court under the present application is to either continue or to terminate the alimony which is being paid under the former order, and the sole question at this time is whether or not that order for the payment of alimony should be continued longer.

Mr. Lamsback, notwithstanding the difficulties which have heretofore existed between himself and his wife, is still her husband, and is entitled to some rights. The conduct which was disclosed at the former hearing upon his part was not such as to bar him of his entire rights as a husband. He is entitled at the very least to the hope of reconciliation. The present condition of affairs, as they are disclosed by the evidence, deny to him even the right of personal intercourse with his wife, deny him the privilege of calling upon her and talking with her and reasoning with her, or endeavoring to win, if he has already lost (as it appears he has), her affections, and it cannot be that he is to be, as is suggested by counsel, banished from all social relations with her, and denied even the hope of any future reconciliation.

I am convinced that the husband, Mr. Lamsback, is entirely sincere in his wish that his wife should come to him. It is quite manifest, however, that at this time, whatever may have been the conditions heretofore, his wife probably is not physically able to come to him; but, beyond all of that, it is also manifest that, if she were able, she would not come. I do not think it is going too far to say that it may be that her fears of treatment she would receive at his hands are, from her standpoint, in view of her recollections of past treatment, well grounded; but if he is repentant for any faults that may have transpired heretofore, and is sincere in his determination to treat her right and to do by her as a husband should do by a wife, he is entitled to the benefit of his repentance. No conduct that has been shown upon his part at any time has been such as to deny him the status of

a husband entitled to a future hope of reconciliation, and I can see no way under which this court could be justified in continuing to impose upon the husband the payment of alimony under the present conditions. If there should be any mistake touching my present belief that the reason why the wife refuses to return to her husband, or refuses to even treat with him, is that she has lost her love for him and does not mean to return to him in any event—if her real reason is only that her physical condition is such that it would be imprudent for her to do so—that condition of affairs can be made to appear at some future time; but at present I am entirely satisfied that there can be no propriety in continuing the order compelling the husband to pay a weekly alimony so long as there is a fixed determination upon the part of the wife to deny him even the privilege of social intercourse with her, to deny him the right to call at the house and talk with her, or to even discuss with her the propriety of their ever hoping to entertain proper relations as a husband and wife. I am convinced that the only order that can be properly made at this time is an order terminating, for the present, the order requiring weekly payments of alimony, and I will advise such an order.

(71 N. J. E. 729)

WYCKOFF et al. v. O'NEIL

(Prerogative Court of New Jersey. June 13, 1906.)

1. EXECUTORS AND ADMINISTRATORS (§ 117*)—NEGLECT IN PAYMENT OF INHERITANCE TAX—LIABILITY.

An executor is responsible for the amount of interest and penalties imposed under 3 Gen. St. 1895, p. 3341, § 268, regulating the payment of collateral inheritance tax, resulting from his neglecting to pay such tax within the limit of time required to prevent such additional charges on the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 117.*]

2. EXECUTORS AND ADMINISTRATORS (§ 111*)—MANAGEMENT—CREDITS—COUNSEL FEES.

Evidence examined, and held not to justify the allowance for counsel fees claimed by the executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 448-462; Dec. Dig. § 111.*]

3. EXECUTORS AND ADMINISTRATORS (§ 104*)—MANAGEMENT—CHARGES—INTEREST.

As an executor is not entitled to commissions until they have been settled and allowed, if he takes them before that time he occupies the position of a borrower of the amount so taken, and is chargeable with interest thereon to the time of his accounting.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 423-426; Dec. Dig. § 104.*]

4. EXECUTORS AND ADMINISTRATORS (§ 100*)—MANAGEMENT—CREDITS—TRAVELING EXPENSES.

Evidence examined, and held insufficient to sustain an allowance for traveling expenses in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

curred in connection with the business of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 443; Dec. Dig. § 109.*]

5. EXECUTORS AND ADMINISTRATORS (§ 104*)—MANAGEMENT—CHARGES—INTEREST.

An executor should not be charged with interest on moneys in his hands previous to the accounting, where it appears that he received such moneys, not in bulk, but in varying sums as from time to time the amounts due on the different securities were paid, and where he settled his account promptly; he being under no obligation to make temporary investments of it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 423-432; Dec. Dig. § 104.*]

(Syllabus by the Court.)

Appeal from Orphans' Court, Warren County.

Final accounting of William O'Neil, as executor of the will of Mary E. Harris, deceased. To this account exceptions were filed by Martha Wyckoff and others, and from the allowance of certain credits they appeal. Reversed, and account ordered restated.

See, also, 67 Atl. 32.

William H. Morrow, for appellants. Sylvester C. Smith, for respondent.

BERGEN, Vice Ordinary. The respondent, as executor of the last will and testament of Mary E. Harris, late of Belvidere, Warren county, filed with the surrogate his final account to be audited and presented to the orphans' court for examination and allowance. To this account certain exceptions were filed by the appellants, but only those which I shall state are now here for consideration. One of them disputes the right to a credit for \$1,027.75, paid to the state treasurer in satisfaction of the total sum assessed against all the legacies subject to a collateral inheritance tax. The orphans' court surcharged the accountant with \$152.31, that sum representing the amount of interest and penalties imposed, because he did not pay the taxes within the time necessary to avoid the penalty. The appellants appeal from so much of the decree as allows the accountant credit for the residue of the amount paid, and the respondent appeals from the decree surcharging the \$152.31. I am satisfied that the orphans' court committed no error in making the accountant responsible for the penalty resulting from his neglect to pay the taxes within the limit required to prevent such additional charges on the estate. He had ample funds of the estate, in bank, subject to his check, and the estate should not suffer because of his negligence. With regard to the exception which questions the allowance of the amount paid for collateral inheritance taxes, exclusive of the penalties imposed, it is manifest that the accountant has not observed the law which requires him, if the legacy or gift is of mon-

ey, to "deduct the tax therefrom" (3 Gen. St. 1895, p. 3341, § 268), and to pay to the state treasurer, in doing which he is acting practically as the agent of the state, and, strictly speaking, the proceeding has no place in his final account. It is a matter in which no other legatee has any interest. It concerns only the executor, the legatee, and the state.

In this case, if this was the only error, I should be content to let the matter stand as it is, trusting that, as it was claimed on the argument it would, the orphans' court would correct the error in its decree of distribution; but as this account will have to be restated for other reasons, and in order to have the account stand as it should, I shall hold that the accountant be charged with the whole amount paid on this account, viz., \$1,027.75, instead of \$152.31, as decreed by the orphans' court. The accountant will not suffer because he can retain from each legatee the true amount of the tax assessed against each legacy, which will not include the \$152.31, for which he is personally liable. This method has the advantage of showing the true balance for which the accountant should be charged, and will avoid a retrial of the question on the settlement of the decree for distribution.

The next exception relates to a credit in the account of \$300 for counsel fees paid Joseph H. Wilson, and in this connection I will also consider a further exception to the allowance of \$100, additional counsel fee, to the same counsel on the final accounting. I find it impossible to justify the allowance of the \$300, and consider the \$100 allowed when the account was passed as ample compensation for any services counsel could have rendered this executor in the discharging of the duties of his office. The inventory shows that this estate was bank stock or mortgages, and all of such a class that they were realized on without suit, and apparently without any special difficulty. Nor does the evidence show any particular services rendered by counsel, or the necessity for them. The business of collecting this estate and reducing it to money was such that any man of ordinary business ability could readily conduct it without the aid of counsel. From the nature of the estate, the business knowledge, and judgment of the accountant, he having served two terms as surrogate of the county of Warren, and supported by the fact that the accountant had, for some years prior to her death, been the adviser and attorney in fact of the testatrix, with full knowledge of all her business affairs, and of the place and character of her investments, it is impossible to find any justification for this allowance. Reasonable counsel fees are never refused when the settlement of the estate requires the aid of counsel; but there must be a necessity and the fee allowed based upon some real and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not fancied service, and the power to make an allowance ought never to be so exercised as to make counsel a legatee. The accountant will be surcharged with the \$300 allowed by the orphans' court as a counsel fee, but will be allowed the \$100 awarded by the orphans' court on the final accounting.

The next question raised relates to a charge of interest decreed by the orphans' court against the accounting on \$700, withdrawn by the executor as his commissions. The testatrix died August 17, 1904, and the executor filed his inventory of the estate December 13, 1904, but prior to this date, and on November 21, 1904, he drew from his account, as executor, \$700, on account of his commissions, and placed the same to his individual credit in bank. The final account of the executor was filed November 8, 1905, in which the commissions were fixed at \$717.62, so that with the exception of \$17.62 this accountant had had in his possession, subject to his own use, his commissions for services nearly a year before they were fully rendered, and for all practical purposes before any of the services for which commissions were allowed had been performed. As this executor was not entitled to commissions until they had been settled and allowed by the court (*Lathrop v. Smalley's Ex'rs*, 23 N. J. Eq. 192, 194), he occupied the position of a borrower of the amount taken, and should be charged with interest as decreed by the orphans' court.

Another exception, and one which the orphans' court refused to sustain, relates to five items amounting to \$25.50. The accountant prays allowance for car fare to Philadelphia and return, and expenses to assign five mortgages. They are set out in the record and need not be recited here. The cost in each case, with a single exception, was \$4.90; the exception being \$5.90. The appellants insist that these charges are not proper, and it is difficult to understand from the evidence why the accountant was required to go to Philadelphia. In one case, it appears that the purchaser of the mortgage was a resident of Belvidere, where the accountant lived, and as to every case the accountant testified that he had a business in Philadelphia which required him to go to that city every week during the time he has charged this estate with car fares. This admission of respondent is sufficient to justify a refusal of these charges. The car fares were incurred for his own purposes, and the fair presumption from the nature of the business claimed to have been done for the estate is that it was not necessary to put the estate to this expense, and, if any business for the estate was done in Phila-

delphia, it was done there for the convenience of the respondent. He had ample opportunity as a witness to explain the matter in detail, but did not, beyond the statement that he went to Philadelphia to assign the mortgages because he had agreed to; but this agreement was carried out because he was going to Philadelphia weekly on his private business, and he would have gone even if the estate had no mortgages on property in that city. These items should not be allowed. They were expenditures made by the respondent in the carrying on of his private affairs and ought not to be cast upon the estate.

The appellants also object to so much of the decree of the orphans' court as overrules the exception to the charging part of the account because the accountant is not charged with interest on moneys in his hands previous to the accounting. After a careful consideration of this question, I have come to the conclusion that the decree of the orphans' court in this matter is correct, and that the accountant should not be charged with this interest. He did not receive the money in bulk. It was paid to him in varying sums as, from time to time, the amounts due on the different securities were paid. He settled his account quite promptly, and was justified in holding the money to be disbursed as soon as the orphans' court had passed upon it; nor did he have in hand any large sum until a few months prior to the date he might expect to be called upon to pay it out. He could not make any permanent investment, and I cannot say that under the circumstances he was guilty of any negligence in the management of the fund sufficient to justify the court in charging him with interest on the fund in hand prior to the settlement of his account.

Another ground of complaint is that the orphans' court allowed counsel fees on the exceptions in that court and charged the estate with the costs of that dispute. In my judgment, the counsel fees of \$200 to counsel for the accountant, and of \$100 to counsel of the exceptants, were a proper allowance; but that the costs of so much of the proceedings in the orphans' court as are chargeable to the trial of the exceptions ought to have been adjudged against the accountant, because it was the errors in his account that provoked the exceptions, the substantial and material part of which have been sustained.

The decree of the orphans' court will be reversed, and the account ordered restated in accordance with the views here expressed. The costs of this appeal to be paid by the respondent.

(74 N. J. E. 761)

EARLE v. AMERICAN SUGAR REFINING CO.

(Court of Chancery of New Jersey. Sept. 15, 1908.)

1. CORPORATIONS (§ 561*)—RECEIVERS—COLLECTION OF ASSETS—ACCOUNTING.

S., who owned a majority of the stock of the C. C. Co., which in turn owned a majority of the stock of the P. S. R. Co., borrowed \$1,250,000 from the A. S. R. Co., upon a pledge of such stock (among other collateral), under an agreement that the P. S. R. Co. should not be operated during the pendency of the loan. The P. S. R. Co.'s plant, which was practically, but not entirely, completed, was erected for the purpose of undertaking the same business as that in which the A. S. R. Co., was engaged. One attempt to borrow money with which to start the P. S. R. Co. was made, and proved abortive. To secure the carrying out of the agreement mentioned, the board of directors of the last-named company was organized in the interest of the A. S. R. Co., the lender corporation. The P. S. R. Co. was subsequently declared insolvent, and the complainant was appointed its receiver. He filed the bill in this cause to have the A. S. R. Co. declared trustee for the creditors and stockholders of the P. S. R. Co. because of the former's control of the plant of the latter, and asked that it account for profits alleged to have been made by and through such control. It was proved that the P. S. R. Co. was insolvent when the loan was made; that it never was a going concern, and it was not proved that it could have made profits if it had been operated.

Held, that a case is not made which entitles the complainant, as receiver of the P. S. R. Co., to an accounting in this court from the A. S. R. Co. for profits, as it appears that no profits were made in the transaction.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 561.*]

(Syllabus by the Court.)

2. CORPORATIONS (§ 462*)—POWERS—"BUYING OF BILL."

Where a corporation, organized under Act April 21, 1896 (P. L. p. 277), loaned the owner of a majority of the stock of another corporation a large sum of money, and took from him a pledge of such stock, it was a violation of the third section of such act, providing that no corporation created under the act should possess the power to carry on the business of discounting bills or notes, or of buying and selling bills of exchange, the loan, while not strictly a discounting of the note, was the "buying of a bill."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1816-1819; Dec. Dig. § 462.*]

3. BANKS AND BANKING (§ 2*)—"BANKING BUSINESS."

The "banking business," as defined by laws and customs, consists, among other things, in making loans of money on collateral security.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 2; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 1, pp. 697, 698; vol. 8, p. 7587.]

Bill for accounting by George H. Earle, Jr., auxiliary receiver of the Pennsylvania Sugar Refining Company, against the American Sugar Refining Company. Bill dismissed.

Grey & Archer, J. De F. Junkin, and H. Snowden Marshall, for complainant. Richard V. Lindabury, John G. Johnson, and

Henry W. Taft, for defendant. Davies, Stone & Auerbach, for certain bondholders of Philadelphia Sugar Refining Company.

WALKER, V. C. The bill in this case prays that it may be decreed that the defendant, the American Sugar Refining Company, on December 30, 1908, became trustee in the control of the affairs and plant of the Pennsylvania Sugar Refining Company, for the benefit of that company and its creditors and stockholders; that as such trustee the defendant make discovery of all profits made and acquired by it by reason of its actions in controlling the affairs and plant of the Pennsylvania Sugar Refining Company, and account to the complainant as auxiliary receiver of that company for such profits; that whatever profits have been made by the American Sugar Refining Company, by reason of its actions in so controlling the Pennsylvania Sugar Refining Company, belong to, and be paid to, the complainant as such receiver, and for further and other relief. For the sake of brevity the defendant will be referred to as the American Sugar Company, and the complainant's insolvent corporation as the Pennsylvania Sugar Company.

The state of facts upon which the defendant's liability is said to arise are, succinctly stated, these: The Pennsylvania Sugar Company, a corporation, built a plant and works for the refining of sugar in Philadelphia, which plant was practically completed in the winter of 1903-04. Its construction was commenced in or about the year 1901. The plant was erected for the Pennsylvania Sugar Company by a corporation known as the "Champion Construction Company." Mr. Adolph Segal was the owner of the majority of the stock of the Champion Construction Company, which company owned a majority of the stock of the Pennsylvania Sugar Company. He was therefore the master of both. The Pennsylvania Sugar Company's works were constructed by Mr. George M. Newhall, an engineer and general designer for manufacturing plants, including sugar refining plants, who appears to be in every way a competent man. He testified that in the winter of 1903-04 the plant of the Pennsylvania Sugar Company was practically finished, and that it was tested in detail. Certain complements to the machinery, and certain supplies, however, remained to be acquired to make the plant a complete going concern, as will be hereafter mentioned.

Prior to December 17, 1908, Mr. Gustav E. Kissel called upon Mr. John E. Parsons, the counsel and one of the directors of the American Sugar Company, concerning an application for a loan by that company to Mr. Segal. Mr. Kissel, the defendant asserts, was Mr. Segal's agent at that time, but that he afterwards became the defendant's agent. My judgment is that he never was the agent of

Segal in any legal sense, but was always the agent of the American Sugar Company. Segal undoubtedly acted for himself so far as he was not represented by Mr. Thomas B. Harned. The amount of the loan asked for was \$1,250,000. At an interview between Mr. Harned, counsel for Mr. Segal, and Mr. Kissel, with Mr. John E. Parsons, Mr. Parsons was informed that the loan would be secured by \$1,000,000 of bonds of a property, known as the "Majestic Apartment House," in Philadelphia, by \$500,000 of bonds of the Pennsylvania Sugar Company, and by 26,000 shares of that company. There was a voting trust in respect to this stock, which was incomplete. It was stated, either by Mr. Harned or Mr. Kissel, that there was to be an arrangement that the Pennsylvania Sugar Company should not run during the pendency of the loan, which was to be for a year. On another occasion Mr. Segal was present, as well as the persons just mentioned. It was stated that Mr. Segal was not willing to apply for consent from the other stockholders, and that he did not wish anything about the transaction in writing. Mr. Parsons declined to have anything to do with the transaction unless all of the particulars were committed to writing. In passing it might be observed that, on the first visit of Mr. Segal in company with Messrs. Harned and Kissel to Mr. Parsons, he (Mr. Segal) stated that he understood or believed that the loan was to be made by the American Sugar Company. This fact, like the other, is not, in my judgment, of any very great importance. The fact is, as I believe, that Mr. Segal knew from the first that the loan was to be made by the American Sugar Company. In other words, I believe that, in casting about him for the procurement of a loan with which to complete his Majestic Apartment House, he conceived the idea that through his virtual ownership and his actual control of a majority of stock of the Pennsylvania Sugar Company he could secure such loan from the American Sugar Company, under an agreement whereby the Pennsylvania Sugar Company was not to be run in competition with the American Sugar Company. Upon this head there is no difficulty, and I think that the defendant itself does not seriously contend otherwise.

In order to secure his client, not so much for the repayment of the loan, for which the security appeared to be inadequate, but more for the purpose of the principal object for which the loan was made, namely, that the Pennsylvania Sugar Company should not run and operate, Mr. Parsons prepared what is called in the pleadings and proofs "Mem. re Segal Loan." It provides that an agreement be made and exchanged; that a stock note be signed and securities be turned over; that Mr. Hipple (the trustee named in the incomplete voting trust agreement) must give a certificate that he holds 26,000 shares subject to the control of the lender, and that he

will not accept directions from the proposed committee (provided for in the voting trust agreement), or does accept notice from the majority of the stockholders, that they will not appoint, or consent to the appointment of, the committee; that the construction company notify Mr. Hipple, as depositary of the stock, that inasmuch as no names for a committee have been agreed to in the pooling agreement, as owner of 26,000 shares (a majority of the stock of the Pennsylvania Sugar Company), it elects to treat the agreement as not complete, and that Mr. Hipple will be so good as to act accordingly, accepting no directions from a committee, should names for a committee be proposed, and accepting notice that the construction company, as the holder of a majority of the stock, will not, until the notice is countermanded in writing by the construction company or its assigns, participate in the appointment of such committee, or consent to such appointment; that Mr. Hipple acknowledge the receipt of the communication by a letter or certificate in which he shall say that he has received it, that he holds the 26,000 shares of the stock of the construction company subject to the rights, if any, under the pooling agreement as thus stated, to the ownership and control of the construction company and its assigns; that the construction company transfer the certificate with trust certificates, if trust certificates are to be issued, to Mr. Kissel under the terms of the Segal agreement; that if the stock is in the name of the construction company, it must give an irrevocable proxy, and should assent to whatever is the arrangement with Mr. Hipple; that changes in the board (of directors) be arranged as proposed; that the lender should be satisfied that the executive officers will obey the orders of the directors in respect to the running of the refinery; a note from the president of the company addressed to Mr. Kissel, in substance or effect, as follows, will answer: "Referring to the resolution of the directors of the Pennsylvania Sugar Refining Company, passed this day, with reference to the starting of the refinery, I wish to say that I recognize the authority of that resolution, and will act in conformity with it, subject to any change that may hereafter be made by a majority of the board of directors"; that a resolution of the directors may be in this form: "Whereas, to start the refinery at the present time would involve an outlay of a large sum of money which would need to be provided, for which the time is not opportune: Resolved, that the refinery do not run, and that no proceedings looking to the beginning of operations be taken until the further order of the board." The reason I say that the principal object of the loan was to prevent the operation of the Pennsylvania Sugar Company rather than to secure a return of the money is that a corporation, no part of whose legitimate business was the loaning of money, would never have made

such a loan at legal interest, unless lurking behind the transaction there was some advantage of great importance to the lender. The American Sugar Company was safe. If the loan were repaid, it lost nothing, and had the advantage of no opposition from the Pennsylvania Sugar Company during its pendency. If the borrowed money were not returned, then the advantage from stifled competition was enduring; and the security was available, in case of default, with at least the possibility of the ultimate acquisition of a rival plant.

On December 30, 1903, an agreement in writing was signed by Mr. Segal and Mr. Kissel, "an agent." It was expressed to be made between Mr. Segal, therein called the borrower, and Mr. Kissel, "as agent, his principals and assigns," therein called the lenders. It recited Mr. Segal's desire to borrow \$1,250,000 upon a stock note to be given therefor, a copy of which is recited in the agreement. The form of note recited that Mr. Segal 12 months after date, for value received, promised to pay, Mr. Kissel, agent, or his assigns, \$1,250,000, with interest at 6 per cent., having deposited with him as collateral security the following property: One thousand first mortgage bonds of \$1,000 each of the Majestic Apartment House Company; 500 first mortgage bonds of \$1,000 each of the Pennsylvania Sugar Company; receipt of Mr. Hipple for 26,000 shares of the capital stock of the Pennsylvania Sugar Company, the right to the stock, and all voting and other rights which belonged to it. Then followed the usual undertaking of a collateral note concerning the sale of the securities, after default, at public or private sale without advertisement or notice, etc. Then a recital that the bonds of the Pennsylvania Sugar Company, and the right to the 26,000 shares of the stock of that company, and the voting and other powers which belonged to that stock, were regular, and the stock regularly issued and constituted a majority of all of the stock of the company. The agreement then proceeds to recite that the bonds of the Majestic Apartment House Company are the entire issue of such bonds; that the entire issue of first mortgage bonds of the Pennsylvania Sugar Company is \$3,000,000, the 500 bonds being one-sixth of the total authorized issue; that the borrower (Mr. Segal) will so arrange that the absolute voting power of the 26,000 shares of the stock of the Pennsylvania Sugar Company shall be in the lenders, who shall have the right to use such voting power as may be suitable to aid or effectuate the purposes of the agreement, and, as the control thereby given is a material part of the consideration for the note, the borrower further agrees that he will so arrange that, of the seven directors of the Pennsylvania Sugar Company, four to be nominated by the lenders, of whom one shall be Mr. Kissel, shall be put in place of four of the then present directors,

and that they, or substitutes to be nominated by the lenders, shall be directors so long as any part of the loan shall remain unpaid, and that the control and possession of the property of the Pennsylvania Sugar Company shall be in such way and so effectually subjected to the control of the board of directors that so long as the note, or any part thereof, remains unpaid the refinery of the Pennsylvania Sugar Company shall only be run or operated or do business, as shall be directed by such board.

To effectuate the purposes of the agreement, and to carry out the terms of the transaction, the Champion Construction Company on the same date, December 30, 1903, gave Mr. Kissel its proxy to vote the stock owned by it and standing in its name, which proxy is expressed to be irrevocable pending the life of the agreement mentioned. It is signed for the company by Mr. Harned, president, and is attested by its secretary. On the same date Mr. Harned wrote a letter to Mr. Hipple, which stated that, inasmuch as no names for a committee had been agreed upon, the construction company, as owner of 26,000 shares of the stock of the Pennsylvania Sugar Company (a majority of the stock), notified him, as depository of the stock, that it elected to treat the agreement as not complete, and that he would be so good as to act accordingly, accepting no directions from a committee should names for a committee be proposed. This letter Mr. Harned signed as president, stating it was by order of the board of directors. To this Mr. Hipple replied, by letter of the same date, acknowledging the receipt of Mr. Harned's communication, and stating that, as there was no committee in existence to direct him in voting the stock, and none could be nominated except by the holders of the majority of the stock, he could not exercise any right to vote the stock deposited with him, until such committee of direction be appointed. This letter from Mr. Hipple to Mr. Harned, president of the Champion Construction Company, was by that company assigned, transferred, and set over to Mr. Kissel, as a paper in the nature of a certificate signed by Mr. Hipple, trustee, contemporaneously with the assignment and delivery to him (Mr. Kissel) of trustees' certificates for 26,000 shares of the stock of the Pennsylvania Sugar Company, under the terms of the agreement bearing date December 30, 1903, expressed to be made between him (Mr. Kissel) and Mr. Segal. This assignment is signed for the company by Mr. Harned, as president, and is attested by the secretary. On the same day, December 30, 1904, the board of directors of the Pennsylvania Sugar Company met, and in pursuance of the agreement that four directors should resign in the interest of the lenders, and four others, to be nominated by them, be elected in their places, four of the directors did resign, and their resignations were ac-

cepted and their successors elected, among those chosen being Mr. Kissel, according to agreement. At that meeting a preamble and resolution, reading as follows, was adopted: "Whereas, to start the refinery at the present time would involve an outlay of a large sum of money, which would need to be provided, and for which the time is not opportune: Resolved, that the refinery do not run, and that no proceedings looking to the beginning of operations be taken until the further order of the board."

On June 16, 1904, Mr. Harned wrote Mr. Parsons that Mr. Segal requested a return of the 26,000 shares of stock against a cash payment of \$100,000 on account of the loan, in which case he would enter into such guaranty as necessary to insure refinery remaining closed until October 1, 1904; that he would pay off unconditionally the entire loan with interest to October 1st, against return of all securities; that if neither proposition be acceptable, he would like to feel free to make sale of his entire position, legal and otherwise, and it would be more satisfactory to all concerned if that be not objectionable. Segal did not pay the loan, either on October 1, 1904, or at maturity (nor has he at any time, as it appears), and on July 6, 1905, Mr. Parsons, representing the American Sugar Company, wrote to Mr. Untermeyer, then representing Segal, in which he said that the sugar company (meaning the defendant) regarded Segal's Camden affair (i. e., sugar refinery built by Segal in Camden) as a strike; that the company did not think or believe that Segal, or any one else, could run the present refinery (meaning the Philadelphia Refinery, of which the complainant is receiver) at a profit, but that the attempt could do harm, and to the extent of making the loan (under investigation) the company yielded, but it declined to do so if Segal was to be at liberty, by borrowing, either to run the refinery, or for any other purpose to put indebtedness ahead of the stock collateral, or to use the money obtained from the loan in any way to hurt the lender. This letter was admitted in evidence, over objection, upon the ground that it tended to contradict the verbal testimony given by Mr. Parsons; the question whether or not it amounted to an admission of the American Sugar Company's motive in making the loan being reserved by me, with the statement that it (the motive) was to be inferred from the evidence already in, notwithstanding Mr. Parsons' testimony, then the complainant did not need the letter for the purpose mentioned, otherwise the complainant did need it. Now, I have no difficulty whatever in holding, from the testimony in the cause, laying aside entirely the letter of Mr. Parsons to Mr. Untermeyer, that the motive of the defendant company in making the loan to Segal was either to stifle threatened competition, or to avoid the consequences of a "strike" by Segal, whatever that may exact-

ly mean in the connection in which it was used. Therefore the letter is not received as evidence of any admission by the defendant. Another thing of which there can be no doubt is that the whole matter of the loan was arranged by Mr. Segal and Mr. Haver-meyer, president of the American Sugar Company, before Mr. Parsons had anything to do with it. It appears that it was referred to him to arrange details and put the matter in the best legal shape his well-known talent could devise, to at once secure and disguise the loan. Whether Segal's offer to make a payment on account of the loan for a return of the stock was bona fide or not makes no difference. The incident does not touch the merits, and is only adverted to for the purpose of introducing Mr. Parsons' letter to Mr. Untermeyer.

What I said about Mr. Kissel being the agent of the defendant is abundantly shown by Mr. Parsons' testimony. It will be remembered that in the agreement it was provided that four directors of the Pennsylvania Sugar Company should be nominated by the lenders, of whom Mr. Kissel should be one. By that very agreement Segal and Kissel dealt at arms' length, so to speak; Segal being the borrower, and Kissel, "as agent, his principals and assigns," being the lenders. Now Mr. Parsons says that, so far as the directors were concerned, he was willing that Kissel (whom he stated was Segal's broker), or anybody whom he nominated, should supply the place of those whom Segal said he controlled, remarking that they (meaning the defendant company) had confidence in Kissel, although he was Segal's broker. Later on in his testimony Mr. Parsons said that the loan was made in the name of Kissel, and the promissory note which Segal gave went to Kissel, and that it was stated, in the conversations referred to, that the arrangement was that from that time on Kissel would hold the loan for the company. If anything were wanting to show the real character of Mr. Kissel with reference to the transaction, it is supplied by the letter of Mr. Haver-meyer, president of the defendant company, directed to Mr. Kissel, dated January 5, 1904, in which he says: "Referring to the loan made by you [Kissel] as agent for us to Mr. Segal, under the agreement of December 30, 1903, we will hold you harmless by reason of the execution of that agreement and of any action taken under it." This shows conclusively the character of the transaction. It was a scheme on the part of the defendant company, born of Segal's necessities, to tie up the Pennsylvania Sugar Company and prevent its operation in competition with the defendant company so long as the loan should be outstanding. And it was entered into in a secretive manner; that is, the name of the defendant company did not appear in the transaction, and the form in which the papers were cast might have protected the

defendant from disclosure in any attack by third parties, or in any investigation by public authorities. But when attacked by one of the parties, or, what is the same thing, by the receiver of the Pennsylvania Sugar Company, who was, by reason of his position, able to obtain his information of the transaction from inside sources, the proceeding is laid bare.

And now an appeal is made to a court of equity, which penetrates all disguises of form, and, disregarding the shadow, grasps the substance. *Stockton v. Central Railroad Co.*, 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97. If the complainant were entitled to the relief he asks upon the state of facts which is disclosed by this cause, it would unhesitatingly be accorded to him. It is, however, conceded by the complainant that there is no precedent for the relief he prays, and I am asked to go a step further than the courts have yet gone in dealing with the operations of corporations in the stifling of competition and the restraint of trade. Want of precedent would not deter me for a moment in awarding the complainant a decree if I could find law upon which to rest it. The principles of equity will be applied to new cases as they are presented, and relief will not be withheld merely on the ground that no precedent can be found. *Van Duyn v. Vreeland*, 12 N. J. Eq. 142. The absence of precedents or novelty in incident presents no obstacle to the exercise of the jurisdiction of a court of equity. It is no objection to the exercise of jurisdiction that, in the everchanging phases of social relations, a new case is presented and new features of wrong are involved. *Vanderbilt v. Mitchell* (N. J. Err. & App.) 67 Atl. 97, 101, 14 L. R. A. (N. S.) 304. While it is true that equity will make a precedent to fit a case novel in incident, yet in my judgment the facts of the case must come within some head of equity jurisprudence. This observation is not, as I understand it, in conflict with the broad doctrine of the expansive and expanding jurisdiction of this court as laid down in *Vanderbilt v. Mitchell*. Each of the cases cited by Judge Dill, in the opinion of the Court of Errors in that case upon this head were cases in which the facts involved were referable to some head of existing equity jurisprudence. Chancellor Pitney in his opinion, in *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, May term, 1908 (not yet officially reported) 71 Atl. 153, in dealing with the question of promoters' liability, says that it "is not the creature of statute; it is 'judge-made' law, in the sense that courts of equity everywhere, recognizing the obligations arising from the fiduciary relation, have applied to it the same principles of equity that obtain in all cases of trust." This, as I read it, is but another declaration to the effect that known principles of equity will be applied to new cases as they arise,

and that the expansion of equity goes to new facts, not that it calls into being new principles.

The doctrine invoked here is the right to an accounting, and that right must be denied, unless the complainant can show, under the law, that he is entitled to an accounting. Because the American Sugar Company loaned the owner or controller of a majority of the stock of the Pennsylvania Sugar Company a large sum of money, and took from that owner a pledge of that stock and an agreement whereby the Pennsylvania Company could not be run and operated in competition with the American Company during the pendency of the loan, will not entitle the complainant to an accounting, unless the more ancient law, or the more recent policy of the state, affords the remedy which the complainant seeks. I cannot make law. I can only apply it. This observation is probably subject to this exception, namely, I can make law by the application of existing principles to new cases. Nevertheless, I cannot call into being principles which have no existence in equity, the common law, the statute law, or what may be called the "public policy of the state." The Legislature may make public policy, but not the courts. *The Trenton Potteries Company v. Oliphant*, 58 N. J. Eq. 507, 524, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; *Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537, 545, 54 Atl. 570.

It ought to be observed in passing that it was no part of the business of the American Sugar Company to loan money. The objects for which the company was formed are the purchase, manufacture, refining, and sale, of sugar, molasses, and melada, and all lawful business incident thereto. These are the only objects expressed in the charter under which this corporation was organized, and its charter limits its powers. *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673, 682, 53 Atl. 842. The loan to Segal was in direct violation of the third section of our corporation act (April 21, 1896 [P. L. p. 278]), which provides, among other things, that no corporation created under the provisions of the act shall, by implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes, or other evidences of debt, or of buying and selling bills of exchange. While the loan to Segal was not, strictly speaking, the discounting of a note, it undoubtedly was the buying of a bill, within the meaning of the section. In other words, it was the doing of a banking business, as the loan was not made by the company for its own benefit in the course of its own business. This section is understood to be a prohibition against the exercise of banking powers by companies organized under our general corporation act. The business of banking, as defined by law and custom, consists, among other things, in

making loans of money on collateral security. Bolles on Modern Law of Banking, vol. 1, p. 2, citing *Mercantile Bank v. New York*, 121 U. S. 138, 156, 7 Sup. Ct. 826, 30 L. Ed. 895. The transaction under investigation falls directly within the definition of banking just adverted to; that is, it was a loan of money upon collateral security. The Supreme Court in *McOarter, Atty. Gen., v. Imperial Trustee Co.*, 72 N. J. Law, 42, 45, 60 Atl. 223, held that the third section of our act is a regulation of and limitation upon all corporations, and is not confined to corporations created under the act of 1896. Besides an exactly similar provision existed in the corporation act of 1875, under which the defendant company was organized. Gen. St. 1895, p. 910, § 4. It was incorporated by certificate filed in the office of the Secretary of State January 10, 1891. The loan was an act clearly ultra vires. Of course Segal could not take advantage of this situation. He got the company's money, and estoppel would prevent his defending a suit for its recovery. His obligation was clearly enough to repay. The doctrine of ultra vires, when invoked for or against a corporation, is not allowed to prevail where it would defeat the ends of justice or work a legal wrong. *Ohio & Miss. Ry. Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693. The plea of ultra vires is not admitted, except where it is practicable to restore the status quo ante. *Rutherford v. Hudson River Traction Co.*, 73 N. J. Law, 227, 230, 63 Atl. 84; *Campbell v. Perth Amboy Shipbuilding Co.*, 70 N. J. Eq. 40, 57, 62 Atl. 319. The loan would have been legitimate had it been made to advance the corporation's business. *Whitehead v. American Lamp & Brass Co.*, 70 N. J. Eq. 581, 585, 62 Atl. 554. While the transaction under investigation is illegal and reprehensible, the only penalty, so far as I am aware, which might be visited upon it for its excess of corporate power would be the forfeiture of its charter. If a corporation violates its charter or the laws of the state, it is liable to proceedings to forfeit its charter. *Camden & Atl. R. R. Co. v. May's Landing, etc.*, R. R. Co., 48 N. J. Law, 530, 7 Atl. 523; *Elizabethtown Gas Light Co. v. Green*, 46 N. J. Eq. 118, 18 Atl. 844; *Attorney General v. American Tobacco Co.*, 55 N. J. Eq. 352, 86 Atl. 971; *Phillipsburg Electric Co. v. Phillipsburg*, 66 N. J. Law, 505, 507, 49 Atl. 445. This, however, is a matter which concerns the state alone. Should the loan, or any part of it, be ultimately lost to the defendant company, its officers who authorized the transaction would undoubtedly be liable as for a waste or misapplication of corporate funds. *Citizens' Loan Ass'n v. Lyon*, 29 N. J. Eq. 110; *Id.*, 30 N. J. Eq. 732; *Williams v. Riley*, 34 N. J. Eq. 401; *Ackerman v. Halsey*, 37 N. J. Eq. 301.

The complainant contends that the defendant, under the contract of loan, put

those who would do its bidding upon the board of directors of the Pennsylvania Sugar Company, and controlled that company as against the interests of its minority stockholders, and that the defendant is therefore bound to account for the profits it made in the transaction. To this doctrine, thus broadly stated, I assent. But my trouble is to find that the complainant has made a case which shows him to be entitled to an accounting upon the theory that profits were made by the defendant company in consequence of its illegal act. To better apply the law upon this branch of the case the facts with reference to the situation of the Pennsylvania Sugar Company at and before the making of the agreement and loan should be understood. They were these: Assuming its plant to have been practically complete in the winter of 1903-04, as stated by Mr. Newhall, its architect and builder, nevertheless, it clearly appears from the evidence that the refinery could not have been operated economically without an expenditure of about \$150,000 for boneblack, filter bags, tools, and sundries. The company's treasury was empty, and all its property was mortgaged for \$3,000,000, the refinery and its lands being worth approximately \$1,370,000; that is, if the cost of the refinery (about \$1,075,000 or \$1,080,000) and the value of the land (about \$293,600) are a criterion of its value, and that is the evidence of value in the case. Taxes on the property were in arrears since the year 1899, and no interest had been paid upon the bonds which were issued. The company was therefore insolvent, and, apparently, hopelessly so. At least one attempt was made to operate the Pennsylvania Sugar Company. Mr. Cook, who had a knowledge of the sugar business as a lender of money on raw and refined sugars, investigated the refinery, its capacity to produce the refined product, its probable earnings, and dealt with his associates looking toward the making of a loan to enable the company to start business. Application was made to Mr. Cook through Mr. Sparhawk, a broker, for a loan of \$750,000 with which to commence the operations of the refinery. Mr. Cook's deliberate judgment appears to have been that at least twice that amount of money, or \$1,500,000, was requirable for the purpose. The terms upon which Mr. Cook and his associates appear to have been willing to make the loan were such as the company apparently could not accept, and the loan was not made. The terms were hard on the company. They were that the stock of the company was to be put under control of the lenders so that they could control the running of the plant. The interest on the bonds was to be postponed for 18 months, and raw material and material in process of manufacture were to be subject to a lien for the money of the lenders. They were to name the manager of the plant. There was to be a voting trust

with reference to the stock. The lien upon the material, raw and manufactured, was to continue until the product was sold. The lenders were to have supervision of the sales, so that no funds should be diverted from them. The application for this loan was made by Mr. Sparhawk, as counsel for the Pennsylvania Sugar Company, the Champion Construction Company and Adolph Segal—the same parties exactly who figure in the loan transaction under consideration. They were unwilling to accept, for the benefit of the Pennsylvania Sugar Company, the harsh terms proposed by Mr. Cook, though afterwards, for the benefit of Segal alone, they accepted the still harsher ones imposed by the American Sugar Company.

We have now reached the last analysis in the facts of this case, and it remains only to apply the law arising upon those facts. As already remarked, the complainant may prevail, if prevail he can, by calling upon the defendant to account. The cases cited by the complainant do not support his contention. For instance, in *Docker v. Somes*, 2 Myl. & K. 655, the executors of the decedent continued his business, gradually closing it out. They went into the same business themselves, and used the money of the estate in their enterprise. They accounted for the moneys, and charged themselves with interest on the same, and the court held that they were chargeable with the actual profits that they made by use of the trust funds in their business. Manifestly that case has no application to the one sub judice. The numerous cases relied on by the complainant do not, in my opinion, any more nearly apply to the facts of the case under consideration than does *Docker v. Somes*, to which allusion has just been made. Vice Chancellor Reed said, in *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq. 658, at page 667, 37 Atl. 509, that a decree for an accounting could only go if it appeared that there was something for which the defendant was liable to render an account. In *Bergmann v. Macmillan, L. R.*, 17 Oh. Div. 423, Mr. Justice Fry held that an account of profits will not be directed if it is clear that no profits have been made. On a bill for an accounting the court must always decide in the first instance whether or not there is anything for which the defendant is liable to account, and will not, I take it, direct an accounting in any transaction unless the evidence discloses that profits were made. Surely an accounting will not be directed for the business of a company which never commenced operations, and certainly not unless it be shown that the concern, if operated, could have made profits. The language of Chief Justice Green, speaking for the Court of Errors and Appeals in *Campbell v. Campbell's Adm'r*, 8 N. J. Eq. 738, at page 743, is particularly apposite. He said: "But if the court be satisfied that there is nothing due, no account will be decreed. The Chancellor

must first be satisfied that the complainant is entitled to have an account taken. If he be satisfied upon that point, the practice is to refer it to a master to state the details of the account, and ascertain the balance. But the Chancellor may, if he see fit, take the account himself. In this case, however, I understand the Chancellor to say that the complainant is upon the evidence not entitled to an account. He not only may, but ought to refuse an account, if he be satisfied upon the evidence that nothing is due the complainant, or that for any cause an account ought not to be decreed. * * * Now the Chancellor does not, as has been insisted, arrive at his conclusion by examining an account and then refusing an account. He arrives at his conclusion by evidence independent of the account." In *Stout v. Seabrook's Ex'rs*, 30 N. J. Eq. 187, an accounting was denied by Vice Chancellor Van Fleet, who remarked, at page 193 of 30 N. J. Eq., that if, in an action for an account, the court is satisfied nothing is due to the complainant from the defendant, no further proceedings will be permitted, but the bill will be dismissed, citing *Campbell v. Campbell's Adm'r*, ubi supra. *Stout v. Seabrook's Ex'rs*, was affirmed for reasons given in the court below. 32 N. J. Eq. 826. This court in a case of equity cognizance, may award damages. *Ackerman v. Halsey*, 37 N. J. Eq. 357, 366; affirmed *Halsey v. Ackerman*, 38 N. J. Eq. 501, 509.

Aside from the trustee aspect of this case, the accounting feature involves the law of loss of profits, which is usually to be found in cases sounding in contract or in tort. The law concerning speculative, remote, and contingent profits is here applicable. They are never allowed, as I understand it, in either class of cases. In *Pollock on Torts* (6th Ed. 1901), page 538, it is laid down: "With regard to the measure of damages, the same principles are, to a great extent, applicable to cases of contract and of tort. * * * The rule with regard to remoteness of damage is precisely the same whether the damages are claimed in actions of contract or of tort." And at page 540: "One point may be suggested as needful to be borne in mind to give a consistent doctrine. Strictly speaking, it is not notice of apprehended consequences that is material, but notice of the existing facts, by reason whereof those consequences will naturally and probably ensue." In *States v. Durkin*, 65 Kan. 101, 68 Pac. 1091, it was held: "Before one may recover damages, occasioned by the wrongful acts of another, for loss of profits to an established general business, it must be made to appear that the business had been in successful operation for such period of time as to give it permanency and recognition, and that such business was earning a profit which may reasonably be ascertained or approximated." In *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58, it is held, at page 747 of

79 Ga., at page 60 of 8 S. E.: "That anticipated profits from a business intended to be carried on * * * cannot be allowed is as well settled as anything can be in an age of legal skepticism." These cases of *States v. Durkin* and *Kenny v. Collier* were contract cases, but *Dudley v. Briggs*, 141 Mass. 582, 6 N. E. 717, 55 Am. Rep. 494, was a tort case, in which the court held (at page 586 of 141 Mass., at page 720 of 6 N. E. [55 Am. Rep. 494]): "Until the plaintiff had entered upon the compilation of the directory for 1885, we do not think there was any business of publishing a directory for 1885 carried on by the plaintiff, or anything that, for example, could have been sold as a going concern by an assignee in insolvency, if the plaintiff had become an insolvent debtor." And (at page 587 of 141 Mass., at page 721 of 6 N. E. [55 Am. Rep. 494]): "The fatal objection to the present case is that it is entirely problematical whether the plaintiff would actually have published a directory if the defendant had not made the fraudulent misrepresentations alleged. The plaintiff abandoned his intention to compile and publish a directory in consequence of the defendant's acts; but this, upon the principle stated in *Bradley v. Fuller*, 118 Mass. 239, and the cases therein cited, is not sufficient to support an action." Among the cases cited in *Bradley v. Fuller*, just referred to, is that of *Wellington v. Small*, 3 Cush. (Mass.) 145, 50 Am. Dec. 719, wherein the court said, at page 149 of 3 Cush. (Mass.): "The uncertainty of the plaintiff's damage seems, of itself alone, to be a sufficient reason for his not recovering. In an action on the case *ex delicto* the plaintiff must show injury and damage, and these must be shown as facts by legal proofs, except in a few cases, where, by the rule of law, damage is presumed from the act complained of. This case does not fall within that exception. How could this plaintiff prove that he suffered from the acts of the defendant, which are averred in the declaration? How could he prove that he would have secured his debt by attaching the property of his debtor, if the defendant had not intermeddled with it? Other creditors might have attached it, or it might have been stolen or destroyed while in the debtor's possession. The fact that the plaintiff has suffered actual damage from the defendant's conduct is not capable of legal proof, because it is not within the capacity of human knowledge, and cannot be shown by human testimony. It depends on numberless unknown contingencies, and can be nothing more than a matter of conjecture."

And now, finally, the case on the law of accounting may be summarized as follows: That the Pennsylvania Sugar Company was not a going concern at the time its stock was hypothecated; that its business had never been established; that it cannot be postulat-

ed that, if its business had been established, it would have been profitable, but, on the contrary, it is entirely problematical whether its business would have been successful in the fierce competition it would necessarily have encountered from the defendant company; that, while the complainant may have shown injury to his insolvent corporation, he has not shown damage; that if damage has been suffered, it has not been proven, because it is incapable of proof; that anticipated profits from a business intended to be, but actually not, carried on cannot be allowed.

Upon the whole case, I am constrained to the conclusion that nothing has been shown to be due from the defendant to the complainant, and that consequently the complainant is remediless, and therefore his bill must be dismissed, with costs.

(75 N. J. E. 80)

ROWLEY v. BOWYER et al.

(Court of Chancery of New Jersey. Nov. 27, 1908.)

1. DEEDS (§ 61*)—"DELIVERY"—SUFFICIENCY—DELIVERY TO THIRD PERSON.

The delivery of a deed of conveyance of land by the grantor to a third person to be held by the third person and delivered to the grantee upon the death of grantor will operate as a valid delivery, where there is no reservation on the part of the grantor of any control over the instrument, though the grantee had not empowered the third party to act for him in holding the deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 140, 141; Dec. Dig. § 61.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1958-1970; vol. 8, p. 7632.]

2. FORMER DECISION DISTINGUISHED.

Schlicher v. Keeler, 67 N. J. Eq. 635, 61 Atl. 434, distinguished.

(Syllabus by the Court.)

Bill by Sarah Ann Rowley against William W. Bowyer and others to set aside deeds. Finding for defendants.

The bill is filed to set aside two certain deeds of conveyance of real estate made January 25, 1906, by John Bowyer, now deceased, to his son William W. Bowyer.

A few days before the date of these deeds John Bowyer employed William Casselman, an attorney at law, to prepare his will and to draw these deeds. He gave the attorney a list of his several tracts of real estate, and directed that his will should dispose of all of them excepting three, and requested the attorney to prepare two deeds conveying the three pieces of real estate not covered by the will to his son William W. Bowyer, defendant herein, stating that he owed his son William some money, and that the deeds were to pay him.

The will and deeds were accordingly prepared by the attorney as directed. The will made devises of real estate to all of Bowyer's children except his son William, grantee in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the deeds, and his daughter Sarah Ann Rowley, complainant herein. All of Bowyer's real estate, except the three properties covered by the deeds, was disposed of by the will, and the will contained no residuary clause. The will was executed January 23, 1906, and two days later the deeds were executed. After executing the deeds Bowyer handed them to the attorney, and said: "Deliver these to my son after my death." The deeds were accordingly retained by the attorney until the death of Bowyer, which occurred some three months later, when the deeds were delivered by the attorney to the grantee named in them and recorded.

Complainant, who receives nothing under the will, now seeks to set aside the deeds on the ground that there was no valid delivery of the instruments.

S. Conrad Ott, for complainant. Bleakly & Stockwell, for defendants.

LEAMING, V. C. The delivery of a deed of conveyance of real estate is essential to its validity. Its delivery is a matter of intention, and the acts and declarations of the grantor are evidence of his intention. It is not delivered unless or until it is the intention of the grantor to perfect the instrument and make it presently effective as a conveyance.

These elementary principles have been recognized in this court in *Crawford v. Bertholf*, 1 N. J. Eq. 458, 467, *Woodward v. Woodward*, 8 N. J. Eq. 779, 784, *Martling v. Martling*, 47 N. J. Eq. 122, 20 Atl. 41, and *Vreeland v. Vreeland*, 48 N. J. Eq. 56, 60, 21 Atl. 627, and in the Supreme Court in *Folly v. Vantuyt*, 9 N. J. Law, 153, 160, and in the Court of Errors and Appeals in *Ruckman v. Ruckman*, 33 N. J. Eq. 354, 358, and *Schlicher v. Keeler*, 67 N. J. Eq. 635, 639, 61 Atl. 434. In *Ruckman v. Ruckman* it is said: "The essence of delivery consists in the intent of the grantor to perfect the instrument, and to make it at once the absolute property of the grantee, and his acts and declarations are the evidence of such intent." In *Schlicher v. Keeler* it is said: "A deed does not become operative until it is delivered with the intent that it shall become effective as a conveyance. To constitute a good delivery it must appear from the circumstances of the transaction that it was the grantor's intention to part with the deed, and thereby put the title in the grantee."

Consistently with the principles above defined, it must be held that if the grantor handed the deed now in question to the third party with the instructions already stated and with an intention to part with all dominion and control over the deed, to the end that it should be presently effective as a conveyance, there was a valid delivery of the deed and a consequent present transmission of title from the grantor to the grantee co-extensive with the grantor's purpose. If, on the other hand, the grantor's intention was that the deed should not permanently pass

from his control, the deed would be ineffective as a present conveyance for want of delivery, and it could not be supported in such case as a conveyance to take effect after the death of the grantor, as the transaction would then embody the essential elements of a testamentary devise and be violative of the terms of our statute of wills.

In *Schlicher v. Keeler*, 61 N. J. Eq. 394, 48 Atl. 493, a deed had been handed by the grantor to a third party with instructions for delivery to the grantee at the death of the grantor, and Vice Chancellor Reed held that the delivery was sufficient, and the deed, in consequence, presently operative as a conveyance. The case was reversed in the Court of Errors and Appeals (67 N. J. Eq. 635, 61 Atl. 434), and it is now earnestly urged in behalf of complainant that the decision of the Court of Appeals referred to is in conflict with the rule already stated. I am unable to adopt that view. The conclusion reached by the learned Vice Chancellor is accurately stated in the headnote of the case as follows: "Where a grantor delivers a deed to a stranger as agent of the grantee to hold till the grantor's death, with no power of control reserved by the grantor, there is a valid delivery, though the grantee had not empowered the stranger to act for him in holding the deed." While the decree which was entered was reversed, I do not understand the opinion filed by the Court of Appeals to repudiate, in any way, the legal principles defined by the learned Vice Chancellor. By reference to page 639 of 67 N. J. Eq., page 435 of 61 Atl., in the opinion of the Court of Appeals, it will be observed that that court was unable to reach the conclusion of fact that the deed there in question had been delivered by the grantor to the third party as a wholly voluntary act. Assuming the delivery to have been to any extent involuntary, it is manifest that no defined intention upon the part of the grantor to place the deed beyond his control or that the deed should become presently effective as a conveyance could be properly ascertained. The subsequent statement contained in the opinion to the effect that the deed could not be sustained as a grant to take effect after the death of the grantor, because violative of the terms of the statute of will, further discloses the view of the court to have been that the deed then under consideration had not been delivered with an intent upon the part of the grantor that it should be presently operative as a grant.

The precise question here involved has frequently been before the courts of our sister states. The conclusions reached are almost uniformly to the effect that where the delivery of the deed by the grantor to the third person, with instructions for its delivery to the grantee at the grantor's death, has not been accompanied with some acts or words of the grantor indicating a purpose on his part to reserve to himself the control of

the deed, the delivery will be considered sufficient to render the deed operative as a conveyance, and to vest a present estate in the grantee coextensive with the purpose of the grantor. I say coextensive with the purpose of the grantor, because in all cases of this class the grantor by the very nature of the transaction reserves to himself until his death the possession of the premises conveyed. But, where the grantor fails to reserve to himself the control of the deed, the delivery of the deed to the third person is held to presently vest the fee in the grantee. The following cases will be found to support this view: *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 85 Am. St. Rep. 186; *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300; *Rulz v. Dow*, 113 Cal. 490, 45 Pac. 867; *Meech v. Wilder*, 130 Mich. 29, 89 N. W. 556; *Shea v. Murphy*, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; *Stewart v. Stewart*, 5 Conn. 317; *Belden v. Carter*, 4 Day (Conn.) 66, 4 Am. Dec. 185, where it is held that title passes presently by delivery to a third person with instructions on the part of the grantor that the third person should keep the deed, and, if not called for by the grantor, deliver it to the grantee after the death of the grantor; *St. Clair v. Marquell* (Ind.) 67 N. E. 693, where the conveyance was sustained notwithstanding the fact that the grantor subsequently procured possession of the deed; *Lippold v. Lippold*, 112 Iowa, 134, 83 N. W. 809, 84 Am. St. Rep. 331, where the grantor retained the power to recall the deed during his lifetime, but failed to exercise the power; *Arnegard v. Arnegard*, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258; *Marvin v. Stimpson*, 23 Colo. 174, 46 Pac. 673; *Haydon v. Easter*, 24 S. W. 626, 15 Ky. Law Rep. 597; *Doe v. Beeson*, 2 Houst. (Del.) 246; *Wright v. Werden*, 8 Ohio S. & C. P. Dec. 1, 7 Ohio N. P. 122; *Hoffmire v. Martin*, 29 Or. 240, 45 Pac. 754; *Studebaker Bros. v. Hunt* (Tex. Civ. App.) 38 S. W. 1134; *Griffis v. Payne*, 92 Tex. 293, 47 S. W. 973; *Stephens v. Huss*, 54 Pa. 20; *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Foster v. Mansfield*, 8 Metc. (Mass.) 412, 37 Am. Dec. 154; *O'Kelly v. O'Kelly*, 8 Metc. (Mass.) 436; *Moore v. Hazleton*, 9 Allen (Mass.) 102; *Church v. Gilman*, 15 Wend. (N. Y.) 656, 30 Am. Dec. 82; *Hathaway v. Payne*, 84 N. Y. 92; *Ladd v. Ladd*, 14 Vt. 185; *Meech v. Wilder*, 130 Mich. 29, 89 N. W. 556; *Linton v. Brown's Adm'r* (C. C.) 20 Fed. 455; *McCalla v. Bane* (C. C.) 45 Fed. 828.

The reasons for the conclusions reached in the cases above cited are not entirely uniform; but all of the cases cited hold that title passes either at or as of the date of the first delivery where no reservation of control of the deed is made by the grantor. In 13 Cyc. the following text, at page 569, is adopted without qualification: "The delivery of a deed by the grantor to a third person to

be held by him and delivered to the grantee upon the grantor's death will operate as a valid delivery where there is no reservation on the part of the latter of any control over the instrument. If, however, a power to recall the deed is reserved by the grantor, there is no effectual delivery, and the deed cannot take effect." In the several cases above cited the acceptance by the grantee is uniformly regarded as sufficient. In some cases the acceptance is assumed to be complete because of the presumption of acceptance by the grantee of that which is in his favor. In others the final acceptance by the grantee is held to relate to the first delivery.

In harmony with the adjudications already referred to, I think it must be held in this case that the title to the land in controversy is in defendant. The deeds in question were delivered by the grantor to the third party with the instruction that, at the death of the grantor, they should be delivered by the third party to the grantee. The delivery to the third party was without reservation of control on the part of the grantor over the instruments. No word was said to qualify the specific direction which was given, and nothing occurred to indicate a purpose upon the part of grantor to qualify the direction so given. The direction given was specific, complete, and absolute. It is manifest that no purpose to recall the deeds existed in the mind of grantor at the time he delivered them. His purpose at that time was entirely fixed and definite. The suggestion is perhaps incident to all transactions of this nature that the grantor may have believed that he could recall the instrument in the event of a subsequent but unanticipated change of purpose; but such suggestion enters the field of conjecture, and cannot be properly entertained in the absence of some evidence of the fact. In *Linton v. Brown's Adm'r* (C. C.) 20 Fed. 455, 465, Mr. Justice Bradley adopts the view that, in the absence of some evidence of a contrary intent, full force must be given to the language of the deed and acknowledgment to the effect that the instrument has been signed, sealed, and delivered. The retention of possession of the land by the grantor is but consistent with the obvious purpose of a grantor in all transactions of this nature. If a purpose existed to surrender possession of the land at once, no occasion to deposit the deed for the life of the grantor would exist. The intention manifest from the irrevocable delivery to a depository is to convey the fee but to reserve the possession for life. Accordingly in *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592, in referring to facts similar to those now present, it is said: "As to the grantor, the delivery is absolute and final, and so is his conveyance of the land, the title to which passes, at once, to the grantee, qualified only by the right of the grantor to use and occupy, or take and receive the rents and profits during his life, or until the event shall have hap-

pened, upon which second delivery is made. The grantor in such case converts his estate into a life tenancy, and makes himself the tenant of the grantee. These conclusions result unavoidably from the certainty of the event upon which the second delivery is made to depend, and from the impossibility under the circumstances that the grantor will ever be able to recall or repossess himself of his deed. He delivered his writing, therefore, as his deed, always so to remain, and never to return to him, and it becomes presently operative and the title vests immediately in the grantee. * * * As observed in *Cook v. Brown*, 34 N. H. 460, the owner of land desiring to make disposition of it at his death has three courses open to him, either of which he may adopt according to circumstances and as will best suit his convenience and intentions. 'If he desires to convey the same, but not to have his deed take effect until his decease, he can make a reservation of a life estate in the deed, or it may be done by the absolute delivery of the deed to a third person, to be passed to the grantee upon the decease of the grantor; the holder in such case being a trustee for the grantee. But, if he wishes to retain the power of changing the disposition of the property at his pleasure, that can only be properly effected by a will.'"

But other circumstances of the present case exist which tend to strengthen the conclusion that it was the intention of the grantor to irrevocably deliver the instruments. The grantee was the son of the grantor, and had during a long period of time advanced various sums of money to his father and has never exacted repayment. No exact account of the moneys so advanced has been kept by the son; but in June, 1892, the father by a promissory note to his son of that date recognizes an indebtedness of \$2,000. In April, 1894, he executed another note to the son for \$100, and in June, 1901, another note for \$50. None of these notes had been paid at the date of the execution of the deeds. While these are all the written evidences of loans which the son can at this time produce, he testifies that many other similar advances were made to his father, and no account kept of them. I think that the evidence justifies the conclusion of fact that at the time the deeds were executed by the father he was indebted to his son for an amount approximating the value of the property which was conveyed to the son by the deeds now in question. Charles P. Bowyer, a brother of grantor, testifies that some five years ago grantor stated to him that he had received considerable money from his son William at various times, and that he saw no way of securing him but to deed certain properties to him, and that he intended to do so. Later, about a month after the deeds now in question had been executed, the grantor told this witness

that he had executed the two deeds to his son William to discharge a debt that he owed him. Charles D. Bowyer, a brother of defendant, testified that grantor stated to him that he was using some of William's (defendant's) money and would have to make him whole in some way. A somewhat similar statement was made by grantor to John R. Bowyer, another brother of defendant. Ida Bowyer, a sister-in-law of defendant, testified that shortly before the date of the deeds in question grantor told her that he owed defendant money and intended to deed to him the properties which are included in the deeds. Defendant testified that before the date of the deeds his father told him that he did not know that he would ever be able to pay him unless he paid in real estate by deeding to him the properties now in question, and that, after the date of the deeds, his father told him the deeds were executed and were in the hands of Mr. Casselman, and that witness could have them at any time he wanted them. Mr. Casselman, the depositary, testified that the grantor stated to him when the deeds were drawn that he owed the grantee some money, and that the deeds were to pay him. While some of the testimony of the witnesses referred to is in a measure consistent with the idea that the grantor may have thought that the deeds did not become operative as conveyances until his death, yet the testimony here briefly summarized is substantially corroborative of the conclusion already reached that the grantor treated the delivery of the deeds to the third party as a finality and as operative to discharge his indebtedness to the grantee.

I will advise a decree denying the relief prayed for.

(75 N. J. E. 33)

FARMER et al. v. WARD.

(Court of Chancery of New Jersey. Oct. 31, 1903.)

1. TAXATION (§ 674*)—TAX SALES—RIGHT TO PURCHASE—MORTGAGEE.

Under the Martin act (3 Gen. St. 1895, p. 3370), providing for the sale of land for taxes, a mortgagee may not purchase so as to cut off the equity of redemption by notice.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1857; Dec. Dig. § 674.*]

2. MORTGAGES (§ 200*)—PAYMENT OF TAXES BY MORTGAGEE—LIEN FOR TAXES PAID.

A mortgagee prior to sale may pay the taxes on the mortgaged property and thereby acquire a lien by subrogation, which, in respect to priority, occupies the same position as the tax lien.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 530; Dec. Dig. § 200.*]

3. TAXATION (§ 697*)—TAX SALES—REDEMPTION—RIGHT OF MORTGAGEE.

If a mortgagee does not pay taxes before sale, he may redeem by the Martin act (3 Gen. St. 1895, p. 3370) after sale.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1399; Dec. Dig. § 697.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. TAXATION (§ 683*)—TAX SALES—PROCEEDS—DISTRIBUTION—RIGHT OF MORTGAGEE.

After sale of land for taxes, and before redemption, a mortgagee's interest is practically transferred to the fund, and he is entitled to any excess paid by the purchaser over the tax lien to be applied on the mortgage debt.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1367; Dec. Dig. § 683.*]

5. MORTGAGES (§ 200*)—TAX SALES—REDEMPTION BY MORTGAGEE—LIEN OF MORTGAGEE—EXTENT.

If, in order to redeem from a tax sale, a mortgagee is required to pay liens which the purchaser has paid in addition to the tax lien for which the sale has been held, the Martin act (3 Gen. St. 1895, p. 3370) gives to the mortgagee a lien for the total amount so paid, which he may enforce, either in a suit to foreclose the mortgage or in a separate suit.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 629, 530; Dec. Dig. § 200.*]

6. MORTGAGES (§ 144*)—TAX SALES—TAX TITLE—ACQUISITION OF OUTSTANDING TITLE.

Neither the mortgagor nor mortgagee can acquire a tax title on the premises.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 285, 289; Dec. Dig. § 144.*]

7. TAXATION (§ 531*)—RECOVERY OF TAXES PAID—PURCHASE BY MORTGAGEE—EFFECT.

Where a mortgagee without authority purchased the property at a tax sale, she occupied the same position as if she had paid the taxes before sale, and was therefore only entitled to subrogation to the tax lien.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 986, 987; Dec. Dig. § 531.*]

8. MORTGAGES (§ 200*)—FORECLOSURE—TAX LIEN.

Where a mortgagee purchased the property at a tax sale, and thereby acquired a mere lien on the property for taxes, she could thereafter sell the property on foreclosure of the mortgage, subject to the tax lien, without affecting her right to hold such lien as against the purchaser on foreclosure.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 200.*]

9. TAXATION (§ 689*)—TAX LIEN—VACATION—PAYMENT.

Under the maxim that he who seeks equity must do equity, a purchaser of land on mortgage foreclosure, charged with a tax lien, held by the mortgagee as a prior incumbrance, could not maintain a suit to vacate the tax lien without paying the amount represented by the tax certificate, with interest.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1385; Dec. Dig. § 689.*]

10. COSTS (§ 60*)—EQUITY SUIT—RELIEF ALLOWED.

Where both parties to a suit in equity prayed for relief as against the other, which was inequitable, and the decree did not conform to either prayer, costs would not be allowed to either.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 264; Dec. Dig. § 60.*]

11. PLEADING (§ 245*)—AMENDMENT—FILING.

Where a case for the vacation of a tax certificate was argued on the assumption that the bill had been amended so as to allege the procurement of a tax deed after the bill was filed, the amendment must be actually made before decree.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 669; Dec. Dig. § 245.*]

Suit by Thomas Farmer and another against Margaret Ward. Decree for complainant on condition.

John J. Mulvaney, for complainants. Clarence Linn, for defendant.

STEVENSON, V. C. My conclusions in the above-stated cause may be briefly stated as follows:

1. I think that the Martin act (3 Gen. St. 1895, p. 3370) impliedly excludes the mortgagee from becoming a purchaser so as to be able to cut off the equity of redemption by notice. Under what I think is a well-settled rule, the mortgagee prior to sale may pay the taxes which the owner of the equity of redemption was primarily liable to pay, and thereby acquire by a species of subrogation a lien for the amount so paid which in respect of priority occupies the same position as the tax lien. *Manning v. Tuthill*, 30 N. J. Eq. 29; *Flacre v. Chapman*, 32 N. J. Eq. 463; *Schatt v. Grosch*, 31 N. J. Eq. 199; *Sidenborg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163. If the mortgagee does not see fit to pay the taxes before the sale is held, the statute protects him by giving him a most ample right of redemption. After sale, and before redemption, the mortgagee's interest stands practically transferred to the fund, and he is permitted to come into court and have any excess paid by the purchaser over and above the tax lien applied to the satisfaction of his mortgage debt. If, in order to redeem, the mortgagee is obliged to pay liens which the purchaser has paid in addition to the tax lien for which the sale was held, the statute gives the mortgagee a lien for the total amount which he has thus paid in effecting redemption. The statute further expressly gives the mortgagee a remedy for the enforcement of his lien—the lien which he has acquired by subrogation—either in a suit to foreclose his mortgage or in a separate suit. If all the provisions of this statute are read together, I think it is quite plain that the intention is that the mortgagee shall stand with the owner, and that the rights which he can enjoy under the statute after a sale held in pursuance of the statute are those which are expressly provided or recognized. The statute does not in terms prevent the owner from acquiring a tax title which will cut off the mortgagee, and yet such a prohibition, it is conceded, actually exists. Of course, the main reason for this rule arises from the fact that the owner ordinarily is primarily liable for the taxes, and, as between himself and the mortgagee, ought to pay them. In determining whether the mortgagee is to be deemed excluded from the class of possible purchasers, we have presented, I think, merely a question of statutory construction. We must ascertain what the statute means. I perceive very strong

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

indications that the procedure under the Martin act for the acquisition of tax titles was not provided for the use of either owner or mortgagee. This construction of the statute is supported, I think, by the policy of the law which is to induce all parties interested in real estate to see that the taxes are paid. Mortgagees oftentimes are practically owners and always may be regarded as part owners of the thing which is taxed—of the thing in respect of which the state demands its money. Mortgagees should be encouraged to influence the owners of the equity to keep their taxes paid, and when that is not done to come forward and pay the taxes themselves for the protection of what is their own property. It would tend to the accumulation of arrears of taxes if mortgagees could stand by indifferently until a tax sale should be held at which they could acquire a valid tax title which in many cases would save the expense of a foreclosure suit. The above are some of the considerations which point to the conclusion that it is not the intention of the Martin act that a mortgagee who may get the benefit of the rights and remedies provided by the act for mortgagees shall be a purchaser so as to be able to acquire an absolute title by notice. Perhaps the whole matter may be summed up in the statement that the Martin act expressly provides for the protection of the mortgagee upon the theory that his estate is sold, and that he cannot be a buyer at what is his own sale. There might be good reasons for permitting the mortgagee to buy at the tax sale, and thereby merge the mortgage title subject to a restoration of the original status upon redemption by the owner, if the mortgagee were not otherwise fully protected by express provisions of the statute. Both owner and mortgagee are sold out. The purchaser takes their estates. Both owner and mortgagee are allowed a wide privilege of redemption, and the mortgagor is vested with a most important and protective right of subrogation in respect of the payment of taxes. Both owner and mortgagee may I think very properly be considered as confined to these ample remedies of redemption and subrogation. These remedies greatly modify the title which any purchaser can take through the tax sale. The status thus seems to define the rights of two classes, and the rights created for each class are in derogation of the rights created for the other class. The purchaser in time may acquire absolutely the estate of both owner and mortgagee. On the other hand, both owner and mortgagee have a right to redeem which can only be extinguished after notice has been served upon them and a period of time has elapsed during which they may save their estates. Last of all, the equities between the owner and the mortgagee in case the mortgagee redeems are protected and enforced by the most ample right of subrogation which is

given to the mortgagee against the mortgagor. The whole situation to my mind impliedly excludes the mortgagee from claiming at his option to exercise the statutory rights of redemption and subrogation accorded to him as mortgagee, or what may be called the antagonistic rights which the purchaser acquired as against both owner and mortgagee.

2. It does not follow that the defendant must lose the amount of the tax lien which she paid to the tax collector in the form of a bid for the property. I think she stands in the same position as if, instead of bidding the amount of the tax lien at the sale, she had paid the same amount in discharge of the tax lien before the sale was held. If the Martin act does not contemplate that a mortgagee who is specially cared for by the act shall be a purchaser at the tax sale, it follows that, when a mortgagee assumes to do this thing, what in fact he does is to pay off the tax lien and acquire the same by subrogation. No practical difficulty will be encountered in dealing with the situation on this theory in case the mortgagee should pay more than the amount of the tax lien. I think that the defendant occupies substantially the same position as the holder of two mortgages who forecloses the second and sells subject to the first. The claim on behalf of the complainant that the defendant lost her lien for the taxes seems to me to be without any equitable basis. There is no proof that the complainants at the foreclosure sale did not have full notice of all the tax liens which at that time incumbered the property. The taxes which the defendant paid were a matter of public record. Neither the complainants nor any possible purchasers were misled by any conduct of the defendant. The defendant was openly undertaking to foreclose her mortgage while she still held her tax title, or tax claim, for what it might be worth, and all parties interested must be presumed to have understood the exact situation. It may be that the defendant after foreclosing her mortgage and neglecting to bring in her tax lien or claim would not be allowed costs in a subsequent suit for the enforcement of that lien. I do not see how the complainants have been subjected to any disadvantage because the tax lien was kept out of the foreclosure suit if they are protected against unnecessary costs of suit. In the case of *Manning v. Tuthill*, supra, Chancellor Runyon most positively upheld the right of the mortgagee who has paid the tax to a lien by subrogation. In that case, however, the mortgagee paid the tax, and thereby apparently canceled the tax lien, and the land was then sold apparently free and clear of taxes. Subsequently the mortgagee endeavored to compel this purchaser to reimburse him the amount of the tax so paid. This claim was

not sustained. The mortgagee had already failed to recover against the purchaser in an action at law based on an alleged promise of the purchaser to repay the amount of the tax. The case is widely different from the present one in a most important particular. The mortgagee, having allowed the land to be sold to a purchaser apparently free from the tax lien, undertook in a subsequent suit to have the canceled lien reinstated for his benefit. He asked to be subrogated to the original holder of the lien when he himself had canceled the lien and caused the land to be sold apparently free from it. Under the evidence in the present case, as we have seen, the complainants are charged with having made their bid and bought the property with full notice that the defendant was holding the tax certificate, having never intended to pay the tax or cancel the tax lien, and that such lien was outstanding in full force as undoubtedly appeared from the public records. If, however, any course of reasoning leads to the result that the defendant has lost her lien, it must be borne in mind that the defendant is not coming into court and asking to have such lien enforced. On the other hand, complainants are standing in a court of equity, and asking that court to aid them against this defendant. They are seeking equity, and they must do equity. This property was primarily bound to pay the tax which the defendant paid, and the defendant had the right to pay this tax and collect it at the same time when she collected the amount of her mortgage. The land was offered to the public for sale in the foreclosure suit charged with the amount of the taxes paid by the defendant as a prior incumbrance. No court of equity in my judgment would give to the complainants the relief which they ask for against the defendant which involves compelling the defendant to surrender her tax title excepting upon condition that complainants pay the defendant the amount represented by the tax certificate with interest.

3. No costs should be allowed to either party in this case, as each party has been in part successful. The complainants have sought to strip the defendant of her tax title or tax lien without paying her anything for it. The defendant, on the other hand, has sought to have the complainants' bill dismissed, and her title under her tax deed adjudged absolute. In my judgment each party has contended for what is inequitable, and therefore neither should have costs.

4. Counsel will bear in mind that this case has been argued upon the assumption that the bill of complaint has been amended so as to set up the procurement of the tax deed after the bill was filed. The amendment is by way of supplement under the rule. This amendment, however, must be made before the decree is advised.

(75 N. J. B. 109)

KRAH v. WASSMER et al.

(Court of Chancery of New Jersey. Nov. 11, 1908.)

1. SPECIFIC PERFORMANCE (§ 32*)—CONTRACT—SUFFICIENCY—PART PERFORMANCE.

A contract to convey lands can be specifically enforced, though it is signed by the vendor only, where the purchaser has paid all the price to be paid in cash, and has entered into possession.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 91; Dec. Dig. § 32.*]

2. SPECIFIC PERFORMANCE (§ 32*)—CONTRACT—MUTUALITY—UNILATERAL CONTRACTS.

A unilateral contract to convey land ceases to be unilateral on the purchaser filing a bill for specific performance thereof.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 32.*]

3. SPECIFIC PERFORMANCE (§ 116*)—PLEADING—ANSWER—ADMISSIONS—RIGHTS OF DEFENDANT.

On a bill for specific performance, defendant cannot admit that there was a contract, and then set out a materially different contract from the one alleged in the bill, making the one so set out binding upon complainant, though the parties are bound by the statements in the answer in so far as they are admissions, or admissions without substantial variation from the bill; and, where defendant admits a substituted contract, complainant can have specific performance thereof, if he chooses to perform it on his part.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 116.*]

4. SPECIFIC PERFORMANCE (§ 28*)—CONTRACT—CERTAINTY—ORAL CONTRACT TO CONVEY LAND.

A bill to specifically enforce an oral contract to convey land will be dismissed, where the terms of the contract are uncertain.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61-68; Dec. Dig. § 28.*]

5. SPECIFIC PERFORMANCE (§ 52*)—DEFENSES—MISTAKE OF FACT.

Pure mistake of fact will sometimes defeat specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 155; Dec. Dig. § 52.*]

6. SPECIFIC PERFORMANCE (§ 12*)—DEFENSES—DEFENDANT'S NEGLIGENCE.

One cannot defeat specific performance of a contract because of the omission of terms therefrom resulting from his own negligence.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 12.*]

7. SPECIFIC PERFORMANCE (§ 46*)—PART PERFORMANCE—CONTRACT TO CONVEY LAND.

That the purchaser has completed his part of a contract for conveyance of land, and gone into possession, entitles him to specific performance, whether it be under an oral or written contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 128; Dec. Dig. § 46.*]

8. SPECIFIC PERFORMANCE (§ 120*)—EVIDENCE—ORAL CONTRACT TO CONVEY LAND.

If the purchaser under a contract to convey lands, suing for specific performance, is compelled to stand upon an oral contract, he can refer to a receipt for part of the purchase money to show the terms of the contract.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 120.*]

9. VENDOR AND PURCHASER (§ 134*)—TITLE OF VENDOR—INCUMBRANCES—RESTRICTIVE COVENANTS IN CONVEYANCE.

Complainant, having bargained for land understanding that he was to receive title free of incumbrances, can insist upon a conveyance free of restrictive covenants.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 250, 252; Dec. Dig. § 134.*]

10. SPECIFIC PERFORMANCE (§ 121*) — EVIDENCE—CONTRACT TO CONVEY LAND.

Evidence held to entitle the purchaser, under a contract to convey land, to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 121.*]

11. SPECIFIC PERFORMANCE (§ 127*) — RELIEF AWARDED—REFUSAL OF WIFE TO RELEASE DOWER—RELINQUISHMENT—JUDICIAL POWER.

One taking a decree of specific performance of a contract to convey land must take title subject to the vendor's wife's right of dower, unless she voluntarily releases it, since the Court of Chancery can only compel a wife to release her right in the manner prescribed by statute or in a case of clear fraud.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 127.*]

12. DOWER (§ 49*)—INCHOATE RIGHT—RELINQUISHMENT—EVIDENCE.

In a suit to specifically enforce a contract to convey land, a deed, properly executed and acknowledged by the vendor and his wife, is evidence of her willingness to relinquish her dower.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 154-175; Dec. Dig. § 49.*]

13. SPECIFIC PERFORMANCE (§ 127*) — RELIEF AWARDED—DELIVERY OF DEED.

Where, in a suit to specifically enforce a contract to convey land, it appears that the vendor and his wife have executed and acknowledged a deed to complainant and his wife, the court can decree a delivery of such deed, if complainant will accept it, thus avoiding the necessity of complainant taking title subject to the wife's dower right.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 410; Dec. Dig. § 127.*]

14. SPECIFIC PERFORMANCE (§ 106*)—PARTIES—WIFE OF VENDOR IN CONTRACT TO CONVEY LAND—PLEADING.

If one suing to specifically enforce a contract to convey land would exercise an option to take a deed already made to him and his wife by the vendor and his wife, his wife should be a party complainant, and the bill should allege the execution of the deed and pray for its delivery.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 106.*]

15. SPECIFIC PERFORMANCE (§ 114*) — PLEADING—CONTRACT BY ONE TO CONVEY LAND HELD BY ANOTHER.

A bill to specifically enforce a contract signed by one defendant to convey land held by another defendant should show such situation.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 114.*]

16. SPECIFIC PERFORMANCE (§ 114*) — PLEADING—POSSESSION OF COMPLAINANT.

Complainant, in a suit to specifically enforce a contract to convey land, having been in possession since a certain date, should show that fact in his bill.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 114.*]

Bill by Jacob L. Krah against John Wassmer and others. On final hearing on bill, answer, replication, and proofs. Decree for complainant.

James McDermott, for complainant. Frank E. Bradner and Frank Voight, for defendants.

HOWELL, V. C. The bill in this case is filed against Wassmer and Radcliffe to compel the specific performance of an alleged contract to convey lands. The so-called contract, a copy of which is given below, was signed by Wassmer, although the title to the lands in question was in Radcliffe. It was testified at the hearing that Wassmer and Radcliffe had some sort of a joint interest in a number of lots of land, of which the one in question was one, although their titles were separate and distinct, and that Wassmer had authority from Radcliffe, to make the contract in question. The bill does not state whether the agreement was in writing or not. The answer alleges that it was oral, and it sets out what the defendants claim the contract was. The difference between the two consists in this: The defendants, who are the vendors, claim that it was agreed that the land should be conveyed with certain covenants restricting its use; the complainant, who is the vendee, claims that there was no such agreement. The agreement between the parties was made in September, 1907, at which time the vendee paid \$50 on account of the purchase money, and took a receipt therefor, which has been destroyed. On October 3, 1907, he paid \$750 more, making \$800 up to that time, and some time prior to October 19, 1907, he paid the further sum of \$202, these three payments aggregating the total amount of the purchase money that was to be paid in cash. The land was subject to a mortgage held by a building and loan association on which the vendors were liable as bondsmen. Some time between the first and last payment of the purchase-money installments the vendee executed a new bond and mortgage in his own name to take the place of the ones previously executed by the vendors and held by the building and loan association; these being steps preliminary to the taking of the title. At the time the vendee made the payment of the \$750 installment of the purchase money he received a receipt for it, of which the following is a copy: "Irvington, N. J., Oct. 3rd/07. Received from J. L. Krah the sum of eight hundred dollars on account of purchase price of Smith St. property, purchase price to be thirty-five hundred and fifty dollars, two hundred and two dollars to be paid on or before Oct. 19th/07. The balance to be paid by said J. L. Krah assuming and agreeing to pay a present building and loan mortgage now upon the above premises for twenty-five hundred and forty-eight dollars. John Wassmer." On October 4, 1907, the

vendee, with the knowledge and consent of the vendors, took possession of the said premises, and with his wife and family has actually resided thereon until this time. About the time the complainant entered into possession the defendant Radcliffe and his wife executed in due form of law, and properly acknowledged, a deed of conveyance to the complainant and his wife for the lands in question, which deed did not contain the restrictive covenant that the vendors now insist upon.

The defendants claim that the receipt above set out is not a contract, or at least if it is a contract, it belongs to that class which is known as "unilateral contracts," and is not specifically enforceable in equity. The law in relation to contracts of this class has received a great deal of judicial attention in this state. In *Cramer v. Mooney*, 59 N. J. Eq. 164, 44 Atl. 625, it was held that a contract for sale of lands, though signed only by the vendor, would not be held to be unilateral in a case where the vendee had paid nine-tenths of the purchase money, and had tendered the balance thereof and had entered into possession of the lands. Vice Chancellor Grey says: "The defendant has not only paid to the vendor complainant the greater part of the purchase money, but has actually entered into possession of the premises and tendered the balance of the agreed price, and demanded a deed and the clearing of the title, and the complainant has accepted him as a purchaser, and tendered him a deed, and now files his bill to enforce payment. These acts of part performance are sufficient to establish a contract between the complainant and defendant which would be enforced in equity even if entirely by parol." Even if the case stood upon this so-called unilateral contract, it ceased to be unilateral the very moment the vendee filed his bill for the specific performance of the contract. *Richards v. Green*, 23 N. J. Eq. 536. In that case Chief Justice Beasley, in the opinion in the Court of Appeals says: "But it will be observed that, when such contracts come to be enforced in equity, they cease to be unilateral, for upon filing the bill the party who was before unbound puts himself under all the obligations of the contract. By his own act he makes the contract mutual, and the other party is enabled to enforce it. The consequence is that in every case that I can find where specific performance has been ordered a mutual remedy existed upon it at the time of the rendering of the decree." I must therefore hold that this objection is untenable.

The vendors next claim that, inasmuch as the bill does not set out the fact that the agreement was in writing, the vendee cannot have a decree because of the statute of frauds, the benefit of which the vendors claim, and that it was competent for the defendants, by an answer in such case, to set up their version of the oral agreement, and that the agreement so set up, without any evidence or proof of any nature, is binding on

the complainant. In *Ashmore v. Evans*, 11 N. J. Eq. 151, the bill alleged a parol contract, which it prayed might be specifically performed. The defendant denied the agreement alleged in the bill, but admitted an oral agreement, which did not substantially differ from the one set out in the bill. The defendant failed to insist upon the benefit of the statute, and the court held that the agreement was sufficiently admitted. It has been a constant practice to decree the specific performance of oral contracts to convey land in cases in which the contract in the bill is admitted, or substantially admitted, by the answer. The insistence of the vendors in this case, however, goes considerably beyond the ruling in any case that I have been able to find. They maintain that they may admit that there was a contract, and that they may then set out a very different contract from the one alleged in the bill, and that such contract so set out in the answer is binding upon the complainant and must be taken as the contract which was made between the parties. This statement hardly needs argument to show its fallacy. It would permit a fraudulent defendant to impose upon the complainant any sort of contract that he might choose to put in his answer, and would drive the complainant to an abandonment of his suit, or compel him to submit to a possibly outrageous fraud. The parties are bound by statements made by the defendant in his answer in so far as they are admissions, or admissions without substantial variation of the charges in the bill; and, where the defendant admits a substituted contract, the complainant is entitled to have a decree for the specific performance of the substituted contract if he chooses to perform it on his part, and he can have such relief in his suit on the original contract. *Ryno v. Darby*, 20 N. J. Eq. 231. If on the whole case the terms of the oral contract are uncertain, the bill will be dismissed. *Clow v. Taylor*, 27 N. J. Eq. 418. The defendant's contention on this point must also be rejected.

It is also urged that the defendants' vendors intended that certain restrictions should be part and parcel of the contract, and that they were omitted from it and from the deed by mistake. Pure mistake of fact is sometimes a defense to a suit for specific performance. *McCormick v. Stephany*, 57 N. J. Eq. 257, 41 Atl. 840. But the circumstances of this case do not indicate that the vendors acted under any misapprehension of fact whatever. They rather show that, if any term was omitted from the contract and from the deed it was the result of their own negligence, and not of mistake, and it is well settled that this court will never relieve a party from the consequences of his own negligence. *Cairo & Fulton Railroad v. Titus*, 27 N. J. Eq. 106; *Phillips v. Pullen*, 45 N. J. Eq. 6, 16 Atl. 9. This insistence of the vendors must likewise fail. I think that, whether the complainant relies

upon the receipt of October 3, 1907, or upon an oral contract of the character which must be inferred from the bill, he has a valid contract which is enforceable in this court. The bill states the complainant's idea of the contract, and it turns out that he has completed the contract which he has set out by payment of the full consideration, and was thereupon let into possession at the time of the payment. This of itself would give the complainant a right to a decree for a deed in accordance with the contract that was proved, whether it be an oral contract or the written one of October 3, 1907. If the complainant is compelled to stand upon the oral contract, I think he may refer to the receipt for the purpose of showing what the terms of the oral bargain were.

It is insisted that Mrs. Krah, the wife of the complainant, had notice that the lands were restricted. This evidence consisted of three items. She saw an advertisement in a newspaper of the sale of the property in question, which described it as being situated in a restricted section. There is a large painted sign at the head of the street on which the property is located, which describes the neighborhood as a restricted neighborhood. The agent of the vendors told her that the property was restricted, so that there could be no nuisance, no saloons, and that all houses were required to be built on the same street line. This was entirely oral. No one had any written document showing exactly what the restrictions were or were to be. The defendant Radcliffe, who talked with the complainant, never mentioned the restrictions at all, and it does not appear that the complainant ever had brought home to his knowledge the fact that any restrictions were intended to be inserted in the deed. There is no positive proof in the case as to exactly what restrictions the defendants are insisting upon. The allegations of the bill in that behalf are not supported. The agent of the vendors was called, and gave his evidence, as is above stated. They also called a witness named Ecker, who purchased a lot from the vendors, and who testified that the restrictions were that the fronts of the houses should all be built on one line, and that the houses should be three-story houses; that there should be no factories, saloons, or breweries on the premises. If the court were satisfied that it was intended that the use of the land should be restricted, there is nothing in the case to indicate what restrictions were intended or were agreed upon. I am therefore of opinion that when the complainant bargained for the premises in question he did so with the idea that he was to receive the title to the property free and clear of all incumbrances, and that he is now entitled to insist upon a conveyance without the restrictions which the defendants are attempting to impose upon him. *Lounsbery v. Locander*, 25 N. J. Eq. 554.

The case does not differ in its essential features from *Richards v. Green*, 23 N. J. Eq. 536. In that case the complainant set forth two agreements, the first being oral, whereby the defendant Richards agreed to convey to the complainant Mr. Green a house and lot for \$2,500, to be paid for as follows: Five hundred dollars in cash, and the remainder secured by bond with an accompanying mortgage covering the premises. The other agreement was an instrument in writing in favor of the wife of the complainant Green, which was signed by the defendant Richards alone. In that case the complainant was permitted to enter into possession of the premises; and the court examined into the oral agreement, and into the written agreement, for the purpose of ascertaining what the terms of the actual agreement were. The complainant was given a decree for specific performance.

In this case on the evidence the complainant is entitled to a decree. Unless he can have relief in this court and in this suit, he will be in the anomalous position of having a right to the possession of the land, and of being in actual possession, in pursuance of that right, without any legally defensible or transmissible title. If, however, he takes a decree in accordance with the prayer of his bill, he will be obliged to take the title subject to the inchoate right of dower of Mrs. Radcliffe, unless she is willing, voluntarily and gratis, to release her interest, for this court has no authority to compel the wife to relinquish her right except in the manner pointed out by the statute, and except, also, in a case of clear fraud. *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Peeler v. Levy*, 26 N. J. Eq. 330. It appears, as already stated, that a deed was executed by the defendants Radcliffe and wife to the complainant and his wife. This deed was before the court at the hearing as an exhibit. It appeared to have been executed and properly acknowledged, not only by Radcliffe, but by his wife also, which may be taken as evidence that she was willing to release her right. In *Hulmes v. Thorpe*, 5 N. J. Eq. 415, a similar situation was developed, concerning which the Chancellor said: "It may be that the wife's acknowledgment of the deed in this case should be considered as equivalent to her express consent to execute it, and that on this ground the court would be justified in making a decree that Thorpe deliver a deed executed by him and his wife, but it would be safer for the court to decree the delivery of the deed already executed by her, and perhaps it would be safer for the complainant." I will follow that course in this case. If the complainant will accept the deed already executed to himself and his wife, a decree will be made that such identical deed be delivered. If he will not accept this deed, he may have a decree for specific performance against Radcliffe alone.

While the complainant is entitled to the

relief above indicated upon the evidence, it ought not to be adjudged to him on the present state of the pleadings. I find the following defects in them which must be remedied: (1) The bill is filed by Mr. Krah alone. If he intends to take advantage of the option to accept the deed made to himself and his wife, the bill should be amended by adding the wife as a party complainant, alleging the execution of the identical deed in question, and praying that it should be delivered. (2) It appears that the title to the premises is in Mr. Radcliffe alone, and not in Wassmer; that the contract is signed by Wassmer, and not by Radcliffe. There should be a proper allegation of these facts and a corresponding amendment to the prayer. (3) It appears that the complainant has been in possession of the property since October 4, 1907. There is no allegation of this most important fact in the bill, and it should be amended accordingly. Counsel may find on closer examination that the bill may need amendment in other particulars. On account of these glaring defects in the bill, and the complainant's almost entire misconception of his cause of action, I think that the defendants were justified in answering, and that it would not be equitable to compel them to pay costs.

The decree will therefore be without costs against either party.

(71 N. J. E. 603)

WOOLSEY et al. v. WOOLSEY et al.

(Court of Chancery of New Jersey. June 22, 1906.)

JUDGMENT (§ 429*)—EQUITABLE RELIEF.

The matters involved in this suit are res adjudicata, and this court is bound by the decree of the Court of Errors and Appeals in Woolsey's Case, 68 N. J. Eq. 763, 62 Atl. 636.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 808; Dec. Dig. § 429.*]

(Syllabus by the Court.)

Bill by Frank Woolsey and others against Virginia M. Woolsey and others. Bill dismissed.

Decree affirmed 67 Atl. 1047.

Carrick & Wortendyke, James Buchanan, and Robert H. McCarter, Atty. Gen., for complainants. Crouse & Perkins and Richard V. Lindabury, for defendants.

BERGEN, V. C. The complainants seek to restrain the enforcement of a decree of the orphans' court of the county of Hudson, entered in compliance with the mandate of the Court of Errors and Appeals on exceptions to the account of the complainants as executors of the last will of Charles A. Woolsey, deceased.

The foundation of the prayer for relief is that the only question raised by the record in the accounting proceedings was whether the payments for which allowances were asked

had been actually made to the persons named, and that no issue was presented by the record upon which the appellate court could properly rest a finding refusing the application of such payments towards the discharge of the principal of certain legacies. The bill charges that, although the money was really paid to the same parties now claiming it, credit was refused complainants for \$27,016.85 so paid, because, in the judgment of the Court of Errors and Appeals, such payments ought not to have been made on account of annuities until legacies amounting to \$15,000 and a trust fund of \$20,000 had been provided for; that complainants, as such accountants, are decreed individually responsible for this large sum under the rule laid down in *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454, by which payments of income, made to and unwittingly received as such by a beneficiary, cannot be charged against the principal of a fund from which it is falsely represented it arises; and they insist that the question whether the legatees were induced to exhaust their principal "by the mistaken or fraudulent representation of those to whom he had intrusted it that what has been paid is income" was not before the court, and that so much of the decree as adjudges that the payments made by the complainants are not applicable to the principal has no record to support it, because no such issue was presented for adjudication; that the only issue was payment or nonpayment, and that the application of the payments was adjudged without record or hearing. They also claim, and have undertaken to show in this cause, that all payments for which credit is denied were made upon an agreement with the legatees that they were to be charged to principal in default of sufficient estate to satisfy annuities and principal, and that there was no misrepresentation as to the character of the payment, but assert that no evidence was offered on the hearing in the orphans' court on this matter, because the issue as framed did not permit it. The complainants further insist that the will justified them in holding testator's investments in the paint company as a security for the \$20,000 trust, and that it was sufficiently set apart to warrant them in so considering it, and thereupon to pay the life tenant annuities, which they did to the extent of \$7,499.72, and that the refusal to allow a credit to them for that sum because they had not set apart the trust fund, without a hearing on the question of their right under the will to hold the investments in the company as security for the trust, deprives them of their property without due process of law.

The defendants have answered without questioning the propriety of the method pursued, and much testimony has been taken, but under the view I take of this case it is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

only necessary to refer to the items in the account which are subject to the present consideration of the court. By the decree the accountants are charged with \$27,018.85, the sum of the items for which credit was refused, and also with the balance, which the executors admitted they had in hand, of \$5,986.85, a total of \$33,005.70, with which to satisfy the trust of \$20,000 and also \$10,950 balances due on legacies, making a total of \$30,950, and leaving a surplus of \$2,055.70, which complainants say is properly payable on account of annuities, and, having once paid it to these defendants on that account, it is inequitable to require them to pay it again. This, I think, fairly states the complainants' position.

Considerable testimony was taken with regard to the conduct of the company, the increase of salaries of the officers, and charges of mismanagement made and denied; but I have not considered these matters, because no objection was made to the charging part of the account, and certainly those matters were not within the issue on the former hearing, and unexplained charges made without giving parties a chance to be heard in denial could not have influenced the court.

I am satisfied, from the evidence in this cause, that, if the decree assailed is res judicata as to all the questions raised by the complainants, they will be unfairly deprived of their property; but this situation arises, in my opinion, because they misunderstood the issue, or, if not, negligently omitted to offer the evidence at hand which they now claim would have produced a different result; but in either case this court cannot, and ought not to, interfere in the absence of any charge of fraud or of corrupt practices. But the complainants insist that the result reached was not warranted by the issues shown in the record sent up by the orphans' court.

What appears in the record is that the complainants presented their account in the orphans' court, to which exceptions were filed, and, as the exceptions are alike in all cases affecting the question now being considered, I will quote but one, which reads as follows: "That the sum of \$14,832.82 claimed to have been paid by said executors to December 31, 1902, to Mrs. V. M. Woolsey, on annuity account, was not in fact paid by said executors, and said item is improperly credited to said executors, and allowance thereof should not be made." The purpose of such an account as is now under consideration is to ascertain what estate hath come to the hands of the executor, what disbursements have been properly made, and to determine the balance in hand to answer the bequests of the testator; and it seems to me indisputable that an exception which charges that an item for which credit is claimed was not in fact paid properly raises

the question of the legality of the payment, for, if not legal, it is no payment for which an allowance should be given. Manifestly the exception above stated requires the accountant to show, not that the money was passed over to another, but that it was a lawful payment, or a payment for which he should have a credit on the account he offers.

In this case the court of last resort has adjudged what credits should be allowed, and decreed the balance in hand for distribution under the will, and I am unable to discover any reason, nor have I the knowledge of any rule of law, which would support the theory that the settlement of charges and disbursements and the ascertainment of the balance for which an executor should account, under the circumstances present in this cause, is not a final adjudication of the questions. The decree does not undertake to distribute the fund. It merely fixes the balance to be accounted for, and if the manner of distribution was not within the record, and was not lawfully passed upon, and is not res judicata, the very questions raised here can be more effectively presented on the application for a decree for distribution or offered as a defense when the parties who are entitled to the balance found by the decree attempt to enforce their claims. The balance in hand need only be paid to those lawfully entitled to it. If the question of the application of the payments to the legatees is not res judicata here, it would not be subject to that objection in another forum; but if the question has been settled by the highest court in the state, it is a closed door in all our state courts.

The ascertainment of the balance for which an executor should account to legatees does not usually settle the question of payment to legatees or distributees. Whatever they may have had on that account is a credit, to which the executor would be entitled on a settlement between the parties.

Under the view I take of this cause, no equitable ground for interfering with the decree is presented, and the bill of complaint should be dismissed.

(75 N. J. E. 39)

L. MARTIN CO. v. L. MARTIN & WILCKES CO.

(Court of Chancery of New Jersey. Nov. 13, 1903.)

1. CORPORATIONS (§ 49*)—NAME.

In a suit to enjoin the use of a corporate trade-name and to recover profits diverted by such use, evidence considered, and held to show that the act of defendant company, in hiring one who had been a member of plaintiff company and placing his name at the head of the former name, so as to read L. Martin & Wilckes Company, was with the fraudulent intent to imitate the plaintiff's name, L. Martin Company, and constituted unfair competition.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 137; Dec. Dig. § 49.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. CORPORATIONS (§ 49*)—NAME—RIGHT TO USE—SIMILARITY.

A corporation, apart from statutory provision, has not the right to so use an individual's name, in forming its corporate name, as to imitate a prior corporate name, engaged in the same business, so closely that the public would be deceived; the maxim, "Sic utere tuo ut alienum non lædas," applying to everything a man has, including his name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 137; Dec. Dig. § 49.*]

3. CORPORATIONS (§ 49*)—NAME—INDIVIDUALS—STATUTES.

Laws April 21, 1896 (P. L. p. 280), c. 185, § 8, providing that no name shall be assumed by a corporation already in use by another corporation, or so nearly similar thereto as to lead to uncertainty or confusion, does not merely impose a duty upon the Attorney General of the state, but protects all corporations created under it in the use of their corporate names, and hence an individual name, so used as to imitate a prior corporate name having the same individual name, by which the public are deceived, is within the terms of the statute, and its use may be enjoined.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 137; Dec. Dig. § 49.*]

4. CORPORATIONS (§ 49*)—USE OF CORPORATE NAME—INJUNCTION—EXTENT OF RESTRAINT.

Where it is found that a name adopted by a corporation is so nearly similar to a prior corporate name, both corporations being engaged in the same business, as to entitle the latter to an injunction, the injunction should merely restrain the former from carrying on the same kind of business unless the name be changed so as to clearly and unmistakably distinguish the two corporations and their respective business, and it cannot permit the use of the same name with only qualifying words to show that the company is a different one, as it would still be deceptive to the public.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 49.*]

5. EQUITY (§ 11*)—JURISDICTION—FRAUD.

The Court of Chancery of New Jersey has general jurisdiction in all cases of fraud, and the only question as to jurisdiction, where there is fraud, is the propriety of exercising the power which the court undoubtedly has.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 21, 23, 24; Dec. Dig. § 11.*]

6. EQUITY (§ 39*)—JURISDICTION—INJUNCTION—INCIDENTAL RELIEF—ACCOUNTING.

In all cases in which the jurisdiction of the court of chancery, based on fraud, is invoked to obtain purely equitable relief, such as an injunction, the court should proceed to accomplish complete justice and enforce all the complainant's rights arising out of the fraud, including the ascertainment and award of all damages caused by the fraud, unliquidated as well as liquidated.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

7. TRADE-MARKS AND TRADE-NAMES (§ 98*)—JURISDICTION—GRANTING COMPLETE RELIEF—ACCOUNTING FOR PROFITS—UNFAIR COMPETITION.

Where a court of chancery has taken cognizance of a suit for unfair competition in the use of a corporate trade-name, in which an injunction is sought as the main remedy, the court may grant the injunction and authorize an accounting for profits claimed to have been di-

verted by the use of the trade-name as an incidental relief.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. § 98.*]

8. INJUNCTION (§ 198*)—INCIDENTAL RELIEF—ASSESSMENT OF DAMAGES.

Where, in an equity suit for injunction to restrain the use of a corporate name similar to a prior corporate name, an accounting for diversion of profits is ordered, incidental to the injunction, it is proper, in the absence of a request to have the damages assessed by the court, to refer the assessment of damages to a master.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 198.*]

Suit by the L. Martin Company against the L. Martin & Wilckes Company to restrain the use of the latter's corporate name as unfair competition, and to recover profits diverted by reason thereof. Injunction granted, and assessment of damages referred to master.

Robert H. McCarter, Atty. Gen., and Charles L. Carrick, for complainant. Craig Marsh and Frank P. McDermott, for defendant.

STEVENSON, V. C. The evidence in this case, which is very voluminous, in my judgment establishes a plain case of fraud, and an equally plain violation of the complainant's rights in respect of its corporate name vested in it by virtue of the provisions of the eighth section of the Corporation Act, Laws April 21, 1896 (P. L. p. 280) § 8. An appeal having been taken from the decree of this court, a statement of the "reasons" therefor becomes necessary.

Inasmuch, however, as the complainant's right to injunctive relief, which manifestly was the principal relief for which its bill was filed, has become an academic question by reason of the abandonment by the defendant of its corporate name, and the substitution of a corporate name which seems to distinguish it and its business from the complainant and the complainant's business, such statement need not be so extensive as otherwise might be deemed necessary. Apart from the question of costs, however, the issue still in litigation between the parties seems to relate solely to the liability of the defendant to account for the damages or diversion of profits which the decree adjudges that the complainant suffered as the result of the defendant's wrong. Of course the defendant is not liable to account for profits or to pay damages to the complainant unless the defendant's conduct which caused such loss was fraudulent or otherwise illegal. The appeal, therefore, necessarily involves the review of the main issue decided by this court in favor of the complainant establishing the complainant's right to injunctive relief. Nevertheless, in view of the enormous

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mass of testimony, including exhibits, the probative force of which sometimes can only be determined when presented to the eye, I shall not enter upon an elaborate discussion of the evidence; an outline of the facts will, I think, be sufficient for the purposes of this statement.

On the 10th day of January, 1906, the complainant, the L. Martin Company, and the defendant corporation, then bearing the corporate name of Weglin & Wilckes Black Manufacturing Company, were two corporations created under the general corporation act of New Jersey, and actively and competitively engaged in the manufacture and sale of lampblack throughout the United States. Both parties were large manufacturers and dealers in an article (lampblack) proved to be used in large quantities and in a very great variety of businesses. A large portion of the output of each concern is sold in bulk without any special label other than perhaps a brand on the bag. This branch of the trade seems to be carried on directly between the lampblack manufacturer and certain classes of large dealers who buy without regard to any special label, and who do not seem to be liable to make any mistake as to the identity of the manufacturer whose goods they buy. Another large portion of the product is put into a great variety of packages of various sizes under different brands and labels, upon which packages the name of the manufacturer is printed, and is distributed widely throughout the country and sold for a great variety of purposes.

It appears that from the year 1849 the historic name "Luther Martin" has been intimately associated with the lampblack business. From that date continuously until the present time the Luther Martins—three of them, father, son, and grandson—have been widely known as lampblack manufacturers under the name of L. Martin & Co., which name has been printed and stamped upon packages of lampblack offered for sale at retail in the market. Although the American manufacturers of lampblack were to a large extent enumerated and described in the testimony, I do not recall that the name "Martin" appeared in any form in connection with any one of them besides the parties to this suit.

In 1886 the original Luther Martin died, and his two sons, who were then his partners, and one of whom bore his name, continued the family lampblack business, using the same firm name, L. Martin & Co. In 1900 Luther and Robert W. Martin, these two sons, who were still carrying on the lampblack business under the firm name of L. Martin & Co., entered into a consolidation agreement with the Ebony Lampblack Company in pursuance of which the complainant corporation, the L. Martin Company, was created, and succeeded to the business and good will of both the constituent manufacturing concerns so consolidated. The complain-

ant is thus the direct successor to the original firm of L. Martin & Co. founded in 1849, and owns the good will of this old-established Martin lampblack business.

The defendant, the L. Martin & Wilckes Company, was incorporated under our general act on the 14th day of March, 1901, by a number of German lampblack manufacturers whose names were Weglin or Wilckes. The name of the corporation as set forth in its certificate, and with which it began to do apparently a large and successful business, was the Weglin & Wilckes Black Manufacturing Company. The prior history of the business of this company, which extended back, as I recall the testimony, for a brief period, need not be set forth. The Weglin & Wilckes concern soon after its incorporation became large manufacturers of lampblack in this country and sharp competitors of the complainant.

One fact is of great importance, I think, in getting a clear view of the situation of these two rival lampblack manufacturers in January, 1906. By that time the Martin family had to a large extent transferred their interest in the L. Martin Company to the original proprietors of the Ebony Lampblack Company or other persons. In February, 1904, Luther Martin, 3d, a young man about 32 years of age, after some years of employment in the L. Martin Company and service as a director, resigned as a director and quit his employment, and, after apparently a faint effort to establish some sort of a lampblack business of his own, negotiated a contract of employment with the defendant corporation, the Weglin & Wilckes Black Manufacturing Company. The written contract of employment which was produced in evidence bears date March 10, 1904, and in it Luther Martin, 3d, is described as Luther Martin, and he signs his name in that way. According to the terms of this contract he was employed as manager in the manufacturing department and as salesman of the goods of the defendant corporation "for a period of five years commencing March 15th, 1904, and terminating March 15th, 1909, at a salary of \$1800 per annum, payable in equal weekly instalments." Young Mr. Martin expressly agrees to give his entire time, skill, etc., to the business of his employer, and agrees specially that he will manufacture and turn out black of the strength, color, and fineness equal to the best black manufactured by any other manufacturer, "and fully equal in all other respects and in all qualities to the black now produced by the L. Martin Company"; and he further agrees that said black shall be pure, straight lampblack, and that he will instruct the president of the party of the first part in methods of making the same. The contract further provided for setting aside for Mr. Martin \$6,000 of the capital stock of the defendant, and that upon his faithfully carrying out the contract on his part such stock should be transferred

to him at the end of the above-mentioned term of five years. Any violation of the contract by Mr. Martin effected a forfeiture of his right to the stock. The dividends on the stock were payable to Mr. Martin, and were guaranteed not to be less than \$350 per annum. In the event of Mr. Martin's death at any time after September 15, 1904, and during his employment, the stock was to be paid to his widow, but the corporation held the right to repurchase the same at par at any time within one year from Mr. Martin's death. In case Mr. Martin fully performed the contract so as to become entitled to the stock, it was agreed that if he desired to sell the same the corporation should have the privilege of buying it back at its par value, \$6,000.

There are a number of significant features of this contract, but perhaps the most noticeable one is the very slight interest which young Mr. Martin obtained in the defendant corporation—an interest which was practically controlled by the corporation itself. The Weglin & Wilckes Black Manufacturing Company plainly were seeking to get the knowledge and skill which young Mr. Martin had acquired in the service of the L. Martin Company. It is conceded that they had a right to do this. It is conceded that they had a right to announce to the trade and widely advertise that they had in their employ as the manager of their manufacturing department the only man by the name of "L. Martin," or "L. Martin, 3d," or "Luther Martin," who was actively engaged in the lampblack business, if such was the fact. Such a course of procedure may be criticized as being not in accord with the highest standards of ethics or of taste, but the law permits competitors to be coarse and greedy and to do savage things. I think, however, that it is quite plain that when the defendant corporation took this young man in in the manner above described, and proceeded to advertise his connection with its business, it became all the more necessary that it, the defendant corporation, should scrupulously avoid any simulation of the complainant's business which might have the effect to deceive purchasers and users of lampblack and injure the complainant.

In the fall of 1905 the \$6,000 of stock appears to have been transferred to young Mr. Martin, and the papers were drawn to effect a change of the corporate name of the defendant from the Weglin & Wilckes Black Manufacturing Company to "L. Martin & Wilckes Company." I think young Mr. Martin had previously become a director and a vice president of the company.

The certificate effecting the above-mentioned change of name was filed on the 10th day of January, 1906, and thereafter until the recent second change of corporate name above referred to, made by the defendant corporation, these two great competitors in the manufacture and sale of lampblack car-

ried on their business under the names respectively of the L. Martin Company and L. Martin & Wilckes Company. In these days of consolidations, inasmuch as it was widely known throughout the country that there had been an old and successful lampblack business of high repute carried on for 50 years under the name of L. Martin & Co., it seems to be evident from the mere statement of these two names that there was a high degree of probability, if not practically a certainty, that numerous purchasers and users of lampblack—buyers, for instance, of a 10-cent package at a grocery or paint store—would infer, upon seeing the name of L. Martin & Wilckes Company, that the corporation bearing that name had succeeded by consolidation or otherwise to the original Martin lampblack business and good will, and that the package so purchased bearing the Martin name had back of it the qualities and reputation of the well-known Martin lampblack. The two competitors were dealing with articles which in many important respects were necessarily similar in appearance and in characteristics. The name "Germantown" as a sort of mark or designation used on packages of lampblack is admitted to have been common property among all lampblack manufacturers. The course of business pursued by both these concerns in the way of advertising, packaging, and distributing their products present many similar features, and thus makes confusion arising from the use of the name L. Martin in each of their corporate names more liable to occur. That confusion in fact was created, to the annoyance and injury of the complainant, I think, was sufficiently proved. A very large manufacturer of paints and chemicals, Mr. Robert S. Perry, was sworn on behalf of the defendant to testify that there was no possibility of any confusion in the business of the two corporations arising from their similarity of name. This witness, however, seemed to refer to large purchasers of lampblack in bulk like his own firm or corporation. The witness frankly admitted that such direct dealers with the defendant corporation would be saved from confusion only by their knowledge of the continued business activity of the old Martin concern under the name of L. Martin & Co. This testimony strengthens the position of the complainant that the purchasers of lampblack in packages, who find it on shelves in the shops all over the country bearing the name of the defendant corporation, in large numbers of instances would probably infer that the goods before them were manufactured by the successor of the old manufacturing concern which for so many years went under the name of L. Martin & Co.

All the inferences leading to the conclusion that the assumption of this new name by the defendant corporation was a fraud, injurious to the complainant, are sustained by a mass of testimony which from its form,

variety, and minuteness of detail requires for elucidation the exposition of counsel which was made before this court on both sides in a most ample and satisfactory manner. Without undertaking to set forth this testimony, I will, I think, be sufficient to state the main conclusions which I have reached in this case.

1. No honest purpose for changing the corporate name of the defendant so as to appropriate the name "L. Martin" as a part of it has, in my opinion, been suggested by the testimony. Let it be conceded that the defendant corporation in its competition with the complainant corporation had an unlimited right to advertise to all purchasers of lampblack that it (the defendant) had in its employ the only man named L. Martin who was connected with the manufacture of lampblack, and that he had learned his business with the original L. Martin Company. Let it be conceded that defendant's corporate name might be changed so as to advertise these facts, provided no fraud or confusion injurious to the complainant was effected thereby. It seems unnecessary to consider under what limitations the corporate name of the defendant might have been employed in the manner and for the purpose above indicated, because Mr. Felix Wilckes, the president of the defendant company, one of the original founders of its business, and one of its largest stockholders, who was thoroughly conversant with all the transactions which resulted in the change of the defendant's corporate name, testified that in making such change they did not have in view that thereby there would be a wider publication of the fact that the defendant had the advantage of the L. Martin name and the L. Martin skill. The witness repeated that that result was not in view at all.

I shall not undertake to discuss the very considerable mass of testimony about a dinner which was held by the officers and customers of the defendant, some time, I think in or about January, 1905, in which it was suggested that young Mr. Martin should be recognized by having his name introduced into the business of the defendant. It is, I think, impossible to believe that these keen, aggressive business men, who apparently have large experience in the markets and have other business ventures on their hands, would have made this change in their corporate name from the sentimental motives applied to them upon the occasion of this dinner. The change in fact was not made for about a year. When the change was made young Mr. Martin had no business and no good will of any business. Only a few weeks at most had intervened between his withdrawal from the employ of the complainant corporation and his successful negotiation for employment with the defendant corporation. I do not recall any testimony that young Mr. Martin in that brief period did anything in the way of business, except pos-

sibly to have a label printed preparatory to embarking in the lampblack business at Germantown. During all of his business life until he left the employ of the complainant, he had been identified with the business of the complainant, and had no good will of his own, and he had acquired none when he merged himself in the Weglin & Wilckes Company in March, 1904. Why should these two manufacturers, the Messrs. Wilckes, after the Weglins had withdrawn and gone back to Germany, so as to make a change of the corporate name proper and necessary, place this young man's name at the head of their own so as to constitute it the most prominent and distinctive part of their corporate title? He was with them under a five-year contract, after which period he might be turned out. He might be discharged at any time for violation of his contract, or he might die or become incapacitated. The Messrs. Wilckes had a very large investment in this lampblack business. Out of 902 shares of stock outstanding, each brother held 420 shares, representing in the aggregate \$84,000. The remaining stock outstanding consisted of 2 qualifying shares, and the 60 shares which the Messrs. Wilckes had transferred to Mr. Martin. It does not appear that the transfer on the books of these shares in the fall of 1905 practically affected the control over them which the Messrs. Wilckes had under the terms of Mr. Martin's contract of employment.

We have, then, a large and apparently permanent business almost wholly owned and exclusively controlled by the Messrs. Wilckes, while the connection of young Mr. Martin with that business was based upon a very slight interest, and was necessarily extremely uncertain in respect of its duration. Is it possible to believe that the Messrs. Wilckes made this permanent change in the name of their corporation from a kindly desire to gratify this young man whose personality was liable to disappear from their business at any time? Is not the inference unavoidable that these shrewd men intended permanently to incorporate the name of L. Martin in the name under which their large and expanding business would be conducted in order to appropriate to themselves the permanent benefit of the name "L. Martin" in the lampblack business? If young Mr. Martin at the end of a period of two or three years, during which this L. Martin & Wilckes Company had been advertised all over the country as lampblack manufacturers of high repute, had died or been discharged for dishonesty, can it be doubted that the Messrs. Wilckes, the defendant corporation, would remain permanently in the possession of a very valuable thing? The Messrs. Wilckes changed the name of their corporation with such possibilities plainly in view. Can there be any doubt that when contemplating such possibilities they had no intention, in case young Mr. Martin was eliminated

from their lampblack business, to have his name eliminated from their corporate name as well?

A great deal of testimony was taken in regard to the very significant change which young Mr. Martin made in his own name after he left the employ of the complainant. The testimony satisfactorily proves that young Mr. Martin originally was uniformly known as L. Martin, 3d, or perhaps occasionally Luther Martin, 3d, and that he so signed his name. His father was known as "L. Martin, Jr.," or "Luther Martin, Jr.," notwithstanding the fact that the first Luther Martin who appears in the testimony died in 1886. When young Mr. Martin associated himself with the defendant corporation, he seems to have resolved upon changing his name. In the latter part of 1895 we find him signing his name in letters addressed to the L. Martin Company and to the Philadelphia Trust Company, where his stock was pledged, as L. Martin, 3d—the name by which these correspondents knew him. We also find during the same period that he signed his name as L. Martin when carrying on the correspondence of his employer with its customers. When the business of changing the defendant's corporate name was finally entered upon, the young man's name was accepted as "L. Martin," and that name appears in the most prominent place in the new title of the corporation. Assuming, for the mere purpose of the present discussion, that the defendant corporation would have an absolute right to put the name of this young man, whose connection with their large business was so slight and possibly transient, at the head of their corporate name without the slightest regard to the fact that such form of corporate name would lead to uncertainty and confusion or deception to the injury of the complainant, what possible justification can be offered for incorporating this young man's name in an altered form, a form in which it had not been known, but which manifestly simulates the name of the defendant corporation and the name of the Martin lampblack business to which the complainant had succeeded? In my opinion, in order to find that the defendants were innocent of any intent to fraudulently appropriate the name and good will of the original Martin lampblack business which belonged to the complainant, we must disregard sound rules of evidence, all experience with the motives which influence human nature, and common sense.

2. The idea that a man has a right to use his name as a part of the name of a corporation in which he is interested, without regard to the effect of such use in the way of accomplishing deception and fraud, precisely as a natural person can use his own name, has, I think, in this state, been exploded. The opinion of Mr. Chief Justice Fuller in the case of *Howe Scale Company v. Wyckoff, Seamans & Benedict*, 198 U. S.

119, 25 Sup. Ct. 609, 49 L. Ed. 972, 985, so far as it negatives, when properly interpreted, the proposition that the use of a family name by a corporation stands on a different footing from its use by individuals or firms, is, I think, inconsistent with the unanimous opinion of the Court of Errors and Appeals in this state in *International Silver Co. v. Rogers Corp.*, 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506.

I think we have got beyond the notion, if it ever prevailed, that a man has an absolute right to use his name in his business shutting his eyes to the inevitable effect of such use to deceive the public generally, and to injure some other dealer in the market. The maxim, "*Sic utere tuo ut alienum non lædas*," applies to everything that a man has, including his name. Confusion seems to have sometimes arisen from the failure to recognize the difference between the name with which a man finds himself incumbered and perhaps cursed when embarking in business, and which perhaps to a very large extent he is practically obliged to use in such business, with the name of a corporation which he creates for the purpose of carrying on his business. He is not responsible for his individual name—had no chance in its selection; he is wholly responsible for the corporate name, having had a wide field within which to make any selection as he might see fit. Confusion between two natural persons who are doing business under the names their parents, wisely or unwisely, gave them, generally may be regarded as an accident, a misfortune to both, but neither is to blame for the harm that is done. Two men having the name "John Smith" in common might be engaged in the same line of business in the same town. Certain special duties may be cast upon each growing out of this sameness of name and business. Neither one, however, can compel the other to abandon his name or carry on his business under a different name. Suppose, however, an old-established lampblack manufacturer named John Smith carrying on his business in his individual name, should incorporate his business under the name of the "John Smith Lampblack Company." Is it not clear that no other John Smith could thereafter embark in the lampblack business and carry on the same under the same corporate name? Under our present corporation act the second John Smith could not create a corporation with such a name.

3. Apart from the general equitable principle which limits a man in his use of his name as a part of the corporation which he creates for carrying on his business, our statute, it seems to me, recognizes a right in every corporation under our general act to be protected against the evils of "uncertainty and confusion" which arise from the adoption of a similar name by a subsequently created corporation. Laws April 21, 1896. c. 185, § 8 (P. L. p. 280). I do not think that

the object of this provision of our corporation act was merely to impose a duty upon the Attorney General of the state. It seems to me that one object of this statute was to protect all corporations created under it, and to safeguard the use of their corporate names in their business. What similarity must be deemed as leading to "uncertainty or confusion" must depend upon circumstances. An important test oftentimes will be found in the objects of the corporation set forth in its certificate. A John Smith Company carrying on the lampblack business in Camden might have no possible complaint against a subsequently created J. Smith Company carrying on the lumber business in Paterson, the objects of the two corporations being set forth in their respective certificates. A change of business or a change of location might bring two corporate names which originally passed the statutory test subject to the operation of the equitable rule which existed independently of and prior to any statute. In the present case, however, I think the complainant's right to relief, both through an injunction and a recovery of damages or diverted profits, rests firmly upon the great equitable principles which do not depend upon the above-mentioned statute. The statute, however, seems to be utterly inconsistent with the idea that the names of corporations on the one hand, and the names of individuals and firms on the other, stand on the same footing in cases of unfair competition. Apart from any question of actual fraud, every man is bound to recognize the prior right to a corporate name which has been acquired under our statute. No man has an unlimited right to use his own name in the creation of a corporation under our statute. Any incorporation under our law is a privilege, which must be accepted under the conditions imposed.

4. The injunction which the complainant was allowed to issue in this case does not restrain the defendant from doing any business under its present corporate name. Under its present certificate or under an amended certificate it might carry on a business entirely different from the lampblack business without causing any deception to the public or injury to the complainant. It is not suggested that the L. Martin & Wilckes Company might not carry on the business of manufacturing silk fabrics or steel rails without defrauding or annoying the complainant by the introduction of uncertainty or confusion into its business. The injunction will therefore merely restrain the defendant from carrying on the lampblack business under a name of which the words "L. Martin" are a part, unless other words are made a part of such name which will have the effect to clearly and unmistakably distinguish the two corporations and their respective businesses. Counsel for defendant in his brief suggested that the injunction should be so drawn as to permit the defendant to use its present cor-

porate name, "coupled with such other words as would unmistakably distinguish it from the defendant." Counsel suggested the phrase "not connected with the L. Martin Company, our competitors," as a proper form of language to be employed "in connection" with the defendant's present corporate name. These suggestions are based upon the opinion of the court of Errors and Appeals in the Rogers Case.

The difficulty about permitting the defendant to continue to use its present corporate name in the lampblack business arises from the fact that, although the defendant may connect other words with its corporate name, the public may not. The situation is radically different from that which was present in the Rogers Case. There the question related to the stamping of the goods or the name of a label or advertisement describing the goods. In order to get the benefit of the principle which the defendant invokes, it is necessary, I think, that the suggested curative phraseology be actually inserted in and made a part of the corporate name. Only in this way can the defendant corporation be with certainty identified and distinguished from the successor to the old business of L. Martin & Co. No practicable way was suggested by which the name "L. Martin" could be employed as part of the defendant's corporate name without creating liability of injury to the complainant. Counsel for the defendant was allowed on settlement of the decree to further argue this question, and to submit a form of corporate name for the defendant in which the name "L. Martin" or "L. Martin, 3d," might appear without injury to the complainant's rights. It seems to be conceded that such a form of corporate name is impracticable.

5. After the announcement of the conclusions substantially set forth above, extensive argument was made in regard to the right of the complainant to an accounting from the defendant. The conclusion which I reached in regard to this matter is set forth in the following memorandum heretofore furnished to counsel:

The gist of the complainant's case lies in a charge of fraud against the defendants. The Court of Chancery of New Jersey has general jurisdiction of all cases of fraud. The only question as to jurisdiction where there is fraud is confined to the propriety of exercising the power which the court undoubtedly has. The cases decided in this court and the Court of Errors and Appeals sustain the wide theory of equity jurisdiction in New Jersey in all cases of fraud which has prevailed in England. *Eggers v. Anderson*, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570; *Hubbard v. International Mercantile Agency*, 68 N. J. Eq. 434, 59 Atl. 24; *Dawson v. Leschziner* (N. J. Ch.) 65 Atl. 449; *Mazzolla v. Wilkie* (N. J. Ch.) 66 Atl. 584. It follows that where the complainant is

found to have brought his case properly in the Court of Chancery of New Jersey for equitable relief based on fraud, and the court has administered a portion of the relief to which he is entitled, he ought not to be turned out of the court of equity and compelled to try his case all over again in a court of law in order to have his damages awarded to him. Assuming that this tort called "unfair competition," which is so peculiarly the creature of courts of equity, is cognizable at law in an action of trespass on the case, it may be that the Court of Chancery would not entertain a bill in this case, the sole object of which was to give the complainant damages which he had suffered on account of the defendant's fraud. If such a bill were presented, the Court of Chancery, while asserting its theoretical jurisdiction, might decline to exercise it on the ground that the complainant had an adequate remedy at law. Right here it seems to me comes the distinction between the award of damages in a fraud case and the award of damages in a nuisance case, where an injunction goes. Without a Lord Cairns' act the Court of Chancery is powerless, in a suit in which an injunction upon a nuisance is granted, to go on and assess the damages which the complainant has suffered from the nuisance. Most jurists, I think, in these days agree that this is a deplorable result, and that Lord Cairns' act effected a useful reform.

The general rule, to which perhaps there may be exceptions, in my opinion may be safely laid down that in all cases in which the jurisdiction of the Court of Chancery, based on fraud, is invoked to obtain purely equitable relief such as an injunction, the court should proceed to accomplish complete justice and enforce all the complainant's rights arising out of the fraud, including the ascertainment and award of all damages caused by the fraud, unliquidated as well as liquidated. It may be noted that the present case does not call for the application of such an extreme rule. It has not so far been suggested that the complainant has suffered any substantial damages from the fraud of the defendant other than the diversion of profits. The defendant presumably has received or will receive these profits fraudulently diverted from the complainant, and the theoretical "fund" to which Prof. Pomeroy refers (1 Pom. Eq. §§ 170, 175), and which was thought to help out the jurisdiction of a court of equity to award damages, may perhaps be assumed to exist. The extreme rule above indicated would be applicable in case the complainant claimed damages (unliquidated, of course) because of the conduct of the defendant in supplying the market with inferior or defective goods which would be attributed by the purchasing public, or some part of them, to the complainant, whereby the complainant's reputation in the market had suffered. No such damages have been claimed in this case, but if they were I

should not hesitate to hold that the jurisdiction of the Court of Chancery to award such damages exists in full force and should be exercised, the complainant having necessarily come into the Court of Chancery for the most important part of the relief to which it was entitled, viz., Injunctive relief. Of course, the court might obtain the aid of a jury in assessing the damages, if in its judgment such aid would be valuable. The defendant, however, has no constitutional right of trial by jury, because the Court of Chancery has complete, though concurrent, jurisdiction of fraud cases.

The effect of extending the jurisdiction of courts of equity by statutes like Lord Cairns' act, and of extending the jurisdiction of courts of law by statutes giving them cognizance of equitable defenses, and giving them power to issue injunctions, upon our dual system of law and equity, has, I think, oftentimes been misunderstood. To some minds the separation between the administration of law and the administration of equity is imperilled when the court of law or the court of equity in which a particular case happens to be pending is permitted to recognize and enforce all the rights of the parties litigant, whether legal or equitable, and to award all remedies which either a court of law or a court of equity can supply. This sort of merger of law and equity in particular cases has been firmly established under the modern English practice for many years without in the slightest degree impairing the value of the dual system. The reason is plain. The vast majority of disputes between litigants can be completely disposed of in a single civil action either in a court of law or in a court of equity. Day after day our two systems of courts are at work, each within its appropriate sphere. Our judges are trained and become expert in that particular kind of work which is allotted to their respective courts. The full advantage of the application of the principle of the division of labor to judicial work is obtained by the natural and necessary classification of the vast majority of all civil actions as actions at law or suits in equity, and the allotment of these classes to their respective courts. When, however, the exceptional case appears, and the enforcement of all the rights of the parties litigant so as to accomplish complete justice between them in a particular case necessarily involves the application of both law and equity, it certainly seems to be better to allow an exception to the general rule. Justice, convenience, and common sense should not be sacrificed in order to maintain a rigid remedial system. In New Jersey we believe in the so-called separation of law and equity, because we think that such separation leads to the evolution of better law and better equity, to the training of better law judges and better equity judges than is possible under a system which compels every trial judge to be expert in all branches of

judicial work. But the separation of which we approve ought not to include the splitting of a cause in two, and the trial of the two portions in different courts. If the great majority of litigations were both legal and equitable in their nature, in my opinion the dual system would be an intolerable evil.

After trying a nuisance case for three or four days and granting an injunction, it gives me no satisfaction, but, on the contrary, somewhat shocks my sense of justice, to refuse to hear the complainant's appeal for his damages, and to require him to bring an action at law involving perhaps three or four days of trial in order that his damages may be assessed by a jury. In all cases in which only a court of equity has the power to administer an important part of the relief sought by the complainant, I think it ought to be astute to find a way by which it can go further and administer the rest of the relief to which the complainant is entitled, but which ordinarily he could obtain only in a court of law. A similar statement, I think, can justly be made with reference to any possible corresponding action on the part of a court of law in the way of administering complete relief by exercising not only its own legal jurisdiction but also in the particular case the jurisdiction of a court of equity.

It may be noted in passing that the proposed constitutional amendments now before the Legislature of the state provide for the "giving of complete legal and equitable relief in any cause in the court or division where it may be pending."

6. A reference to a master in order to assess the complainant's damages was made in this case, because counsel on both sides assumed that such a course would be taken if an accounting of any kind should be ordered. In many cases of this class, probably the better method is to have the court try and determine the issues in regard to the nature and amount of damages to be awarded precisely as the other issues in the cause are tried. No application having been made to have the damages ascertained by the court in this manner, the old and well-settled method of conducting an assessment of damages or an accounting for diverted profits was followed in the decree. The decree, therefore, directs that an injunction issue in the form above indicated, and that complainant's damages be assessed by a master.

(74 N. J. B. 631)

HARTMAN v. HARTMAN.

(Court of Errors and Appeals of New Jersey.
Nov. 17, 1908.)

APPEAL AND ERROR (§ 1135*)—TERMINATION OF CAUSE—AFFIRMANCE.

Where a case involves only questions of fact, and the appellate court agrees with the

conclusions of the Vice Chancellor, the decree should be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4455; Dec. Dig. § 1135.*]

Appeal from Court of Chancery.

Action by Joseph H. Hartman against Anna M. Hartman. From a judgment for complainant, defendant appeals. Affirmed.

Chauncy H. Beasley and Samuel J. McDonald, for appellant. Charles F. Herr, James M. Trimble, and Samuel Kalisch, for respondent.

PER CURIAM. This case involves only questions of fact. We agree with the conclusions of the learned Vice Chancellor. The decree under review should therefore be affirmed.

The application for counsel fee is denied.

(108 Md. 653)

BROWN et al. v. REEDER et al.

(Court of Appeals of Maryland. Nov. 14, 1908.)

1. TRUSTS (§ 181*)—EXECUTED TRUSTS—STATUTE OF USES.

The employment of the additional words "to the use of him and his heirs," in a deed granting premises to a person named and his heirs, "to the use of him and his heirs," in trust, for the benefit of grantor for life and thereafter for the benefit of her son and his heirs forever, has no particular meaning or effect, as the deed is a deed of bargain and sale, whereby the bargainor herself was seised to the use, and by the operation of the statute of uses (St. 27 Hen. VIII, c. 10) the use was executed in the bargainee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 175; Dec. Dig. § 131.*]

2. DEEDS (§ 93*)—CONSTRUCTION—CONSTRUCTION AS A WHOLE.

In construing a deed the court will not usually confine itself to a single word or phrase, but will ascertain, if possible, the intention of the parties, and especially of grantor, by construing the whole deed and every part thereof.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 231; Dec. Dig. § 93.*]

3. DEEDS (§ 93*)—CONSTRUCTION—INTENT.

The courts are first, by inspection of a deed, to ascertain what the parties intended, and then they are to expound it so as to accomplish that intention, unless expressions are employed which positively forbid it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 231; Dec. Dig. § 93.*]

4. DEEDS (§ 90*)—CONSTRUCTION.

In the construction of a deed the court takes into consideration the language employed, the subject-matter, and the surrounding circumstances.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 239; Dec. Dig. § 90.*]

5. PERPETUITIES (§ 4*)—SUSPENSION OF ABSOLUTE OWNERSHIP.

A deed granting premises to a person named and his heirs, in trust, for the benefit of grantor for life and thereafter "for the benefit of her son and his heirs forever," does not violate the rule against perpetuities; it being apparent, when the deed is read in the light of the surrounding circumstances that it was grantor's intent to provide for the maintenance of herself

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and son so long as they or the survivor should live and no longer.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 11; Dec. Dig. § 4.*]

Appeal from Circuit Court, Charles County, in Equity; Geo. C. Merrick, Judge.

Bill by Elizabeth S. Reeder and another against Gustavus T. Brown to determine the validity of certain deeds. Defendant having died pending this suit, Catesby Graham Brown and others, his heirs at law, were made defendants in his place. Decree for complainants, and defendants appeal. Affirmed.

The following is a copy of the deed of trust executed by Mrs. Elizabeth S. Bowle to Gustav A. Rasch, June 18, 1880: "This deed made this 18th day of June in the year eighteen hundred and eighty, by Elizabeth S. Bowle of Charles county in the state of Maryland: Whereas the said Elizabeth S. Bowle is desirous to make provision for herself and her son William T. Stoddert against future contingencies, and for the maintenance and support of the said William T. Stoddert; and Gustav A. Rasch of Baltimore City in the state aforesaid is willing to accept the trust under these presents, and to discharge and execute the same according to the true intent and meaning thereof: Now this deed witnesseth, that the said Elizabeth S. Bowle, in consideration of the premises, and the sum of one dollar, doth grant, bargain and sell unto the said Gustav A. Rasch and his heirs, unto the use of him and his heirs, all that tract or part of a tract or parcel of land called 'West Hatton' and the 'Reserve,' being a part of 'Wicomico Field,' and other parcels or tracts called 'Ford's Amendment,' being parcels held in connection with the principal tract, and lying on the Wicomico river in the lower part of Charles county aforesaid: Containing five hundred acres more or less and now known as 'Wicomico.' To have and to hold the said tract, part of a tract or parcel of land, for the following purposes and none other; that is to say in trust for the use and benefit of the said Elizabeth S. Bowle during her natural life, and so as she alone, or such person as she shall appoint, shall take and receive the rents, issues and profits thereof; and from and after the decease of the said Elizabeth S. Bowle in trust for the use and benefit of the said William T. Stoddert and his heirs forever; the said trustee to collect the rents, issues and profits from said land and pay the same to the said William T. Stoddert, or to permit the said William T. Stoddert to use and occupy the said land, whichever the said trustee may consider most advantageous to the said William T. Stoddert. It is hereby declared and provided that said trustee shall have power at any time after my death, with the approbation and consent of the said William T. Stoddert ex-

pressed in writing—and provided the trustee shall consider it for the manifest advantage of the said William T. Stoddert—to determine the trust hereby created and to convey by deed the legal title to the real estate, hereinbefore mentioned, to the said William T. Stoddert in fee simple, without having recourse to a court of equity."

Argued before BOYD, C. J., and BURKE, BRISCOE, PEARCE, SCHMUCKER, and WORTHINGTON, JJ.

W. Mitchell Diggs and L. Allison Wilmer, for appellants. W. Roy Stephenson and Adrian Posey, for appellees.

WORTHINGTON, J. The more essential facts of this case, briefly stated, are as follows: Mrs. Elizabeth S. Bowle, widow, of Charles county, Md., being the owner in fee of a certain tract of land located in that county, containing about 500 acres, known as "Wicomico," on the 18th day of June, 1880, made a deed of the same to one Gustav A. Rasch of Baltimore City, in trust for the use and benefit of herself for life, and after her death "in trust for the use and benefit of her son, William T. Stoddert, and his heirs forever"; her son's name having been changed from Bowle to Stoddert to please his grandfather, Maj. John T. Stoddert. Subsequently, on August 4, 1885, during the lifetime of his mother, William T. Stoddert died, leaving one daughter, Mrs. Elizabeth S. Reeder wife of Foster M. Reeder, as his only heir at law, who, together, with her husband, is the appellee in this case. Mrs. Elizabeth S. Bowle, the mother of William T. Stoddert, died on June 8, 1905, at the advanced age of 85 years. A few days before her death—that is to say, on May 17, 1905—she executed a deed in fee simple of the same land to her nephew, Gustavus T. Brown, the original defendant in this case, who died pending the suit, leaving a son and two daughters, as his only heirs at law, who were made defendants in his place and now appear as the appellants in this court. The last-mentioned deed from Mrs. Bowle to her nephew, Gustavus T. Brown, was, of course, of no avail beyond the conveyance of her equitable life estate, provided for in her deed to Rasch, if that deed was itself a valid conveyance; but as Brown and his heirs, the appellants, claimed the land under the deed of May 17, 1905, on the ground that the deed of trust of date June 18, 1880, violated the rule against perpetuities and was therefore void, and Mrs. Reeder, the appellee, claimed the property by virtue of the deed of trust, which, as she contended, did not violate the rule against perpetuities, but was a perfectly valid deed, while, on the other hand, as she insisted, the deed to Brown was void, as well because of Mrs. Bowle's mental incapacity at the time it was executed, as of her want of title at that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

time, except as to her equitable life estate, a bill of complaint was filed by Mrs. Reeder and her husband, the appellees, in the circuit court for Charles county, in equity, on August 9, 1905, for the purpose of having the validity of the two disputed deeds judicially determined. The lower court upheld the deed of trust to Rasch and declared the deed to Brown null and void and of no effect whatever. The substituted defendants, heirs of Gustavus T. Brown, deceased, have prosecuted this appeal.

The first and most important question presented by the record is whether the deed of trust to Rasch of June 18, 1880, violates the well-known rule against perpetuities, and is therefore void. A copy of this deed is set out in full in the report of this case preceding this opinion. It will be observed, by referring to the deed, that it recites as follows: "Whereas the said Elizabeth S. Bowie is desirous to make provision for herself and her son William T. Stoddert, against future contingencies, and for the maintenance and support of the said William T. Stoddert; and Gustav A. Rasch of Baltimore City in the state aforesaid is willing to accept the trust under these presents and to discharge and execute the same according to the true intent and meaning thereof," etc. Then after conveying the property to Rasch and his heirs, "to the use of him and his heirs," she again declares the purposes for which the grant is made; that is to say: First, for her own use for life, and then "in trust for the use and benefit of said William T. Stoddert and his heirs forever." As to the employment of the additional words, "to the use of him (Rasch) and his heirs," we do not think they have any particular meaning or effect in this case, because the deed of trust is itself a deed of bargain and sale, whereby the bargainor herself was seised to the use, and by operation of the statute of uses (St. 27 Hen. VIII, c. 10) the use was executed in the bargainee. The additional words mentioned added nothing to Rasch's title and served no office whatever, as without them he took the legal title, and the additional use remained unexecuted in him and his heirs. *Brown v. Renshaw*, 57 Md. 67.

In connection with the conveyance of the legal title to Rasch and his heirs, the words of the deed to which the appellants especially refer as creating a perpetuity are these: "In trust for use and benefit of said William T. Stoddert and his heirs forever." Whether these words of themselves, without other words in the deed explanatory of the intention of the grantor, would create a perpetuity, we are not called upon to determine, for in construing a deed, as well as in construing other instruments of writing, we are not usually to confine ourselves to a single word or phrase, but to ascertain if possible the intention of the parties, and especially of the grantor, by considering the whole deed and every part thereof. Waller

v. Pollitt, 104 Md. 172, 64 Atl. 1040; 13 Cyc. 363. The courts are first, by an inspection of the deed, to ascertain what the parties intended should be effected by it, and then they are to expound it so as to accomplish that intention, unless expressions are employed which positively forbid it. *Peyton v. Ayres*, 2 Md. Ch. 64. "It is the duty of the court (the intention being ascertained) to give the instrument such interpretation as will effectuate that intention, provided the terms and expressions employed will admit of such construction." *Peyton v. Ayres*, supra. In the construction of deeds and contracts, the courts take into consideration the language employed, the subject-matter, and the surrounding circumstances. *Chesapeake, etc., Co. v. Goldberg*, 107 Md. —, 69 Atl. 37.

It seems only proper therefore, in this connection, to refer to certain extrinsic circumstances connected with the making of the deed, which throw light upon the purpose and object of Mrs. Bowie in executing the same. The land in question known as "Wicomico" and containing five hundred acres, more or less, originally belonged to Maj. John T. Stoddert, the father of Mrs. Bowie who by his will devised the same to Mrs. Bowie for life, and then in fee to his grandson, William T. Stoddert. Maj. Stoddert died in the year 1870. Subsequently his grandson, William T. Stoddert, became involved in debt, and in 1879 a judgment was recorded against him in the circuit court for Charles county, and all his interest in remainder in the property was sold at sheriff's sale under the judgment. This interest was purchased by Mrs. Bowie, for a small consideration, and conveyed to her by deed from the sheriff, dated May 18, 1880. One month later she executed the deed of trust to Rasch above mentioned. The future contingencies mentioned in the deed, no doubt, had reference to the apprehension of Mrs. Bowie concerning the probability of her son's again running into debt, and her purchase of his interest in remainder at sheriff's sale and the making of the deed of trust to Rasch we may very well ascribe to her desire to protect him from his own improvidence and to secure a means of support for him as long as he lived, and then to have the property go to his heirs in accordance with the provisions of Maj. Stoddert's will. Reading the whole deed of trust to Rasch in the light of surrounding circumstances, it seems too plain for argument that these were the objects and purposes she had in view when she executed the deed.

Having thus ascertained that it was Mrs. Bowie's intention to create a trust so as to provide for the maintenance and support of herself and of her son, so long as they or the survivor of them should live, and no longer, it is our duty to effectuate that intention, unless some rule of law or language in the deed should forbid it. In the case of *Long v. Long*, 62 Md. 65, this court, speaking by Alvey, C. J., says: "The principle is now well

settled upon the most indubitable authority that the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or equivalent terms, but by the object and extent of the trust upon which the estate is given." And so in this case, though the deed to the trustee, Rasch, is to him and his heirs, yet, as there was no duty whatever for the trustee to perform after the death of both the grantor and her son, there was no practical or useful purpose for continuing the trust beyond their lives, and it will not be inferred that, when the purposes of the trust have been accomplished, the grantor still intended that the trust should continue throughout all generations. In *Phelps, Equity*, at section 198, it is stated: "That the duration of a trustee's estate is measured by the substantial objects and purposes of the trust, and not by the technical form of the words creating it."

Whatever title, if any, remained in Rasch or his heirs, or vested in any substituted trustee, after the death of the equitable life tenants, it was a mere naked legal title, while the whole equitable estate in fee was vested in Mrs. Reeder, the only child and heir at law of William T. Stoddert, deceased. In contemplation of a court of equity, an equitable estate in lands may be aliened or devised, or, in the absence of either alienation or devise, it descends in the same manner as legal estates. 2 Washb. Real Property, 532; *Reid v. Gordon*, 85 Md. 174; *Brown v. Renshaw*, 57 Md. 67. The barren legal title in the trustee is of importance to the owner of the equitable title only as it may be required to give the latter a standing in a court of law. *Matthews v. Ward*, 10 G. & J. 449, *Reid v. Gordon*, supra. Both in the *Barnum Will Case*, 26 Md. 119, 90 Am. Dec. 88, and in the *Deford Will Case*, 36 Md. 175, as well as in the case of *Missionary Society v. Humphreys*, 91 Md. 131, 46 Atl. 320, 80 Am. St. Rep. 432, all of which are relied upon by the appellants to sustain their contention, the trustee had active duties to perform and discretion to exercise, so that "a court of equity would be bound to supply a trustee to execute the trust to remote generations." *Missionary Society v. Humphreys*, supra.

In this case all the powers and duties of the trustee were required to be performed, if at all, during the lifetime of Mrs. Bowle and her son, William T. Stoddert. Since they are both dead, the entire equitable estate in the land is vested in Mrs. Reeder. Even assuming that the trustee still holds title to the property, it is at most only a dry legal title with no power or discretion to exercise, and no duty to perform, and she has the right to call upon him for a conveyance of the same to her, so that she may have indubitable standing in a court of law, as well as in a court of equity. Rasch having voluntarily resigned the trust some years ago, in the life-

time of Mrs. Bowle, and Adrian Posey having been duly appointed in his place, and having accepted the trust, he is the proper person to make such conveyance, as the lower court by its decree directed him to do.

We have carefully considered the able brief submitted by the counsel for the appellants, and have examined the authorities referred to therein; but we cannot see that the deed of trust to Rasch could by any reasonable and fair construction create a perpetuity such as is condemned by the policy of the law, and the court will never strain a point to declare a deed of trust within the rule against perpetuities merely in order to strike it down, but, on the contrary, will uphold it by every fair intendment so as to effectuate the purpose and object of the grantor as ascertained from an inspection of the whole deed and every part of it, as read in the light of surrounding circumstances, and duly considering the subject-matter. In the case of *Johnson v. Preston*, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A. (N. S.) 564, cited by the appellants, the court held that the rule against perpetuities applies to the creation of a term of years as well as to a freehold estate; but our predecessors have held that a lease for 99 years, renewable forever, does not violate the rule against perpetuities, because the property was not thereby placed extra commercium, which is the test. *Banks v. Haske*, 45 Md. 207. Neither do we think the property in this case was so placed by the deed of trust from Mrs. Bowle to Rasch, and we find no words in that deed and no rule of law which forbid our giving effect to the intention of the grantor therein.

Having determined that the deed to Rasch is a valid deed, and that the whole equitable title to the property was vested in Mrs. Reeder from and after the death of Mrs. Bowle, and that the lower court was right in directing the legal title to be conveyed to Mrs. Reeder, it becomes unnecessary to consider the circumstances under which the deed to Brown, of date May 17, 1905, was made, as Mrs. Bowle then had no title to convey except her equitable life estate, which came to an end at her death, on June 8, 1905.

We think the decree of the lower court correctly determines the dispute between the parties concerning the whole controversy, and that decree will therefore be affirmed.

Decree affirmed, with costs.

(109 Md. 30)

RICHTER et al. v. POE et al.

(Court of Appeals of Maryland. Dec. 2, 1908.)

1. GAMING (§ 14*) — SPECULATIVE TRANSACTIONS—AGREEMENTS FOR PAYMENT OF DIFFERENCES—"GAMBLING CONTRACT."

A contract whereby a so-called purchaser of stock, in case of a decline in the market price, is to pay the difference between the contract price and the market price, with no intention that he shall receive and pay for the stock itself

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is a gambling contract, and no action can be maintained upon it.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 25, 26; Dec. Dig. § 14.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3028, 3029.]

2. GAMING (§ 12*) — SPECULATIVE TRANSACTIONS — SALES FOR FUTURE DELIVERY — "WAGER."

A contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods nor any other means of getting them than to go into the market and buy them; but such contract is only valid when the parties really intend a delivery by the seller and payment of the price by the buyer. And if the real intent be merely to speculate in the rise and fall of prices, and the goods are not to be delivered, but the difference is to be paid between the contract and market price at the date for executing the contract, then the transaction is nothing more than a wager.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 22; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7365-7368, 7831.]

3. GAMING (§ 11*) — GAMBLING CONTRACTS — NATURE AND FORM.

A contract which is in fact a gambling contract is not rendered valid by being clothed in legal form, as the court will look through the form of the contract and will declare its true nature.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 11.*]

4. GAMING (§ 11*) — SALES ON MARGIN.

A speculative contract for the purchase and sale of stocks on margin is valid, where the broker undertakes at once to buy the stock selected, and agrees to advance the money required beyond the per cent. furnished by the customer, and carry or hold the stock for the benefit of the customer so long as the margin agreed on is kept good, or until notice is given by either party that the transaction must be closed, and agrees at all times to have in his name and under his control, and ready for delivery, the shares purchased, or an equal amount of other shares of the same stock, and deliver such shares to the customer when required by him on receipt of advances, commissions, and interest, or sell such shares on the order of the customer on payment of the sums due him and account to the customer for the proceeds of such sale, and the customer undertakes to pay the margin agreed upon, and keep it good according to the fluctuations of the market, and take the shares whenever required by the broker, and pay the difference between the percentage advanced by him and the amount due the broker.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 23; Dec. Dig. § 11.*]

5. GAMING (§ 49*) — REMEDIES OF PARTIES — ACTIONS — EVIDENCE.

In an action against a broker to recover money paid him under a contract to purchase stock which plaintiff claims was a gambling contract, the validity of the contract will be presumed, and the burden of proof is upon plaintiff to establish the fact that it is a gambling contract.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 100; Dec. Dig. § 49.*]

6. APPEAL AND ERROR (§ 1010*) — FINDINGS OF COURT — CONCLUSIVENESS.

Where the greater part of the testimony is taken orally before the judge who decides the case, it is proper for the appellate court to consider that the trial judge had the opportunity to observe the witnesses and the manner of testifying, and had the best means of deciding upon

the value of their testimony, although this should not prevent the appellate court from reversing the decree if it is not warranted by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

7. GAMING (§ 49*) — REMEDIES OF PARTIES — EVIDENCE.

Evidence, in an action to recover money paid a broker on an alleged gambling contract, held insufficient to show that the contract was a gambling contract.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 49.*]

8. BROKERS (§ 38*) — LIABILITIES TO PRINCIPAL — ACTIONS — EVIDENCE.

Evidence, in an action against a broker to recover for failure of the broker to perform his contract to carry stock purchased for plaintiff until it should decline to a specified price, held insufficient to establish an agreement to carry the stock in that manner.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 38.*]

9. BROKERS (§ 24*) — DUTIES TO PRINCIPAL — "STOP ORDER."

A "stop order" is a direction by a purchaser to his broker to sell the stock purchased at the best available price if it should touch the price named in the order, while it is being held by the broker; but it does not impose an obligation on the broker to hold it until it reaches that price, as it is a measure of protection which the purchaser provides for himself against loss beyond a certain point in a fluctuating market.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 24.*]

For other definitions, see Words and Phrases, vol. 7, p. 6669.]

Appeal from Circuit Court No. 2 of Baltimore City; James P. Gorten, Judge.

Action by Bruno Richter and others against Philip L. Poe and others. From a decree dismissing the complaint, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, and HENRY, JJ.

William S. Bryan, Jr., for appellants. J. Cookman Boyd, William M. Maloy, and George M. Brady, for appellees.

BURKE, J. This case comes before us on appeal from a decree of the circuit court No. 2 of Baltimore city, dismissing the appellants' bill of complaint filed in that court. Bruno Richter, who is engaged in the chattle loan business in Baltimore city, had certain stock transactions during the months of August and September, 1907, with the appellees, who are stockbrokers, and also the agents in Baltimore city of the New York brokerage firm of T. A. McIntyre & Co. The suit involves an inquiry into the nature of certain transactions concerning 500 shares of stock of the Amalgamated Copper Company, upon which Bruno Richter had paid to the appellees the sum of \$4,200, and had given a mortgage on certain property in Baltimore county for \$10,000 as additional security in part payment of the purchase price of the stock. The specific relief pray-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed for in the bill is: (a) That the appellees may be decreed to repay to Richter said sum of \$4,200, with interest; (b) that they may be decreed to surrender to him the mortgage note of \$10,000 to be canceled; (c) that they may be decreed to release the mortgage, and be enjoined from attempting or proceeding to sell the mortgaged property under the powers contained in the mortgage. The two grounds upon which this relief prayed for rests are: First, that the transactions respecting the purchase and sale of the stock were mere gambling or wagering contracts; secondly, that the appellees had agreed with Richter to carry the stock until it declined to \$45 per share, and that in violation of their agreement they sold the stock at \$56 per share; and it is contended that because of this violation of the agreement Richter had a right to rescind the contract, and demand the release of the mortgage and recover the money paid by him to the appellees. The bill alleged that while the transaction between him and the appellees were in the form of a purchase of said stock it was in truth and in fact a mere gambling wager, there being no intention or belief on the part of himself or the appellees that the stock for the purchase of which orders had been given should even actually be delivered to him, but that the sole purpose, as well known to the appellees, was that there should be an accounting and settling of the differences as the stock rose or fell in market price, or as the appellant won or lost on his wagers; that the only expectation of all parties to the transaction was that when the wagering transactions were completed the settlement and adjustment should be made on the differences between the market prices of the stock at the time the orders to buy the same were given; that, because of the breach of the contract by the appellees to carry the stock to \$45 per share, the reasonable expectation of benefit which Richter had when he delivered the money and the promissory note to the defendants had been disappointed by their wrongful conduct in selling the stock before it declined to that figure, and that he had served a written demand upon the defendants to return the money and note to him and to release the mortgage, which they had declined to do. These grounds upon which the relief prayed for rests are explicitly denied by the answer. It admits that among the transactions had between themselves and Richter there were purchases of Amalgamated Copper stock to the extent of 500 shares, but they deny that the transactions were a mere gambling wager, or that there was no intention or belief on the part of Richter or the defendants that the stock for the purchase of which orders had been given should ever be delivered to him; they deny that the sole purpose was that there should be an accounting and settlement of the differences as the stock rose and fell in price; they deny

that the transactions were wagers on the part of Richter; they deny that the only expectation of all the parties to the transactions was that they should be completed as set forth in the bill, and they alleged that they stood ready and willing to deliver to Richter all shares of stock that he had purchased. From this statement of the pleadings it will be perceived that the two important questions presented for decision are: First, were the transactions mere wagering or gambling contracts, and therefore void? Secondly, was there an agreement between the parties to the effect that the appellees, in consideration of the execution and delivery of the promissory note and mortgage, would carry the stock until it should decline to \$45 per share?

It is settled that "where the contract is that in case of a decline in the market price of the stock the purchaser is to pay the difference between the contract price and the market price, and there is no intention that he shall receive and pay for the stock itself, the dealing is a gambling contract, and the law does not permit an action to be maintained upon it." *Billingslea v. Smith*, 77 Md. 519, 26 Atl. 1077; *Stewart v. Schall*, 65 Md. 290, 4 Atl. 399, 57 Am. Rep. 327; *Cover v. Smith*, 82 Md. 614, 34 Atl. 465. Such a contract is null and void. *Dryden v. Zell & Merceret*, 104 Md. 345, 65 Atl. 33. It is said in *Irwin v. Williar*, 110 U. S. 508, 4 Sup. Ct. 160, 28 L. Ed. 225, that: "The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and if, under guise of such a contract, the real intent be merely to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void."

If it appear that the transaction is a gambling contract, the fact that it is clothed in legal form will not avail. The court will look through the mere guise in which it is attempted to be conducted, and will declare its true nature. But there is a broad and well-recognized distinction between a gambling contract and a speculative contract for the purchase and sale of stocks on margin. Such transactions are valid. The true relations which exist between the broker and the customer in such cases, in the absence of some special agreement, where the stock is purchased on margin for speculative account,

are these: The broker undertakes and agrees: (1) At once to buy for the customer the stocks indicated. (2) To advance all the money required for the purchase beyond the per cent. furnished by the customer. (3) To carry or hold the stock for the benefit of the customer so long as the margin agreed upon is kept good, or until notice is given by either party that the transaction must be closed. An appreciation in the value of the stock is the gain of the customer, and not of the broker. (4) At all times to have, in his name and under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock. (5) To deliver such shares to the customer when required by him, upon the receipt of the advances, commissions, and interest due to the broker; or (6) to sell such shares, upon the order of the customer upon payment of the like sums to him, and account to the customer for the proceeds of such sale. Under this contract the customer undertakes: (1) To pay the margin agreed upon on the current market value of the stock. (2) To keep good such margin according to the fluctuations of the market. (3) To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount due the broker. *Markham v. Jaudon*, 41 N. Y. 235; *Richardson v. Shaw* (decided by the Supreme Court of the United States April 6, 1908) 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835.

The first question is, Does the evidence support the appellants' contention that the transaction between them and the appellees were gambling contracts for the purchase and sale of this stock? Whether they were mere wagers, or were valid purchases and sale on margin within the rules stated, were questions to be decided upon a consideration of all the facts and circumstances in the case. In determining these questions upon the record before us, in which appears, upon the material issues of facts raised by the pleadings, the most direct and irreconcilable conflict of evidence, two things must be remembered: First, that the law presumes the validity of the contract, and that the burden of proof was upon the appellant to satisfy the court of the truth of the essential facts alleged in the bill as the grounds for the recovery of the money paid and for the cancellation of the mortgage note; secondly, that the greater part of the testimony—and it is quite voluminous—was taken orally in the court below before the judge who decided the case. He, therefore, had the opportunity to observe the witnesses and their manner of testifying, and had the best means of deciding upon the value of their testimony. This circumstance, it is true, would not prevent this court from reversing the decree if we found it was not warranted by the evidence; but where the question to be

decided turns so largely, as it does in this case, upon the weight of testimony and the credibility of witnesses, it is properly entitled to much consideration. We have examined and considered carefully the testimony appearing in the record, and have reached the conclusion that it does not sustain the contention of Bruno Richter that the dealings had by him with the defendants with respect to the stock in question were gambling contracts, but that the transactions constituted a purchase and sale of stocks on margin.

This court has repeatedly said that, on a question depending entirely upon the evidence, "no good result can possibly arise from a recapitulation of the evidence. It is enough for the court to announce the conclusion it arrives at." *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273; *Moore v. McDonald*, 68 Md. 321, 12 Atl. 117. Here, however, a brief examination of the evidence, dealing with its nature and purport rather than with its details, may be appropriate. It is admitted that the appellees were stockbrokers, and were the Baltimore agents of the brokerage firm of T. A. McIntyre & Co. It is admitted that Bruno Richter gave orders to the appellees to purchase the stock in question on margin, and that he, at different times after the orders were given, paid to the appellees sums amounting to \$4,200 to be used as margins on the purchase of stock. It is also admitted that the promissory note and mortgage were executed and delivered as security for further or additional margin. It is now claimed that this was a mere sham—a guise to cover up a gambling scheme in order to protect it from the denunciation of the law; that it was never intended by the parties that the stock should be bought or delivered by the seller, and that there was no intention on the part of either the sellers or the purchaser that the stock should ever be bought or delivered, and that the whole arrangement was in truth and in fact a mere gambling wager.

The evidence fails to make out this claim. On the contrary, it is clear and satisfactory that the transaction was strictly a purchase and sale of the stock on margin, and was conducted in the usual and accustomed way governing such transactions. The evidence of Poe and Davies and the employés produced by them at the trial, respecting the giving of the orders of purchase of the stock, is utterly inconsistent with the plaintiffs' theory. It shows that the stock was actually purchased, and paid for by T. A. McIntyre & Co., and could have been delivered to Richter had he paid for it. Mr. McIntyre testified that he had paid for the stock at the price shown upon the books of his firm, and that he had personal knowledge of that fact, and that any time from the date of the purchase he was ready to deliver the stock to Richter upon his paying for the same. This testimony is strongly supported by that of

other witnesses and by circumstances appearing in the record, and is really contradicted. The stock was sold by McIntyre & Co., upon the New York Stock Exchange, for \$56 per share; but before this sale was made the weight of the evidence is that a demand was made by Poe and Davies upon Richter to pay for the stock and take it up, or to put up additional margin to protect them. This he refused to do, claiming that Poe & Davies were under a contract with him to carry the stock until it should decline to \$45 per share. It is a significant fact that at no time, until the bill was filed, did Richter claim that he and the appellees were engaged in a stock gambling scheme. No such claim is made in the letter of his counsel to Poe & Davies, dated October 14, 1907, in which he notified them that he considered the contract between them rescinded, and made demand for the return of the money paid and the surrender of the promissory note and the release of the mortgage, but he rested his right of rescission exclusively upon the ground that the appellees had wrongfully and contrary to their agreement sold the stock before it had declined to \$45 per share. Assuming, *ex gratia* argumenti, the truth of all the testimony produced by the plaintiff, it does not certainly appear that the transaction was a gambling one. It is not pretended that there was any express understanding that the stock was not to be actually purchased for the account of Richter, and his testimony as to what took place at the beginning of the course of dealing is so indefinite and uncertain as to be of little value upon this inquiry.

It seems to be reasonably certain that Richter assumed that the transaction was a gambling one from the mere fact that he was buying and selling on margin. This is obvious from his own evidence and that of Mr. Burgess, who, when asked by the plaintiff's counsel if it was understood between himself and Richter and Poe & Davies that the settlement was to be made on differences and that there was to be no actual delivery of the stock, answered as follows: "That is the way we understood it. I can't say Mr. Poe and Mr. Davies never said to me that they would not deliver. I want to be perfectly fair; but it was understood he knew, and we talked the matter over, that this was simply a margin transaction, but they never told me and I never told them—I want to be perfectly fair—Mr. Boyd: You never told them, or they never told you, what? Witness: I would never take the stuff, and they never told me. I said I was simply buying this on margin. I said, I want to speculate on margin when I went there. He says that it is five points on stock and three cents a bushel on wheat. I never took a turn on cotton, so I do not know what that was." It is settled by all the authori-

ties that a speculative transaction for the purchase and sale of stock on margin does not constitute gambling. *Dryden, Adm'r, v. Zell & Merceret*, 104 Md. 345, 65 Atl. 83; *Richardson v. Shaw*, *supra*.

2. Nor do we find sufficient evidence of an agreement on the part of the appellees to carry the stock until it should decline to \$45 per share. There is no written evidence of such an agreement, and it would have been a most unwise and improvident contract for them to have made, as it might have tied up indefinitely the money invested by them in the purchase of the stock. The court ought not to be too ready to believe they would do such a foolish thing. It is true that both Mr. and Mrs. Richter testify that Mr. Poe did so agree; but this he positively denies, and the circumstances attending the execution of the mortgage and the delivery of the instrument of writing marked "Plaintiff's Exhibit No. 8" strongly support his denial. The recital in that exhibit that Richter had requested the appellees to carry the stock on margin until it should reach a certain market price evidently refers to the stock loss order at \$45 which he gave to the appellees on the day the mortgage was delivered, and does not imply, nor was it intended to mean, that they were unconditionally bound to carry the stock for that figure.

A stop order is a direction given by the purchaser to the broker to the effect that if the stock touches the price named in the order, while it is being held, the broker shall sell it at the best available price; but it does not impose an obligation upon the broker to hold it until it reaches that price. It is a measure of protection which the purchaser provides for himself against loss beyond a certain point in a fluctuating market. We think it most probable that the claim that there existed a contract such as that set up in the bill grew out of misconception, or misunderstanding of the meaning and effect of that order.

The appellants having failed to sustain either of the grounds of relief alleged in the bill, the decree appealed against will be affirmed. We are not, however, to be understood as deciding that the breach of the contract alleged would, under the facts in this case, assuming the contract to have been proved, have entitled the appellants to the relief prayed for.

Decree affirmed, with costs.

(108 Md. 661)

HINCHMAN et al. v. JOHNSON et al.

(Court of Appeals of Maryland. Nov. 14, 1908.)

1. SET-OFF AND COUNTERCLAIM (§ 27*)—CLAIMS ARISING OUT OF SAME CONTRACT OR TRANSACTION.

In order to constitute a good defense by way of recoupment, the cross-claim must arise

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

out of or in some way be connected with the contract or transaction which constitutes the cause of action.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 45, 46; Dec. Dig. § 27.*]

2. SALES (§ 348*)—ACTIONS FOR PRICE—DEFENSES—RECOUNPMENT.

Defendants purchased by written agreement a husker and shredder from a company giving their notes for the price. Thereafter they secured an extension, giving their notes to plaintiffs, the company's agents, and subsequently renewed them, and also paid cash on account, but said nothing about their claim that plaintiffs had agreed that a pea-hulling attachment would be furnished if desired, though some eight months had elapsed since they claimed to have given notice to have the huller attached. *Held*, that defendants could not in an action on the notes after two years recoup for the failure to furnish the huller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 973; Dec. Dig. § 348.*]

Appeal from Circuit Court, Harford County; Geo. L. Van Bibber, Judge.

Action by Otho N. Johnson and others against Willard N. Hinchman and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

John S. Young, for appellants. Phillip A. Close and Fred R. Williams, for appellees.

BOYD, C. J. The declaration in this case contains seven common counts, and three special counts or promissory notes given by the appellants to the appellees for \$1,100, \$225 and \$212, respectively. The defendants (appellants) filed general issue pleas and also one of set-off; the set-off being for money alleged to be due by the plaintiffs to the defendants for some wood sold to them. As the granted prayers, both of the plaintiffs and defendants, submitted that question to the jury, it will be unnecessary to refer further to the set-off. The main question before us arises by reason of a claim of the defendants for recoupment under the following circumstances: The appellees were the local agents at Perryman, Md., of the International Harvester Company of America, and through a salesman sold to the appellants in September, 1903, a McCormick husker and shredder, with cutter head; the order providing that the purchasers were to give notes payable to the order of the company for \$162 due November 1, 1903, and \$163 due November 1, 1904. When the notes were given, the defendants desired longer credits than the contract provided for, which the appellees agreed to allow, and guaranteed that the change would be accepted by the company, or, if not, they would take the notes up themselves. It resulted in the appellants giving two notes, each for \$150, dated October 19, 1903, and payable on November 1, 1904, and Novem-

ber 1, 1905, respectively; the difference between the sum of those notes and the contract price not being explained in the record.

The appellants contend that, when they purchased the husker and shredder, O. M. Johnson, one of the appellees, agreed to furnish and deliver a pea-hulling attachment, to put it on the machine and fix it in running order, if notice was given to him to do so, and that W. H. Hinchman gave him notice to do so in the fall of 1904 (over a year after the sale of the husker and shredder), but it was never furnished. They claim that, by reason of the failure of the appellees to furnish the pea-hulling attachment, they lost a large number of bushels of cowpeas, which they had reserved for seed, and they sought to recoup to the extent of that loss. The appellants had large dealings with the appellees, and on June 22, 1905, they gave them their note for \$1,359.33, which included the first note due for the husker and shredder which the company had assigned to the appellees. That note was reduced and renewed in part from time to time, and the one for \$1,100 sued on is for the balance still due on it. Included in the note for \$212.63 is the other note given to the harvester company, which was also taken up by the appellees. It is at least doubtful, to say the least, whether the claim of the appellants could properly be allowed by way of recoupment. The purchase of the husker and shredder was from the International Harvester Company, and the original notes given for the purchase money, which were afterwards included within the notes sued on, were payable to that company. The order for the husker and shredder was in writing, and there is not only nothing in it in reference to the pea-hulling attachment, but the terms of the order forbid changes by such agents as the appellees were, unless approved by the company or its general agent, of which there is no evidence. It would seem, therefore, that the agreement with reference to the pea-hulling attachment was with the appellees, and not with the company. If that be so, it is difficult to understand how the defendants could recoup against the claim for purchase money for the husker and shredder, as the sales of that and of the pea-hulling attachment can scarcely be said to be the same transaction, when one contract was with the company and the other with the appellees. In order to constitute a good defense by way of recoupment, the cross-claim must arise out of, or in some way be connected with, the contract or transaction which constitutes the cause of action. 1 Poe, § 615; State v. B. & O. R. R. Co., 34 Md. 344. If the suit for the purchase money had been brought by the harvester company, there could have been no defense by way of recoupment on account of the pea-hulling attachment, unless it had contracted to furnish it, which the evidence does not show, and,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that being so, can it be said that the suit by the assignees of the company for the purchase money for the husker and shredder is on the same transaction as the sale of the pea-hulling attachment made by the appellees? In one instance the appellees were agents of the company, in the other they acted for themselves, and it would be carrying the doctrine of recoupment very far to allow it under the circumstances of this case. But, if we do concede that the claim of the defendants was sufficiently connected with the sale of the husker and shredder to permit them to recoup, and passing over the further question whether the damages claimed are of a character to be allowed by way of recoupment, under the general issue plea, we are of the opinion that it cannot be allowed by reason of the conduct of the appellants, and, as that was the question argued and the ground apparently relied on by the court below, we will base our decision on that.

The appellants cannot now in good faith question these notes. They not only gave their note for an amount which included the first one given for the husker and shredder eight or nine months after they claim they ordered the pea-hulling attachment, but they paid considerably more than the first one for the purchase money, renewed the balance from time to time and as late as October 24, 1906, sent a check for \$100 and a new note for \$1,000 to the appellees to take up the one for \$1,100, which the appellees, however, declined to accept without security. They also sent a renewal for the one for \$212.63, which was not accepted. It was not until just before this suit was brought, and after the appellees had refused to accept the renewals, that the appellants set up the claim for damages which they now seek to have allowed against the notes. In *Adler v. Robert Portner Brewing Co.*, 65 Md. 27, 2 Atl. 918, this court announced a rule which is so conclusive of this question that we will quote from it at some length. After referring to another branch of the case, the court spoke of a number of facts, including the giving of notes for the purchase money after the defendant had possession of the machine in question for about eight months, and then said: "If there was a breach of warranty, he knew it at that time, or, at least, he had the most ample opportunity of ascertaining it. After eight months he seeks to obtain a further credit by giving notes. Some significance must be attributed to the giving of a note. In good faith it imports that the maker will pay it at maturity. If the defendant did not intend to pay these notes because of some matter which had occurred, or if he intended to refuse payment in some contingency which he did not make known to his creditor, in either of these cases he was contemplating a fraud. We can give to the defendant's conduct no interpretation consistent with good faith, ex-

cept that he had no purpose of refusing to pay these notes at maturity. This clearly implied that he would make no objections to the amount claimed to be due as the purchase money of the machine. After this the defense arising from an alleged breach of warranty, or from any other cause, could not in good faith be set up in bar of a suit on this account. We think, therefore, that the court would have been justified in refusing to submit such question to the jury." In that case the purchaser gave the seller his note after having had possession of the machine for about eight months, while in this case the note for \$1,359.33 was given to the appellees nearly a year after the defendants claim they gave notice to have the pea huller delivered, then renewed it in part from time to time, and two years after the alleged notice asked for further renewals of that note and the one which included the other of the two notes given to the company for the purchase money.

The appellants do not rely on a breach of warranty, but they do rely on an alleged breach of contract, for the damages which they now seek to recoup against the notes, and it will be observed that in the *Adler Case* the language used is: "After this the defense arising from an alleged breach of warranty, or from any other cause, could not in good faith be set up in bar of a suit on this account." The opinion concluded by saying that the instruction given by the court proposed the true inquiry to the jury. That was as follows: "If the jury find that after the delivery of the machinery, and after the expiration of a sufficient time to have become acquainted with its condition and quality, the defendant asked for an extension of time, and promised to pay the claim, the plaintiff is entitled to recover." In the case of *Walker v. Pue*, 57 Md. 155, the same principle was in effect announced. That was a suit on a promissory note given for the purchase price of some fertilizer, called "Eureka," and the defendant claimed that there was a warranty that the Eureka "would keep up to its former standard in analysis and preparation for drilling"; the defendant having previously used that fertilizer. About a month after the Eureka was delivered, and when the defendant knew that it "was damp and filthy, and consequently difficult to drill," he gave a note for the purchase money without saying any thing about the condition of the fertilizer. The next summer he asked Walker, the company's agent, not to let the note go to protest, and applied for an extension of time for payment. Walker told him he would arrange so that the note would not be protested, but that he must apply to the company for an extension of time. Accordingly a year after he gave the note Pue wrote to the president of the company stating that he could not meet it at maturity, owing to a hail storm which had destroyed his wheat crop, and but for that it would have been

paid. He testified that he knew the bad condition of the fertilizer when he gave the note, but made no objection to signing it and intended to pay it, but made up his mind not to do so when Walker refused an offer of compromise.

The court held that certain prayers of the plaintiff (Walker) should have been granted, including the eighth, which was as follows: "If the jury believe from the evidence that after the defendant had ascertained the actual drillable condition of the Eureka delivered, if they shall find such delivery, and after he had also ascertained the result of the application of the Eureka so delivered to his land, he made an express promise to pay the note sued upon in this case, then they must find for the plaintiff, even although they believe the defendant received no benefit from the use of the said Eureka." Those cases fully sustain the court below in granting the plaintiff's second prayer that: "Under the pleadings and evidence in this case, the defendants are not entitled to recoup from the plaintiffs the alleged damage resulting from the failure of the defendants to receive the cow-pea huller referred to in the evidence," and, that being so, the omission to submit that question in the plaintiff's first prayer was proper. Of course, it was not intended in the cases above cited, or by the court below in this case, to hold that merely giving a note for purchase money or a renewal of one will under all circumstances be a waiver of a breach of warranty or breach of contract. Sometimes a purchaser cannot well avoid giving a note, or obtaining a renewal of it, but when purchasers act as these did, and never intimate that they have any ground for damages for an alleged failure to comply with the contract until about two years after the alleged breach, having in the meantime done acts which were utterly inconsistent with good faith and fair dealings, if they then believed they had the right to reduce the note by a claim for damages, and intended to assert that right, but did not tell the appellees, it would encourage fraud and unfair dealings to permit such a defense to notes which were given without objection, which had been paid in part and the balance from time to time renewed, and which the makers still sought to renew two weeks before this suit was brought. Promissory notes would be of little value if the makers are to be left free to thus repudiate them, in whole or in part, under such circumstances as are shown in this record, and we are of opinion that the defendants must be held to have waived their right to recoup these damages from the purchase money if it ever existed.

So, without deeming it necessary to say more in reference to the rulings on the prayers which were excepted to, and there are no other exceptions, we will affirm the judgment.

Judgment affirmed, the appellants to pay the costs above and below.

(109 Md. 75)

WILLIAR v. NAGLE et al.

(Court of Appeals of Maryland. Dec. 4, 1908.)

1. CONTRACTS (§ 280*)—PERFORMANCE—SUFFICIENCY—ARCHITECTS—MAKING PLANS.

An architect employed to prepare plans and specifications for a building to cost a specified sum cannot recover compensation for his services where the building cannot be erected except at a cost materially in excess of the amount specified.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1253; Dec. Dig. § 280.*]

2. CONTRACTS (§ 323*)—SERVICES OF ARCHITECTS—QUESTION FOR JURY.

In an action by architects for compensation, the question whether plaintiffs' estimate was reasonably near the cost of the building is for the jury, unless the question is to be determined from a construction of the provisions of a written contract of employment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1545; Dec. Dig. § 323.*]

3. TRIAL (§ 296*)—INSTRUCTIONS—ERRORS—CURE BY SUBSEQUENT INSTRUCTION.

In an action by architects for compensation, an erroneous instruction given at the request of plaintiffs that plaintiffs were entitled to recover if they prepared the plans and specifications for defendant, unless it was "distinctly understood and agreed by the plaintiffs" that they should receive no compensation if the cost of the building proved to be more than their estimate, was not cured by an instruction given at the request of defendant that if plaintiffs undertook to prepare plans and specifications for the building to cost not over a certain sum, and that the lowest bid received was for a sum greatly in excess of the estimate, the jury must find for defendant, since the instructions were contradictory, and it could not be said which instruction the jury observed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

4. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

A party cannot complain of the refusal of a requested instruction substantially covered by the charge as given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. CONTRACTS (§ 353*)—SERVICES OF ARCHITECTS—ACTION FOR COMPENSATION—INSTRUCTIONS.

In an action by architects for compensation, an instruction, requested by defendant, that, if there was an understanding or agreement between plaintiffs and defendant that the services should not be paid for unless the building could be erected according to the plans and specifications for a sum not exceeding a specified amount, plaintiff could not recover, was properly refused, since it failed to submit to the jury the question whether the building could be erected for the sum stated.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 353.*]

6. COURTS (§ 189*)—MUNICIPAL COURTS—BALTIMORE CITY PRACTICE ACT—EFFECT OF PLACING CASE ON TRIAL DOCKET.

Where defendant appears in an action commenced under the practice act of Baltimore city, and complies with the requirements of the statute, and the case is placed on the trial docket, plaintiff is not confined to the cause of action originally filed with the declaration, and neither party is bound or prejudiced by the affidavits originally made under the practice act, except

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

so far as such affidavits may strengthen or weaken the other testimony of the affiants.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 189.*]

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by George A. Nagle and others against Harry D. Williar. From a judgment for plaintiffs, defendant appeals. Reversed, and new trial granted.

Argued before BOYD, C. J., and BRISCOE, BURKE, WORTHINGTON, THOMAS, and HENRY, JJ.

Armstrong Thomas, for appellant. William F. Johnson, Jr., and John E. Semmes, Jr., for appellees.

BOYD, C. J. The appellees, who are architects, sued the appellant on an account which reads as follows: "To architectural services rendered in preparing working drawings and specifications from January to March, 1906, for apartment house at the northeast corner of Charles and Read streets. Two and one-half per cent. on lowest estimate—\$125,000.00—\$3,125.00." They obtained a verdict for \$2,075, and the questions arising on this appeal are on the exceptions to the rulings of the lower court in granting the plaintiffs' first and in rejecting the defendant's second prayer. The defendant contends that the plaintiffs undertook to prepare plans for a building, the cost of which would not exceed \$90,000; one line of the defense being that the work was undertaken by the plaintiffs under an implied condition that they were to receive no compensation for their services unless a building could be erected according to the plans prepared by them for a sum not to exceed that amount, and another being that there was an express agreement to that effect. The testimony offered by the respective parties is conflicting; the plaintiffs denying that there was such an understanding or agreement, either express or implied, while the defendant offered some evidence tending to sustain both of his defenses.

By the plaintiffs' first prayer the jury was instructed that "if they find that the plaintiffs are architects, and the defendant employed them to prepare plans and specifications for a building to be erected on the lot on the corner of Charles and Read streets owned in part by the defendant, and they further find that the plaintiffs did prepare such plans and specifications, then the plaintiffs are entitled to recover, unless the jury find that it was distinctly understood and agreed by the plaintiffs that they should not be entitled to receive any compensation for their services unless the building to be constructed under their plans would cost less than a certain sum of money, and that the same could not be built for the sum of money so specified." The qualification of the prayer,

"unless the jury find that it was distinctly understood and agreed by the plaintiffs," etc., is what is complained of by the appellant, as he contends that was not a proper statement of the law, and that, even if it be conceded that it did sufficiently instruct the jury as to one of the defenses, it ignored the other, and hence there was reversible error. There would seem to be no doubt that the prayer is not sustained by the authorities, if we are confined to it alone. If an architect be employed to prepare plans for a house to cost not more than \$5,000, he cannot under that employment recover for a house which would cost \$10,000. The latter might be of no use whatever to the employer, for he might not be financially able to erect a house at such cost, or, if he was, he might not be desirous of doing so. A dishonest architect could easily impose on his clients if such were the law. Indeed, we do not understand counsel for the appellees to contend in this court that there must necessarily be a distinct agreement on the part of the architect not to charge for his services, unless the building can be constructed at a cost reasonably near the estimate. It is said in their brief: "It is conceded that the general principle of law governing the transactions between the owner and architect with regard to the preparation of plans and specifications for a building is that, if the architect makes an estimate of the cost of the building, he is not entitled to his fee, unless the building be constructed at a cost reasonably near that estimated or agreed upon." In their brief they quote from *Wait on Engineering and Architectural Jurisprudence*, c. 33, par. 860, that: "An architect employed to prepare plans and specifications of a building and furnish an estimate of the probable cost is not upon submitting the same entitled to his fees unless the building can be erected at a cost reasonably approximating that stated in such estimate." They also quoted from 6 Cyc. 30, that "a person employed as an architect to furnish a plan is entitled to remuneration therefor, if made in accordance with the directions of the owner; but he cannot recover where the owner stipulates that the plan should be for a building not to cost over a specified amount, if the plans made are for a building exceeding that sum." The law as stated by the appellees, does not materially differ from that contended for by the appellant, who also relies in part on 6 Cyc. 30, and some of the cases cited by the appellees. If the cost of erecting a building is "reasonably near" or "reasonably approximates" (as some of the authorities express it) that stated in the estimate or understanding of the parties, the owner might very properly be held liable, certainly in many cases, for he knows or as a man of ordinary intelligence may be presumed to know that there may be some slight variance between

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the estimate and the actual cost of the building. *Feltham v. Sharp*, 99 Ga. 280, 25 S. E. 619; *Nelson v. Spooner*, 2 Foster & Finlason, 618; *Wait on Eng. and Arch. Juris.*, supra. Ordinarily that question should be submitted to the jury, unless there be a written contract which has to be entirely construed by the court and has no provision in it which should be submitted to the jury, but in a case like this, where it was contended that the building to be erected was not to exceed \$90,000, while the lowest bid was \$125,000, the court could declare as a matter of law that the estimate did not reasonably approximate the cost, which the lower court in effect did in granting the defendant's first and third prayers. In addition to the authorities above referred to, see 2 Am. & Eng. Ency. of Law, 818, *Maack v. Schneider*, 57 Mo. App. 431; *Wees v. Warren*, 72 Mo. App. 644, *Ada St. M. E. Church v. Garnsey*, 68 Ill. 132, *Hall v. Los Angeles Co.*, 74 Cal. 502, 16 Pac. 313, *Smith v. Dickey*, 74 Tex. 61, 11 S. W. 1049, and 1 *Hudson on Bldg.* 70, although some of them do not discuss the question fully.

While the court below seems to have adopted the doctrine announced by the authorities, it must have either overlooked the effect of the language used in the plaintiffs' prayer, or concluded that the defendant's first and third prayers sufficiently modified it. It is contended by the appellees that the latter are not in conflict with their first, but constitute merely a modification or qualification of the law announced in it. But is that correct? It is true that this court has decided in a number of cases that a defect in a prayer which by itself might be objectionable may be cured by others which are granted, but are those cases applicable to this? Compare for example the defendant's third prayer with the plaintiffs' first. It instructed the jury that if they found that "the plaintiffs undertook to prepare plans and specifications for a building to be erected in Baltimore city to cost not over \$90,000, and that the plaintiffs prepared plans and specifications for such building and requested bids thereon, and that the lowest bid received was \$125,000, then their verdict must be for the defendant." That is not a mere modification of the plaintiffs' prayer, but it is in direct conflict with it. In the one it was said the plaintiffs could recover "unless the jury find that it was distinctly understood and agreed by the plaintiffs that they should not be entitled to receive any compensation for their services," etc.; while in the other the jury was instructed, in substance, that it was not necessary that there be such understanding and agreement, for that is the effect of both of the defendant's prayers which were granted. In other words, it was not necessary, in order to defeat recovery by the plaintiffs, for the jury to find an express agreement on the subject; but, if they found that the plaintiffs were

employed to prepare plans for a building not to cost over \$90,000 and furnished them for a building which would cost at least \$125,000, the plaintiffs could not recover, yet the qualification in the plaintiffs' prayer was confined entirely to the one defense. When then the jury retired to their room with these conflicting instructions, what were they to do? If they would first read the plaintiffs' prayer, and then the defendant's prayers, it is not reasonable to suppose that they would conclude that the court merely intended to submit the qualifications in the alternative, unless they found the express agreement referred to in the plaintiffs' prayer or the implied condition in those of the defendant. If it be said that was possible or even probable, we cannot be certain that such was the case, if we assume the court so intended. Prayers may be so drawn that, although the one does not include the whole case, another does in such way as to avoid the danger of misleading the jury, but this prayer of the plaintiffs instructed the jury that if they found certain facts, which were not disputed, the plaintiffs were entitled to recover, unless they found one other fact, although there was evidence of two facts, either of which was sufficient to prevent recovery, but the court did not say so in that prayer. If the jury found against the defendant on the qualification in the plaintiffs' prayer, then there was nothing to do under it but find a verdict for the plaintiffs. Then when they took up the defendant's prayers, or either of them, they would see, in the first place, that there were no words used to connect them with the plaintiffs' prayer, nothing to show that they were intended to submit another qualification of it, but, if they found for the defendant as to the facts submitted to them in his prayers, they might well have thought "it is true the court has instructed us that if we find these facts our verdict must be for the defendant, but it said in the plaintiffs' prayer that the plaintiffs were entitled to recover, 'unless it was distinctly understood and agreed by the plaintiffs that they should not be entitled to recover any compensation for their services unless the building to be constructed under their plans would cost less than a certain sum of money,' and therefore, as we do not find that it was so distinctly understood and agreed by the plaintiffs, we must find our verdict for the plaintiffs." So it seems to us that, if we assume that the defendant's prayers were intended to be a further modification of the plaintiffs' first prayer, they were in the manner submitted calculated to mislead the jury, and were in fact contradictory; the plaintiffs' theory being, as shown by the prayer, that nothing short of an express understanding or agreement could bar a recovery, while those of the defendant presented the opposite theory, namely, that the contract could be implied from the facts stated in them. As was said of two conflicting

prayers in *B. & O. R. R. Co. v. Blocher*, 27 Md. 286: "The theories of these prayers were *prima facie* directly opposed. The jury could not without disregarding one or the other come to any correct conclusion." The jury might have reasoned: "We cannot tell which prayer we must be governed by, and, although we think the defendant's evidence sustains the facts set out in his prayers, yet, as we believe the plaintiffs did not distinctly agree that they should only be entitled to compensation for their services as set out in their prayer, we are authorized by that to find our verdict for the plaintiffs, and, as they did actually render the services, they ought to be paid for them." We cannot, therefore, treat the defendant's prayers as mere modifications or qualifications of that of the plaintiffs, and are of the opinion that there was reversible error in granting the latter.

The defendant's second prayer, which was rejected, was: "If the jury shall find from the evidence that there was an understanding or agreement between the plaintiffs and the defendant that the services for which suit is brought should not be paid for unless a building could be erected according to the plans and specifications prepared by the plaintiffs for a sum not exceeding \$90,000, then their verdict must be for the defendant." We find no reversible error in rejecting that prayer. In the first place, that theory of the defendant was so submitted in the plaintiffs' first prayer that we do not see how he could have been injured, but, in addition to that, it did not submit to the jury the question whether the building could be erected for the sum stated. We understand the appellant to rely mainly on the fact that the account filed by the plaintiffs admitted that the lowest bid was \$125,000, but this was originally a suit under the practice act of Baltimore city. When the defendant appears in such action, and complies with the requirements of the statute, the case is then placed on the trial docket, and is governed by the ordinary rules of procedure in actions *ex contractu*. The plaintiff can claim anything recoverable under his declaration, and the defendant can avail himself of any defense or evidence admissible under his pleas. The plaintiff is not confined to the cause of action originally filed with the declaration, and he and the defendant are not bound or prejudiced by the affidavits originally made under the practice act, "except in so far as the respective averments of these affidavits may strengthen or weaken the other testimony of the party making the affidavits." *Councilman v. Towson Bank*, 103 Md. 469, 64 Atl. 358, and cases therein cited. The prayer ought to have submitted the question whether the cost of the erection of the building would exceed the sum named.

For error in granting the plaintiffs' first prayer, the judgment will be reversed.

Judgment reversed and new trial awarded, the appellees to pay the costs above and below.

(109 Md. 42)

LORD v. SMITH.

(Court of Appeals of Maryland. Dec. 9, 1908.)

1. PRINCIPAL AND AGENT (§ 23*)—RELATION OF PARTIES—EVIDENCE.

Evidence held to show that complainant was the founder and proprietor of a business, and that defendant was his salesman and confidential clerk.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 41; Dec. Dig. § 23.*]

2. EQUITY (§ 65*)—MAXIMS—CLEAN HANDS—APPLICATION OF RULE.

Since the refusal of the court to act always gives defendant an unfair advantage of complainant contrary to the real justice of the case, the application as a defense of the maxim, "He who comes into equity must come with clean hands," is only allowed for reasons of public policy, as a check upon fraud and wrongdoing.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 185-187; Dec. Dig. § 65.*]

3. EQUITY (§ 65*)—MAXIMS—CLEAN HANDS—APPLICATION OF RULE.

Complainant before embarking in a new business had given up all his interest in his former business, and all his individual property for the benefit of his creditors, which have yielded or will yield sufficient to satisfy all his obligations. When starting anew in a commission business with other people's merchandise and on others' credit, he opened a bank account in the name of another to prevent the funds from being tied up by attachment proceedings. Held, that he was not guilty of such fraud towards his creditors as would preclude a suit by him to establish his right to the business as against the person in whose name the account was kept and who claimed to be proprietor; the maxim, "He who comes into equity must come with clean hands," not applying.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 185-187; Dec. Dig. § 65.*]

4. PRINCIPAL AND AGENT (§ 69*)—NATURE OF AGENT'S OBLIGATION.

An agent owes to his principal the utmost fidelity, and cannot make any profit for himself from the business in which he is employed, to the principal's detriment.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 132; Dec. Dig. § 69.*]

Appeal from Circuit Court of Baltimore City; Charles E. Phelps, Judge.

Bill by Charles W. Lord against Harry W. Smith for an injunction and accounting. Decree of dismissal, and complainant appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, WORTHINGTON, HENRY, and THOMAS, JJ.

J. Kemp Bartlett and Wm. S. Bansemer, for appellant. Wm. A. Wheatley, for appellee.

WORTHINGTON, J. The litigation in this case grows out of a dispute between the parties as to which is the proprietor of a certain brokerage business carried on in Baltimore city for a number of years past under

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the trade name and style of Charles W. Lord & Co.

The appellant, who was the complainant below, claims that the business was established by him in 1895, and has ever since been conducted by him as the sole proprietor, with the appellee (the defendant below) as his trusted and confidential clerk; while, on the other hand, the appellee contends that the business was established in 1895 by him, and that it has ever since been conducted by him as sole proprietor, with the appellant as his clerk. According to the testimony of the parties themselves, neither of them was aware of the claims and pretensions of the other until the month of November, 1907, when a controversy took place between them concerning the ownership of the business, and Mr. Lord according to his testimony claimed the whole; but, according to Mr. Smith's testimony, Mr. Lord said in the course of that controversy that he had as much interest in the business as Smith had, that half of it was his. At the same time Smith claimed that the whole business belonged to him. Shortly after this conversation—that is to say, on December 24, 1907—Mr. Lord filed the bill of complaint in this case in the circuit court for Baltimore city, setting forth his claims to the business as sole proprietor, alleging that he had established the business in the early part of the year 1895 at 21 Grant street, in Baltimore city, and had there begun operations as a manufacturer's agent of woodenware and kindred merchandise; that Harry W. Smith, the defendant, had been taken into the employ of the old firm of Lord & Robinson when he was a boy 15 years of age, and had continued in its employ for many years until the failure of that firm in 1893; that complainant had been a member of the firm of Lord & Robinson until it went into the hands of receivers in the year 1893, and that there had developed toward Smith on complainant's part an attitude of trust and confidence; that, upon commencing business again after his failure, the complainant took with him to 21 Grant street the said Harry W. Smith, in whose integrity he had implicit confidence, at the weekly salary of \$15 per week, which was subsequently increased to \$25 per week; that at the time he started the new business the complainant was not entirely free from the obligations of the old firm, and as he contemplated handling in a fiduciary capacity, to wit, that of factor or sales agent, the money of such of his old business associates as might entrust the sales of their merchandise to him, he feared that if he opened a bank account in his own name, and deposited therein such moneys together with his own earnings, that such funds might be subject to the danger of being tied up by proceedings instituted by some of his old creditors, who had not at that time been settled with, and, for the sole purpose of avoiding this danger, he

opened a bank account in the name of Harry W. Smith, with his consent, and took a power of attorney from the said Smith, authorizing the complainant to draw checks against said account; that both he and Smith thereafter drew checks upon this account so opened in the name of Smith, and that such practice was continued down to the time of filing the bill of complaint; that, by reason of the confidential relations between the complainant and Smith, the latter was allowed broad powers in the handling of the complainant's cash and bank deposits, and that Smith, acting under these broad powers, would from time to time draw checks for his own purposes over and above his weekly salary of \$25, and charge them on the books of the complainant, and would from time to time purport to put back sums of money to replace the amounts so withdrawn, which sums put back, however, did not in fact measure up to the amounts withdrawn; that in the course of time the excess of the withdrawals by Smith over the amounts put back by him was over \$9,000, not including withdrawals from the cash drawer; that in October, 1907, Smith had purchased with \$1,750 of the complainant's money a ground rent in the dwelling property known as No. 2318 Gullford avenue, in Baltimore city. The bill further averred that Smith had recently set up pretensions that he was the sole owner and proprietor of the business, and that all the money taken by him was his own money for which he was accountable to no one; that Smith had threatened, unless complainant would recognize Smith's pretensions, to solicit away from the complainant his patrons and customers, which it was averred Smith was able to do. The prayers of the bill were for an injunction: (1) Prohibiting said Harry W. Smith from exercising any control or interference in the complainant's business as it was known under his trade-name of Charles W. Lord & Co. (2) That said Smith be enjoined from collecting any moneys, or from diverting any consignments coming or due to the said Charles W. Lord & Co. (3) That he be further enjoined from making any withdrawals from the bank deposit of the complainant standing in the name of Harry W. Smith in the National Bank of Commerce of Baltimore. (4) That he be further enjoined from removing any of the books of account or other evidence of the state of business of Charles W. Lord & Co. from the office thereof, and that he return and replace in said office any books or other evidences of account of said business that were then under his individual control. (5) That he be further enjoined from soliciting the patrons of the complainant, trading under the name of Charles W. Lord & Co., to discontinue business with the complainant, and to give their patronage to the said Smith. (6) That pending these proceedings the defendant be further enjoined from disposing of the lot of

ground No. 2318 Guilford avenue, mentioned in the bill of complaint; also that said Harry W. Smith discover and set forth in detail all the sums of money taken by him during the whole period of his employment since 1895 in excess of \$25 a week for services, and that Smith be decreed to make restitution and payment of all sums of money shown to be due by him to the complainant, and for general relief. The same day an injunction prohibitory and mandatory was issued as prayed in the bill of complaint, except as to the prohibition against the disposition of the lot on Guilford avenue. On February 17, 1908, the defendant filed his answer, denying all the material allegations of the bill of complaint, and averring that he himself "was, has all the time been, and still is the sole owner of said business," and that no money had ever been contributed toward or used in said business except the defendant's own money, or money borrowed by him for that purpose; that the complainant had never made any pretensions to be any other than an employé of the defendant until shortly before filing the bill of complaint, and then he claimed to be only part owner of the business. He asked that the injunction theretofore granted be dissolved, and the bill dismissed. After much time and patience spent in comparing the evidence of the several witnesses, we have finally been able to thread our way through the great mass of most conflicting testimony taken to support the contentions and claims of the respective parties.

It would extend this opinion to an unreasonable length to attempt to set out here a synopsis of the evidence, consisting as it does of over 600 printed pages, but, after the most careful consideration that we have been able to give the case, we are unable to reconcile the claims of Smith with certain material facts established by the exhibits and documentary evidence produced at the hearing. One of these facts is that at the very commencement of the business in 1895 certain office furniture of the old firm of Lord & Robinson was purchased of the receivers of the firm for the use of the new concern at 21 Grant street. Lord testified that he gave the money (\$25) to Smith with which to buy the property for him. Smith, on the other hand, testified that he bought the furniture with his own money for his own use. A receipt was, however, finally produced by Lord, which on its face shows that the money had actually been paid by Smith, but on the back of the receipt and of the same date was the following indorsement, signed by Smith: "For value received I hereby transfer the articles mentioned to Charles W. Lord. [Signed] H. W. Smith." Smith's explanation of why he made this transfer, in view of the fact that he claimed to have himself established the business, is in our judgment far short of being satisfactory. Another important fact not disputed is that

the assessment of the property of the concern on the tax books of Baltimore city was in the name of Charles W. Lord & Co.; Smith's name not being mentioned in connection therewith. Besides this, Mr. Lord produced at the hearing below books of entry concerning the business from its very beginning in 1895 to the time the controversy between him and the defendant arose in 1907, in which books were entered the items of cash received and cash paid out during the whole period, as it seems; these entries in many respects substantiating Lord's claim to be the founder and sole proprietor of the business. The production of these books, or at least of some of them, was evidently a great surprise to Smith, who testified that he understood from Mr. Lord that they had been burned in the great fire of February, 1904. These books show the payment weekly to Harry W. Smith on every Saturday at first of the sum of \$15, and later of the sum of \$25, charged either to "hands" or "expenses," and the entries continue regularly from week to week down to October 10, 1903, and most of these entries, as it appears, were made in the handwriting of Smith himself. The withdrawals of money by Mr. Lord, however, were not charged to either "hands" or "expenses" or any other distinct account, and, besides, they vary in amount from time to time; thus clearly indicating that Smith worked on a salary, and that Lord did not. Another significant fact is that the contracts for the rental of the rooms at different times occupied for the purposes of the business and the rent bills for the use of the same were invariably made in the name of Charles W. Lord & Co.

Another quite significant fact, and one that cannot be disputed, is that the license to carry on the business was from 1895 to 1907 always issued to Charles W. Lord alone, and this was true, although the applicant who made the representations to the license clerk apparently under oath was several times H. W. Smith himself. In the year 1907, however, upon the application of Smith, the license was issued for the first time to Charles W. Lord and Harry W. Smith, trading as Charles W. Lord & Co. Much other testimony of a character tending to prove Mr. Lord to be the founder and proprietor of the business was adduced, but need not be referred to here in detail. Mr. Smith, on the other hand, relied upon the fact that the bank account was in his name, and checked upon by him at all times as he saw fit; that, besides his regular weekly salary charged to him as such, he drew various sums from time to time in the aggregate largely in excess of his salary, some of which afterwards he returned, and some he did not, claiming that, as the business was his, he was not accountable to any one for such withdrawals. He further relied upon the fact that the insurance on the stock carried by the concern was in his name, and that after the great

Baltimore fire in February, 1904, the amount of this insurance was paid to him. Certain manufacturers dealing with the concern also testified that they had always dealt with Smith as the proprietor, and that they had no dealings with Lord whatever, and they regarded Smith as the owner of the business. Certain members of the office force also testified in effect that they regarded Mr. Smith as the proprietor. As we have before indicated, however, the controlling facts of the case upon the question as to who started the business in 1895 at 21 Grant street, and continued it down to the time of filing the bill of complaint in this case, are in our opinion those first above recited in support of Mr. Lord's contention. We must, therefore, hold that Charles W. Lord was the founder and proprietor of the business, and that Harry W. Smith, the defendant, was his salesman and confidential clerk.

The learned judge in the court below did not find to the contrary of this, but dismissed the complainant's bill upon the ground that Mr. Lord at the time he commenced business in 1895 had not paid off his former creditors, and that consequently the placing of the bank account and the insurance in the name of Harry W. Smith was done for the purpose of defrauding, hindering, and delaying these creditors. He then applied the maxim that he who comes into equity must come with clean hands, and held that under the circumstances a court of equity should grant no relief, but leave the parties where it found them; citing *Roman v. Mall*, 42 Md. 513, and some other cases in support of his position. While we recognize and approve the doctrine of those cases, yet we cannot agree that this is a case to which the maxim above quoted is applicable. As the complainant was about to embark in a business requiring him to handle goods on commission, and in consequence to have in his custody and possession from time to time the moneys of other people, he may very well have desired to save those persons the possible embarrassment and expense of having their money, if deposited in his name, tied up by way of proceedings in attachment. Mr. Lord had previously to embarking in the new business, surrendered and given up not only all his interest in the assets of the firm of Lord & Robinson, but also all his own individual property and assets, for the benefit of his creditors, and it appears that these assets have yielded or will yield sufficient to satisfy all his obligations and leave a surplus besides. It is true that this result may not have been known in 1895, when the account in bank was first opened in Smith's name, but Lord had then already stripped himself of all he owned in order to satisfy his obligations in full, and was starting business anew, with other people's merchandise and upon other people's credit.

While we have no purpose to relax the strict enforcement of the maxim that "He who comes into equity must come with clean hands," or as it is some times expressed, "He that hath committed iniquity shall not have equity," yet in this case we are unable to satisfy ourselves that Mr. Lord has been guilty of any such iniquity or moral turpitude as should deny him the aid of a court of equity.

After a somewhat extended research, we have been unable to find in this state or elsewhere a reported case in which the maxim has been applied under circumstances like these, and, as the refusal of the court to act always gives the defendant an unfair advantage of the plaintiff contrary to the real justice of the case, the application of the maxim as a defense is only allowed for reasons of public policy as a preventive check upon fraud and wrongdoing. After a careful consideration of a number of adjudged cases as well as of the purpose in view in the application of the maxim, we are unable to attribute to Mr. Lord any such fraud or wrongdoing as we think demands or justifies the application of the maxim in this case. We hold therefore that he is entitled to relief. It must be remembered that an agent owes to his principal the utmost fidelity, and that he is not allowed to make any profit for himself from the business in which he is employed to the detriment of his principal. We think the plaintiff entitled to the benefit of the injunction as originally granted and to the accounting as prayed in the bill of complaint. It is not for this court to state an account between the parties even if it were possible to do so from the record. That is more properly the business of a bookkeeper or accountant. All we can do is to point out the principles on which it should be stated.

For the reasons assigned, we think the decree of the lower court should be reversed and the cause remanded, to the end that there may be further proceedings in accordance with the views herein expressed.

Decree reversed, with costs, and cause remanded.

(108 Md. 644)

ROBINSON v. STATE

(Court of Appeals of Maryland. Nov. 14, 1908.)

1. LIBEL AND SLANDER (§ 152*) — CRIMINAL RESPONSIBILITY—INDICTMENT.

An indictment for libel, which sets out the libelous publication in full, and alleges that the same is "false, scandalous, malicious, and defamatory," is sufficient, without a specific assertion of the falsity of each statement contained in the publication.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 417; Dec. Dig. § 152.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. LIBEL AND SLANDER (§ 155*)—CRIMINAL RESPONSIBILITY—EVIDENCE—PROVOCATION.

In a prosecution for libel, evidence of violent and abusive language used by the prosecutor in regard to defendant before the publication of the libel for which the prosecution was laid was not admissible on behalf of defendant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 430; Dec. Dig. § 155.*]

3. LIBEL AND SLANDER (§ 155*)—CRIMINAL RESPONSIBILITY—EVIDENCE—SUBSEQUENT PUBLICATIONS BY DEFENDANT.

In a prosecution for libel published in defendant's newspaper, a subsequent publication in such newspaper, in which defendant disclaimed any malice toward the prosecutor in making the publication complained of, was not admissible in behalf of defendant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 430; Dec. Dig. § 155.*]

Appeals from Circuit Court, Allegany County; Robert R. Hender and M. L. Keedy, Judges.

John J. Robinson was convicted of libel, and appeals. Affirmed.

Indictment sworn to and filed January 11, 1908, in the words following, to wit:

"State of Maryland, Allegany County—to wit:

"The jurors of the state of Maryland, for the body of Allegany county, do on their oath present, that John J. Robinson, late of Allegany county, on the twenty-sixth day of December, in the year of our Lord nineteen hundred and seven, at Allegany county aforesaid, contriving, and unlawfully, wickedly and maliciously intending to injure, vilify and prejudice one Duncan R. Sloan, and to deprive him of his good name, fame, credit and reputation and to bring him into great contempt, scandal, infamy, disgrace, hatred and ridicule, unlawfully, wickedly and maliciously did write and publish a false, scandalous, malicious and defamatory libel in a certain newspaper called the Lonaconing Star and the Lonaconing Review, in the county of Allegany, and state of Maryland of which said newspaper published as aforesaid, the said John J. Robinson was the publisher and editor, unlawfully, wickedly and maliciously did write and publish a false, scandalous, malicious and defamatory libel in the form of a newspaper article, containing divers false, scandalous, malicious and defamatory matters and things of and concerning the said Duncan R. Sloan according to the tenor and effect following, that is to say:

"Our Position Endorsed.

"Vigorous Letter from a Close Observer of Past and Present Local Events.

"Lonaconing, Md. Dec. 14th, 1907.

"Editor Star: The thanks of the community are due for the severe but high-toned, well deserved chastisement you administered busy-body D. R. Sloan both in the Board

of Trade meeting and this week's issue of the Star. In squirming and wiggling Duncan has been an artist in the past but now as upon several other notable occasions he stands before this community as a blundering, stuttering ninny. An increase of wages is always welcome—always desired; but what possible influence the Board of Trade could expect to wield in that direction is not clear to a reasonable mind. Their action in that regard now or at any other time could not be but an "empty bubble" in the air.

"For some time past it has been noticed that Duncan has been catering to a certain prominent member of the miners' organization, and as the city election will soon be at hand, when Duncan will be a candidate to succeed himself as City Treasurer, probably he had in view a strategic move politically. If so, a boomerang for Duncan, like unto the one he enjoyed when he had his parade and played his fiddle in the streets of Lonaconing in honor of Sampson's victory at Manila, when it developed next day that he should have paraded and fiddled for Schley, the real commander of that great Naval Triumph. Duncan wants to be progressive in any public movement where he can keep Duncan to the fore and see something material in the progressiveness for Duncan's interest.

"High time he should go way back and sit down. He says he alone was responsible for the resolution, didn't consult any miners, had no apologies to make, and wouldn't take anything back. Of course not. It would be a condescension for Duncan to consult miners when his own empty, rickety head devised the resolution.

"Apologize or take anything back. Never. Not Duncan. Never did, never will have sense enough to admit his universally recognized assininity. Calls you a snake in the grass, Mr. Editor. You don't look it. What about Duncan? Unless the science of Phrenology or physiognomy is falsely constructed I will wager a barrel of the best sweet potatoes, of which Duncan is fond, that you cannot produce a man in our vicinity who looks the part and plays it with more precision than Duncan R. Sloan.

"What has he done in politics?

"Since Davy Dick dethroned him from county political prestige, his avocation politically has been constantly that of a slimy, wriggling, biting, treacherous "snake in the grass." So in the Board of Trade or any other capacity in which he figures publicly, Duncan must be the whole show, Big Chief, and anyone who questions his right is ignorant, vile and unworthy.

"He told you he could look every man in the face. Can he? Has he always been able to do so? Then to me he will have to deliver the proofs. No off-hand statement,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

but actual living evidences. "Pay dollar for dollar," he declared in ringing, but screeching, discordant tones. Does he? No one has said he didn't. That was not the subject under discussion. But any old thing will do for Duncan to say when he gets on his feet to talk, and talk he will when he cannot get an opportunity to play his famous Sampson fiddle. Duncan couldn't always pay dollar for dollar. I remember the time when Duncan didn't have a dollar to pay anyone, and a more impoverished, haggard, idiotic specimen of forlorn looking young manhood never walked the streets of this historic village. Our miners sympathized with him, and put him where he is today. Yet he impudently and defiantly confesses to having originated an agitation of great moment to the miners without consulting any of them. Shame upon such ingratitude—selfish and mercenary? Yes, these alone were his motives. He has always raised nearly every commodity in his store several times since the miners have had an increase of wages, and if an increase should come he would be the first to do it again. Has he increased his employé's wages? Has he advocated an increase of the wages of the employés of the silk mill many of whom work for a mere simple pittance? He is quoted as saying at its opening that many of them in their eagerness to get employment were willing to work for anything. Remarkable that he did not so employ them. In some instances he came mightily close to it. What about the telephone girls that work for the company with which he is connected? The small wage they get for their arduous labors is positively unfair. Why don't he do something in these cases where he can wield some influence and leave our miners who are infinitely better qualified than he to look after their own business.

"Times are brightening and it is to be hoped that the discharged miners will soon get their employment. The companies should not hold our miners responsible for the action of a dolt.

"The resolution probably had no part in the discharging of the men and certainly should not have had, but whether or no, it was a resolution of brazen stupidity and should be condemned by all right thinking men. The Board of Trade cannot disbar you for criticising their action. They have a right to be criticised for an unwise act, as well as they have a right to be commended for work well and profitably done. If they represent anybody in their official capacities it is the populace, and they should, by all means, be always publicly informed of the Board's proceedings.

"Give us a fearless, unvarnished account of the proceedings of Board of Trade, City Council, and other public functionaries, and the people will sustain your action.

"Yours for right. Retired Miner."

"He, the said John J. Robinson, then and there well knowing the said defamatory libel

to be false, to the great damage, scandal and disgrace of the said Duncan R. Sloan to the evil example of all others in like case offending, and against the peace, government and dignity of the state.

"David A. Robb,

"State's Attorney for Allegany County."

Endorsed as follows, to wit: "True Bill. W. W. Shultice, Foreman."

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HENRY, JJ.

Irving R. Dickey, for appellant. Isaac Lobe Straus, Atty. Gen., for the State.

PEARCE, J. The appellant was indicted in the circuit court of Allegany county for publishing a criminal libel upon Duncan R. Sloan, and, being convicted and sentenced to pay a fine of \$100 and costs, and to confinement in the county jail for a period of 15 days, he has appealed from that judgment.

The alleged libel is contained in an article or letter purporting to be written by a retired miner, and published in the *Lonaconing Star*, a newspaper, owned, edited, and published in Allegany county by the appellant. In this article or letter Mr. Sloan is characterized as "a blundering stuttering ninny"; as having an "empty, rickety head"; as "not having sense enough to admit his universally recognized assinnity"; as "playing the part of a snake in the grass"; and it declares that "his avocation politically has been constantly that of a slimy, wriggling, biting, treacherous snake in the grass," with numerous other epithets of like character. The indictment contains but one count, and that sets out the article in full, which will be reproduced in full in the report of the case. The traverser demurred to the indictment, and the court overruled the demurrer. The traverser then, without withdrawing his demurrer, pleaded over, with leave of the court, and pleaded not guilty.

The sole ground of demurrer is that, instead of pointing out and specifying some particular alleged false and defamatory matters, the entire article is set out as "a false, scandalous, malicious and defamatory libel," and the indictment then charges that the traverser well knew the same to be false. The traverser contends that, if a whole letter or article may be charged as libelous, "he must defend against it in its entirety, though it may have reference to many conditions, may contain many statements, and may be full of various subjects"; but he was not able to produce any authority to sustain his demurrer other than a single Texas case, viz., *Jackson v. State* (Tex. Cr. App.) 77 S. W. 223, which we are not able to accept as controlling. The practice appears to be strongly against this contention. In 18 Enc. Pl. & Pr. p. 47, it is said: "It is not necessary, in a complaint for libel, to set out the whole of the obnoxious publication in which the libel

appears. It will be sufficient to set forth such parts of the libel as the plaintiff relies on"—and this text is supported by decisions from numerous courts. The author of this article in the *Encyclopedia of Pleading & Practice* adds: "It would seem that, if any omitted parts explain those set out, the defendant may give them under the general issue." The same is stated to be the law in 25 Cyc. 448. It was so held in *Com. v. Harmon*, 2 Gray (Mass.) 289, citing 3 Chitty's *Crim. Law*, 375. In *American Book Co. v. Kingdom Pub. Co.*, 71 Minn. 363, 73 N. W. 1080, the entire article was set out, and on motion to make the complaint more definite, the court said: "While in actions for libel it may not be necessary to set forth an entire article, it is absolutely necessary to set forth in precise words such passages as are claimed to be actionable"—and the motion was refused. In *State v. Dowd*, 39 Kan. 412, 18 Pac. 483, the whole article was set out in the information. There was a motion to quash on the ground that the charge was too indefinite and uncertain, but the motion was refused. In *State v. Smith*, 7 Lea (Tenn.) 249 the whole letter was set out in the indictment, which was held good on motion in arrest of judgment. The court said: "The entire publication is set out, and thus the principle and letter of the rule, which requires the libelous matter to be set forth verbatim, is complied with." In *Evening Post Co. v. Richardson*, 113 Ky. 641, 68 S. W. 665, the entire article was held to be admissible in evidence, though parts were not libelous. In *McClure v. Review Pub. Co.*, 38 Wash. 160, 80 Pac. 303, there was a demurrer to the complaint, and also a motion by defendant to make the complaint more definite and certain by incorporating a copy of the entire publication. This motion was granted, and the ruling was excepted to. On appeal the court said: "An alleged libelous newspaper article, like every other instrument of writing, must be construed in connection with, and with reference to, the entire article, and no intelligent construction can be obtained by a perusal of excerpts or disconnected extracts from the publication"—and the ruling was affirmed. This case illustrates an extreme view, going to the extent of holding that the complaint or indictment is necessarily indefinite and uncertain unless the whole article is set out, and we are not to be understood as adopting that view. But if that view were adopted, we should be compelled to sustain the indictment in this case. In *Singer v. N. Y. Times Co.*, 74 App. Div. 390, 77 N. Y. Supp. 531, the complaint set out a lengthy article in full, and averred that the matter so printed and published was false, libelous, and defamatory, and was maliciously and wantonly published. The defendant asked for a bill of particulars, and filed an affidavit that some of the statements of the article were true, and that it believed none were untrue; that it had a defense on

the merits, and was able to justify in part, and that, in order to prepare and present its defense, it was necessary that the plaintiff should designate what parts were libelous, and in what respect false. It was held that a bill of particulars was not necessary to enable defendant to answer; that as the complaint set out the article in full, and averred that the whole was false and defamatory, it was sufficiently definite and certain. The court said: "We know of no rule which requires a plaintiff to inform a defendant, in an action for libel, to what portion he may plead justification, and that is what the order in the present case would accomplish. Nor is there any need that the plaintiff make his complaint more definite and certain, as it is already fully complete in such particulars. It sets up the whole article claimed to be libelous, and avers that the whole is false and defamatory. Words could not make it more definite."

It will be observed that the indictment in the present case charges the publication of "a false, scandalous, malicious and defamatory libel in a certain newspaper called the *Lonaconing Star* and the *Lonaconing Review* in Allegany county, * * * according to the tenor and effect following," etc., thus characterizing the whole article as scandalous and defamatory. Wanton and reckless malice breathes in every line of this letter, and it would be difficult to segregate a single passage which was not intended and calculated to make Sloan odious and contemptible in the eyes of the public, and to injure his reputation for honesty and truth. We are not required to say, and do not say, that under all circumstances an entire book, or work of magnitude dealing with legitimate subjects of general interest, could be charged as libelous without any specifications whatever. That question will be dealt with when it arises; but we cannot hesitate to hold that the demurrer in this case was properly overruled.

Three exceptions were taken in the course of the trial. In the first the traverser offered to testify that at a public meeting in Lonaconing on December 5, 1907, Duncan R. Sloan used violent and abusive language about him, calling him a snake in the grass, and using other opprobrious terms; that some person then present wrote in his defense the article alleged to be libelous, and that the same was inadvertently published on December 26, 1907, in his paper. To this offer the state objected, and the court excluded that part of the offered evidence which related to what was said by Sloan at the public meeting and the offer to connect the same with the publication, but admitted the rest of the proffered evidence. In the second exception the traverser was asked to state the opprobrious language used by Sloan about him, and upon the objection of the state the objection was sustained and this evidence was excluded. In the third exception the

traveller offered in evidence a copy of his paper of January 2, 1908, containing a letter of Duncan R. Sloan to the Evening Times of Cumberland, in which he stated that he intended to present to the grand jury of Allegany county the matter of the publication referring to him, in the Star of December 26, 1907, and also the traveller's statement, in the issue of his paper of January 2d, that he had no comment to make, other than to say that, if an indictment was found, it would be defended with vigor, and that the public knew there was no malice in the publication of which Sloan complained. We have been referred to no authority in support of these exceptions, and we discover no error in the rulings upon them. The law, as settled by our decisions, is that nothing short of evidence tending to show the truth of the charge is admissible. *Richardson v. State*, 66 Md. 205, 7 Atl. 43; *Lewis v. Daily News Co.*, 81 Md. 473, 32 Atl. 246, 29 L. R. A. 59. In that case it was said: "Every publication injurious to the character is, in law, false and malicious, until the presumption of falsehood is met by plea of the truth, or the presumption of malice is removed by showing a justifiable occasion or motive." And in *Coffin v. Brown*, 94 Md. 193, 50 Atl. 567, 55 L. R. A. 732, 89 Am. St. Rep. 422, the court quoted the following from 18 Enc. of Law (2d Ed.) 169: "That to constitute a justification, the precise charge must be justified, and it will not be sufficient to offer truth of another charge, though of the same general nature, and though distinct only as to the subject-matter or the time and place." This principle embraces the setting up of a counter charge previously made provoking the alleged libel. Nothing but the truth will avail.

Judgment affirmed, with costs above and below.

(109 Md. 123)

SHOCKLEY v. PENNSYLVANIA R. CO.

(Court of Appeals of Maryland. Dec. 2, 1908.)

1. APPEAL AND ERROR (§ 1058*) — REVIEW — HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action against a carrier to recover damages for delay in transporting a shipment of strawberries, error in excluding evidence of the time of arrival, at the place to which the berries were shipped, of the early morning train carrying berries for market, is rendered harmless by subsequently admitting testimony of other witnesses as to the time of arrival of such train.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

2. DEPOSITIONS (§ 88*) — ADMISSIBILITY IN EVIDENCE — MEMORANDUM PREPARED BY WITNESS.

It is not error to refuse to allow to be read, in connection with a deposition, parts of a tabulated statement prepared by the witness showing the time of arrival of cars on defendant's road at certain points thereon, not included in

a stipulation making certain portions of such statement admissible.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 88.*]

3. CARRIERS (§ 172*)—CARRIAGE OF GOODS—CONNECTING CARRIER—DUTY.

An intermediate connecting carrier is bound to safely carry, with reasonable dispatch, the shipment over its own road, and to safely and promptly deliver it to the next connecting carrier, and the acceptance of goods directed to a point off the carrier's line is not a sufficient basis for the implication of a contract extending its liability beyond its terminals.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 172.*]

4. CARRIERS (§ 185*)—CONNECTING CARRIERS—ACTIONS—BURDEN OF PROOF.

In an action against a connecting carrier for damages from delay in transportation, the burden of proof is on complainant to show that the delay occurred on defendant's road; there being no presumption that it occurred there.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-837; Dec. Dig. § 185.*]

5. CARRIERS (§ 187*)—CONNECTING CARRIERS—ACTIONS—EVIDENCE.

Evidence in an action against a connecting carrier for damages from delay in transportation considered, and held to warrant the court in withdrawing the case from the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 187.*]

Appeal from Circuit Court, Somerset County; Henry Lloyd and Chas. F. Holland, Judges.

Action by George A. Shockley against the Pennsylvania Railroad Company. From a judgment for defendant for costs, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

Leonard Walles and James E. Ellegood, for appellant. John R. Pattison, for appellee.

BRISCOE, J. On the 27th day of December, 1904, the appellant brought this suit in the circuit court for Wicomico county against the appellee, the Pennsylvania Railroad Company, a corporation incorporated under the laws of the state of Pennsylvania, but exercising franchises as a common carrier in the state of Maryland. On the 23d day of March, 1908, upon suggestion of the appellee, the case was removed to the circuit court for Somerset county for trial, and from a judgment in favor of the defendant for costs the plaintiff has appealed.

It appears from the record there were three exceptions taken by the plaintiff to the rulings of the court in the course of the trial of the case, and these form the basis of this appeal. Two of these were to the admission of testimony, and the third to the granting of the defendant's prayer at the conclusion of the plaintiff's case, which instructed the jury that upon the pleading and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evidence in the case there was no legally sufficient evidence to entitle the plaintiff to recover. The questions presented by these exceptions will now be considered by us in their regular order. The suit was instituted, as stated by the bill of particulars filed by the plaintiff, for the purpose of recovering damages for the loss of strawberries shipped from Pittsville, Wicomico county, Md., to Seaverns & Co., commission merchants, at Boston, Mass., from May 6, 1903, to June 1, 1903, over and by way of the connecting lines and railroad of the defendant and not transported and delivered with due dispatch by the defendant. The strawberries were delivered and received on the days stated by the Baltimore, Chesapeake & Atlantic Railway Company, the initial carrier, at its station, Pittsville, Wicomico county, to be carried to their point of destination, Boston, Mass. They were consigned and waybilled over the following railroads: From Pittsville to Salisbury, a distance of 10 miles, by the Baltimore, Chesapeake & Atlantic Railway; from Salisbury to Delmar, a distance of 6 miles, over the New York, Philadelphia & Norfolk Railroad; from Delmar to Philadelphia, a distance of 120 miles by the Delmar Division of the Philadelphia, Baltimore & Washington Railroad; from Philadelphia to Jersey City, a distance of 90 miles, over the defendant's road, an intermediate carrier, known as the New York Division of the Pennsylvania Railroad; and from the last-named point to Boston, over the New York, New Haven & Hartford Railroad, the terminal carrier. The declaration in this case alleges that the defendant (an intermediate connecting carrier) did not transport the strawberries over its road with reasonable dispatch, as it was in duty bound to do, and, by reason of this failure on its part, the strawberries reached their point of destination too late for the market of the day for which they were shipped, and were received in a damaged condition, whereby the plaintiff sustained a heavy loss. The trial resulted in a verdict for the defendant, and, the case being here upon the plaintiff's exceptions, we will now proceed to consider them.

The first exception relates to the rulings of the court in excluding the testimony of the witness Davis as to the customary usage for the transportation and time of arrival of "the Boston train" for the early morning market for berries. It appears, however, that the witnesses Loring and Morrison, subsequently in the course of the trial, upon the offer of the plaintiff, testified as to the time of the arrival of the strawberry trains, so the plaintiff had full benefit of the excluded evidence of the witness Davis, and could not have been injured by this ruling, assuming the court below committed an error in so ruling.

The second exception was taken to the ruling of the court in refusing to permit the

counsel for the plaintiff to read to the jury, in connection with the depositions of the witness Tomlinson, taken in Jersey City, N. J., on the 27th of February, 1908, under a commission, before a notary public of the state of New Jersey, a tabulated statement called "Boston Cars," under the column headed "Passed Gray's Ferry," and under the column arrived "J. City," for the purpose of showing the time that the cars arrived at and passed Gray's Ferry at Philadelphia and their arrival at Jersey City. It appears upon the taking of the depositions of the witness Tomlinson in Jersey City (which were read to the jury without objection), the witness had a memorandum headed "Boston Cars" with the first or left-hand column headed "Car Initial Number," and the right hand column headed, "Time Floated," and the witness here testified that the initials and car numbers noted in the column headed "Car Initial Number" and the figures at the right-hand column under the words "Time Floated" are the car numbers and the times that the said cars were delivered to the floats of the New York, New Haven & Hartford Railroad. Thereupon the following agreement was had by the counsel for the parties as to the use of the memorandum at the trial of the case: "It is stipulated and agreed between the plaintiff and defendant that the plaintiff may offer in evidence at the trial of this cause the first or left-hand column, headed 'Car Initial Number,' and the right-hand column headed 'Time Floated,' and that the offer will not be objected to on the ground that the same is not the original or primary evidence, and shall have the same effect as if the same were so offered as the primary proof, and that the defendant may offer at the trial of the cause any other data appearing upon the memorandum consisting of two sheets and marked 'Boston Consignments,' and no objection to such offer will be made on the ground that the memorandum is not primary evidence; the plaintiff and defendant reserving objections as to the materiality of the said testimony." It will be thus seen that the copy of the memorandum offered to be read, called the tabulated statement of "Boston Cars"—that is, the columns headed "Passed Gray's Ferry" and "Arrived J. City"—was not included in the stipulation between the parties, to be used as evidence by the plaintiff at the trial of the case, and, not being the original record, was properly rejected by the court. The plaintiff had the benefit of the depositions of the witness, both his examination in chief and on cross-examination, and the defendant was not required to offer its evidence until the close of the plaintiff's case. We find no reversible error in the ruling of the court embraced in this exception.

The principal question, however, on the appeal, arises under the third exception, and that is whether the court committed an error in granting the defendant's prayer which

withdrew the case from the jury. According to the evidence, the defendant company was an intermediate connecting carrier, its road beginning at Gray's Ferry, Philadelphia, and ending at Jersey City, N. J. Freight shipped from Pittsville to Boston would have to pass over the roads of three other companies—the Baltimore, Chesapeake & Atlantic Railway Company from Pittsville to Salisbury, the New York, Philadelphia & Norfolk from Salisbury to Delmar; and the Philadelphia, Baltimore & Washington to Gray's Ferry—before reaching the defendant's road, and then, before reaching Boston, the point of destination, would have to pass over the New York, New Haven & Hartford Railroad, the delivering carrier. The grievance complained of by the plaintiff and the substantial cause of the action was the negligence of the defendant company a connecting carrier to deliver with reasonable dispatch or on time the freight mentioned in the declaration, and in consequence of this failure they did not reach the point of destination in time for the market of the day for which they were shipped. Under the facts of the case now before us there were five different railroads over which the freight in question had to be carried from Pittsville, Md., the initial point, to Boston, Mass., the point of destination, and the liability of the defendant company as one of the intermediate connecting carriers was confined to the limits of its own road. In other words, it was in duty bound to safely carry with reasonable dispatch over its own road and to safely and promptly deliver without unnecessary delay and detention to the next connecting carrier. The law in this regard has been settled in this state by numerous decisions and by the Supreme Court of the United States. *P. W. B. R. Co. v. Lehman*, 56 Md. 233, 40 Am. Rep. 415; *Hoffman v. Cumberland R. R. Co.*, 85 Md. 394, 37 Atl. 214; *B. & O. R. R. Co. v. Whitehill*, 104 Md. 314, 64 Atl. 1033; *Orem Fruit Co. v. N. C. Ry. Co.*, 106 Md. 16, 66 Atl. 436. In *Myrick v. Railroad Co.*, 107 U. S. 107, 1 Sup. Ct. 425, 27 L. Ed. 325, it was held: "Each road confining itself to its common-law liability is only bound in the absence of a special contract to safely carry over its own route and safely to deliver to the next connecting carrier, but any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence." And in *Elliot on Railroads*, § 1435, it is said: "The majority of our courts have held, in accordance with what is called the 'American rule,' that the mere acceptance of goods di-

rected to a point off the carrier's line is not a sufficient basis for the implication of a contract for extra terminal liability, and that, in the absence of an express contract or of more significant facts or specification than the fact of acceptance as the basis of an implied contract, the initial carrier is discharged by carrying safely to the end of its line and there delivering to the next carrier."

There was no contract in this case for extra terminal liability or any facts upon which such a contract could be based, so it is clear the defendant company would be liable only for delays occurring on its own route which could have been avoided by the exercise of reasonable diligence in delivering the freight to the next connecting carrier. According to the evidence in the case, the freight was delivered to the initial carrier, the Baltimore, Chesapeake & Atlantic Railway, at its station at Pittsville, in good condition, on the day it was to be shipped, and the cars were due to leave Pittsville at about 5:30 p. m., but there is no evidence whatever that the train left on time or the hour of the day at which the cars actually left the starting point. The witness Hickey, agent at Delmar of the New York, Philadelphia & Norfolk Railroad and of the Philadelphia, Baltimore & Washington Railroad, testified as to the time of the arrival of the cars at Delmar, a distance of only 16 miles from Pittsville, and stated they arrived at different hours, from 8:30 p. m. to 12:52 p. m.

There is also an absence of evidence as to the time when the cars left Pittsville, Delmar, Salisbury, and Gray's Ferry, or what would be a reasonable time to be consumed in the transportation of the freight over the several roads. There is no evidence whatever as to the time when the freight was received upon the defendants' road or when it was delivered to the next carrier, and it is therefore difficult to see upon what ground it can be asserted that the delay in the transportation of the freight was solely due to the defendant's negligence. The burden of proof was upon the plaintiff to show that the delay occurred upon the defendant's road, and, failing, in this, the court below committed no error in granting the defendant's prayer, which instructed the jury that upon the pleading and evidence there was no legally sufficient evidence to entitle the plaintiff to recover. In this case there was no evidence showing when or where the delay was in fact caused, and, there being no presumption that it happened upon the line of the defendant company, an intermediate carrier, there could be no recovery against the defendant.

There being no error in the rulings of the court, the judgment will be affirmed.

Judgment affirmed, with costs.

(108 Md. 678)

TURPIN et al. v. MILES.

(Court of Appeals of Maryland. Nov. 12, 1908.)

1. TRUSTS (§ 72*)—RESULTING TRUSTS—PAYMENT OF PURCHASE PRICE FOR ANOTHER.

A resulting trust arises in favor of one paying the purchase price of land, the deed to which is taken in the name of another.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 102; Dec. Dig. § 72.*]

2. TRUSTS (§ 88*)—CONSTRUCTIVE TRUST—EVIDENCE—PAROL EVIDENCE.

The payment of the purchase price of land, the deed to which is taken in another's name, can be shown by parol in order to establish a resulting trust in favor of the payor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 130-133; Dec. Dig. § 88.*]

3. TRUSTS (§ 89*)—CONSTRUCTIVE TRUST—EVIDENCE—SUFFICIENCY.

The proof to establish a resulting trust in land by showing payment of the purchase price must be clear and positive.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. § 89.*]

4. TRUSTS (§ 359*)—ESTABLISHMENT—ACTIONS—FORM OF REMEDY—RESULTING TRUST.

One claiming a resulting trust in land by payment of a part of the purchase price cannot establish it upon exceptions to its sale by the trustee for benefit of creditors of the holder of the legal title, but an independent suit is necessary.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 554; Dec. Dig. § 359.*]

5. TRUSTS (§ 203*)—RESULTING TRUST—SALE BY TRUSTEE—TITLE PASSING.

A resulting trust in land was not affected by the sale of the land by the trustee for benefit of creditors of the legal owner where only the interest of the legal owner was sold.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 203.*]

Appeal from Circuit Court, Wicomico County; Henry Lloyd, Judge.

Proceedings to sell land for the benefit of creditors by Alonzo L. Miles, trustee, against John W. Turpin and H. Gale Turpin. From a final order ratifying the sale and overruling the objections thereto of H. Gale Turpin, he appealed. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HENRY, JJ.

Robert P. Graham and Samuel R. Douglass, for appellant. Alonzo L. Miles and James E. Ellegood, for appellee.

BURKE, J. The record shows that E. Stanley Toadvine was appointed by decree of the circuit court for Wicomico county, passed in a chancery proceeding instituted in that court, to sell certain real estate. He sold the property and reported the sale as having been made to John W. Turpin and H. Gale Turpin. The sale, as reported, was finally ratified and confirmed. On the 20th of September, 1895, Mr. Toadvine, as trustee, executed and delivered to John W. Turpin a

deed for the property. The deed recites that the entire property known as the "Ben Truitt Farm," containing 350 acres of land, more or less, was sold by him to John W. Turpin for the sum of \$2,955, and that the purchase money had been fully paid. On the same day John W. Turpin executed a mortgage covering the whole farm to James C. Dirickson to secure the sum of \$1,500, which was applied as part payment of the purchase money. The mortgage recites that the land therein conveyed was the Ben Truitt farm, and was the same land which was conveyed to Turpin by E. Stanley Toadvine, trustee, by deed of even date. Turpin took possession of the farm under the deed, and remained in the undisturbed and continuous possession or control of the same until the 28th of August, 1900, when, being financially embarrassed, he executed and delivered on that day a deed of trust for the benefit of his creditors to Alonzo L. Miles of all his estate and property of every nature, kind, and description. Mr. Miles accepted the trust created by the deed, filed an approved bond as trustee, and upon his petition the court assumed jurisdiction over the administration of the trust. On the 19th of January, 1901, the trustee sold a portion of the Ben Truitt farm, containing 186 acres, to William K. Leatherbury and Daniel J. Elliott; and another portion to L. Earnest Williams and John D. Williams, trading as L. E. Williams & Co., and reported these sales to the court for its ratification. The first report of sale was made on the 18th of April, 1901, and the second on July 6, 1901. H. Gale Turpin on May 31, 1901, filed exceptions to the ratification of the first sale reported upon the ground that he was the joint owner with John Wesley Turpin, as tenants in common, of the property so sold, and that the trustee, with a knowledge of this fact, sold the property as the property of John Wesley Turpin, selling all of the property, instead of the undivided half interest of John W. Turpin therein. He did not except to the second report of sale; nor did John W. Turpin except to either sale. On the 9th of July, 1901, the purchasers filed exceptions to both sales, in which they alleged that they purchased the land in good faith and in the belief that John W. Turpin was the sole owner thereof in fee; that since the purchase, they have been informed that there is an apparent defect in the title in that it appears from the record of proceedings in the case of Truitt et al. v. Taylor et al. that E. Stanley Toadvine, trustee, reported the property as sold to John Wesley Turpin and H. Gale Turpin, and subsequently conveyed the whole of the property to John Wesley Turpin; that since the purchase of the property Daniel J. Elliott and William K. Leatherbury have been threatened with proceedings to dispossess

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

them of said property; and that H. Gale Turpin has filed exceptions to the ratification of the sale to them. Their exceptions further allege that they have no disposition to set aside the sale, but they object to the ratification thereof for the reasons stated, and to the end that the sufficiency of their title and whether the same be a clear and marketable title may be determined by the court. The trustee filed an answer to the exceptions of Turpin and the purchasers, in which, among other things, he denied that H. Gale Turpin was a joint owner with John W. Turpin of the property sold as reported; that the report made by E. Stanley Toadvine, trustee, to John Wesley Turpin and H. Gale Turpin as the purchasers of the property, was an error; and that as a matter of fact John Wesley Turpin was the sole purchaser of the property so reported, and that H. Gale Turpin has no interest therein. The purchasers withdrew their exceptions, and the court overruled the objections of H. Gale Turpin and ratified the sales. From these orders of final ratification, which were passed on the 26th of March, 1908, H. Gale Turpin has brought this appeal.

It appears from the testimony taken in support of the exceptions of H. Gale Turpin that he is setting up a secret equity as to one-half of the land conveyed by Toadvine, trustee, to John W. Turpin by the deed of September 20, 1905. He is claiming upon the facts appearing in the record that a trust resulted in his favor as to one-half of the land conveyed by that deed. The law applicable to such a case is well settled. "When it is clearly shown that one has purchased an estate and paid the purchase money therefor, but has taken a deed in the name of another, a trust results by construction of law in favor of the party who has so paid. The payment of the money which is the foundation of the trust can be proved by parol, but the proof must be clear and positive." *Johns et al. v. Carroll*, 107 Md. —, 69 Atl. 36. If it be assumed that H. Gale Turpin is entitled to such an equity in the land sold by Mr. Miles, that equity cannot be established under exceptions to the ratification of the sale. The court has no power in this collateral way to pass such a decree. The right of H. Gale Turpin in the land sold, if he has any, is not affected by the sale, as the trustee sold only the interest of John W. Turpin. If H. Gale Turpin is entitled to an equity in the land, it could only be established by an independent bill brought for that purpose. This is settled by the case of *Patapsco Guano Com-*

pany v. Elder et al., 53 Md. 463. In that case certain mortgaged premises were sold under the power contained in the mortgage. The appellant, who was not a party to the mortgage, excepted to the sale upon the ground that he was a judgment creditor of one of the mortgagors, and that the mortgage under which the property was sold was fraudulent, and that he had filed a bill to set the mortgage aside, and that the assignee of the mortgage, who had made the sale, and other parties in interest, had been summoned to the suit, and that pending the suit the mortgaged premises were sold. This court held that it had no power upon objections to the ratification of the sale to decide the questions presented by the exceptions. Judge Robinson, who delivered the opinion, said: "Courts have no power under exceptions to a sale to hear and decide upon the merits of a bill in equity. As between the parties to the suit, the decree is conclusive as to the matter, and as to strangers not parties to the suit it can in no manner affect their rights. Whether the mortgage under which this property is sold was in fact fraudulent or not is an inquiry which could not be heard and decided in this collateral way." We have carefully examined the testimony appearing in the record, and, while the orders appealed against will be affirmed for the reasons stated, we do not hesitate to say that the claim of H. Gale Turpin is not supported by the evidence. The property was bought and paid for by John W. Turpin, and the mention of H. Gale Turpin as co-purchaser with him in the report of sale made by Mr. Toadvine, trustee, was an evident mistake, as he has testified. The conduct of the parties is utterly inconsistent with the existence, or recognition of such a claim as that asserted in this case. H. Gale Turpin advanced a small amount of the purchase money; but this appears to have been a loan to his father to assist him in paying for the property. On March 9, 1901, he wrote to Mr. Miles, saying: "As far as I am concerned in the Truitt farm, I have no interest to deed to any one, but, if it is necessary that I should sign any papers to ratify the sale, I am willing to do so. I loaned my father a small amount of money at the time he purchased the farm, and he probably mentioned something of the kind to Mr. Toadvine, and he reported the sale as you stated." This, we think, is a correct statement of the appellant's connection with the purchase of the property by John W. Turpin.

Decree affirmed, with costs.

(109 Md. 131)

HOLLANDER et al. v. CENTRAL METAL & SUPPLY CO. OF BALTIMORE CITY.

(Court of Appeals of Maryland. Dec. 2, 1908. Supplemental Opinion, Feb. 11, 1909.)

1. SPECIFIC PERFORMANCE (§ 107*)—COMPELLING DEED—FORM OF RELIEF.

Under Code Pub. Gen. Laws 1904, art. 16, § 117, providing that, in suits to enforce contracts, the court may order notice to be given nonresident defendants, and section 127, prescribing how the notice shall be given, and section 91, authorizing appointment of a trustee to execute a deed decreed to be executed, while a nonresident cannot be compelled to execute a deed under a contract to convey, the court can appoint a trustee to convey his title, and to that end the proceedings are in rem and not in personam, and sustainable by publication service.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 352; Dec. Dig. § 107.*]

2. SPECIFIC PERFORMANCE (§ 107*)—PUBLICATION SERVICE—DESCRIPTION OF LAND—SUFFICIENCY.

An order for publication service in a suit to specifically perform a contract to convey sufficiently described the land where it described it as a lot of ground on the east side of a 10-foot alley in the rear of specified streets, as being subject to a specified annual ground rent created by a lease between specified persons, of specified date, recorded at a specified place; and where it specified defendants' interest in the reversion, and stated that plaintiff notified defendants of its desire to redeem the rent, and sent them a deed which they refused to execute.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 107.*]

3. EQUITY (§ 373*)—SUBMISSION ON PLEADINGS—ADMISSIONS.

Where a case is submitted on a petition and answer, the truth of the facts alleged in the answer is taken as admitted.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 711; Dec. Dig. § 373.*]

4. EQUITY (§ 373*)—SUBMISSION ON PLEADINGS—PRIVILEGE.

The privilege of having a case heard on petition and answer belongs to the petitioner only.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 373.*]

5. APPEAL AND ERROR (§ 914*)—REVIEW—PRESUMPTIONS.

Since, on motion to rescind an order for publication service and on answer thereto, only movant could have the motion set down for hearing, on appeal it must be assumed that it was done at movant's instance.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 914.*]

6. EQUITY (§ 141*)—PLEADING—BILL.

Generally a bill must state clearly plaintiff's right to the relief prayed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 323-330; Dec. Dig. § 141.*]

7. LANDLORD AND TENANT (§ 79*)—COVENANTS RUNNING WITH LEASE—RIGHTS OF LESSEE.

Where a covenant runs with a lease, the lessee's assignee's right to the leasehold interest entitles him to the benefit of the contract.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 250; Dec. Dig. § 79.*]

8. SPECIFIC PERFORMANCE (114*)—PLEADING.

In a suit to specifically perform a contract to convey to lessees and their assigns, it was sufficient to allege that plaintiff was an assignee

of the leasehold interest, without setting forth circumstances tending to prove that fact.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 114.*]

9. PLEADING (§ 11*)—MATTERS OF EVIDENCE.

While every material fact to which plaintiff intends to offer evidence should be distinctly pleaded, a general allegation is sufficient; it not being necessary to charge minutely all the circumstances conducing to prove the general charge, since they are properly matters of evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 11; Dec. Dig. § 11.*]

10. SPECIFIC PERFORMANCE (§ 17*)—COVENANTS—PARTIES' PRIVILEGES.

Wherever, and regardless of the form and technical character of a contract, performance of a covenant respecting lands would have been decreed between the parties to it, it will, in the absence of intervening equities, be decreed as between persons claiming under them in privity of estate, representation, or title.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 17.*]

11. COSTS (§ 172*)—COUNSEL FEES.

Counsel fees are not allowable as costs, in the absence of a statute or special agreement.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 665; Dec. Dig. § 172.*]

12. VENDOR AND PURCHASER (§ 172*)—CONTRACT TO CONVEY—"COST AND CHARGE" OF CONVEYANCE.

A provision in a lease giving the lessee an option to purchase, and further providing that any conveyance shall be at the "cost and charge" of the grantee therein, does not require an assignee of the lease to pay a counsel fee to the vendor for the examination of the assignee's title to ascertain if he is entitled to the conveyance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 172.*]

13. COVENANTS (§ 59*)—COVENANTS RUNNING WITH LANDS.

A covenant to convey the fee of land to lessees, their heirs and assigns, is a covenant running with the land.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 56; Dec. Dig. § 59.*]

14. SPECIFIC PERFORMANCE (§ 17*)—COVENANT TO CONVEY TO LESSEES.

If a landlord's covenant to convey the fee in the demised land enhances the value of the lessees' interest therein and forms part of the consideration for the acceptance of the lease, equity will decree specific performance not only as between the parties to the contract, but in the absence of intervening equities, also as between those claiming under them in privity of estate.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 17.*]

15. PERPETUITIES (§ 4*)—DEFINITION.

A "perpetuity" is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period prescribed by law for the creation of future estates and interests, and which is not destructible by the person for the time being entitled to the property subject to the future limitations, except with the concurrence of the individual interested under that limitation.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5319-5321; vol. 8, p. 7752.]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

16. PERPETUITIES (§ 4*)—APPLICATION OF RULE.

The application of the rule against perpetuities is not determined by the character of the estate conveyed, but by the answer to the question, will it necessarily vest within the time fixed by the rule?

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

17. PERPETUITIES (§ 4*)—RULE NOT VIOLATED.

A covenant by a lessor, her heirs and assigns, to convey the fee to the land to the lessees, their heirs and assigns, upon payment of specified amounts, does not violate the rule against perpetuities.

[Ed. Note.—For other cases, see *Perpetuities*, Dec. Dig. § 4.*]

Supplemental Opinion.**18. ABSENTEES (§ 2*)—ACTIONS AGAINST—WHO ARE "NONRESIDENTS."**

If petitioner has been out of the state for a year and a half, with no intention of returning, or with the intention of returning at some indefinite future time, he is a nonresident, within Code Pub. Gen. Laws 1904, art. 16, § 123, providing that, where it is unknown whether a nonresident is living or dead, a bill may be filed against him as if living, etc., and he may be proceeded against as such, though he may not intend to abandon his domicile in the state.

[Ed. Note.—For other cases, see *Absentees*, Cent. Dig. § 1; Dec. Dig. § 2.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4823-4825; vol. 8, p. 7733.]

19. ABSENTEES (§ 2*)—ACTIONS AGAINST—WHO ARE "NONRESIDENTS."

A "nonresident," within Code Pub. Gen. Laws 1904, art. 16, § 123, providing that, where it is unknown whether a nonresident is living, a bill may be filed against him as if living, etc., is one who does not reside in the state, as defined in the law relating to attachment.

[Ed. Note.—For other cases, see *Absentees*, Cent. Dig. § 1; Dec. Dig. § 2.*]

Appeal from Circuit Court of Baltimore City; Thos. Ireland Elliott, Judge.

Suit by the Central Metal & Supply Company of Baltimore City against Charles S. Hollander and others. From a decree for plaintiff, defendants appeal. Affirmed and remanded.

Argued before **BOYD, C. J.**, and **BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON**, and **THOMAS, JJ.**

Arthur W. Machen, Jr., and Arthur W. Machen, Sr., for appellants. John G. Schilpp and H. M. Brune, for appellee.

THOMAS, J. The Central Metal & Supply Company of Baltimore city, "a corporation duly incorporated under the laws of the state of Maryland," having purchased the leasehold estate in a certain lot of land in Baltimore city, brought this suit on the 31st day of May, 1907, against the appellants, as the present owners of the reversion in said lot, for a specific performance of the covenant in the lease of the lessor, "her heirs and assigns," upon payment of the amounts specified therein, to convey the fee to the lessees, their "heirs and assigns." The bill alleges that the defendants, Charles Hollander and Elsie Hollander, his wife, and

Lee M. Hollander, are nonresidents, and that the plaintiff, in January, 1907, addressed a letter to these defendants notifying them of its desire to redeem the ground rent under the lease, and prepared and forwarded to them for execution a deed from them to the plaintiff of the fee in said lot, which they refused to execute on the ground that "the said rent is not redeemable." After an order of publication had been passed against the nonresident defendants, Charles S. Hollander and wife filed a motion to rescind the order and to quash the proceedings, on the ground (1) that a suit for the specific performance of a contract is a suit in personam, and cannot be maintained against a nonresident on service by publication, and (2) that the order of publication in this case does not contain a sufficient description of the property to inform the defendants of the property involved in the suit. Some time after this motion was filed, Lee M. Hollander filed a similar motion, alleging, as an additional reason for rescinding the order as against him, that at the time of the bringing of the suit he was a resident of the state of Maryland.

The case of *Worthington v. Lee*, 61 Md. 530, was for specific performance of a covenant for a renewal of a lease for 99 years, renewable forever, and for an injunction to restrain an action of ejectment for the recovery of the premises. Some of the nonresident defendants appeared and pleaded to the jurisdiction of the court to grant relief, while against others interlocutory decrees were entered in default of appearance and answer. The notice to nonresidents was by publication, and the court, in dealing with the case as against the nonresident defendants, said:

"If the application was for a sale of the property, or for a simple conveyance thereof, those objects could be accomplished by the appointment of a trustee, as provided by Code Pub. Gen. Laws 1904, art. 16, §§ 67, 135. But those provisions of the statute do not apply in a case like the present, where the object of the decree is to secure to the plaintiff the specific execution of the covenant, whereby she is entitled to obtain a renewed lease, with important and valuable personal covenants of the lessors, and without which it would not be an instrument of the character contemplated by the covenant decreed to be performed. The court could direct a lease for 99 years to be made by a trustee, but not with covenant for renewal, and other personal covenants, to bind personally the owners of the reversion, their heirs and assigns. The court could, through the instrumentality of a trustee, direct the conveyance of an estate, or the transfer of a right, but not the making of personal covenants, in the absence of the parties, to bind them personally, and those who may stand in privity with them. The court possesses no such power as that inherently, and the statute does not confer it."

In the case of *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101, cited and relied on in *Worthington v. Lee*, supra, the court said:

"It would doubtless be within the power of the state in which the land lies to provide by

statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose."

And in the case of *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918, in passing upon a Nebraska statute, and dealing with the right of the state to provide for notice to nonresident defendants, the court said that the state had "control over property within its limits; and the condition of ownership of real estate therein, whether the owner be a stranger or a citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice." Section 117, art. 16, Code Pub. Gen. Laws 1904, is as follows:

"If in any suit in chancery, by bill or petition, respecting, in any manner the sale, partition, conveyance or transfer of any real or personal property lying or being in this state, or to foreclose any mortgage thereon, or to enforce any contract or lien relating to the same, or concerning any use, trust or other interest therein, any or all of the defendants are nonresidents, the court in which such suit is pending may order notice to be given to such nonresidents, of the substance and object of such bill or petition, and warning them to appear by a day therein stated."

Section 127 of article 16 provides how the notice shall be given, and section 91 authorizes the court, whenever the execution of a deed of any kind is decreed, to appoint a trustee to execute it. The prayer of the bill and the covenant here sought to be enforced is for conveyance to the appellee of the lot described in the lease, and, while the court could not enforce a decree requiring a nonresident to execute a deed for the property, its decree may be made effective, under the provisions of the Code, by the appointment of a trustee to convey the title of the appellants, and to that end the proceedings are in rem and not in personam. *Miller's Equity Procedure*, § 120; *White v. White*, 7 Gill. & J. (Md.) 208; 22 Am. & Eng. Ency. of Law, 917; *Phelps on Juridical Equity*, §§ 85, 223.

The order of publication, which is set out in the record, in addition to describing the land as the "lot of ground on the east side of a ten-foot alley in the rear of Lombard and Frederick streets in the city of Baltimore," and as being subject to the annual ground rent of \$36 "created by the lease from Charlotte Bolgiano to Robert Bolton and others, dated July 18, 1835, and recorded in Liber T. K. No. 262, folio 294," etc., states that an undivided one-third interest in the reversion in said lot is vested in Edward Hollander, trustee for Amelia Hollander, for life, remainder to Charles S. and Levi M. Hollander, and that the remaining

two-thirds interest is vested in said Charles S. and Levi M. Hollander, "as by reference to Liber R. O. No. 2243, folio 93, will appear," and that the plaintiff notified the defendants by letter of its desire to redeem said rent, and prepared and had sent to them for execution a deed from them to the plaintiff for their interest in said lot, which they declined to execute and returned. The reference to the lease under and by virtue of which the defendants received the annual rent of \$36, to their interest in the reversion, and to the letter and deed sent to them, could have left no doubt in their minds as to the land referred to, and we think was sufficient notice to the defendants of the subject-matter of the suit. *Meshaw v. Meshaw*, 2 Md. Ch. 12; *Phelps on Juridical Equity*, 313.

The petition of Lee M. Hollander was answered by the plaintiff, denying that he was a resident of the state of Maryland, and again alleging that he was a nonresident. The matter, as stated in the opinion of the court below, was submitted, without proof, on the petition and answer, and his motion, and the motion of Charles S. Hollander, was and we think properly, overruled. Where a case is submitted on petition and answer, the truth of the facts alleged in the answer is taken to be admitted, but the privilege of having a case so heard belongs only to the petitioner. The record does not disclose who set this motion down for hearing, but as the plaintiff in this case had no right to do so on the petition and answer, we must assume that it was done at the instance of the petitioner. *Miller's Equity Procedure*, § 255, and notes.

After these motions were overruled, the defendants demurred to the bill on the following grounds: (1) That the bill does not show plaintiff's right to take advantage of the covenant in the lease; (2) that the plaintiff does not offer to comply with the terms of the covenant; (3) that the covenant is not one running with the land, and cannot be enforced by the assignee of the lessees against the assignees or the lessor; and (4) that the covenant cannot be enforced against the assignee of the reversion because it violates the rule against perpetuities.

The bill charges that the plaintiff, on the 9th day of January, 1907, obtained by deed from Benjamin Krulewicz, administrator, the leasehold property, a description of which is set out in the bill and in the plaintiff's deed filed with the bill; that the lot of ground so obtained by the plaintiff is subject to an annual ground rent of \$36, created by a lease from Charlotte Bolgiano to Robert Bolton and others, dated July 18, 1835, and recorded among the Land Records in Liber T. K. No. 262, folio 294, etc., and a certified copy of which is filed with the bill; "that the said lease contains a covenant on the part of said lessor, her heirs and assigns, that at any time during the continuance of said demise, at the request and cost of said

lessees, their heirs or assigns, and on their paying six hundred dollars, with all rent accrued and accruing, said lessor, her heirs and assigns, would cause to be delivered to said lessees, their heirs and assigns a good and sufficient deed in fee simple, of and for the said property"; and that the plaintiff bought said property "upon the express condition that the said rent could be extinguished at its option at any time"; "that the reversion in and to said lot, with the right to collect the annual rent of thirty-six dollars, is now vested in said defendants, as follows: (a) Edward Hollander, trustee, one of the above-named defendants, and trustee in the case of *Edward Hollander v. Amella Hollander et al.*, in the circuit court of Baltimore city (docket 24a, folio 245), holds a one undivided third interest therein, for Amella Hollander, another of the above-named defendants, for life, with remainder to Charles S. Hollander and Lee M. Hollander, other above-named defendants, absolutely. (b) Said Charles S. Hollander and Lee M. Hollander hold the other two-thirds undivided interest therein, as would appear by reference to the deed to said named defendants of said lot of ground, dated May 10, 1905, and recorded among the said Land Records in Liber R. O. No. 2143, folio 93," etc.; that the plaintiff notified the nonresident defendants by letter of its desire to redeem said ground rent, and in January, 1907, prepared and had sent to them for execution a deed to the plaintiff of their interest in said lot, which deed they refused to execute on the ground that by the terms of said lease the rent was not redeemable; that on the 20th of May, 1907, the plaintiff tendered to Edward Hollander trustee, \$210.30, it "being one-third of the said redemption money, together with the proportionate part of the accruing rent to the date thereof, and likewise, on May 31, 1907, tendered to Arthur W. Machen Jr., Esq. solicitor of the defendants, Charles S. Hollander and Elsie Hollander, his wife, and Lee M. Hollander, the sum of \$420.60, being their two-thirds share of said redemption money, together with their proportionate part of the accruing rent to said date"; and that at the same time plaintiff handed to said trustee and said solicitor a draft for a new deed "requesting them, and each of them, to have the same properly executed so as to vest" the plaintiff "with an absolute fee-simple title in and to the property," which deed is filed with the bill, and which they refused to execute or to have executed; and that said Machen was the solicitor of the defendants "in this matter." The prayer of the bill is for leave to bring into court the sum of \$630.90 so tendered, and that a trustee may be appointed to convey to the plaintiff the reversion in said lot, etc.

1. The general rule is that the bill must state clearly plaintiff's right to the relief prayed, and counsel for the appellants insist that, in compliance with this rule, the bill should have set out all of the assignments

from the original lessees down to the plaintiff, in order to show the right of the plaintiff, as assignee of the leasehold estate, to the benefit of the covenant sought to be enforced. The leasehold interest was conveyed by the lease to the lessees, their executors, administrators, and assigns, and the bill charges that the plaintiff is the owner of the leasehold property described in said lease by virtue of the deed from Benjamin Krulwitch, administrator. If the covenant is one that runs with the lease, in favor of the assignee of the lessees, the right to the leasehold interest created by the lease entitles the owner to the benefit of the covenant. In *Spencer's Case*, 1 Smith Lead. Cas. (11th Ed.) 77:

"It was resolved that the assignee of the assignee should have an action of covenant. So of the executors of the assignee of the assignee; so of the assignee of the executors or administrators of every assignee; for all are comprised within this word (assignees), for the same right which was in the testator, or intestate, shall go to his executors or administrators."

The bill in substance alleges that the plaintiff is the assignee of the leasehold interest or estate created by said lease. It was not necessary to allege all the circumstances tending to prove that fact. While "every material fact to which the plaintiff means to offer evidence, ought to be distinctly stated in the premises; for otherwise he will not be permitted to offer or require any evidence of such fact. A general charge or statement, however, of the matter of fact is sufficient; and it is not necessary to charge minutely all the circumstances, which may conduce to prove the general charge; for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs." *Story's Equity Pleading* (5th Ed.) § 28; *Miller's Equity Procedure*, § 92; *Phelps on Juridical Equity*, §§ 49, 55; *Meshaw v. Meshaw*, supra; *Dennis v. Dennis*, 15 Md. 73. The covenant is, at the request, etc., of the lessees, "their heirs and assigns," to convey to the lessees, their heirs and assigns, etc., yet the manifest intention of the parties to the lease, as gathered from the whole instrument, was to give to the lessees and those claiming under them, viz., "their executors, administrators and assigns," the benefit of the covenant. This, however, is not an action at law for a breach of the covenant, and the doctrine of specific performance does not depend upon such technical distinctions. Wherever, and without regard to the form and technical character of the contract, performance of a covenant in respect to lands would have been decreed between the parties to it, it will, in the absence of controlling intervening equities, "be decreed as between persons claiming under them in privity of estate, or of representation, or of title." 2 *Story's Eq.* (5th Ed.) §§ 788-790, 714, 715, 791; *Worthington v. Lee*, supra.

2. The second objection to the bill is that

the plaintiff does not offer to bear the "cost and charge" of the conveyance of the fee to him, which, it is claimed, include a counsel fee to the defendants for the examination of plaintiff's title in order to ascertain if he is legally entitled to the benefit of the covenant. In the case of *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43, the court held that counsel fees were not recoverable in a suit on an injunction bond, the condition of which was to satisfy and pay "all costs, damages, and charges" which should be occasioned by such writ of injunction, and said that the disallowance of such fees "rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy." This case was cited and relied on in *Wood v. State*, Use of White, 66 Md. 61, 5 Atl. 476, where, in a suit on an injunction bond, the court held that the plaintiff could not recover fees paid counsel for procuring a dissolution of the injunction. In *Johnson v. Glenn*, 80 Md. 369, 30 Atl. 993, a provision in a mortgage authorizing "the payment of all expenses incident to such sale" was said to include services of an auctioneer, cost of advertising, etc., but not an allowance for commissions. Counsel fees "are not allowable" as costs "in the absence of a statute, or in the absence of some agreement or stipulation specially authorizing the allowance thereof." 11 Cyc. 104. While parties must be left to contract as they please, in the absence of a clear undertaking to do so, one party to a contract should not be required to pay for services rendered for the benefit of the other, and, whatever may have been held on the subject elsewhere, under the decisions in this state the "cost and charge," which the plaintiff under the lease is required to pay, cannot be held to include a counsel fee to the defendants for examination of the plaintiff's title.

3. The next ground of the demurrer is that the covenant to convey the fee to the lessees, "their heirs and assigns," is not a covenant running with the land. In *Glenn v. Canby*, 24 Md. 127, the court stated, as the established doctrine, "that a covenant to run with the land must extend to the land, so that the thing required to be done will affect the quality, value, or mode of enjoying the estate conveyed, and thus constitute a condition annexed or appurtenant to it; there must also be a privity of estate between the contracting parties, and the covenant must be consistent with the estate to which it adheres, and of such a character that the estate will not be defeated or changed by a performance of it." This is the doctrine asserted by Mr. Poe in 1 Poe's P. & P. (1st Ed.) 253, and reiterated by this court in *Whalen v. B. & O. R. R. Co.*, 69 Atl. 390. In *Taylor's Landlord and Tenant* (7th Ed.) § 261, it is said that:

"In order that a covenant may run with the land, its performance or nonperformance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or must affect its mode of enjoyment.

It must not only concern the land, but there must be a privity of estate between the contracting parties."

"In order that a covenant may run with the land—that is, that its benefit or obligation may pass with the ownership—it must respect the thing granted or demised, and the act covenanted to be done or omitted must concern the land or estate conveyed. Whether a covenant will or will not run with the land does not, however, so much depend on whether it is to be performed on the land itself, as on whether it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those by whom it is owned or occupied, for if this be the case every successive assignee of the land will be entitled to enforce the covenant." 11 Cyc. 1080.

"Such covenants, and such only, run with land as concern the land itself, in whatsoever hands it may be, and become united with, and form a part of, the consideration for which the land, or some interest in it, is parted with, between the covenantor and covenantee." *Washburn on Real Property*, § 1205.

That the covenant in this case is within these requirements, as affecting the interest in the land demised, as enhancing the value thereof, and as forming a part of the consideration for the acceptance of the lease by the lessees, would seem to be free of doubt. The learned counsel for the appellants contend, however, that the performance of the covenant would defeat the estate of the lessor, and change the character of the estate of the lessee, and that it therefore falls within the restrictions of *Glenn v. Canby*, *supra*. But in *Taylor's Landlord and Tenant*, § 262, it is said:

"The right of renewal constitutes a part of the tenant's interest in the land, and a covenant to renew is consequently binding upon the assignee of the reversion. So the grant of an additional term, or the right to purchase, is, for many purposes, to be considered a continuation of the former lease; and, if there is nothing in the lease to show that such right or renewal was intended to be confined personally to the lessee, they will inure to his assignees or executors, without their being particularly named."

In the case of *Maughlin v. Perry*, 35 Md. 352, the covenant on the part of the lessor was as follows:

"And the said party of the first part, for himself, his heirs and assigns, doth hereby covenant and agree with the party of the second part, his heirs and assigns, to sell and convey unto the party of the second part, his heirs and assigns, the above-described property and premises for the sum of fifteen hundred dollars at any time before the expiration of this lease or tenancy."

The lessor died after having sold the property, and suit was brought by the assignees of the lessee against the assignee of the lessor for a specific performance of the covenant, and the court, in affirming a decree requiring the defendant to convey the property to the plaintiff in accordance with the terms of the covenant, said:

"As a part of the consideration of the lease constituting the contract between the parties, Wells, the lessor, covenanted to sell the property to Hynson, his lessee, for fifteen hundred dollars, at any time during the existence of the lease. This was a continual obligation running with the lease on the part of the lessor, with

the option in the tenant to accept the same, or not, within that time. But it seems Wells, before the right of Hynson to make his election had determined, made sale of the property to Maughlin, and died. Maughlin, with notice of the recorded contract between the parties, can acquire no greater right than possessed by Wells."

The certain and definite rule deducible from the authorities cited, then, is that if the covenant, as in this case, touches and concerns the land or estate demised, enhances the value thereof, and forms a part of the consideration for the acceptance of the lease by the lessee, a court of equity will decree specific performance, not only as between the parties to the contract, but, in the absence of intervening equities controlling its conscience, also as between those claiming under them in privity of estate. 24 Cyc. 1026; Gear on Landlord and Tenant, § 84; Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 673; Robinson v. Perry, 21 Ga. 183, 68 Am. Dec. 455; Kerr v. Day, 14 Pa. 112, 53 Am. Dec. 526; Hagar v. Buck, 44 Vt. 285, 8 Am. Rep. 368; Spencer's Case, 1 Smith's Leading Cases, 75.

4. The remaining ground of the demurrer is that the covenant cannot be enforced because of the rule against perpetuities. The nearest approach to a correct definition of a perpetuity is found, this court said, in *Graham v. Whitridge*, 99 Md. 248, 57 Atl. 609, 58 Atl. 36, 66 L. R. A. 408, in *Lewis on Perpetuities*, and is as follows:

"A future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the person for the time being entitled to the property subject to the future limitations except with the concurrence of the individual interested under that limitation."

In *Gray on Perpetuities* (2d Ed.) § 230, the author says that covenants for perpetual renewal are treated as an exception to the rule against perpetuities, but that it is "hardly necessary to create an exception to meet the case—the covenant to renew is a part of the lessee's present interest"; and, in section 230b, that:

"An option to a tenant for years to purchase a fee, exercisable at a remote time, is bad as violating the rule against perpetuities. * * * The only reason for considering the rule against perpetuities as inapplicable to such an option is the analogy to covenants for renewal treated in the two preceding sections. But the exemption from the rule in the case of covenants for renewal is either an exception which there is no reason to extend, or is to be explained, as it is in section 230, on the ground that the covenant to renew is a part of the present interest, a ground which cannot well be taken when the present interest is a tenancy for years, and the interest to be purchased is a fee."

While the statement of Mr. Gray, that the option to a tenant to purchase is bad, is supported by the authorities cited by the appellants, the distinction he makes between such

an option and a covenant for renewal is not altogether satisfactory. The application of the rule is not determined by the character of the estate or interest conveyed, but by the answer to the question, will it necessarily vest within the time fixed by the rule? If the fee covenanted to be conveyed in the covenant under consideration is to be regarded as a future limitation, it may not of course necessarily vest under the terms of the covenant within the prescribed time. Likewise the estate to be conveyed to the lessee under the covenant for a renewal of the lease, at the option of the lessee, and upon payment of a fine, etc. If the covenant to renew is a part of the lessee's present interest, so is the covenant for a conveyance of the fee. The estate acquired under the new lease, while of the same character, is for a different term, and just as much a new and distinct estate as the estate acquired under the covenant for the conveyance of the fee. If the estate conveyed to the lessee, and the lessee's present interest, is, in the one case, not a term for 99 years, but a term for 99 years with the right of renewal, so, in the other case, the estate conveyed to the lessee, and the lessee's present interest, is not a definite term, but the term coupled with the right to acquire the fee. In this connection we may again refer to the statement in *Taylor's Landlord and Tenant*, supra, that "the grant of an additional term, or of a right to purchase, is, for many purposes, to be considered a continuation of the former lease." But, however this may be, our predecessors, in view of the fact that titles to property of great value in Baltimore city, and elsewhere in the state, are held under leases of the character of the one in this case (the forms of which, generally used, are suggested in *Latrobe's Justices' Practice* [7th Ed.] pp. 463, 464, and *Carey's Forms and Precedents*, pp. 364, 365), have somewhat relaxed the technical rules applicable to such estates, for the purpose of enforcing the contracts of the parties thereto. In *Banks v. Haskie*, 45 Md. 207, where a bill was filed for specific performance of a covenant for renewal in a lease for 99 years, renewable forever, the court, in discussing the character of estates created by such leases, said:

"This character of tenure is, so far as we know among the states, peculiar to Maryland. It has not been generally adopted, so far as we are informed, in any other state. It was introduced here in colonial times, and has been a favorite system of tenure from a very early period. A large city has been built, and improved, and a vast majority of the real estate in Baltimore is now held under it. It is not open to any of the objections against perpetuities. Property is not thereby placed extra commercium. On the contrary, these leasehold interests devolve upon the personal representatives of the owner, are in terms made assignable, and they, as well as the ownerships in fee under the denomination of 'ground rents,' are subjects of daily transfer, and are constantly sought for as safe investments of capital. It is a peculiar description of tenure which has been sustained by

our courts, and approved and fostered by our people. While the ground rents from their nature are usually of a fixed value, the leasehold interests are more or less fluctuating. In many, and indeed in most, cases, they have largely increased in value with the growth of the city. And most extensive and costly improvements have been and are daily made by owners of such interests on grounds thus leased."

Again, in the case of *Myers v. Silljacks*, 58, Md. 319, speaking of leases of this character, Judge Alvey said:

"We all know that estates dependent upon leases, like the one before us, are exceedingly common in this state, and particularly so in the city of Baltimore. Both the reversionary freehold and the leasehold estates are the subjects of daily transfers and assignments, and they constitute a considerable portion of the substantial wealth of the people. While the one estate is subject exclusively to the law that governs real property, the other is mainly controlled by the law that governs personality; the one estate passing by descent, and being subject to the law of partition among heirs, while the other is the subject of administration, and is governed by the law that directs distribution of the personal estate. Both estates alike are the subjects of mortgage and judgment liens, and are constantly being sold and transferred in the enforcement of such charges. It is of the utmost importance, therefore, that the tenure be maintained with entire certainty; that the true relation of the parties to the property be at all times fully recognized, so that their exact rights may be known and enforced, and that third parties may know how to deal with respect to those rights."

And again, in the case of *Worthington v. Lee*, supra, the court said that the above cases fully state the reasons why this court "has applied a more liberal doctrine to these cases than that applied in the English courts; and it has done so with special reference to the peculiar nature and condition of the local titles that exist in the city of Baltimore." Without detracting from the great weight and respect to which the authorities cited by appellants are justly entitled, we must adhere to the previous decisions of this court, and hold that the lease in question did not place the property extra commercium, and that the rights of the parties under the covenants therein are "not open to any of the objections against perpetuities."

It follows, from what we have said, that the decree of the court below must be affirmed.

Decree affirmed, with costs, and cause remanded.

Supplemental Opinion.

Since the filing of the opinion in this case, our attention has been called to the agreement of counsel and the certificate of the clerk of the circuit court of Baltimore City, filed in this court on the day of the argument, whereby it appears that the petition and motion of *Lee M. Hollander* was set down for hearing by the plaintiff. In the case of *Paul v. Nixon*, reported in a note to *Jones v. Magill*, 1 Bland, 177, Chancellor Hanson said: "If, indeed, the defendant was entitled to have the case set down for final hearing on bill and answer, it must be on terms similar to those of the complainants setting down, viz., that everything contained in the bill is true; that is to say, the rule must

be reversed. But there is no such practice." *Miller's Eq. Procedure*, p. 319, note 4.

Who is a nonresident is a mixed question of law and fact. The petitioner states in his petition "that he has lately been in Scandinavia for a year and a half for the purpose of studying philology, and is now in the city of New York for the purpose of using libraries there situated, but that your petitioner has never abandoned his residence and citizenship in the state of Maryland." It therefore appears that he has been out of the state at least a year and a half. The petition does not say when he expects to return to Maryland, or whether he intends to return at any certain time, and it may be that he intends to remain out of the state indefinitely. If he has been out of the state for a year and a half, with no intention of returning, "or with the intention of returning at some indefinite time in the future, as circumstances may dictate or permit," he is a nonresident, within the meaning of section 123 of article 16 of the Code of Public General Laws of 1904, and may be proceeded against as such, notwithstanding he may not intend to abandon his domicile in this state; for, as was said in *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617: "In contemplation of the attachment law, the domicile may be in this state, while the actual residence is in another." The term "nonresident," in section 123 of article 16 of the Code of Public General Laws of 1904, means a "person who doth not reside in this state" as defined in the law relating to attachment. *Dorsey v. Dorsey*, 30 Md. 531, 96 Am. Dec. 633; *Miller's Eq. Procedure*, p. 160, § 123.

In the case of *Dorsey v. Dorsey*, supra, the defendant stated in his petition that he left his home in Maryland to visit his wife, who was then sick at her father's in Winchester, Va., with the intention of returning in a few days; but owing to the position of the armies about Winchester and Harper's Ferry he was unable to do so, and was forced to wait for the close of the Civil War, although at all times intending to return. While he was absent from the state he was proceeded against as a nonresident, and the court held that he was a nonresident, within the meaning of the provision of the Code. In the case of *Risewick v. Davis*, 19 Md. 82, in disposing of an exception to evidence offered to show the intention of the defendant to return to the state at some indefinite time, the court said: "Residence and domicile are sometimes distinct things. In the *Matter of Thompson*, 1 Wend. (N. Y.) 43, it was decided that residence out of the state, for the purpose of being subject to foreign attachment, did not import that domicile should be out of the state also. *Frost v. Brisbin*, 19 Wend. (N. Y.) 14, 32 Am. Dec. 423. In *Haggart v. Morgan*, 5 N. Y. 428, 55 Am. Dec. 350, the defendant offered to prove that at the time of taking out the attachment he was not a nonresident, but a resident of the city of New York; that he had been absent about three years, attending a lawsuit at New Orleans, and returned in the spring of 1848. The judge excluded the evidence, on the ground that the offer itself showed the debtor to be a nonresident, within the spirit of the act. In the case at bar the defendant had been absent four or five years, and non constat but he might be absent as many years longer. The evidence, being foreign to the issue, should have been excluded."

Mr. Poe says: "It may be stated, as the result of the authorities, that where a citizen of this state, domiciled here, goes abroad on business or pleasure for a brief period, without any intention of abandoning or changing his domicile, and with a fixed purpose to return at a definite or specified time, retaining and intending to retain, in the meantime, both his domicile and political citizenship, he cannot properly be treated as a nonresident, within the meaning of the attachment law, simply because of his temporary absence from his residence and home."

Where, however, he leaves the state and remains absent for any considerable period, without any intention of returning, or with the intention of returning at some indefinite time in the future, as circumstances may dictate or permit, he will be liable to be proceeded against as a nonresident, notwithstanding he may not have acquired a fixed residence in any other state or country." 2 Poe's P. & F. (3d Ed.) § 506.

On the facts stated in the petition, we think the plaintiff had a right to proceed against the petitioner as a nonresident, and that, therefore, there was no error in the order of the court overruling the motion to quash the proceedings against him. As we have said, the plaintiff had no right to have the matter set down for hearing on the petition and answer; but, as it appears he did so, we must assume that it was done with the petitioner's consent, and he, therefore, has no right to complain if the motion was properly disposed of on the facts stated in his petition.

(29 R. I. 240)

STATE v. CREPEAU.

(Supreme Court of Rhode Island. Dec. 29, 1908.)

MUNICIPAL CORPORATIONS (§ 624*)—ORDINANCES—VALIDITY—BUILDING REGULATIONS.

An ordinance providing that every person, firm, or corporation doing or causing to be done, and every owner of land permitting to be done, any work in or about the construction or reconstruction of a building, without a permit, shall be fined, etc., and making every day's violation of the ordinance after service of the warrant issued on the first offense a distinct offense, is void for want of legislative authority; Gen. Laws 1896, c. 40, § 21, authorizing towns to pass ordinances for the ordering of the prudential affairs and police of their town, not repugnant to the Constitution and laws of the state or of the United States, not authorizing the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1375; Dec. Dig. § 624.*]

Rosanna Crepeau was convicted of violating an ordinance, and her motion in arrest of judgment has been certified to the Supreme Court. Motion granted.

Charles R. Easton, for the State. Edward W. Blodgett, for defendant.

BLODGETT, J. The complaint in this case charges a violation of a certain ordinance of the town of Lincoln, in these words and figures, viz., that the respondent "did then and there, on the tenth day of May, 1907, permit and suffer to be done on her land, within said town, work and labor in or about the construction of a building without a permit, against an ordinance of Lincoln aforesaid, being section 3 of chapter 8 of said ordinances, and against the statutes and the peace and dignity of the state"; and, after being adjudged guilty, the respondent has moved in arrest of judgment on the ground that the town is without legislative authority to enact the ordinance in question, without otherwise questioning the sufficiency of the charge, and the case has been certified here under the provisions of section 478, Court and Practice Act 1905.

The ordinance is as follows:

"Sec. 3. Every person, firm or corporation that shall do or cause to be done, and every owner of land who shall permit or suffer to be done, on said land within this town, any work or labor of any kind whatsoever in or about the construction or reconstruction of any building without a permit, shall be fined not less than two nor more than twenty dollars or be imprisoned not exceeding ten days for each offense; and every day's violation of any of the provisions of this chapter after the service of the warrant issued on the first complaint thereof shall be deemed a separate offense and shall subject the offender to the penalties herein before enumerated."

It is conceded that the town of Lincoln has no special statutory authority to enact building regulations, and that the validity of the ordinance must depend upon the concluding paragraph of section 21, c. 40, Gen. Laws 1896, which is as follows:

"And, generally, all other ordinances, regulations and by-laws for the well-ordering, managing and directing of the prudential affairs and police of their respective towns not repugnant to the Constitution and laws of this state, or of the United States."

There are two objections to this ordinance, either of which is fatal to its validity. The first is an entire lack of legislative authority to enact building regulations, inasmuch as the statute above cited clearly does not confer such authority, and the second is the practically unlimited power assumed by the town council in this ordinance, such as was thus characterized in *State v. Tenant*, 110 N. O. 609, 612; 14 S. E. 387, 388, 15 L. R. A. 423, 28 Am. St. Rep. 715:

"It is equally clear that, if an ordinance is passed by a municipal corporation which upon its face restricts the right of dominion which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of aldermen, who may exercise it so as to give exclusive profits or privileges to particular persons."

In like manner, in *Bostock v. Sams*, 95 Md. 400, 413, 52 Atl. 665, 668, 59 L. R. A. 282, 93 Am. St. Rep. 394, the court says:

"Notwithstanding the delicate power conferred by the proviso in question, a power to control the citizen in the exercise of important and valuable rights of property, the power is conferred in the most vague and general terms, and an unlimited and unregulated discretion is given to an agency of the city government thereunder. No standard is set up according to which this judgment is to be exercised, nor means provided by which it is to be instructed or controlled, and the citizen is left helpless to question its exercise in any particular case."

And in this case the court held that a statutory provision that the city of Baltimore might enact "such ordinances as it may deem expedient in maintaining the peace, good government, health and welfare of the city of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Baltimore" was insufficient to authorize the building regulations then before the court. See, also, *City of Newton v. Belger*, 143 Mass. 598, 10 N. E. 464.

The decision of the court, therefore, is that the ordinance in question is ultra vires and void, and that the motion in arrest of judgment should be granted; and the papers in the case will be sent back to the district court of the Eleventh judicial district, with this decision certified thereon.

(29 R. I. 339)

McKENNA BROS. v. BROWN, Constable.
(Supreme Court of Rhode Island. Dec. 28, 1908.)

EXECUTION (§ 323*)—SALE—PROCEEDS—MORTGAGES—“AMOUNT DUE ON EXECUTION.”

The expenses of an execution sale of mortgaged property is a part of the “amount due on the execution,” which amount is required by Court and Practice Act 1905, § 629, to be paid out of the proceeds of the sale after payment of the mortgage debt; and when the proceeds of an execution sale of personalty are insufficient to pay the mortgage debt the mortgagee is entitled to recover from the levying officer the full amount of the sale, without any deduction for such expenses.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 957; Dec. Dig. § 323.*]

Action by McKenna Bros. against Samuel Brown, constable. Case certified to the Supreme Court from the district court on agreed statement of facts. Judgment for plaintiffs.

Joseph H. Gainer, for plaintiffs. John I. Devlin, for defendant.

PER CURIAM. This case was certified to this court from the district court of the Sixth judicial district upon the following agreed statement of facts:

“The defendant, a constable in and for the county of Providence, on the 23d day of June, 1908, attached the stock and fixtures of a bar-room on Charles street belonging to Ferdinando Savastano, on which the plaintiffs held a chattel mortgage of \$1,000. Said mortgage was made January 28, 1908, and was recorded in the record office in Providence January 30, 1908, within five days from date, was proper in form, and was given for an actual cash consideration of \$1,000. The plaintiff in the writ of attachment against Savastano obtained judgment and execution, and the defendant levied said execution on above-described chattels, and sold same at public auction. The sale brought about \$147. The plaintiffs claim, under section 629, Court and Practice Act 1905, that the entire amount received at sale should be turned over to them in satisfaction, as far as it will go, of their mortgage. The plaintiff in the writ of attachment claims that under the statute, which provides that the ‘proceeds of the sale shall be applied to the payment of the amount due on the mortgage,’ he is entitled to retain the actual expense of sale, auctioneer’s fee, \$5, advertising, \$14, and rent of store where goods were sold, \$5, and pay the balance to the mortgagee.”

The statute above referred to reads as follows:

“Sec. 629. The proceeds of the sale shall be applied to the payment of the amount due on

the mortgage, with such deduction for interest for the anticipated payment, or allowance for damages for such anticipated payment, as may be ascertained and allowed by the court to which the execution is returnable, and the balance shall be applied to the payment of the amount due on the execution.”

A proper construction of the foregoing statute is determinative of the case. In our opinion, the various sums which the judgment creditor claims that he is entitled to retain out of the money obtained from the sale of the mortgaged property levied upon by him constitute a portion of “the amount due on the execution,” which amount is to be paid out of the balance of the proceeds of sale remaining after payment of the amount due on the mortgage. As there is no such balance of such proceeds, there is no fund out of which such payment can be made. We therefore decide that the plaintiffs are entitled to recover the full amount received for the property sold by the defendant, without any deduction, and with interest from the date of the writ.

The papers in said case, with our decision certified thereon, are remitted to the district court of the Sixth judicial district, with direction to enter judgment for the plaintiffs upon the decision.

(29 R. I. 365)

RUHLAND v. WATERMAN, Town Clerk,
et al.

(Supreme Court of Rhode Island. Dec. 29, 1908.)

1. INTOXICATING LIQUORS (§ 25*)—LOCAL OPTION—STATUTES—INVALIDITY.

The proviso in Gen. Laws 1896, c. 102, § 4, authorizing the submission at general election in cities and towns of the question whether liquor licenses shall be granted, if “a number of qualified electors, equal in cities to 10 per centum and in towns to 15 per centum of the vote cast for general officers at the election next preceding,” shall petition therefor, etc., is void for uncertainty because it fails to establish a basis of mathematical computation, and because the words “qualified electors” are uncertain in meaning, and because the manner of ascertaining the fact that the petitioners for a vote are qualified electors is uncertain.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 31; Dec. Dig. § 25.*]

2. STATUTES (§ 205*)—CONSTRUCTION—INVALIDITY OF PROVISIO—EFFECT.

Where the proviso to a section of an act is void for unconstitutionality or other reason, nevertheless, though not enforceable, such invalid proviso cannot be disregarded in giving the interpretation of the section.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 282; Dec. Dig. § 205.*]

3. INTOXICATING LIQUORS (§ 25*)—LOCAL OPTION—ELECTIONS—STATUTES.

Gen. Laws 1896, c. 102 (entitled “Of the Suppression of Intemperance”) § 4, authorizes the submission at general elections in cities and towns of the question whether liquor licenses shall be granted, and provides that no vote shall be taken on the question, unless a number of electors equal in cities to 10 per centum and in towns to 15 per centum of the vote cast for general officers at the preceding election shall petition therefor. *Held*, that the section, when con-

sidered in the light of the history of liquor legislation especially as to local option, continues the local option features of former statutes, and makes this law applicable throughout the state under one general rule, and that the proviso is in form void for uncertainty does not affect the law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 31; Dec. Dig. § 25.*]

4. INTOXICATING LIQUORS (§ 25*)—LOCAL OPTION—STATUTES—VALIDITY.

The provision in Gen. Laws 1896, c. 102, § 4, providing for the submission at general elections in cities and towns of the question whether liquor licenses shall be granted, is a complete provision, though the proviso thereof, declaring that no vote shall be taken on the question unless a number of electors petition therefor, is stricken out because uncertain in meaning.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 31; Dec. Dig. § 25.*]

5. STATUTES (§ 181*)—CONSTRUCTION—INTENTION OF LEGISLATURE.

The court in construing a statute must ascertain the true intent of the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 259; Dec. Dig. § 181.*]

Petition by Lewis Ruhland for certiorari to review the action of Daniel D. Waterman, making a certificate to the Secretary of State. Writ granted.

Edward D. Bassett, John W. Hogan, Arthur P. Sumner, and Phillip S. Knauer, for petitioner. William B. Greenough, Atty. Gen., for Secretary of State. Benjamin W. Grim, for respondent Waterman.

PARKHURST, J. In this cause the court on the 23d day of October, 1908, filed a rescript (71 Atl. 1).

The first question that arises upon the proviso above quoted (Gen. Laws 1896, c. 102, § 4) is as to the meaning of the words "unless a number of the qualified electors equal in cities to ten per centum, and in towns to fifteen per centum, of the vote cast for general officers at the election next preceding, shall petition the city or town clerk therefor at least twenty days prior to said election"; and this question subdivides into two others, viz.: (1) How shall the city or town clerks determine the number of qualified electors necessary to a valid petition? (2) How shall the city or town clerks ascertain whether the names appearing upon the petitions are the names of "qualified electors"?

The basis of computation as to the required number of petitioners is a fixed percentage of the "vote cast for general officers at the election next preceding"; and it was contended before us by the petitioner's counsel that the only possible construction of these words must be either the sum of all the votes cast for each general officer in the whole state, or, at least, the sum of all the votes cast for each general officer in the particular town or city where the electors petitioned the clerk. Now, it appears from the printed "official count," etc., prepared by the state re-

turning board, showing the number of ballots cast at the election held November 5, 1907 (being "the election next preceding"), that the total number of votes (excluding blank and defective ballots) cast for general officers was as follows:

	Whole State.	Cranston.
For Governor.....	66,106	2,252
For Lieutenant Governor....	64,163	2,181
For Secretary of State.....	64,015	2,183
For Attorney General.....	64,022	2,195
For General Treasurer.....	63,734	2,163
Totals	322,045	10,974

Using these figures as the basis of computation, the 15 per centum required in the town of Cranston would be either 48,307 signatures (on the basis of the whole state) or 1,647 signatures (on basis of Cranston alone). On the former basis the number of signatures required would be more than twice as many as the whole number of ballots cast at that election in Providence, and on the latter basis more than 70 per centum of the total number of ballots cast in Cranston alone at that election. The petitioner thereupon further contended that, under either of these methods of computation, the petitions to the town clerk would be insufficient to warrant the town clerk's action in certifying to the Secretary of State, as above set forth, for want of a sufficient number of names. Another suggestion offered to the court by counsel for respondents in this and other similar proceedings was that the town clerk or city clerk would be justified in taking the vote for governor in a town or city as the basis of computation; and it appeared, as to the town of Cranston and some other towns as to which evidence was offered, that this method of computation was in fact used; it being argued that this, being the highest number of votes cast for any one of the general officers, might fairly be regarded as indicating "the vote cast for general officers," and, at all events, as furnishing a safe basis of computation, as it would result in requiring a larger number of signatures than would be required under other methods to be hereafter mentioned. Other suggestions were that the average of the votes cast for the several general officers or the lowest number of votes cast for any general officer be taken as the basis of computation. It thus appears that five different solutions of the mathematical problem set by the language under discussion were offered to the court for its consideration. The court was not able to accept any of these solutions, for the plain reason that they were not in accordance with the statute. The words are: "The vote cast for general officers at the election next preceding." It is plain that these words are not equivalent either to the "sum of all the votes cast for each general officer in the whole state," or to the "sum of all the votes cast for each general officer in the town or city,"

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

etc., and the results of such a construction as worked out above show upon their face that it would be a forced and unreasonable construction. It is equally evident that the words under discussion are not equivalent to "the vote for Governor," "the average of the votes cast," or "the lowest number of votes cast."

What, then, do the words "the vote cast for general officers" mean? After full argument and mature deliberation, we are forced to say that they have no meaning under our present methods of election. It is apparent from reference to the above tabulation of "the votes cast for general officers" in the whole state, and in Cranston, at the "next preceding election," that each of the general officers had a different number of votes. There are no means by which we can find any certain and particular number which can be said to be "the vote cast for general officers." It might have been possible under our former manner of voting before the Australian ballot came into use, and when, perhaps, only two political parties contested the election, that the result of an election might have shown the same number of votes cast for each general officer on the Republican ticket and the same number of votes cast for each general officer on the Democratic ticket; and so it might have been possible to say that "the vote cast for general officers" under such a state of facts would have been the sum of the votes cast for the two tickets. But this state of facts would have been only a possibility even in the past, because it is well known by all that even then the inalienable right of the voter to "split," "scratch," or "scatter" was freely exercised. It is fully manifest, therefore, that the person who drafted the proviso in question and the General Assembly which passed it failed to establish a basis of mathematical computation, and that this court is unable so to construe the proviso in this regard as to give it meaning. It is therefore void for uncertainty in this respect.

There is also another uncertainty in the proviso, in that it uses the term "qualified electors" as the persons who may petition the town clerk or city clerk, and requires that they petition "at least twenty days prior to said election." At once the question arises: "Qualified" when? Must they have been "qualified electors" at the next preceding election, or may they be persons whose names have been placed upon the voting lists at the last canvass meeting prior to the filing of the petition, or may they be persons who may be qualified to vote at the next election, although their names do not as yet appear upon the voting list, but may be placed there, if proper steps are taken prior to the election? Again, a further question arises. How shall it be ascertained that the petitioners are qualified electors? Shall the town or city clerk be governed in his decision as to accepting or rejecting names on such peti-

tions by the voting lists used at the last election or, by the voting lists made up at the last canvass-meeting prior to the receipt of the petition, and shall he require that the names on the petition shall be exactly the same in all respects as to full names, abbreviations of Christian names, initials, and residences as appear on the voting list, so that he may prima facie be satisfied of the identification and qualification of the signers by comparison with the voting lists, and shall he reject all names other than those which appear in identically the same form and with the same residence as they appear on the voting lists, or shall he use his own knowledge and judgment as to accepting names which do not appear upon the voting lists in the same form or do not appear at all, determining for himself whether the signatures are those of electors actually qualified at the time of signing the petition, or may he satisfy himself by inquiry or by taking or accepting evidence by affidavit or otherwise as to the validity of the signatures? It was earnestly contended by counsel for the petitioner in this cause that the town clerk must be governed solely by the voting lists in his custody or accessible to him as the only record evidence of the qualification of voters, and that he should accept as valid signatures only those which were written in the same identical form as appeared upon such voting lists, rejecting all such as appeared in different form, whether by initials, abbreviation of Christian names, different residences, or otherwise. It appeared in evidence that the town clerk used his own judgment as to accepting such signatures, relying upon their identity with the names upon the voting lists in many, perhaps in the majority, of cases, but also relying in case of discrepancy upon his judgment or knowledge of the signatures and electoral qualifications. It is plain upon a mere statement of these difficulties that it would be practically impossible for this court to define what is meant by the words "qualified electors," as used in this proviso, so as to derive from the language of the statute an intelligible general rule to be applied throughout the state. Inasmuch, therefore, as we find it impossible to so construe the words under consideration as to derive therefrom any rule, either as to the basis of computation of the number of names required to make a valid petition, or as to the method by which the town clerk or city clerk shall determine that the signers of the petition are "qualified electors," we are compelled to say that the proviso above set forth in full is void for uncertainty.

The final question that arises is whether the fact that this proviso is void for uncertainty renders void the whole of section 4, c. 102, or whether the proviso may be struck out and the remainder of section 4 be allowed to stand as a clear, complete, and intel-

ligible statute, capable of enforcement without the proviso. It was earnestly contended on behalf of the petitioner that the whole of section 4 should be declared void because it was evident that the General Assembly intended that a vote for or against the granting of licenses should not be taken in any town or city unless upon the initiative of qualified electors by petition, and that, if the machinery provided failed to work by reason of its uncertainty, then the right and duty of local option must necessarily cease; that, if the court should find the words of the proviso relating to petitioners void for uncertainty, it should then leave the section to read as follows: "Sec. 4. The electors of the several cities and towns who are qualified to vote in the election of all general officers, shall, at each election of general officers, cast their ballots for or against the granting of licenses for the sale of intoxicating liquors pursuant to this chapter: Provided, that no vote shall be taken on this question in any city or town." The petitioner strenuously urged that this and this only would be a true interpretation of the legislative intent; and cited *Commonwealth v. Potts*, 79 Pa. 164, *Philadelphia v. Barker*, 160 Pa. 123, 28 Atl. 644, *General Assembly v. Gratz*, 139 Pa. 497, 20 Atl. 1041, *Connolly v. Union, etc., Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, and numerous other cases, to the general proposition of law that, where the proviso to a section of an act is void for unconstitutionality or for other reasons, nevertheless, though not enforceable, such invalid proviso or portion cannot be disregarded in giving the interpretation of the section.

We do not for an instant dispute the general principle of these cases. On the contrary, we have fully considered not only the proviso, but also the entire section and the whole chapter in the endeavor to arrive at the true legislative intent. The chapter in question is entitled, "Chapter 102," "Of the Suppression of Intemperance." The words show in a general way what is the scope and purpose of the chapter, and its various sections place restrictions upon the manufacture and sale of intoxicating liquors by means of a license system with numerous and minute provisions for the administration of such system and for the enforcement of penalties for its violation. In order to ascertain the intention of the Legislature in the enactment of section 4, c. 102, Laws 1896, it will be instructive to review the history of liquor legislation in this state preceding and succeeding the period of constitutional prohibition (from the year 1886 to the year 1889) in so far as local option provisions are to be found therein. Chapter 87, Pub. St. 1882, in section 2 thereof, vested in town councils and boards of aldermen power to grant liquor licenses within their respective towns or cities. Section 3 of said chapter 87 provided that the electors of the city of Providence at each annual election should

cast their ballots for or against the granting of liquor licenses, and provided that no license thereafter granted in said city should be valid if a majority of the ballots cast at any such city election were against the granting of such licenses, and further prohibited the granting of such licenses in that event by the license commissioners of Providence. Sections 4 and 5 of said chapter 87 provided for local option in the town of Pawtucket, and enacted that licenses might be granted by the town council if the ballots cast were in favor of granting the same, and that no licenses should be granted in said town if a majority of the ballots so cast were against the granting of such licenses. Section 9 of said chapter 87 provided that no license for the sale of intoxicating liquor should be granted by any town council if at any regular meeting such town should vote not to grant any such, the vote thereon to be by ballot upon the request of any five qualified electors. Chapter 326, p. 1, Pub. Laws, passed June 1, 1882, amended section 9 of said chapter 87 by providing that no license should be granted in any town if at the annual town meeting in April such town should vote not to grant such license, and providing that the town clerk upon request in writing of ten qualified electors should insert a proposition providing for the taking of such vote in the warrant calling such meeting. Chapter 558, p. 27, Pub. Laws, passed March 30, 1886, amended said chapter 87 of the Public Statutes of 1882 by extending the method of casting and counting ballots for or against the granting of licenses in the city of Pawtucket and re-enacted the provisions of said chapter 87 permitting such licenses if a majority of such ballots were in favor thereof, and prohibiting the granting of such licenses in Pawtucket if a majority of said ballots were against the granting thereof. At the general election April, 1886, a prohibitory amendment was adopted by the people of this state, article 5 of amendments to the Constitution. At the May session, 1886, the General Assembly passed chapter 596, p. 2, Pub. Laws, as a general act for the enforcement of the prohibitory amendment repealing chapter 87 of the Public Statutes and several acts in amendment thereof and in addition thereto. At the May session of the General Assembly 1889, the amendment article 8 annulling the prohibitory amendment article 5 was voted for submission to the people at a special election to be held on the third Thursday in June, 1889, under and by the provisions of chapter 808, p. 1, of the Public Laws passed May 30, 1889, at which special election article 5 of amendments was annulled by the adoption of article 8 of amendments by vote of the people. A special session of the General Assembly called and holden in the month of July, 1889, followed the repeal of the prohibitory amendment. An act to regulate the sale of liquors passed at this spe-

cial session August 1, 1889, contains for the first time a clause identical with section 4, c. 102, Gen. Laws 1896. Pub. Laws July Sess. 1889, p. 136, c. 816, § 4. It thus appears that the right of "local option" on the part of all the towns and cities of the state has been for many years recognized and preserved by the General Assembly as an important part of the system adopted for the "suppression of intemperance."

It is to be noted that prior to June 1, 1882, local option might be exercised in towns at the request of only five qualified electors, and that after June 1, 1882 (chapter 326, p. 1, Pub. Laws of 1882), and down to the adoption of the prohibitory amendment, local option might be exercised in towns at the request in writing of only 10 qualified electors; and it is also to be noted that the peremptory requirements as to voting at each annual election for or against the granting of licenses in Providence and Pawtucket appearing in Pub. St. 1882, c. 87, §§ 3, 4, were enacted by the General Assembly as to Pawtucket, by Pub. Laws, p. 116, c. 858, passed April 19, 1881, and as to Providence by Pub. Laws, p. 149, c. 889, § 3, passed April 29, 1881. Each and all of these provisions were simple, clear, and easily understood and administered. After the annulment of the prohibitory amendment, when the General Assembly by Pub. Laws 1889, p. 133, c. 816, passed August 1, 1889, re-established a license system, it still showed its intention to preserve the local option features of the former statutes by the general language of section 4; and it also intended, beyond question, to make this law applicable throughout the state under one general rule, so that there should no longer be one rule in the towns and another rule in the cities of Providence and Pawtucket. It doubtless supposed that this intention had been fully carried out in both particulars, and that the section as passed did furnish a method by which a vote should be taken only at the instance of a certain number of qualified electors expressed in a definite manner. We cannot suppose that the General Assembly knew that the proviso was so vague and indefinite as to be void for uncertainty, and that it knowingly passed such a proviso intentionally for the purpose of annulling the earlier general words of section 4, and so as to make them inoperative. Nor can we suppose that, as urged by the petitioner, it would not have passed this statute without this proviso. If it had understood that this proviso would render the whole section inoperative, we are convinced that it would have attempted to so change it as to make it accomplish the real intent. The consideration of the entire history of this legislation, as above set forth, as well as the frame of section 4 itself, convinces us beyond a doubt that the real, primary, and true intent was to continue and preserve the right of "local

option" as it had existed and been exercised under the former statutes; and the enactment of the proviso, in a form which is void for uncertainty, does not express the true intent and meaning of the Legislature, because it does not mean anything at all. We have already, in the rescripts above quoted, sufficiently considered and answered in the affirmative the question whether the remainder of section 4, after striking out the proviso forms in itself a clear, complete, and intelligible statute, and have shown how the same should be administered.

We believe that we have found and declared what was the true intent of the General Assembly in this matter and have decided this cause, so as to preserve that true intent in accordance with principles of such universal acceptance in the courts, that the citation of authority is unnecessary. All of the cases cited on the briefs, so far as they apply at all, support the same general doctrine that we have followed above as to the duty of the court to ascertain the "true intent" of the General Assembly in construing statutes. None of the cases cited is so nearly similar to the case at bar as to give us direct aid in construing the language here in question. And there is no case cited where a proviso, which is void merely because it is meaningless, has been held to have the effect of rendering an entire section void, where the remainder of the section is capable of a clear construction and of enforcement. The cases cited, where a proviso, or a distinct section, has been held to have the effect of nullifying a whole section or a whole act, are cases where the intention of the legislation was perfectly clear and intelligible, and where such intention so clearly expressed made the act unconstitutional, and therefore void; and where the court, having ascertained what was the clear intention, have found that the act without the obnoxious portions would not express the true intent. We are therefore of the opinion that a review of the authorities cited on the briefs would serve no useful purpose, but would unnecessarily encumber the opinion.

(29 R. I. 390)

JASTRAM v. MCAUSLAN et al.

(Supreme Court of Rhode Island. Jan. 4, 1909.)

1. CONTEMPT (§ 66*)—CIVIL CONTEMPT—APPEAL.

An appeal lies from orders in proceedings for civil contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 223-228; Dec. Dig. § 66.*]

2. CONTEMPT (§ 25*)—ORDERS FOR PAYMENT OF MONEY—ENFORCEMENT.

A decree for payment of money may be enforced in chancery in proceedings for contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 75-78; Dec. Dig. § 25.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. CONTEMPT (§ 25*)—ORDERS FOR PAYMENT OF MONEY—ENFORCEMENT.

The power of a chancery court to punish by imprisonment for contempt for failure to pay as directed by its decree is not imprisonment for debt, but rests on the power of the court to vindicate its authority and to punish for defiance thereof.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 75-78; Dec. Dig. § 25.*]

4. CONTEMPT (§ 25*)—ORDERS FOR PAYMENT OF MONEY—ENFORCEMENT.

A court of chancery may punish by imprisonment for contempt for failure to pay as directed by its decree, though execution might have issued.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 75-78; Dec. Dig. § 25.*]

5. CONTEMPT (§ 66*) — ORDERS — APPEALABILITY — "FINAL DECREE."

A decree denying and dismissing a petition that defendant trustees be adjudged in contempt for not paying to complainant a specified sum in satisfaction of a decree previously entered determines the right of complainant, and is a "final decree," within Const. Amend. art. 12, § 1 (Laws 1903, p. 2, c. 1089), granting to the Supreme Court appellate jurisdiction on all questions of law and equity.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 224; Dec. Dig. § 66.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 8, p. 7663.]

6. CONTEMPT (§ 24*)—DECREE OF COURT—VIOLATION.

Where a decree requires trustees to pay to a specified person dividends and income from the trust estate collected by the trustees, they cannot justify a nonpayment by showing that no part thereof is available for such payment; and where they have devoted the same to other purposes they must reimburse the fund from their individual estates.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 72, 73; Dec. Dig. § 24.*]

7. APPEAL AND ERROR (§ 1207*)—DISPOSITION OF CAUSE ON APPEAL.

A decree entered by the superior court as directed by the Supreme Court is in effect the decree of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4696; Dec. Dig. § 1207.*]

Appeal from Superior Court, Providence and Bristol Counties; William H. Sweetland, Presiding Justice.

Suit by Edward P. Jastram against Amelia B. McAuslan and another. From a decree dismissing the petition, complainant appeals. Reversed and remanded.

Edwards & Angell (Albert Gerald, of counsel), for appellant. Tillinghast & Tillinghast and Bassett & Raymond (Russell W. Richmond, of counsel), for respondents.

BLODGETT, J. From a decree, entered in the superior court, denying and dismissing the complainant's petition that the respondent trustees be adjudged in contempt for not paying to the complainant the sum of \$11,732.80, together with interest at the rate of 6 per cent. on the sum of \$3,302.90, from March 13, 1907, to the date of satisfaction of the decree heretofore entered in this cause on April 1, 1908, the complainant has appeal-

ed to this court. The respondents have moved to dismiss the appeal on the ground that no appeal lies in such case, and, saving their rights under that motion, contend that they are not in contempt of the decree aforesaid.

The motion to dismiss the appeal must be denied. The distinction between criminal contempts and those which are civil in their nature is well settled; and it is well settled, also, that an appeal will lie in the latter class of cases. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997. Thus, in *Romeyn v. Caplis*, 17 Mich. 449, 454, 455, it is said of an order adjudging a respondent in contempt for the violation of an injunction: "It has been contended before us that the order in this case was not one from which an appeal could be taken, since the appellee did not claim that an actual loss or injury had been produced to the party by the misconduct alleged, and did not ask for any sum to indemnify him. I think that this position cannot be sustained."

* * * The order complained of was final, and not merely a step in the course of proceeding contemplating further action by the court in relation to the same matter; and it belonged to that class of proceedings which are provided to secure obedience to the necessary processes of courts in civil cases.

* * * The right of appeal in similar cases has long been recognized and sanctioned elsewhere, and the necessity therefor will not be denied." See, also, *City of Newport v. Newport Light Co.*, 92 Ky. 445, 17 S. W. 435, affirmed in *Nienaber et al. v. Tarvin*, 104 Ky. 149, 157, 46 S. W. 513; *State v. Leftwich*, 41 Minn. 42, 42 N. W. 598; *Ballston Spa Bank v. Marine Bank of Milwaukee*, 18 Wis. 515; *People v. Simonson*, 9 Mich. 492; *Hundhausen v. U. S. Marine Fire Ins. Co. et al.*, 5 Heisk. (Tenn.) 702; *In re Day*, 34 Wis. 638; *In re Milburn*, 59 Wis. 24, 17 N. W. 965; *Baldwin v. Miles*, 58 Conn. 496, 20 Atl. 618; *State v. Horner*, 16 Mo. App. 191-195 et seq.

That a decree for the payment of money may be enforced in chancery proceedings for contempt has long been settled. Thus, in *Re Meggett*, 105 Wis. 291, 81 N. W. 419, it is said in a case where a mortgagor after foreclosure had collected rents in violation of an injunction and was ordered to repay them: "The court having exercised its jurisdiction and its discretion upon the facts so presented, and having ordered immediate payment of the money, had it not power to either punish nonpayment or compel payment by commitment for contempt? Such power has always been deemed inherent in courts of equity, as essential to the enforcement of their decisions. Indeed, it was anciently their only weapon for enforcing their commands." And the power thus exercised is held not to be imprisonment for debt, but is

thus defined (page 298 of 103 Wis., page 422 of 81 N. W.): "It is the exercise of the contempt power inherent in courts of equity to re-establish a status quo wrongfully disturbed. The punishment inflicted, even in civil contempts, where indemnity to another party is the dominant purpose, nevertheless rests upon the power of the court to vindicate its own authority, and to punish for defiance thereof, but to adjust that punishment so as to protect or enforce private rights." See, also, *Richardson v. Jones*, 3 Gill & J. (Md.) 163, 185, 22 Am. Dec. 293 et seq (1831); *Lester v. People*, 150 Ill. 420-425, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; *Bristol v. Pearson*, 109 N. C. 718, 13 S. E. 925. And this may be done although execution might also have issued. *Hall et al. v. Dana*, 2 Alk. 381; *Brockway v. Copp*, 2 Paige, Ch. 578.

For this purpose the decree of the superior court, denying and dismissing the petition, may well be held to be a final decree, inasmuch as it determines the right of the petitioner in the premises, and the broad grant of "final revisory and appellate jurisdiction upon all questions of law and equity," granted to this court by section 1 of article 12 of Amendments to the Constitution (Laws 1903, p. 2, c. 1089), may well be invoked in such a case.

The respondents urged in the court below, and still maintain that contention in this court, that under the language of the decree of April 1, 1908, they were only required to pay from the trust funds in their hands the amount aforesaid, and the superior court adopted this construction and dismissed the petition. Here there was error. The amount so required to be paid is specifically declared to be dividends and income from the trust estate which had heretofore been received by the respondents as trustees, and to which the complainant is entitled. There is no limitation of language here to a payment out of the trust estate only; nor, indeed, should such a limitation have been in the decree. The respondents are found to have collected, as trustees, income of the trust estate belonging to the complainant, and this, in contemplation of law, they should pay him on demand; but the duty to pay the complainant dividends and income of the estate which they have collected is in no wise to be prejudiced by the fact that the respondents may have devoted the complainant's property to other purposes. If they have done so, they must reimburse him from their individual estates, and cannot be heard to claim that they have none of the trust income now available therefor.

It is proper to observe that the decree of April 1, 1908, was framed by this court, and that the superior court was directed to enter it as thus framed. In effect, therefore, the decree in question is the decree of this court.

The appeal is accordingly sustained, the decree of the superior court dismissing the petition is reversed, and the cause is remanded to the superior court, with direction to enter a decree that the respondents and each of them are adjudged to be in contempt, and that they may purge themselves of that contempt by the payment of the amount named in the decree aforesaid, with interest thereon from the date of the decree, within 60 days, together with the costs of this application.

LEDERER REALTY CORP. v. HOPKINS. (Supreme Court of Rhode Island. Dec. 28, 1908.)

1. STATUTES (§ 205*)—CONSTRUCTION—GENERAL RULES.

The intention of the whole act will control interpretation of the parts.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 282; Dec. Dig. § 205.*]

2. STATUTES (§ 158*)—REPEAL—IMPLIED REPEAL.

Repeals by implication are not favored; it being the duty of the court to so construe the acts, if possible, that both shall be operative.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 228; Dec. Dig. § 158.*]

3. MUNICIPAL CORPORATIONS (§ 601*)—BUILDING REGULATIONS.

Pub. Laws 1878, p. 116, c. 688, § 7, providing that alterations in buildings in the city of Providence should be subject to the regulations of the law, and that "no building * * * shall be raised or built upon in such manner that, were such building wholly built or constructed after the passage of this act, it would be in violation of any provision hereof," is not impliedly repealed by section 34 of chapter 688 (page 150), as amended by Pub. Laws 1894, p. 29, c. 1339, § 6, permitting the alteration of any wooden building, subject to the approval of the building inspector, provided its area or height is not increased, because the two acts may be so construed that both may be operative, and thus accomplish the legislative intent and policy to increase the strictness of such regulations.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 601.*]

Appeal from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Petition for mandamus by the Lederer Realty Corporation against Spencer B. Hopkins, inspector of buildings. From a judgment dismissing the petition, the petitioner appeals. Affirmed.

The following is the opinion of Stearns, J., of the lower court:

"This is a petition for a writ of mandamus, by which the question is raised as to the legal right of the petitioner to make certain proposed changes, etc., in the exterior and interior of a certain wooden building situated on the corner of Clemence and Weybosset streets in the First, or close, district, of the city of Providence. The building now has three stories in the front and two stories in the rear. The plan of the new building

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

calls for a three-story wooden building, both in front and in rear, thereby increasing the rear of the building by one story, the height of the new building, however, not to exceed the height of the present building. To make the proposed changes, it is necessary to tear down practically the entire building above the first story, and to build two new stories of wood on the present first story. The proposed building, when completed, would be less dangerous as a fire risk than the building as it now stands. The witnesses differ as to the method of measuring the cubic contents of the present building and as to the cubic contents of the part of the building which is affected by the proposed change.

"Several questions are raised in this case, but the first question, which calls for a construction of certain sections of the building laws of the city of Providence, is decisive of the case. The building law is found in chapter 688, p. 116, Pub. Laws 1878, amended by chapter 1339, p. 26, Pub. Laws 1894. Section 7 of chapter 688 is as follows: 'Sec. 7. Any alteration in or addition to any building already erected, or hereafter to be built, except necessary repairs not affecting the construction of the external or party walls, chimneys or stairways, shall to the extent of such work, be subject to the regulations of this act. No building already erected, or hereafter built, shall be raised or built upon in such manner that were such building wholly built or constructed after the passage of this act, it would be in violation of any provision hereof.' Section 34 of chapter 688, as amended by chapter 1339, § 6, is as follows: 'Sec. 34. Any wooden building in the First district may be altered or repaired, subject to the approval of the inspector of buildings, provided its area or height is not increased; except whenever an old building shall be torn down or burned to the extent exceeding one-half of such building (such half to be measured in cubic feet), the rebuilding thereof shall be termed the erection of a new building. No wooden building shall be removed from without to within the First district.' The petitioner admits that, if said section 7 is still in force, the proposed building would be a violation of the building law and that he has no case; but the petitioner claims that section 34, as amended, by implication repeals section 7, and bases his claim on said section 34, asserting that neither the area nor height of the old building is increased in the new building. Without passing upon this point, the court is of the opinion that section 7 of chapter 688 is not repealed by said section 34, and that consequently the petitioner has no legal right to make the proposed changes, and the inspector of buildings properly refused to issue a permit to the petitioner. The intent of the law in question apparently is to reduce the fire risk in the First district, which is the

part of the city most closely built, by restraining the use of combustible material in buildings. The policy of the Legislature, as seen in the various changes of the law, appears to be to increase the strictness of such regulations, and not to relax the strictness of the first act. As stated in Lewis' Sutherland on Statutory Construction, p. 370: 'The intention of the whole act will control interpretation of the parts.' And on pages 465 and 466 the same author says: 'Repeals by implication are not favored. This means that it is the duty of the court to so construe the acts, if possible, that both shall be operative.'

"Applying these principles to the acts in question and bearing in mind the purpose of the law, it seems to the court that the acts may be and should be construed in a manner whereby both acts may be operative. If this view is correct, section 7 of the act is still in force, and the petitioner has no right under the law to make the desired changes.

"The petition for writ of mandamus is denied."

Thomas A. Carroll and Walter P. Suesman, for appellant. Albert A. Baker, Henry C. Cram, and Elmer S. Chace, for respondent.

PER CURIAM. We find no error in the decision of the superior court denying the prayer of the petitioner for a writ of mandamus.

The appeal of the petitioner from the judgment of said superior court is hereby dismissed, and said judgment affirmed, and the case is remanded to the superior court for further proceedings.

(109 Md. 84)

MEUSHAW v. STATE.

(Court of Appeals of Maryland. Dec. 2, 1908.)

1. LICENSES (§ 6*)—MUNICIPAL CORPORATIONS—POWER—REGULATION OF CITY MARKET—"TAX."

The new charter of the city of Baltimore (section 6), authorizing the mayor and council "to license, tax, and regulate all businesses, trades, avocations or professions," conferred on the city the power to impose a charge on commission merchants for the privilege of selling in the city market; such charge being a tax for revenue, and not a license or regulation tax.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4133-4141; vol. 8, pp. 6867-6886, 7706, 7813.]

2. LICENSES (§ 7*)—POWER—MUNICIPAL CORPORATIONS—REGULATION OF CITY MARKET—REASONABLENESS.

A tax of \$200 per year imposed by a municipal corporation for revenue purposes on commission merchants using the city market in the erection and maintenance of which the city had expended large sums of money was not unreasonable.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 15; Dec. Dig. § 7.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. TAXATION (§ 493*)—LEVY—DETERMINATION OF RATE—REVIEW BY COURTS.

The courts should be cautious in declaring a tax laid by competent authority to be excessive and unreasonable.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 493.*]

4. LICENSES (§ 7*)—POWER—MUNICIPAL CORPORATIONS—MARKET HOUSE CHARGES—REVIEW BY COURTS.

The mayor and council of the city of Baltimore are primarily the judges of the reasonableness of a tax imposed on commission merchants for the privileges of the city market, and the courts will be slow to review the judgment of the council; every fair intentment being made in favor of such judgment.

[Ed. Note.—For other cases, see *Licenses*, Dec. Dig. § 7.*]

5. LICENSES (§ 9*)—MUNICIPAL ORDINANCES—CONSTRUCTION—MARKET HOUSE CHARGES.

Baltimore City Ordinance No. 283, § 106, provides that all dealers and commissionmen shall pay in advance \$200 per annum for the privilege of selling in the city market. Section 107 provides that the license shall begin May 1st of each year, and the fee must be paid by May 10th, or the license shall be void. City Charter, § 59, provides that all licenses imposed by ordinance shall be due and payable in the first week of January in each year. *Held*, that the charge imposed by section 106 was payable before a commission merchant could enter upon the use of the privileges of the city market, and section 107 cannot operate to permit a commission merchant who begins using the privilege after May 10th to use the same free of charge until the following May; and, since the charge is a tax, and not a license, section 59 does not apply.

[Ed. Note.—For other cases, see *Licenses*, Dec. Dig. § 9.*]

6. LICENSES (§ 5½*) — MUNICIPAL CORPORATIONS — MARKET REGULATIONS — REASONABLENESS OF CHARGES.

In a prosecution of a commission merchant for violating the ordinance requiring payment of a charge before using the privileges of the city market, a contention by defendant that the charge was unreasonable on account of the defective arrangement of the market stalls cannot be considered, since the arrangement of such stalls is a matter exclusively for the mayor and council.

[Ed. Note.—For other cases, see *Licenses*, Dec. Dig. § 5½.*]

Appeal from Criminal Court of Baltimore City; Daniel Giraud Wright, Judge.

Clinton Meushaw was convicted of violating a municipal ordinance, and appeals. Affirmed.

Argued before BOYD, C. J., and BRISGOE, PEARCE, SCHMUCKER, BURKE, THOMAS, and WORTHINGTON, JJ.

J. Charles Linthicum and Moses R. Walter, for appellant. Isaac Lobe Straus, Atty. Gen., for the State.

BURKE, J. The mayor and city council of Baltimore, by ordinance 283, approved May 20, 1907, made provision for the erection and maintenance of a wholesale produce market in Baltimore city. Section 101 of the ordinance defined the limits of the market. Section 102 provided that it should be used solely for the purpose of wholesaling

all produce and fruits brought to Baltimore in vehicles, and that retailing therein should be unlawful. Section 104 declared that no permanent structures of any character should be erected within the market. Section 105 provided that the market should be open every day in the week, except Sundays and holidays, between the hours of 3 o'clock a. m. and 6 o'clock p. m., and should be thoroughly cleansed every market day after 5 o'clock p. m. Sections 106 and 107, which give rise to the important legal questions presented by the record, are as follows:

"Sec. 106. All dealers and commission men shall pay in advance Two Hundred Dollars per annum for the use and privilege of selling in this market. Wholesaling in the public streets is unlawful.

"Sec. 107. License for selling shall begin May 1 of each year, and must be paid by May 10 of each year, otherwise the same shall be void."

Section 108 imposes certain duties upon the assistant market master, and makes it unlawful for any one to interfere with him in the discharge of his duties. It then provides that "any one failing, or refusing to observe, or violating the provisions and requirements of sections 106 to 108 shall be deemed guilty of a misdemeanor, and shall be subject to a fine of ten dollars for each and every offense, the same to be collected as other fines and penalties are collected." Clinton Meushaw, the appellant, was indicted and convicted in the criminal court of Baltimore for violating the provisions and requirements of this ordinance, and was adjudged to pay a fine of \$10 and costs. From this judgment he has brought this appeal.

The indictment contains six counts; but the fourth and fifth counts were quashed by the court at the request of the state's attorney. It is unnecessary to set out the averments to the remaining counts. They each substantially charge that on the 29th of June, 1907, the appellant, being a dealer and commissionman engaged in selling produce and fruits at wholesale in the wholesale produce market of Baltimore city, did sell at wholesale in said market produce and fruits brought to said city and market in wagons without having paid \$200 per annum for the use and privilege of selling produce and fruits in said market, in violation of sections 106 and 108 of the above-mentioned ordinance. The traverser demurred to each count of the indictment, but the court overruled the demurrer, and the case proceeded to trial upon the joinder of issue upon the appellant's plea of not guilty. The state offered in evidence sections 101, 102, 103, 104, 105, 106, and 108 of the ordinance above mentioned. It then produced Mr. Harry Hooper, the city comptroller, whose duty it is to collect the market rentals and license fees, who testified that he had the record of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the persons who occupied the wholesale produce market during the year 1907 and of those who paid the rentals or license fees for that year required by the ordinance offered in evidence, which is \$200, and that the traverser did not pay said sum. It then called Mr. Sanner, the assistant market master at Centre Market, which includes the wholesale produce market, who testified that he visited the market daily from May 20, 1907, to July 1, 1907, and that continuously during that period he saw the traverser, who was a wholesale produce dealer or commission merchant, selling at wholesale all sorts of produce, fruits, and strawberries; that he sold in the wholesale produce market whenever he could get his wagon in; that the produce reached the market by wagons, and was sold by the wagon load within the limits of the market, and in one of the said aisles which ran through the market; that the traverser never paid the fee of \$200 required by the ordinance, but refused to pay the same, and that, after his refusal to pay, he continued to sell as a commission merchant until July 1st. This witness on cross-examination said that the seven aisles were driveways with seven openings, running from the east to the west, from Market Space to West Falls avenue, straight through the market.

The following questions were asked the witness on cross-examination:

"(1) Suppose a wagon went in one of these aisles, could it get in the other aisle?

"(2) Suppose a wagon in that aisle would sell its goods before a wagon ahead of it, could the wagon which had sold get out?

"(3) Where was Mr. Meushaw selling before the market was completed?

"(4) Did you notify him that he must go to this market?"

The court upon objection by the state refused to allow the witness to answer these questions, and these rulings constitute the appellant's first, second, third, and fourth bills of exception.

Charles H. Schenkel was called, and testified that Meushaw did business in the wholesale produce market during the whole season of 1907—that is, during July, August, and September of that year—that he sold produce by the wholesale, which is brought in country wagons, and sold from the wagons, the wagons being somewhere in one of the seven aisles. On cross-examination the witness was asked the following questions, which the court, upon objections by the state, would not permit him to answer: "(1) Was there any special aisle assigned to any of these commission merchants? (2) Can you explain to the jury how these aisles are constructed?" These rulings are made the subject of the traverser's fifth and sixth bills of exception. He then offered to read to the jury section 107 of the ordinance; but the court would not allow it to be read in evidence. This ruling constitutes the seventh

and last bill of exception. With this statement of the material facts we are prepared to consider the reasons urged by the appellant in support of the demurrer. It is said that the charge of \$200 imposed by section 106 of the ordinance is void, first, because it is unreasonable; second, because it is not uniform as to all produce dealers and commissionmen; third, because there is no authority under the charter of Baltimore city given to the mayor and city council to impose such a charge for the use of the market; fourth, that, if the ordinance be not invalid for any or all of these reasons, it is contended that the appellant had not violated any of the provisions of the ordinance if section 107 be valid, because the charge imposed by 106 was not payable for the year 1907 since the ordinance was not approved until May 20, 1907, and therefore the requirement of that section could not become operative or binding upon the traverser until May, 1, 1908; but it is further contended that, if that section be invalid, the demurrer should have been sustained, because by section 59 of the city charter the license imposed was not due and collectible until the first week of January, 1908. As the demurrer denies the power of the city to pass the ordinance, it is proper in the first place to advert to the general rule respecting the construction of municipal powers.

In *St. Mary's Industrial School v. Brown*, 45 Md. 310, this court, speaking through Judge Alvey, stated the rule in these words: "And first and principally we must bear in mind that all such powers are delegated, and depend upon legislative charter or grant, and that the corporate authorities can exercise no power which is not in express terms or by fair and reasonable implication conferred upon the corporation. In construing a grant of municipal powers in the case of *Minturn v. Larue*, 23 How. 435, 16 L. Ed. 574, the Supreme Court of the United States but announced a well-established rule when it said: "It is a well-settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers that we need not stop to refer to the authorities." This is conceded to be the universally accepted rule, and a citation of the numerous cases in this court in which it has been applied is unnecessary. In this case it is not denied that the city has the power to erect, regulate, or maintain the market, or to license and regulate the sale of fresh fruits, meats, vegetables, and all other perishable articles in the city of Baltimore,

because this power is expressly conferred upon the mayor and city council by section 6 of the charter. The city had the unquestionable right under the powers conferred by that section to regulate the sale of produce in Baltimore city. It was contended at the hearing that the cases of *State v. Rowe*, 72 Md. 550, 20 Atl. 179, and *Vansant v. Harlen Stage Company*, 59 Md. 334, have conclusively settled the invalidity of this license upon two grounds: First, because of its unreasonableness; and, secondly, because of the want of power in the city to impose it. In *Rowe's Case* this court held invalid an ordinance of the mayor and city council of Baltimore providing that no person should be permitted to use Centre Market for the sale of fish and crabs without first paying to the clerk of that market \$100 yearly for the license provided in section 2 of the ordinance. It was sought to uphold the ordinance as a lawful exercise of the power conferred upon the city "to erect and regulate markets," and "lease, sell, and dispose of the stalls and stands in any manner and for any term it might think proper." In reply to this contention the court said: "A fair and reasonable construction of this power can only give the city authorities, as owners of the market houses, the power of selling and leasing the stalls in their buildings as they may judge fit, and the power to regulate the markets, given by section 671, can only be held to intend to give reasonable police powers with reference thereto." The court then noticed the *Vansant Case*, supra. In that case the mayor and city council, under the power conferred by Acts 1880, p. 103, c. 69, to license carriages and all vehicles, including carts, drays, omnibuses, wagons, etc., and "to license and regulate" the employment of hackmen, draymen, etc., imposed a tax of \$75 on each omnibus, and \$50 on every renewal. The court held this tax void, because it was a clear attempt on the part of the city to exercise a power which had not been granted. "As the word 'tax,'" say the court, "was nowhere to be found in the law, they could not hold under that law anything more than the bestowal of a police power, and that, although the power to license and regulate gave it the power to impose some tax, it was the mere incident to the main purpose of the law, and only the means of carrying the law into effect."

But we think it perfectly clear that the question we are dealing with is not controlled by those cases. This is not a question of the exercise of mere police power, or of the power merely to license or regulate. Much larger and broader powers are granted to the city under the new charter with respect to the subject-matter we are considering than were passed by it at the time the *Rowe* and *Vansant Cases* were decided. Under section 6 of the charter the mayor and city council is given the power "to license, tax, and regulate all businesses, trades, avo-

cations, or professions," and under this grant of power the city had the clear right to impose the charge of \$200 "for the use and privilege of selling in this market." This conclusion, we think, is fully supported by the cases of *Mason v. Cumberland*, 92 Md. 451, 48 Atl. 136, *Commission of Cambridge v. Cambridge Water Company*, 99 Md. 501, 58 Atl. 442, and *State v. Applegarth*, 81 Md. 293, 31 Atl. 901, 28 L. R. A. 812. The city has expended large sums in the erection and maintenance of this market, and the charge exacted of the class of persons mentioned in the ordinance is not strictly a license or regulation tax, but is a tax for revenue imposed by the city upon persons engaged in the wholesale produce business in that market. The court below upheld the ordinance "upon the right of the city to make a reasonable charge for the accommodations furnished, though under the new charter vesting in the city the right to license, tax, and regulate all businesses, trades, avocations, or professions authority therefor may be found." Nor do we think the charge made can be said to be unreasonable. It is less than 55 cents per day for the enjoyment of the facilities and privileges afforded. This seems to be a moderate sum to be paid as compensation for the advantages conferred by the ordinance. The court, in any case, should be cautious in declaring a tax laid by competent authorities to be unreasonable or excessive, because, as was said in *Vansant's Case*, supra, the mayor and city council of Baltimore are primarily the judges of what is a reasonable tax, and that, if there be doubt upon the question, a court should be slow to revise the judgment of the city council, and that every fair intendment should be made in its favor. There appears to be a general concurrence of authority that the power to license and tax occupations and privileges includes the power to license and tax as a condition precedent to entering upon and exercising such occupations or privileges, and that such taxes are not governed by the ordinary rules controlling property taxation. The lower court held section 107 invalid. The act is complete and effective without it, and to give it the construction contended for by the appellant would not only frustrate the real purpose and intent of the ordinance, but would permit the class of persons named therein to use the market for the season of 1907 as the traverser did, and enjoy all of its privileges and advantages without cost. This would be most unreasonable and unjust to the city, and the court correctly held that the payment of the charge was a condition precedent to the right to sell in the market. Section 59 of the charter, which declares that all licenses imposed by ordinance shall be due and payable in the first week of January in each year, does not apply to or include charges of the kind imposed by this ordinance. It applies to purely license taxes. There is a broad distinction

between revenue received from the exercise of the power to license and regulate and revenue received under the power to tax. This section has reference to money received or payable under the exercise of the first-named power. *Cooley on Taxation*, 598; *State v. Rowe*, 72 Md. 548, 20 Atl. 179; *Mason v. Cumberland*, 92 Md. 451, 48 Atl. 136. What we have said disposes of the appellant's seventh bill of exception. We have in an earlier part of this opinion set out the questions embraced in the other exceptions. Three of these questions suggest that some changes in the arrangement of the market ought possibly to be made so as to afford better facilities and accommodations to persons using the market; but that is a matter exclusively for the mayor and city council to consider. We do not think it necessary to discuss the exceptions, as it will be apparent from reading them that none of them has the slightest relevancy to the real issue which the jury was impaneled to try.

Judgment affirmed, with costs.

(108 Md. 636)

STATE, to Use of MERTENS et al., v.
MOORE et al.

(Court of Appeals of Maryland. Nov. 14, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 534*)—
LIABILITIES ON ADMINISTRATION BONDS—
DEFAULT OF PRINCIPAL.

Code Pub. Gen. Laws 1904, art. 93, § 100, requiring an administrator to pay each claimant his just proportion of the money in his hands, etc., and section 104, providing that no creditor shall sue on an administration bond for any "debt or damages" due from decedent before a non est on a summons is returned against the administrator or a fieri facias returned nulla bona or the insolvency of the estate of the administrator otherwise appears, must be read together, and a creditor whose debt has been established cannot sue on the administration bond without complying with section 104.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2453-2461; Dec. Dig. § 534.*]

2. STATUTES (§ 194*)—CONSTRUCTION—EXCEPTION.

Where a general intention is expressed in a statute, which also expresses a particular intention incompatible therewith, the particular intention is considered in the nature of an exception.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 272; Dec. Dig. § 194.*]

Appeal from Circuit Court, Washington County; M. L. Keedy, Judge.

Action by the State of Maryland, for the use of Frederick Mertens and others, against Virginia B. Moore and others. From a judgment sustaining a demurrer to the declaration, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

J. A. Mason, for appellants. Albert J. Long, for appellees.

BURKE, J. Suit was brought in the circuit court for Washington county by certain creditors against the administration bond given by Virginia B. Moore, the administratrix of the personal estate of J. Jesse Moore, deceased. An account was stated and filed by her as such administratrix in the orphans' court for that county, by which it appeared that certain sums of money stated in the declaration were due and payable to the plaintiffs as creditors of said deceased. This account was approved and passed by the court. The declaration alleges that it was the duty of the administratrix, after the account had been stated and approved, to pay the plaintiffs the several sums of money therein distributed to them. The breach of the bond set forth in the narr. is alleged to be the failure and neglect of the administratrix to pay to the plaintiffs the amounts distributed to them by the account. The court, upon demurrer filed by the defendants, held the declaration bad. There was no judgment entered on the demurrer; but a written agreement has been filed to the effect that the order of the lower court sustaining the demurrer shall be treated for the purposes of the appeal as a final judgment.

The legal question raised on the record is a narrow one, and presents, we think, little difficulty. Its solution depends upon the true construction of sections 100, 104, art. 93, Code Pub. Gen. Laws 1904. Section 100 of that article provides: "An administrator shall discharge all just claims known to him, and pay each claimant his just proportion of the money then in his hands (retaining as herein directed), within thirteen months from the date of his letters, or within such further time, not exceeding four months longer, as shall be allowed by the orphans' court, on his making oath that he hath reason to apprehend that the personal estate and assets which are or shall be in his hands will be insufficient to discharge the just debts of and claims against the deceased; it shall likewise be his duty, once in every term of six months, after the first distribution, to make a distribution of the money which hath since come to his hands, until he shall have fully administered, and on failure, his administration bond may be put in suit." Section 104 declares: "No creditor shall bring a suit upon an administration or testamentary bond for any debt or damages due from or recovered against the decedent before a non est on a summons is returned against the administrator, or a fieri facias returned nulla bona by the sheriff of the county where the administration was granted, or where the effects of such deceased lie, or such other apparent insolvency or insufficiency of the estate of such administrator as shall, in the judgment of the court, render such creditor remediless by any other reasonable means."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

save that of suing such bond." The proposition asserted by the plaintiffs is that, after the amounts due them had been ascertained by the account filed by the administratrix, they had a right to proceed directly against the bond under section 100, and that section 104 does not apply to cases where the claim of the creditor has been ascertained or established. The position of the defendants is that no creditor, no matter whether his claim is established or not, can bring suit upon an administration bond until the conditions specified in section 104 have been complied with, or until the apparent insolvency or insufficiency of the estate of the administrator shall be shown to the court. If the position of the defendants be sound, it must be admitted that the declaration was insufficient, as it does not show a compliance with those conditions or the existence of the facts specified in section 104. By the express terms of that section the conditions therein mentioned must be complied with, or the fact of the apparent insolvency or insufficiency of the estate of the administrator must be shown before a suit can be brought upon the bond. The language of section 100 is sufficiently broad and comprehensive to authorize the bringing of the suit upon the bond; but the general terms of the section must be held to be limited by section 104. Both sections being in pari materia must, if possible, be given a harmonious construction, and each must be given the meaning and effect intended. Reading them together, it seems clear that the Legislature intended to prohibit suits by creditors upon administration and testamentary bonds until the conditions mentioned in section 104 had been first complied with. By section 104 suits by creditors upon those bonds are taken out of the operation of the general principle declared in section 100, leaving the general rule therein stated to govern in all cases coming within it. This interpretation is in accordance with the familiar rule of statutory construction "that when a general intention is expressed in a statute, and the act also expresses a particular intention, incompatible with the general intention, the particular intention is to be considered in the nature of an exception." Dwarrris on Statutes, 765.

Section 104 is a codification of the substantial provisions of Act 1720, c. 24, § 2, as amended by Act 1838, c. 329. In *Laidler's Adm'r v. State*, Use of Hawkins, 2 Har. & G. 277, which was a suit by a creditor upon a testamentary bond, it was held that the proceedings must disclose a compliance with the act. In *Dorsey v. State*, 4 Gill & J. 472, where a suit had been brought by a creditor against an administration bond, it was held that a creditor could not bring a suit upon the testamentary or administration bond before one or the other of the requisites mentioned in the act of 1720 had occurred. Chief

Judge Buchanan, after quoting the provisions of section 2 of that act, speaks as follows: "And as, to entitle a creditor to bring suit on a testamentary or administration bond, one or the other requisites must have occurred before the bringing of the suit, it is incumbent upon the plaintiff to aver it in his declaration, otherwise he does not show that which is a prerequisite to his title to sue, and without which he cannot be *rectus in curia*. It is just as necessary as an averment of performance of a condition precedent is in a declaration in an action of covenant. A plaintiff must in his declaration show himself entitled to sue by showing that which alone gives the right, otherwise he does not show himself entitled to recover." The same principle was announced in *State, Use of Sprigg v. Jones et al.*, 8 Md. 88. After carefully considering the act of 1720, it was there held that the purpose of the act was to make the principal pay instead of the surety. That "it was passed," to use its language, to do away with "a most oppressive and pernicious practice"; in other words, "to prevent the property of sureties being taken to satisfy the debts of the principal when such principal has sufficient property to satisfy it." The contention of the plaintiffs that section 104 does not prohibit suits upon the administration bond by creditors whose debts have been established could not prevail because that section distinctly embraces such claims. It applies to any debt or damages due from or recovered against the decedent and upon which a fieri facias might be issued. Being of opinion, for the reasons stated, that the declaration does not state a good cause of action, the judgment will be affirmed.

Judgment affirmed, with costs.

(100 Md. 1)

SOMERSET COUNTY COM'RS v. POCO-MOKE BRIDGE CO.

(Court of Appeals of Maryland. Nov. 12, 1908.)

1. STATUTES (§ 105*)—TITLE—CONSTITUTIONAL PROVISIONS.

The object of Const. art. 3, § 29, providing that every law shall embrace but one subject, which shall be described in the title, is to prevent the combination in one act of distinct and incongruous subjects, and to apprise the Legislature and the people of the real nature of pending legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 117; Dec. Dig. § 105.*]

2. CONSTITUTIONAL LAW (§ 45*)—VALIDITY OF STATUTES.

While courts should be very cautious in adjudging acts invalid, the courts must protect the public and the members of the Legislature from being imposed on by the violation of constitutional provisions intended to protect them.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 42; Dec. Dig. § 45.*]

3. STATUTES (§ 109*)—TITLE—SUFFICIENCY.

The title of an act should not only fairly indicate the general subject, but should be sufficiently comprehensive in scope to reasonably

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cover all its provisions, and it cannot be misleading in what it says or omits.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136, 137; Dec. Dig. § 109.*]

4. STATUTES (§ 113*)—TITLE—SUFFICIENCY.

Under Const. 1864, art. 3, § 28 (Const. art. 3, § 29), providing that every law shall embrace but one subject, which shall be described in the title, the title of Acts 1865, p. 18, c. 14, entitled "An act to incorporate the Pocomoke Bridge Company," is not sufficiently comprehensive to include a provision requiring two counties to levy an annual tax, and pay the same to the company authorized to build a bridge across a river in such counties.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 113.*]

5. CONSTITUTIONAL LAW (§ 43*)—VALIDITY OF STATUTES—ACQUIESCENCE IN VALIDITY—EFFECT.

Long acquiescence by a county in the validity of an act requiring the county to pay an annual tax does not estop the commissioners of the county from attacking the act as unconstitutional, the commissioners being public servants bound to protect the public, without right to pay out county money unless authorized to do so, and it never being too late to re-establish constitutional rights, the observance of which has been silently neglected.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. § 43.*]

6. STATUTES (§ 61*)—VALIDITY—DETERMINATION—ACQUIESCENCE IN VALIDITY—EFFECT.

In doubtful cases involving the constitutionality of an act because of its title, the court may consider long acquiescence in its constitutionality in support of the act.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 61.*]

7. STATUTES (§ 64*)—INVALIDITY IN PART—EFFECT.

It is not proper to declare an entire act unconstitutional because a provision thereof is void, unless the provisions are so connected in subject-matter, meaning, or purpose that it cannot be presumed that the Legislature would have enacted one provision without the other.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 53-66, 195; Dec. Dig. § 64.*]

8. STATUTES (§ 64*)—INVALIDITY IN PART—EFFECT—BRIDGES.

Acts 1865, p. 18, c. 14, incorporates a bridge company to construct and maintain a toll bridge, authorizes the collection of toll, but provides that residents and nonresident taxpayers of two counties shall pass over the bridge free of toll, and requires such counties to levy an annual tax and pay the same to the company. *Held*, that the provisions for free passage of residents and nonresident taxpayers of the counties and for an annual tax are inseparably connected with each other, and, on the latter provision being void because not embraced in the title of the act, the former provision must also be adjudged void, but the invalidity of such provisions does not invalidate the remainder of the act, as to the incorporation of the company with right to maintain a toll bridge.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

Appeal from Circuit Court, Somerset County; Henry Lloyd, Judge.

Action by the Pocomoke Bridge Company against the County Commissioners of Somerset County. There was a judgment for plain-

tiff, and defendant appeals. Reversed, without awarding a new trial.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

Joshua W. Miles and H. Fillmore Lankford, for appellant. Melvin & Handy, for appellee.

BOYD, C. J. This is a suit by the Pocomoke Bridge Company, a corporation incorporated by chapter 14, p. 18, Acts 1865, against the county commissioners of Somerset county, to recover \$600, claimed to be due under section 12 of that act. A demurrer to the declaration was overruled by the court below, and the defendant then filed six pleas, in the first of which is set out the charter of the company in full, and all of them allege, either that the whole act is unconstitutional and null and void, or that section 12 is. Some of them assign reasons for so alleging, while others do not; the principal ground relied on being that the title to the act is not sufficient, particularly in so far as the provisions contained in section 12 are concerned. A demurrer to the pleas was sustained, and the general issue plea of not guilty was filed. The case was submitted to the court without the intervention of a jury, and resulted in a verdict for the plaintiff. During the trial an exception was taken to the admission of section 12, on the ground that it is unconstitutional and void. This appeal was taken from the judgment on the above-mentioned verdict. We do not deem it necessary to pass on the demurrers and the exception separately, but will proceed at once to what we regard the important question in the case.

It involves section 29, art. 3, of the Constitution, or more properly speaking section 28, art. 3, of the Constitution of 1864, which was in force when the act of 1865 was passed. The provision in question is, however, the same in both—"every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." The title of the act is: "An act to incorporate the Pocomoke Bridge Company." The act names seven persons as commissioners to receive subscriptions to the capital stock, "to construct a bridge across the Pocomoke river, in Worcester and Somerset counties, at or near the site of the present ferry, known as 'Steven's Ferry'"; said stock being limited to \$45,000, divided into shares of \$100 each. As soon as 100 shares were subscribed, the organization of the company was authorized, and various provisions were made in the charter. The two important sections are as follows:

"Sec. 11. And be it enacted, that upon the completion of said bridge, all citizens and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

residents of Somerset and Worcester counties, and all nonresident taxpayers of said counties, shall pass over said bridge free of toll or charges, but all other persons shall pay such tolls and charges as the president and directors may determine, provided said tolls or charges shall not exceed the following rates: For each foot passenger, five cents; for each horse and rider, ten cents; for each carriage with one horse attached, twenty-five cents; for each carriage with two horses attached, fifty cents; for each wagon or cart with more than two horses or oxen attached, seventy-five cents.

"Sec. 12. And be it enacted, that the county commissioners for Somerset county be and are hereby required to levy annually on the assessable property of said county the sum of six hundred dollars, and to pay the same to the president and directors of said company at the end of each year, and that the county commissioners of Worcester county be and they are hereby required to levy annually on the assessable property of said county, the sum of seven hundred dollars, and to pay over the same to the president and directors of the company aforesaid at the end of each year."

No one can read the title to this act without being impressed with the fact that it is exceedingly meager, in order to justify such legislation as section 12. The charter was granted before the General Laws provided for the incorporation of bridge companies. Since 1868 the corporation laws of this state have required companies, incorporated under the General Laws for the erection of bridges, to first obtain, in writing, the consent of the county commissioners of the county in which the bridge is to be located, or if proposed to be erected over a stream dividing two counties to obtain the consent, in writing, of the county commissioners of both counties, and the commissioners are given large powers over them, including that of requiring the adjustment and revision of tolls, so as to yield not more than 8 per centum net dividend. Although those provisions were not in force when this company was chartered, there were other statutes which showed the policy of this state to be to require great care, on the part of the county commissioners, before incurring obligations in connection with the building of bridges. They were required by the Code of 1860 to advertise for sealed proposals for building or repairing a bridge, if the cost exceeded \$200, to award a contract to the lowest competent bidder, to demand a bond of the contractor, and, upon petition praying for a bridge to be built or repaired over a stream dividing two adjoining counties, the commissioners of one county were directed to obtain the concurrence of those of the other. Three examiners were to be appointed by each, who were required to examine into the expediency of building or repairing the bridge, the place where, the plan, material, and the relative

portion of the cost of each county, to advertise for proposals, award the work to the lowest bidder, supervise the work, etc. An appeal was granted any citizen or citizens to the circuit court, if the county commissioners determined to build or repair any bridge, or unite with an adjoining county in building or repairing one between the two counties, etc. Those provisions are still in force, being sections 19-38, art. 25, Code Pub. Gen. Laws 1904. Notwithstanding such precautions were to be taken when the county commissioners proposed to build or repair a bridge, this act required the county commissioners of those two counties to pay to a private corporation \$600 and \$700, respectively, every year, although there is nothing more in the title than shown above. Was that lawfully done? Or, to put the question in a more apt form, Is this constitutional provision of any value, if two counties can thus be required to pay annually 6 per centum on about one-half of the authorized capital of a private corporation, under an act, the title to which does not make the remotest suggestion of such a provision being in the body of the act? There have been so many decisions by this court relating to this clause of the Constitution that it would seem almost as if there was not room for further contention about it, but the difficulty is that the principles applicable to it must be applied to the particular facts and circumstances of each statute under consideration, and hence it is not easy to find a case exactly in point. What may be considered "one subject" in some classes of legislation may not be in others.

The "subject" of the law now under consideration, as indicated by the title, was the incorporation of the Pocomoke Bridge Company, while the body of the act not only contained provisions which were germane and appropriate to that subject, but also this provision which required the two counties to pay the respective sums of money to the company, after it was organized and the bridge was built. If it be conceded that in a charter of a bridge company it would be germane and lawful to authorize a county to subscribe to its capital stock, or to authorize the company to agree with the county that on payment of a reasonable sum its citizens could use the bridge free of tolls—although not mentioned in the title—it does not follow that such a provision as that now attacked can be inserted in a charter of a private corporation, and thus compel a county which is not a party to the charter to levy and pay annually a fixed sum for the use of the bridge, without at least giving some notice of such legislation in the title. That brings us more nearly to the real question in the case: Is the subject of this act so described in the title as to authorize the legislation embraced in section 12, within the spirit and meaning of the constitutional provision? As a matter of fact, it cannot be said that the

title would, in the remotest degree, suggest to either the county commissioners, to any representative of Somerset county in the Legislature, or to any taxpayer of the county that the act proposed to require the county to pay the corporation \$600, or any other sum of money, every year. If we assume that they were informed by the name that it was proposed to form a corporation to build a bridge over the Pocomoke river, there is not even anything in the title to show that the bridge was to be between Somerset and Worcester counties, for that river extended into Worcester county for a considerable distance beyond the Somerset boundary. In many of the cases in this court the object of this constitutional provision has been stated, and in *Stiefel v. Maryland Institution*, etc., 61 Md. 148, it was said of it: "Publicity and a knowledge of the true effect and operation of every bill brought before the Legislature are the great safeguards against ill-considered and improper legislation. The provision in question is one, among many others in the Constitution, designed to promote those objects." In *Kafka v. Wilkinson*, 99 Md. 241, 57 Atl. 618, it was said, and has been several times since repeated, that its purpose and object "have been declared to be twofold: The first is to prevent the combination in one act of several distinct and incongruous subjects; and the second is that the Legislature and the people of the state may be fairly advised of the real nature of pending legislation." In one of the latest cases (*Fout v. Frederick Co.*, 105 Md. 563, 68 Atl. 488) Judge Burke quoted from *Cooley's Con. Lim.* (3d Ed.) 158, that the purpose of this provision is: "First, to prevent hodge podge 'log rolling' legislation; second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles give no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire."

While courts should be very cautious in striking down acts of the Legislature, they must protect the public, and the members of the Legislature themselves, from being imposed on by the violation of constitutional provisions intended to furnish them protection. A title to an act should not only fairly indicate the general subject of the act, but should be sufficiently comprehensive in its scope to cover, to a reasonable extent, all its provisions, and must not be misleading by what it says or omits to say. Applying these and the above principles to section 12 of this act, we cannot hesitate to declare it invalid. If it was actually known by the authorities and people of the two counties before it was passed, this conclusion may possibly work a

hardship, on the stockholders of the company, to now strike it down; but, as we are called upon to determine the question, we must do so regardless of the consequences, however much we may regret that some injury may ensue to innocent persons. The long acquiescence by the county in paying the amount for so many years cannot estop the present county commissioners from raising the question, and thereby make an unconstitutional law in effect constitutional. They are public servants, whose duty is to protect the public, and they have no right to pay out the money of the county unless authorized to do so. It was said by Judge Pearce in *Arnsperger v. Crawford*, 101 Md. 258, 61 Atl. 417, 70 L. R. A. 497: "It was urged in argument that this statute has been silently acquiesced in so long that it should not now be disturbed. This argument was urged in *Sadler v. Langham*, 84 Ala. 332, but the court replied, justly as we think, that it was never too late to re-establish constitutional rights, the observance of which has been silently neglected; and we may add that it is the infringement of the constitutional rights of the few in minor matters which leads to the disregard of the rights of the body of the people in matters of graver import, and that no constitutional right can be so unimportant as to justify a court in failing to enforce it, when its aid is invoked for that purpose." It is said in 26 Am. & Eng. Ency. of Law, 575, that "long acquiescence in the constitutionality of an act in respect of its title is entitled to much weight in determining the sufficiency of the title." In doubtful cases that may be properly considered, just as we may consider the circumstances under which a provision is adopted, the construction placed on it by the Legislature, the framers of the Constitution, and the people, as we said in *Bonsal v. Yellott*, 100 Md. 481, 60 Atl. 593, 69 L. R. A. 914, but in this case we can have no doubt as to the unconstitutionality of this provision, and hence must declare it void.

There is, however, another branch of this case to be determined. It is well settled that it is not necessary, or proper, to strike down an entire act because one provision is void, "unless the provisions are so connected together in subject-matter, meaning, or purpose, that it cannot be presumed the Legislature would have passed the one without the other." 26 Am. & Eng. Ency. of Law, 579. That principle has been announced by this court over and over again, and it has been applied to cases in which the valid and void provisions were in the same section of the act. *Mayor, etc., of Hagerstown v. Dechert*, 32 Md. 369; *Steenken v. State*, 88 Md. 708, 42 Atl. 212. There can therefore be no possible difficulty in the way of declaring section 12 unconstitutional and in upholding other sections, unless it is so inseparably connected with the others, or some of them, as to raise the presumption that the Legislature would not have passed the one without the

other. It is apparent that it would work a great hardship on the appellee to strike out section 12 and retain the part of section 11 which authorizes all citizens, residents, and nonresident taxpayers of the two counties to pass over the bridge free. It is impossible to read those two sections without reaching the conclusion that the Legislature gave that right to the people and taxpayers of the two counties by reason of the provisions in section 12, and that section 12 was passed in consideration of the provision in section 11. No other explanation can be given for the passage of the provisions referred to in the two sections, and the fact that section 11 not only gave the citizens and residents of the two counties, but also the nonresident taxpayers, the right to use the bridge free, strengthens that conclusion, for surely the Legislature would not have made the exemption in favor of the nonresident taxpayers, had it not imposed the burden on them of contributing, as taxpayers, to the payments provided for in section 12. If the provision in section 11 had been inserted in section 12 so as to read: "And be it enacted, that in consideration of said company passing all citizens, residents and nonresident taxpayers of said counties over said bridge free of toll or charges, the county commissioners of Somerset county be and are hereby required to levy annually on the assessable property," etc.—using the language of what is now section 12, there could be no doubt that the exemption from payment of toll or charges would have fallen with the rest of the section, and as that is unquestionably the meaning of the two sections, as they now stand, we are of opinion that the provision referred to in section 11 must fall with section 12.

The rest of the act is applicable to the incorporation of the company—to what the title describes the act to be—and after a lapse of over 40 years, during which time much of the stock of the company has doubtless changed hands, it would be manifest injustice to strike down the whole charter, but it would be equally unjust to strike down the section that was clearly intended to provide compensation for the privileges granted in the other section, and yet permit the latter to remain in force so as to continue those privileges. This conclusion will permit the appellee to charge such toll as the president and directors may determine—not to exceed the rates named in the charter. As the charter is subject to amendment, those rates can be reasonably regulated by the Legislature, if deemed excessive or unreasonable.

Inasmuch as we have reached the conclusions already announced, it is not necessary to discuss the question whether the Legislature could validly make such provisions as are contained in sections 11 and 12, although we do not understand it to be denied by the appellant that they were within the power of the Legislature. The question

involved in this case is not the power to so legislate, but whether the power was validly and constitutionally exercised, and we therefore will not prolong this opinion by entering into a discussion of the power of the Legislature in such matters. Nor are we called upon to consider other questions raised or suggested.

It follows from what we have said that the judgment must be reversed; and, as there can be no recovery, we will not award a new trial.

Judgment reversed, without awarding a new trial, the appellee to pay the costs above and below.

(108 Md. 572)

WEBSTER v. P. W. MOORE & SON.

(Court of Appeals of Maryland. Nov. 12, 1908.)

1. EVIDENCE (§ 258*)—ADMISSIONS—EXISTENCE OF AGENCY.

In an action to recover the contract price of canned goods sold through a broker, where the broker testified that he represented both parties, but was paid by plaintiff in accordance with custom, a letter from the broker to plaintiff, saying that defendant had not approved samples sent, and had requested the broker to have plaintiff send others, was admissible in connection with an offer to show that the broker was defendant's agent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

2. EVIDENCE (§ 472*)—OPINIONS—FACTS OR CONCLUSIONS.

In an action for the contract price of canned goods, where there was no question that 501 cases had been sold and delivered at 77½ cents per dozen, but not paid for, and the only question was what abatement, if any, defendant was entitled to for inferior quality thereof, and for the nondelivery of others embraced in the contract, an answer of a plaintiff to the question how much defendant owed him that he owed for 501 cases at 77½ cents per dozen was not inadmissible as an opinion upon the question to be determined by the jury, but was proper; it being equivalent to a statement as to how much plaintiff claimed had been delivered and not paid for.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

3. TRIAL (§ 36*)—RECEPTION OF EVIDENCE—FACTS CONCEDED BY OPPONENT.

There should be no hard and fast rule compelling a party, against his will, to accept his adversary's concession of a bare fact sought to be proved in lieu of evidence legally admissible to establish the fact, since in some cases the strength of a proponent's case would be greatly weakened by its application.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 89; Dec. Dig. § 36.*]

4. APPEAL AND ERROR (§ 1047*)—REVIEW—HARMLESS ERROR—COMPELLING PARTY TO ACCEPT ADVERSARY'S CONCESSION OF FACT SOUGHT TO BE PROVED.

An action to recover the contract price of goods, compelling defendant to accept plaintiff's concession of the bare fact that the contract price was the full market price, and rejecting his evidence to establish that fact, which would have shown the contract price higher than the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

market price, was not reversible error; it not appearing that the ruling was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4146; Dec. Dig. § 1047.*]

5. SALES (§ 181*)—PERFORMANCE—ADMISSIBILITY OF EVIDENCE—QUALITY OF GOODS.

In an action for the contract price of canned goods, to prove that the goods delivered were of the grade specified, evidence was admissible showing that the pack for the year was examined by witness each day, and that the goods were all of the required grade, except the last day's pack, which was not delivered to defendant; that a portion embraced in the contract, but not delivered, were packed for him from the same lot as were the ones delivered; that another witness had examined samples from the goods delivered, and that they were of the required quality; and that a buyer of another canning company had purchased from plaintiff some of the goods packed that year, and that they were of the required quality.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 480, 481, 483; Dec. Dig. § 181.*]

6. SALES (§ 181*)—PERFORMANCE—ADMISSIBILITY OF EVIDENCE.

In an action for the contract price of goods, purchased through a broker by sample, which had been accepted, where a letter from the broker's clerk subsequent to the acceptance informed plaintiff that defendant had rejected the samples, a letter from defendant to the broker, which was referred to in the clerk's letter as basis for his statement, which made it plain that the samples rejected by defendant were not the ones accepted, but were another lot which had been rejected by a customer of defendant, was admissible to clear defendant of the imputation of bad faith in attempting to revoke his previous approval of the samples.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 485; Dec. Dig. § 181.*]

7. SALES (§ 181*)—PERFORMANCE—ADMISSIBILITY OF EVIDENCE.

In an action for the contract price of canned goods, evidence that a portion of the goods embraced in the contract, but not delivered, were subsequently sold to other persons as the grade specified in the contract, and that other portions of the year's pack were sold as that grade without complaint by the purchasers, was not admissible to show that the goods delivered under the contract were of the required grade.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 480; Dec. Dig. § 181.*]

8. SALES (§ 174*)—PERFORMANCE—EXCUSE FOR NONPERFORMANCE.

Where a contract for goods to be delivered at successive periods provides for payment at stated times after such deliveries, if payment for goods delivered is refused, the contract is breached, and future deliveries need not be made, so that, in an action to recover the price of goods delivered, the buyer cannot recoup damages for failure to make future deliveries.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 434; Dec. Dig. § 174.*]

9. TRIAL (§ 258*)—INSTRUCTIONS—REQUESTS—SUFFICIENCY.

In an action for the contract price of canned goods, where an essential element of the contract price was an allowance for labels furnished by the buyer, a prayer for an instruction which, in stating plaintiff's right to recover, referred to the contract price contemplated the proper allowance for the labels.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 646; Dec. Dig. § 258.*]

10. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—ERRONEOUS CHARGE CURED BY VERDICT.

An error in a charge stating plaintiff's right to recover the contract price of canned goods in not providing for an allowance to defendant for labels furnished, as provided by the contract, was cured, where the verdict provided for the allowance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. § 1068.*]

11. APPEAL AND ERROR (§ 1078*)—ERROR WAIVED IN APPELLATE COURT—FAILURE TO ARGUE.

Alleged errors in rejecting prayers which are not argued orally or in the brief are presumed to be abandoned in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256; Dec. Dig. § 1078.*]

Appeal from Circuit Court, Dorchester County; Henry Lloyd, Judge.

Action by P. W. Moore & Son against Charles Webster. Judgment for plaintiff, and defendant appeals. Reversed and new trial awarded.

The following prayers of plaintiff were granted:

"(6) If the jury believe from the evidence that the three car loads of tomatoes, or 1,500 cases, admitted to have been delivered to the defendant by the plaintiffs on the 2d, 8th, and 23d days of October, 1906, were No. 3 standard tomatoes, and were of the kind and quality of the samples submitted to the defendant on the 8th day of September, 1906, and approved by him, then in that case the plaintiffs are entitled in this cause to recover for the last car load of tomatoes, or 500 cases containing 1,000 dozen cans, delivered as aforesaid to the defendant on the 23d day of October, 1906, at the rate of 77½ cents per dozen, with interest, if any, as the jury may allow, and also to recover for the one case of sample tomatoes admitted to have been procured by the defendant or his agent, and which was sent by the said Webster or his agent to a firm of New York, as shown by the evidence, at whatever price the said case may be found to be worth at the time of their said delivery to the said Webster or to his said agent."

"(10) If they shall find from the evidence that the tomatoes sold and delivered by the plaintiffs to the defendant, if they find such sale and delivery, were not No. 3 standard tomatoes, and were not of the kind and quality of the samples submitted to the defendant of September 8, 1906, and approved by him, and should further find that the defendant received the 1,000 cases of tomatoes shown by the evidence, and admitted, to have been shipped to Pittsburgh, Pa., and 500 cases shipped to Philadelphia, Pa., and subsequently sold by them, and received the money therefor, and paid for 1,000 of said cases, but failed to pay for the other 500 cases, then the plaintiffs are entitled to recover the value of said 500 cases of tomatoes at the contract

price, less any damage, if any, that they may find the defendant to have sustained by reason of the said 1,500 cases of tomatoes not having been No. 3 standard tomatoes of the kind and quality of the tomatoes submitted, as aforesaid, on September 8, 1906."

The following prayers of defendant were granted:

"(6) The jury are instructed that, if they find that the plaintiffs received the labels, referred to in evidence, on or about the 20th day of September, 1906, and that the plaintiffs made the shipments of tomatoes on the 2d, 8th, and 23d of October, 1906, upon the orders of the defendant, as testified to in the evidence, then the plaintiffs thereby waived all provisions of the contract or agreement offered in evidence as to the time of the shipment of labels."

"(8) If the jury shall find from the evidence that the 1,000 cases of tomatoes shipped to Pittsburgh by the plaintiffs, as testified to in evidence (if they shall find the same), were not of the kind and quality of the samples submitted to the defendant on the 8th day of September and approved by him, as testified to in evidence, if the jury shall find the same, but were of a grade and quality inferior to said samples, and were not of the grade known in the canned goods trade as 'No. 3 standards,' but were of a grade and quality inferior to what is known in the canned goods trade as 'No. 3 standards,' then the jury shall deduct, from any amount they may find the plaintiffs are entitled to, the difference between what 1,000 cases of No. 3 standards canned tomatoes of the grade and quality of said samples would have been worth at Pittsburgh, and what they shall find the 1,000 cases mentioned in evidence as having been actually shipped from Cambridge to Pittsburgh were worth in Pittsburgh on their arrival at Pittsburgh; and, if the jury shall also find that the 500 cases of tomatoes shipped to Philadelphia by the plaintiffs, as testified to in evidence (if the jury shall find the same), were not of the kind and quality of said samples, but were of a grade and quality inferior to same, and not of the grade known in the canned goods trade as 'No. 3 standards,' but were of a grade and quality inferior to same, then the jury shall also deduct, from any amount they may find the plaintiffs are entitled to, the difference between what 500 cases of No. 3 standard canned tomatoes of the grade and quality of said samples would have been worth at Philadelphia, and what they find the 500 cases mentioned in the evidence as having been actually shipped from Cambridge to Philadelphia were worth in Philadelphia on their arrival at Philadelphia."

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HENRY, JJ.

Fred. H. Fletcher, for appellant. Emerson C. Harrington, for appellee.

PEARCE, J. This is an action of assumption by the appellees to recover for 500 cases of canned tomatoes sold and delivered to the appellant. Both parties are packers of canned goods residing in Dorchester county, Md., the plaintiffs at Cambridge, and the defendant at East Newmarket. The memorandum of the contract, executed in duplicate, is as follows: "Bought of Mess. P. W. Moore & Son, Cambridge, Md. For account of Mr. Chas. Webster, East Newmarket, Md. 2000 c/s No. 3 Standard Tomatoes at 77½¢ per dozen f. o. b. Cambridge, Md. Cash less 1½% in ten days from prompt shipment. Buyers labels to be put on free with an allowance of 90¢ per M. Subject to approval of samples submitted on Sept. 8, 1906. Prompt shipment of labels. Duplicate. Accepted this 8th day of September 1906. Chas. Webster, Buyer. Accepted this 8th day of September 1906. P. W. Moore & Son, Seller." The sale was made through Edgar B. Simmons, a canned goods broker, of Cambridge. The samples mentioned in this contract were duly submitted, and were approved on Tuesday following the 8th of September. Some days later, one case of 24 dozen cans No. 3 standard tomatoes were gotten by Simmons from the plaintiffs, to be used as samples by defendant in a contemplated sale by him to Austin Nichols & Co. of New York, but it does not appear that the plaintiffs knew to whom these samples were to be sent. On September 14th the plaintiffs received a letter of that date, purporting to be signed by Simmons, but written and signed in his absence, and without his knowledge, by a clerk in his office, saying: "I am in receipt of a letter to-day from Mr. Chas. Webster, saying the samples you sent him were not approved, as they were watery and juicy, and requested me to see you and get you to send him more samples. So please send him another lot of samples at your earliest convenience, and oblige, Yours truly." Between September 8th and 14th the price of canned tomatoes had materially advanced. On September 15th the plaintiffs wrote Simmons: "Yours of 14th inst. received, saying that Chas. Webster did not approve the samples sent him; that they were too juicy; and as the contract claimed approval of samples, and prompt delivery of labels which have not yet arrived, we therefore deem the contract broken, and the aforesaid instrument is null and void. P. W. Moore & Son." On September 18th Webster and Simmons went together to see plaintiffs about the performance of the contract, and Webster told them he had not rejected the tomatoes, and insisted on their delivery; that Austin Nichols & Co., to whom the last samples had been sent, had nothing to do with the contract in question; that he (Webster) was the purchaser, and was perfectly satisfied with the tomatoes; that he then proposed the tomatoes should be delivered in car lots—500 case lots—f. o. b.

Cambridge, payment for each car to be made on receipt of bill of lading (thus modifying the terms of the memorandum of sale). The plaintiffs did not then agree to this proposal, but did so agree on the following day, and so notified Webster by phone, and that the memorandum of September 8th was to be the guide as to kind and quality of goods. Two car loads of 500 cases each were accordingly shipped on October 2d and 8th, respectively, and payment therefor was made on receipt of bill of lading. A third car load was shipped on October 23d, and bill of lading mailed to Webster, who refused to pay the contract price therefor, because he claimed to have discovered, since paying for the two car loads, that neither these nor the third car were of the contract quality, whereupon the plaintiffs refused to deliver the fourth car, though Webster demanded delivery thereof. The present suit is for the contract price of the third car, and for the last-mentioned case of samples. Webster claims to recoup against the price of the third car the damages resulting from the alleged inferiority of all three cars, and from the nondelivery of the fourth car. The narr. contains only the common counts and the pleas are the usual general issue pleas. The verdict and judgment being for the plaintiffs for the contract price of the third car load, and for the value of the last case of samples, the defendant has appealed. Sixteen exceptions were taken, 15 to rulings upon evidence, and 1 to the ruling on the prayers.

The first exception was to the admission of the letter of Simmons of September 14th, above quoted, in connection with the offer to show that Simmons was defendant's agent. Simmons himself testified that he represented both parties as broker, though his brokerage was paid by the plaintiff, in accordance with the custom in such transactions. The manifest purpose of the introduction of this letter by the plaintiff was to lead the jury to believe, as the plaintiff may have believed, that Webster had rejected the samples submitted September 8th as the standard for the 2,000 cases then purchased, and thus to justify the plaintiffs in their attempted cancellation of that contract. Standing alone, and unexplained, it certainly tended to support the plaintiff's view, and we perceive no error in its admission.

After Perry W. Moore, one of the plaintiffs, had given his version of the transaction on examination in chief, his counsel then asked him, "What does Mr. Webster owe you?" to which question the defendant objected, but the court overruled the objection, and after exception taken by defendant, the witness answered, "He owes us for 501 cases of tomatoes at 77½ cents per dozen." This constitutes the second exception; the ground being that the purpose of the question, and the result of the answer permitted, was to enable the witness to give his opinion and decision upon the precise question which was for the

determination of the jury, from a consideration of all the facts and circumstances in the case. If such was the purpose and effect of the question and answer, the ruling would be erroneous, as was held in *Belt R. R. Co. v. Sattler*, 100 Md. 335, 59 Atl. 654, and in *Western U. Tel. Co. v. Ring*, 102 Md. 681, 62 Atl. 801. But we do not think such was either the purpose or effect of the answer elicited. There was no dispute here that 501 cases of tomatoes had been sold at 77½ cents per dozen, had been delivered, and had not been paid for in whole or in part. The only open question under the pleadings and evidence for the determination of the jury was what abatement, if any, the defendant was entitled to from the contract price of these 500 cases, by reason of the alleged inferiority of the 1,500 cases delivered, and the non-delivery of the remaining 500 cases. The question, we think, was equivalent to asking what the plaintiff claimed to have been delivered, and not paid for, and the answer given would have been strictly appropriate and responsive to such a question. Viewed in that light, this exception bears no analogy to those in the two cases relied on and cited above, and is not within the reason on which they were decided. It would be a narrow and arbitrary construction of that question and answer to hold that there was reversible error in their admission.

The third and fifth exceptions raised but one question. In the third Simmons was asked "What was the value at Cambridge of No. 3 standard tomatoes, f. o. b. cars on September 8, 1906?" for the purpose of showing that the contract price was the full market price. The plaintiff objected, but conceded that the contract price was the full market price that day, and the court sustained the objection. In the fifth exception while the deposition of a Mr. Jessup, taken under a commission, was being read, the following question was read: "What was the value of 3 lb. standard tomatoes at Cambridge f. o. b. September 8, 1906?" The answer in the deposition was "seventy-five cents." The plaintiff objected to the question, though the defendant stated he expected to show by the answer that he had agreed to give a price equal to the market price of that day, and the court sustained the objection on the ground that the matter thus proposed to be proved had already been conceded when the ruling on the third exception was made. Upon principle it would seem that there ought not to be laid down a hard and fast rule compelling a party, against his will, to accept his adversary's concession of a bare fact sought to be proved in lieu of the evidence by which the fact is proposed to be established. There are, no doubt, cases in which no actual injustice would be worked by such a rule, but there are others in which the strength of a proponent's case would be greatly weakened by its application. The appellant has cited four cases in support of

these exceptions, all from the Michigan Court, viz., *John Hancock Co. v. Moore*, 34 Mich. 41, *Kimball Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558, *De Camp v. Scofield*, 75 Mich. 449, 42 N. W. 962, and *Baumier v. Antiau*, 79 Mich. 509, 44 N. W. 939. In the first and second of these cases the concession would have operated to exclude record of documentary evidence. In the third it was held that the conceding of a valuable consideration for a written promise cannot deprive the promisor of the right to prove what the consideration was; and in the fourth it was held that, though the defendant offered to admit that the plaintiff was kept out of possession of certain premises by him, plaintiff was entitled to give evidence of the fact and of the attending circumstances, the court in that case using this emphatic language: "The right of a plaintiff to present his proof to the jury in his own way, subject to the rules of evidence, is a substantial and important one, of which he cannot be deprived by the proffered admission of the defendant." If this is the plaintiff's right, it is equally the defendant's right—the rule must be applicable to both parties alike. We have not been referred to any other decisions in point, and we have discovered none, nor have we found any consideration of this question in the text-books or encyclopedias. The excluded answer showed that the contract price was 2½ cents above the market price of that day, and thus illustrates the obvious difference in effect in some cases between a naked concession of a fact and the production of the evidence by which the fact is proposed to be established. We have not had pointed out to us any specific injury worked to the defendant in this case, by the ruling complained of; and, in the absence of injury, the error cannot be held reversible, but we cannot give our sanction to the laying down of a general rule which would deprive a party of his right to produce to the jury, in his own time and way, the evidence upon which he relies, and which is legally admissible for that purpose.

The seventh, eighth, tenth, eleventh, thirteenth, fourteenth, and fifteenth exceptions may be considered together. They all relate to the admission of testimony by which the plaintiff sought to show that the 1,500 cases delivered were No. 3 standard tomatoes such as the contract specified. In the seventh one of the plaintiffs was asked to state "how they packed their tomatoes in 1906, and the grade and quality of the whole pack for that year." The answer was that the whole pack was by hand, by girls, who weighed 34 ounces of tomatoes in each can, that witness personally supervised this packing, and that each day's pack was examined as packed, and that all were standards No. 3 of fair quality, except the last day's pack, which were kept in a separate house, and none of which were delivered to the defendant. The eighth exception relates to 400

cases labeled with defendant's labels, and designed for delivery to him as part of the fourth car load, not delivered because of his refusal to pay for the third car load. The same witness (Moore) was allowed to state that these 400 cases were packed for Webster, and taken from the same pile from which the three car loads were taken. In the tenth exception the same witness, after stating that he had 2,600 cases on hand at the end of the packing season and that Wm. E. Hearn examined samples from these, including the 400 cases above mentioned, was allowed to state that some of the samples examined by Hearn were from the same lot from which the 1,500 cases delivered to the defendant were taken, this answer being allowed upon condition that it should be followed up by Hearn's own testimony upon that point. In the eleventh exception the same witness was allowed to say that the quality of the samples examined by Hearn were all fair standards. In the thirteenth exception Hearn was allowed to confirm Moore's statement in the eleventh. In the fourteenth exception, during the reading of the deposition of Thos. J. Burke, a canner of Duluth, it appeared that he was the vice president and buyer for a canning company of that city, and bought from the plaintiff in July, 1907, 500 cases of Springfield brand canned tomatoes, and was allowed to state that he found them "satisfactory." And in the fifteenth exception he was allowed to say these tomatoes were good quality of standards, thus explaining what was meant by the term "satisfactory." It is plain that the purpose of this testimony was to show that the 1,500 cases delivered were of the character and quality required by the contract. The objection made to all this testimony is that the issue in the case was the quality and character of the 1,500 cases delivered, and that this could not be established either by evidence as to the method pursued in the packing of that year, or only evidence as to the quality of any other part of the pack of that year, but after a careful consideration of this objection, we do not think it should be sustained. It was not in the power of the plaintiffs to produce the tomatoes delivered to the defendant, and the evidence they offered was the best evidence obtainable. *Ames v. Quimby*, 106 U. S. 342, 1 Sup. Ct. 116, 27 L. Ed. 100. If they were not permitted to introduce that evidence, their mouths were sealed, except to affirm merely that the goods complied with the contract. Surely evidence that the plaintiffs packed but one grade and quality of goods that year, and this designated No. 3 standard, that the work was done by competent and careful employes, and under constant and careful supervision, and that a disinterested and competent person examined samples from all the 2,600 cases packed, in addition to the 1,500 cases sold the defendant, and pronounced them all to be good No.

3 standards, afforded some reasonable ground for the belief that they were all of the same grade and quality, and constituted information which ought not to have been withheld from the jury, and in our opinion there was no error in these rulings.

The fourth and sixth exceptions were taken to the exclusion of the following letter offered in evidence by the defendant: "East Newmarket. Md. 9/13-1906. Mr. E. B. Simmons, Cambridge Md.—Dear Sir: I inclose a letter received to-day from Austin Nichols & Co. concerning those samples sent by P. W. Moore. Surely those samples could not have been like those cut in your office. I regret that Austin Nichols & Co. should fail to approve these samples, as it may cause some delay in getting them out. However, if Mr. Moore will send me another case of samples, I will see what I can do in other directions. Yours truly, Chas. Webster." It is apparent that this letter is the same referred to by Simmons in his letter of September 14th, which had been previously admitted, and it at least tends to prove, if it does not conclusively prove, that the samples referred to in the letter of the 14th inst. were not those sent with the contract in suit, but were those subsequently furnished and sent to Austin Nichols & Co., not being connected in any way with this contract. The letter of the 14th, written by a clerk of Simmons, without his knowledge or that of Webster, unexplained by this letter, tended to show an attempt by Webster to reject samples he had already approved as the basis of this contract, and if was offered with that purpose, in order to justify the plaintiffs in their proposed cancellation of the contract of the 8th inst. Simmons acted as agent for both parties in that transaction, and fairness requires that this letter of Webster to him, as such agent, should be admitted in explanation of Simmons' letter of the 14th inst. The principle which so requires was applied in *Roe v. Day*, 7 Car. & Payne, 706, and in *Watson v. Moore*, 7 Car. & Kirwan, 627, cited in note to *Greenleaf on Evidence*, vol. 1, § 201. In the latter case, a letter from defendant's attorney purporting to be an answer to a letter to him from plaintiff's attorney, previously admitted, was objected to by the plaintiff, but was admitted by Chief Baron Pollock, who said: "If you do not like to put in the letter of Messrs. Frankum and Bartlett to which this is an answer, you should not give this letter in evidence. You should either put in both the letters or neither." We think there was error in these rulings. The appellees contend that, if admitted, it could not have affected the issues on any point, and was therefore not reversible error. But that ruling left the defendant under the imputation of bad faith in attempting to revoke his previous approval of the samples of the 8th inst., and it is impossible to determine how far this imputation may have affected the jury in

their consideration of the defendant's good faith in his subsequent assertion that the three car loads delivered were inferior in quality to the samples by which they were sold.

The ninth and twelfth exceptions may be considered together. In the ninth *Perry W. Moore* was allowed to state that the 400 cases labeled for Webster, but not delivered because he failed to pay for the third car, were subsequently sold to parties in Minnesota "as standard No. 3 tomatoes, and were accepted by them as such." In the twelfth the same witness was allowed to state that, in addition to the 1,500 cases delivered to the defendant, he packed that year 2,600 other cases, and had sold all these "for No. 3 standards, and at No. 3 standard prices," without complaint as to any. The issue involved in these exceptions was the quality and grade of the 1,500 cases delivered to Webster, and this could not be established by proof that any other part of their pack was sold and delivered as standards, even though without complaint by the purchaser. Selling an article as of certain grade and quality is far from proof that it actually was of such grade and quality, and the evidence in this case shows that subsequent to Webster's purchase the market price of canned goods advanced largely, and so remained for a considerable period, a circumstance which always goes far to remove slight objections to defects, and to reconcile purchasers to contracts which they might otherwise seek to repudiate. We think under the seventh, eighth, tenth, eleventh, thirteenth, fourteenth and fifteenth exceptions, the plaintiffs were allowed full latitude as to the proof of the quality and grade of the goods delivered to the defendant, and that there was error in the ruling on the ninth and twelfth exceptions.

This brings us to the rulings on the prayers. Only the sixth and tenth prayers of the plaintiffs, and the sixth and eighth prayers of the defendant, were granted, and by these we think the case was fairly and fully submitted to the jury. The defendant's sixth prayer is not important, but the granted prayers will be set out by the reporter. The defendant objects to the plaintiff's granted prayers on two grounds: First, that they ignore the right claimed by the defendant to recoup for damages growing out of the plaintiff's failure and refusal to deliver the fourth car of tomatoes, after defendant's refusal to pay for the third car delivered; and, second, because he alleges that these two prayers do not direct or permit any allowance for the 12,000 labels used in the third car. The first objection is disposed of by the case of *Baltimore City v. Schaub*, 96 Md. 535, 54 Atl. 106, and *McGrath v. Gerner*, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415. These cases determine that, where a contract for the sale of goods to be delivered at successive periods, provides for pay-

ment at stated times after such deliveries, then if payment for goods delivered is refused, such refusal is a breach of contract which justifies the seller in refusing to make further deliveries, and in an action by him to recover the price of goods delivered, the buyer is not entitled to recoup damages for failure to make further deliveries. The second objection we do not think should prevail. The tenth prayer, properly viewed and interpreted, contemplates the proper allowance for labels. It refers to the contract price, and the essential element of the contract price is the allowance provided by the contract for the labels. The sixth prayer is defective in neither expressly providing for this allowance, nor in impliedly so providing, by reference to the contract, and if the verdict did not cure this defect, it would be ground for reversal if that was the only granted prayer. But it will be seen, on reference to the verdict and an examination of the calculation by which it was reached, the allowance for labels was made by the jury. Their verdict was rendered November 15, 1907, for the sum of \$813.22. It was reached in this way:

1,000 dozen cans at 77½ cents per dozen.....	\$775.
1 case samples 2 dozen cans at 77½ cents per dozen	1.55
	<hr/> \$776.55
Credit allowance for 12,000 labels on 12,000 cans	10.80
	<hr/> \$765.75
The contract provided for an allowance of ten days for cash payment. The third car was shipped October 23, 1906, so that interest should begin on November 3, 1906. Interest on \$765.75 from November 3, 1906, to date of verdict November 15, 1907	47.47
	<hr/> \$813.22

—which is the exact amount of the verdict rendered.

This demonstrates that the jury were not misled, either by the omission of any reference in the sixth prayer to the allowance for labels, or by the obscurity of the reference thereto in the tenth prayer, and that they did in fact make the proper allowance therefor. There was thus no injury worked by either of these prayers. The defendant's sixth and eighth prayers which were granted gave them all the law to which they were entitled. The appellant's first prayer asserted that there was no legally sufficient evidence to show that the terms of the original contract were ever changed, and the seventh that there was no legally sufficient evidence under the pleadings to entitle the plaintiff to recover. These were not argued, either orally or in the appellant's brief, and were presumably abandoned. In any event they were properly rejected. The remaining prayers of the defendant all denied the plaintiff's right of rescission, and were properly rejected.

For the errors in the ruling on the fourth, sixth, ninth and twelfth exceptions, the judgment must be reversed.

Judgment reversed, with costs to the appellant above and below, and new trial awarded.

(104 Me. 122)

HEALEY v. SPAULDING.

(Supreme Judicial Court of Maine. March 24, 1908.)

1. TORTS (§ 18*)—ACTS DONE IN RETALIATION. Though injurious acts done in self-defense may be justifiable, such acts done for retaliation are not justifiable by the law.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 25; Dec. Dig. § 18.*]

2. DEFENSES—RETALIATION. If acts begun in self-defense are extended to retaliate for injuries received, they become unlawful.

3. ADJOINING LANDOWNERS (§ 6*)—FENCE—"NUISANCE."

One may erect upon his own land a fence as much higher than six feet as may be necessary to protect himself, his family, and his property from annoyances inflicted or threatened by his neighbor; but if he build the fence still higher for the malicious purpose of annoying his neighbor, in turn, such extra height is unlawful and a private "nuisance" under the statute Rev. St. c. 22, § 6.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 52, 81; Dec. Dig. § 6;* Nuisance, Cent. Dig. § 2.

For other definitions, see Words and Phrases, vol. 5, pp. 4855-4864; vol. 8, p. 7734.]

4. ADJOINING LANDOWNERS (§ 6*)—PRIVATE "NUISANCE"—FENCE—PURPOSE—ANNOYANCE.

In determining whether such fence is a private nuisance under the statute, it is not necessary to show that the purpose of annoyance was the sole purpose. It is enough to show that it was the dominant one.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 52, 81; Dec. Dig. § 6;* Nuisance, Cent. Dig. § 2.]

(Official.)

On Motion from Superior Court, Kennebec County.

Action on the case by Bessie A. Healey against Dexter H. Spaulding. Verdict for defendant, and plaintiff moves for a new trial. Motion sustained, and verdict set aside.

Action on the case brought by the plaintiff in the superior court, Kennebec county, to recover damages for an alleged private nuisance maintained by the defendant, consisting of a tight board fence, 12 feet in height, erected on land of the defendant and near the dividing line between the plaintiff's lot and the defendant's lot. The declaration in the plaintiff's writ is as follows:

"In a plea of the case, for that the plaintiff says that she is the owner and occupant of a lot of land situate on the westerly side of Burleigh street, in the city of Waterville, in said county of Kennebec, upon which stands

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

her residence numbered 28 in the numbering of the buildings on said Burleigh street, and bounded northerly by a lot of land on said Burleigh street, occupied by the defendant, and upon which the house occupied by the defendant as a dwelling now stands.

"And the plaintiff says that on the 30th day of July, A. D. 1906, the defendant maliciously erected, and since that date has maliciously kept and maintained upon said lot occupied by him, for the purpose of annoying the plaintiff, a tightly built fence or structure in the nature of a fence, unnecessarily exceeding 6 feet in height, to wit, of the height of 12 feet, from near the front of said lot on Burleigh street along the line or near the line that divides the lot of land of the plaintiff from that occupied by the defendant, for the distance of 35 feet.

"That said fence or structure in the nature of a fence interfered with the passage of light and air to the windows on the northerly side of the plaintiff's said residence, and the view in a northerly direction from the windows in plaintiff's said residence is obstructed by said fence or structure in the nature of a fence, whereby the rooms in the northerly part of plaintiff's said residence are darkened, made less pleasant and fit for occupancy. And the plaintiff alleges that said fence or structure in the nature of a fence injures her in the comfort and enjoyment of her said estate and her said property. Wherefore, by virtue of the statute in such case made and provided, an action hath accrued to the plaintiff to recover of the defendant the damages sustained thereby."

Plea, the general issue, with brief statement as follows:

"And, for a brief statement of special matter of defense to be used under the general issue pleaded, the defendant further says that plaintiff was at the time of erection of the fence complained of and for many years prior thereto had been and still is a common scold and public nuisance causing constant and extreme annoyance and injury to all persons in her vicinity, and that she caused great and continuous annoyance to defendant and his family, and abused, insulted, and slandered himself, his wife, and his little child.

"And defendant further says that plaintiff, with her two minor daughters, who lived with her in the house mentioned at the time of and before the erection of the fence complained of, were in the habit of constantly mocking, reviling, and ridiculing defendant, his wife, and little child.

"And defendant further says that plaintiff at and before the erection of the fence complained of was in the habit of throwing, putting and placing upon his lot and upon his property thereon dust, dirt, and refuse, to the great damage and injury of his said lot and property.

"And defendant says that the annoying, injurious and insulting practices above al-

luded to were practiced and carried on by plaintiff and her said minor daughters living with her in the house mentioned from the piazzas and windows on the side of her house next to his house and lot, wherefore he erected the fence complained of to protect his property and to secure peace and quiet for his family and himself."

Verdict for defendant. The plaintiff then filed a general motion for a new trial.

Rev. St. c. 22, § 6, relating to a fence as a private nuisance, provides as follows: "Any fence or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously kept and maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."

Argued before EMERY, C. J., and WHITEHOUSE, STROUT, SAVAGE, PEABODY, and KING, JJ.

Charles F. Johnson, for plaintiff. Harvey D. Eaton and Warren C. Philbrook, for defendant.

EMERY, C. J. The plaintiff and defendant owned and occupied dwellings on small adjoining lots in a city. The defendant built on his lot, but close to the plaintiff's lot, and within a foot of her house, a tight board fence extending from the street some 35 feet back. For a few feet next to the street the fence was about six feet high, but for the rest of the distance it was some twelve feet high, and up nearly even with the tops of the plaintiff's lower story windows. It practically shuts in her back porch, materially darkens her lower story rooms on that side, and shuts off her view along the street in that direction. She claims that the fence was unnecessary, and was built maliciously for the purpose of annoying her, against the provisions of the statute. Rev. St. c. 22, § 6.

The defendant denies that the fence was built maliciously for the purpose of annoying the plaintiff, and claims it was built to protect himself and family from persistent insulting and annoying language and conduct on the part of the plaintiff and her family. Whether that was the real dominant motive for building the fence was the question, as the defendant admits such a fence was not necessary for any other purpose.

The jury found for the defendant, but we think enough appears from the defendant's own testimony to make it clear that the jury erred, either in their understanding of the law or of the force of the testimony. It was not necessary for the plaintiff to prove that malice, the purpose to annoy, was the sole motive for building the fence. It was only necessary to prove that such was the dominant motive. Granting, as claimed, that the plaintiff and her daughters annoyed the defendant and his family by using opprobrious epithets, by mocking pantomime, and

by shaking dirty rugs so that the dust would blow on the defendant's line of washed clothes (and the annoyance does not appear to have been anything more), the tenor of the defendant's testimony shows that he was not a patient sufferer acting only on the defensive. He was, in his turn, an aggressor and an exasperating aggressor. His aggressions appear to have been the beginning of the troubles. His testimony showed much animosity against the plaintiff and a disposition to ignore her rights. All this, and the extraordinary and unnecessary height of the fence (12 feet), causing such serious injury to the plaintiff and her property, satisfy us notwithstanding the verdict of the jury that the fence was built to that extreme height more for retaliation, for punishment, than for defense. We fear the jury did not have in mind the distinction between retaliation and defense. The lay mind is too apt to regard retaliation as justifiable, but the law never does. In a well-ordered state no one is allowed to retaliate for any injury. He must resort to legal remedies, which are ample. The defendant had complete protection from the plaintiff's annoying conduct in the statute (Pub. Laws 1905, p. 183, c. 167), or by a much lower fence.

Motion sustained.

Verdict set aside.

(104 Me. 108)

**PHILLIPS VILLAGE CORPORATION v.
PHILLIPS WATER CO.**

(Supreme Judicial Court of Maine. March 17, 1908.)

**1. MUNICIPAL CORPORATIONS (§ 57*)—POWERS
—EXPRESS AND IMPLIED.**

A village corporation, being a creature of the statute, has only such powers as are conferred by statute or by necessary implication.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 144; Dec. Dig. § 57.*]

**2. SPECIFIC PERFORMANCE (§ 36*)—CONTRACTS
ENFORCEABLE—VILLAGE CONTRACTS—ULTRA
VIRE.**

When a village corporation has made a contract which is ultra vires, a bill in equity brought by itself for the specific performance of the same cannot be maintained.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 107; Dec. Dig. § 36.*]

**3. WATERS AND WATER COURSES (§ 183*)—
WATER WORKS—PURCHASE BY CITY.**

When a village corporation is only invested with power "to raise such sums of money as may be sufficient for the support of a suitable number of hydrants in case water is brought into its limits in a suitable manner and sufficient quantity, and suitable fire engines, engine houses, hose, buckets, hooks, and ladders, and provide a sufficient quantity of water in the different parts of said corporation for the extinguishment of fire and for organizing and maintaining within its limits an efficient fire department," and has no power to raise money for any other purpose, such corporation has no authority to enter into a contract with a water company providing that, after the expiration of a term of years, the cor-

poration should have the right to purchase the water company's entire plant at an appraised value to be fixed by three appraisers, chosen one by the corporation, one by the water company, the third by these two, and, on payment of the price so determined, that the water company should transfer to the corporation its entire plant, and, if such corporation does enter into such a contract, it is ultra vires.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 278; Dec. Dig. § 183.*]

**4. WATERS AND WATER COURSES (§ 183*)—
WATER WORKS—PURCHASE BY CITY—METH-
OD OF EXERCISING POWER.**

When a village corporation has made a contract for the purchase of the plant of a water company, and which contract was ultra vires at the time it was made, and afterwards by a legislative act such corporation has been authorized to "vote to purchase the entire works and rights" of the water company "for such sums of money as may be adjudged payable according to the terms" of the contract, such authority may have a retrospective action and make valid the contract, but, when the corporation attempts to avail itself of the granted power, it must proceed according to the terms of the act, and first "vote to purchase," etc., "for such sums of money as may be adjudged payable," etc., before it can maintain a bill in equity for the specific performance of the contract.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 278; Dec. Dig. § 183.*]

(Official.)

Report from Supreme Judicial Court, Franklin County, in Equity.

Bill for specific performance by the Phillips Village Corporation against the Phillips Water Company. Case reported to the law court for determination. Bill dismissed.

Bill in equity brought by the plaintiff corporation against the defendant water company for specific performance of article 10 of a certain written contract entered into between the plaintiff corporation and the defendant water company September 15, 1896, whereby the plaintiff corporation sought to compel the defendant water company to select an appraiser as provided in said article 10.

The plaintiff corporation was incorporated under the provisions of chapter 490, p. 667, Priv. & Sp. Laws 1885, and by the provisions of chapter 141, p. 177, Priv. & Sp. Laws 1887. Section 2 of said chapter 490 was amended so as to read as follows:

"Said corporation is hereby invested with power, at any legal meeting called for the purpose, to raise such sums of money as may be sufficient for the support of a suitable number of hydrants, in case water is brought into its limits in a suitable manner and sufficient quantity, and suitable fire engines, engine houses, hose, buckets, hooks and ladders, and provide a sufficient quantity of water in the different parts of said corporation for the extinguishment of fire and for organizing and maintaining within its limits an efficient fire department and no money shall be raised

for any other purpose except as above specified."

September 15, 1896, the plaintiff corporation and the defendant water company entered into a written contract as aforesaid in relation to a supply of water for the extinguishment of fires within the limits of the plaintiff corporation, and, in addition thereto, by article 10 of the contract, further agreed as follows:

"Art. 10. It is further agreed that said corporation shall have the right to purchase the company's entire works and rights at the expiration of ten years from the date of this contract, for ten per cent. additional to their appraised value, to be determined as hereinafter provided. And it is further agreed that, at the expiration of twenty years from the date of this contract, the said corporation shall have the right to purchase said company's entire works and rights at their appraised value, to be determined as hereinafter provided.

"In case the corporation should avail itself of this option and purchase said waterworks, it is agreed and understood that they shall have appraised, take over and pay for all the property, rights and franchises of said company, and shall assume, perform and carry out all agreements made by said company, and the said company shall, on payment of the price determined, make all deeds, conveyances, assignments and transfers, necessary to carry into effect this article of this agreement.

"For the purpose of ascertaining the value of said waterworks, for the purposes covered by this article, it is agreed that said corporation may select one appraiser, said water company one appraiser, and those two select a third, and that said committee so formed and created, after due notice and hearing given all parties interested shall appraise and fix the value of said waterworks and all the property of said company, and the sum at which said corporation shall have the right to purchase and take over said works, rights, franchises and other property."

By the provisions of chapter 102, p. 191, Priv. & Sp. Laws 1905, the aforesaid chapter 490 as amended by the aforesaid chapter 141 was further amended by adding to said chapter 490 sections 12 and 13; section 12 reading as follows:

"Sec. 12. Said Phillips Village Corporation at any legal meeting called for that purpose may vote to purchase the entire works and rights of the Phillips Water Company for such sums of money as may be adjudged payable according to the terms of article ten of the contract entered into between said Phillips Village Corporation and said Phillips Water Company. Or in accordance with the terms of any other contract hereinafter entered into by the same parties. Said Phillips Village Corporation shall, after such vote, and payment of the purchase price to said Phillips Water Company, receive from said

Phillips Water Company an assignment and transfer of all the works and rights of said Phillips Water Company. And shall thereafter own and operate said works and exercise and enjoy the rights and franchise of said Water Company as fully as if granted to it direct.

"Sec. 13. The Phillips Village Corporation is hereby vested with the authority to raise such sum or sums of money as are necessary for the payment of the purchase price of said works, or in payment of future extensions, additions, or improvements of the same, by assessment upon the polls and property within its territory, or by the issuance of bonds of the corporation and to execute its mortgage of the above works and rights as security for their payment."

The plaintiff corporation had never voted to purchase the plant of the defendant water company, but had twice refused so to do.

The cause came on for hearing before the justice of the first instance on bill, demurrer, answer, replication, and proof, and, at the conclusion of the evidence and by agreement of the parties, the case was reported to the law court for determination upon so much of the evidence as was "legally admissible and competent."

Argued before EMERY, C. J., and WHITEHOUSE, STROUT, SAVAGE, SPEAR, and CORNISH. JJ.

E. E. Richards, F. W. Butler, and D. R. Ross, for plaintiff. Foster & Foster and F. E. Timberlake, for defendant.

STROUT, J. Plaintiff was incorporated by the Legislature by chapter 490, p. 667, Priv. & Sp. Laws 1885, amended by chapter 141, p. 177, Priv. & Sp. Laws 1887. Being a creature of statute, it had only such powers as were conferred by statute expressly or by necessary implication. By section 2, c. 490, p. 668, Priv. & Sp. Laws 1885, as amended by chapter 141, p. 178, Priv. & Sp. Laws 1887, it was empowered to raise money to provide water for the extinguishment of fires, provide hydrants, etc., and for no other purpose. Under this grant of power it might contract with a water company to supply water for such purpose. It did this by a contract with defendant company incorporated by chapter 170, p. 273, Priv. & Sp. Laws 1891, which authorized defendant to contract with plaintiff for supply of water. By article 10 of that contract the parties provided that, after the expiration of 10 years, the plaintiff should "have the right to purchase the [defendant] company's entire works" at an appraised value to be fixed by three appraisers chosen one by plaintiff and one by defendant, and the third by these two, and, on payment of the price so determined, the defendant should transfer to plaintiff by proper conveyance its entire plant.

The plaintiffs have selected an appraiser, and asked defendant to select one, which it

has failed to do, and this bill is brought for specific performance to compel the defendant to select one appraiser as provided for in article 10. To this the defendant says that article 10 was ultra vires, and is not binding. Prior to the act of 1905 (Priv. & Sp. Laws, p. 191, c. 162) no authority had been conferred upon plaintiff to purchase defendant's plant, or to raise money to pay for it. The agreement consequently was ultra vires, and without force. The act of 1905 authorized plaintiff "at any legal meeting called for that purpose" to "vote to purchase the entire works and rights of the Phillips Water Company for such sum of money as may be adjudged payable according to the terms of article ten of the contract entered into between said Phillips Village Corporation and said Phillips Water Company, or in accordance with the terms of any other contract hereinafter entered into by the same parties," and the plaintiff was authorized by the act to raise money for the payment of the price, and for future extension by assessment or by issuing bonds.

Prior to this act we find no authority given to plaintiff to purchase the works or to raise money to pay for them.

This authority given by the act of 1905 may have a retrospective operation, and make valid article 10 of the contract, theretofore invalid. But, when the village corporation attempts to avail itself of the granted power, it must proceed according to the terms of the act. That contemplated a single vote of the village corporation to purchase the waterworks "for such sum of money as may be adjudged payable," etc. This language clearly implies that the vote shall precede the appraisal. It cannot be construed to authorize an appraisal in the first instance, and leave to the village corporation the option then to buy or not. Fair dealing, as well as the reading of the statute, requires that, before an appraisal is had, there should be an obligation to purchase on the one hand and to sell on the other, in which case an appraisal would be useful and binding. There is no reason why the water company should be subjected to the expense, trouble, and exposure of its business attendant upon an appraisal when there is no obligation of the village corporation to buy, and perhaps no intention to do so. It must be borne in mind that prior to the enabling act the village corporation had no authority to purchase or require an appraisal.

No vote of the village corporation to purchase has ever been passed. On the contrary, at two meetings of the corporation in the warrants for which was an article to see if the corporation would vote to purchase the water plant, it was voted to pass over the articles; thus refusing to commit the corporation to the purchase.

The plaintiffs are not entitled to an ap-

praisal until it shall vote to purchase as provided in the act. In *Farmington v. Water Co.*, 93 Me. 192, 44 Atl. 609, there was a valid contract between the parties, and the case turned upon the construction of that contract. Here there was no valid contract between the village corporation and the water company until the village corporation voted to purchase, as authorized by the act of 1905. Such vote was necessary to make any contract between the parties. *Kennebec Water District v. Waterville*, 96 Me. 234, 52 Atl. 774, cited by plaintiff, has no application to this case, and the same is true of *Mayo v. Village Fire Co.*, 96 Me. 541, 53 Atl. 62. In *Kittery Water District v. Agamenticus Water Co.*, 103 Me. 25, 67 Atl. 631, the statute authorizing the purchase of the water plant provided that, if the parties did not agree upon the price, the water district might apply to a justice of this court for the appointment of appraisers. That case does not apply to the question in this.

The entry must be:

Bill dismissed, with costs.

(104 Me. 109)

PERKINS v. OXFORD PAPER CO.

(Supreme Judicial Court of Maine. March 17, 1908.)

1. DEATH (§ 16*)—ACTIONS FOR CAUSING—"IMMEDIATE DEATH."

Rev. St. 1903, c. 89, § 9, provides as follows: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount to a felony." Held, that this statute was designed to cover cases of immediate death, which include cases both of instantaneous death and of total unconsciousness, following immediately upon the accident and continuing until death, and the duration of that period of unconsciousness is immaterial.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 18; Dec. Dig. § 16.*]

2. MASTER AND SERVANT (§§ 217, 238*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

When there is a comparatively safe and likewise a more dangerous way known to a servant by means of which he may discharge his duty, it is negligence for him to select the more dangerous method, and he thereby assumes the risk of injury which its use entails.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 593, 745; Dec. Dig. §§ 217, 238.*]

3. DEATH (§ 16*)—MASTER AND SERVANT (§ 238*)—ACTIONS FOR CAUSING—IMMEDIATE DEATH—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The plaintiff's intestate was employed as an engineer in the defendant's mill, and had been so employed for about five years prior to his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

death. In attempting to pass under a large and rapidly moving belt shackled with "Jackson hooks," so called, the nuts and bolts of which projected about one inch from the surface of the belt, he was struck on the head by the hooks, and knocked to the floor in an unconscious condition, and remained unconscious until his death 75 hours later. The plaintiff administrator then brought an action against the defendant under the provisions of Rev. St. 1903, c. 89, § 9. The defendant contended (1) that this form of action could not be maintained as a matter of law because the death was not immediate; (2) that the plaintiff's intestate was guilty of contributory negligence.

Held (1) that the action was properly brought under the statute, although the plaintiff's intestate survived the accident 75 hours; (2) that the plaintiff's intestate was guilty of contributory negligence, as there was no necessity for his passing under the belt at a point where he was liable to be struck by it.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 18; Dec. Dig. § 16; * Master and Servant, Cent. Dig. § 702; Dec. Dig. § 233.*]

(Official.)

4. WORDS AND PHRASES — "INSTANTANEOUS."
"Instantaneous" means done or occurring in an instant, or without any perceptible duration of time.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3859.]

Exceptions from Supreme Judicial Court, Oxford County.

Action on the case by Frank C. Perkins, administrator of the estate of Arthur N. Perkins, deceased, against the Oxford Paper Company. Verdict for plaintiff, and defendant filed exceptions and moves to have the same set aside. Motion sustained, and verdict set aside.

Action on the case brought under Rev. St. 1903, c. 89, § 9, by the plaintiff as administrator of the estate of Arthur N. Perkins, deceased intestate, for the benefit of the widow of said Arthur N. Perkins and against the defendant corporation to recover damages for the death of the said Arthur N. Perkins; such death having been caused by the alleged negligence of the defendant corporation. The declaration in the plaintiff's writ is as follows: "In a plea of the case, for that the defendant on the 23d day of November, 1906, was the owner and operator of a certain mill, with its machinery appurtenances and appliances, situated in Rumford, in the county of Oxford, and state of Maine, used for the manufacture of pulp and paper. And the plaintiff avers that it was then and there the duty of said defendant to provide a safe and suitable place for its employes to perform their labor, and also safe and suitable machinery and appliances. And the plaintiff avers that the said defendant on said 23d day of November was unmindful of its duty in this behalf, in that it then and there unlawfully and negligently failed to provide either a safe and suitable place for his intestate to perform his labors, or safe and suitable machinery or appliances, as required by law. And the plaintiff avers that as a

part of the machinery of said mill owned and operated by the defendant as aforesaid is an engine numbered 4, with all of its appurtenances and appliances, about which it was the duty of the plaintiff's intestate then and there to be employed. And it is averred that as a part of the appliances of said mill, then and there owned and operated by the said defendant, was a large belt known as the 'speed' or 'power' belt, which was then and there fastened or connected with a large wheel or pulley on said engine, and then and there extending to the main shaft in said mill, and which moved with great rapidity. And it is averred that the defendant then and there unlawfully, carelessly, and negligently connected the two ends of said belt by means of bolts, clasps, and nuts, a system of connection known to the mill trade as 'Jackson hooks'; that the said defendant then and there unlawfully, carelessly, and negligently allowed said bolts by which the said belt was then and there connected to project a great distance from the belt. And the plaintiff avers that on the said 23d day of November, and for a long time prior thereto, his intestate, Arthur N. Perkins, was then and there employed by the said defendant for hire, in its mill, as aforesaid, as engineer, and that it was the duty of the plaintiff's intestate to labor around and about the said engine, its appurtenances, and appliances. And the plaintiff avers that while his intestate was then and there employed about said engine in the regular performance of his duty, and while in the exercise of due care and caution, and without fault on his part, due wholly to the unlawful carelessness and negligent manner, by which the said belt was then and there connected, by the said defendant, your plaintiff's intestate was then and there suddenly and forcibly struck in the head by one of the bolts aforesaid, then and there receiving injuries from which he then and there immediately died. Whereby Lula Perkins, wife of the said Arthur N. Perkins, for whose benefit this action is brought, suffered great loss and damage, and whereby and by virtue of the statute in such case made and provided an action has accrued to the plaintiff in his capacity as administrator, as aforesaid, to have and recover of the said defendant said loss and damage for the benefit of the said Lula Perkins, yet the said defendant, though often requested, has not paid the same, but neglects and refuses so to do, to the damage of said plaintiff (as he says) the sum of \$5,000, which shall be made to appear, with other due damages, and have you there this writ with your doings therein."

Plea the general issue. Tried at the May term, 1907, Supreme Judicial Court, Oxford county. Verdict for plaintiff for \$3,250. The defendant then filed a general motion to have the verdict set aside. Several exceptions were taken by the defendant during the trial,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

but the same were not considered by the law court.

The case fully appears in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, and CORNISH, JJ.

Matthew McCarthy and Wm. H. Newell, for plaintiff. Bisbee & Parker, for defendant.

CORNISH, J. This is an action on the case brought under section 9 of chapter 89 of the Revised Statutes of 1903 for the benefit of the widow of Arthur N. Perkins, the intestate, for the death of said intestate caused by injuries received by him while in the employment of the defendant corporation. The case is before this court on motion and exceptions by defendant.

There was little conflict of testimony. The undisputed facts are as follows: Arthur N. Perkins at the time of the accident was 32 years of age, and had been employed by the defendant as an engineer for about five years. He had charge of engines No. 3 and 4 and their appurtenances, situated in machine room No. 2. These engines and the shafting and pulleys connected therewith were similar in construction. A large belt known as the "step speed belt" extended from the pulley on the front cone shafting (said pulley being set between piers on the floor) to the machine shafting at the upper part and rear of the room. The lower side of this belt moved from the machine shafting downward on an incline toward the pulley, and its height from the floor varied from a few inches at the pulley to eight or nine feet at the machine shafting. The belt was 18 inches wide, fastened together with "Jackson hooks," so called, the nuts and bolts of which projected about one inch from the surface, and, when the machinery was in operation, as at the time of the accident, the belt moved at the rate of a mile a minute. The distance on the floor from the center of the front cone shafting to a point beneath the center of the machine shafting was about 30 feet.

Standing by the front cone shafting, and looking toward the belt and the rear wall, one would see at the left of the belt and about 8 inches from it two upright steel columns, the nearest 9 feet distant and the furthest 21. Between the furthest column and the rear wall, a distance of about 9 feet, but a little toward the left, was a pump, so placed that there was a clear space of 3½ feet between it and the column. At the left of these columns was a wide and unobstructed passageway.

On the other side, at the right of the speed belt and about 10 feet from it, was a cross-belt connecting the front cone shafting with the rear cone shafting. The engineer at times, in the course of his duty, had occasion to visit this intervening space, and this could not be reached from the broad passageway on the left without going under the speed

belt at some point. At no point between the first and second columns could a man cross without stooping, but at any point beyond the second column stooping was unnecessary, as the height of the belt varied from six feet three inches to nine feet. At the time of the accident, Mr. Perkins started to go beneath the rapidly moving belt at a point between the two steel columns where the height of the belt above the floor was 4 feet 9¼ inches. His height was five feet four inches. As he crossed, he stooped, but not enough. His head was struck by the hooks in the belt, and he was knocked to the floor in an unconscious condition. The accident occurred at about 10 a. m. November 23, 1906, and he remained unconscious until 1 p. m. on November 26th, a period of 75 hours, when he died.

1. Form of Action.

The first point raised by the defense is that this action cannot be maintained as a matter of law because death was not immediate.

It is admitted that the intestate survived 75 hours after the injury, taking nourishment that was administered, but was in an unconscious condition during the whole period, so that even an operation upon the skull was performed without the use of anesthetics. The question is raised sharply whether sections 9 and 10 of chapter 89 of the Revised Statutes of 1903 should be construed to cover such a case. The history of this legislation and the construction put upon it by the court are interesting and important. At common law no value was put upon human life to be recovered in the way of damages. At common law, too, a right of action to recover damages for personal injuries did not survive. But by an early statute, now Rev. St. 1903, c. 89, § 3, those actions that could be maintained at common law for personal injuries were made to survive, and could be prosecuted by the personal representatives whether an action had been brought in the lifetime of the injured party or simply the cause of action had accrued and the injured party had died before suit was actually brought.

A remedy by indictment against steamboats and railroads in case the life of a person was lost through the carelessness of the respondent's servants was provided by chapter 70, p. 59, Pub. Laws 1848, and the limit of recovery extended to \$5,000 by chapter 161, p. 159, Pub. Laws 1855. This statute was construed to cover cases of immediate death only. *State v. Maine Central Railroad Company*, 60 Me. 491. That case came before the court on a demurrer to the indictment, which alleged that the accident occurred on June 27th, and death ensued on June 29th, but did not state whether the injured party was in a conscious or unconscious condition during that time, and the court did not attempt to define the word "immediate" as used in that connection.

In *State v. Grand Trunk Railway*, 61 Me. 114, 14 Am. Rep. 552, a similar proceeding by indictment, the court in reaffirming the essential element of immediate death also call attention to the conscious condition of the sufferer in these words: "In this case the evidence shows clearly and beyond a reasonable doubt that Pullen, the person injured, did not die immediately. He not only survived several hours, but during most of the time was conscious and able to converse intelligently. A right of action, therefore, accrued to him, which, upon his subsequent death, descended to his personal representatives."

A similar statute giving remedy by indictment was construed by the Supreme Court of Massachusetts not to be limited to cases where death was instantaneous. *Commonwealth v. Metropolitan R. R. Co.*, 107 Mass. 236.

Chapter 124, p. 135, Pub. Laws 1891, entitled "An act to give a right of action for injuries causing death" extended, in section 1, the remedy to a civil action in these words:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as shall amount to a felony." Rev. St. 1903, c. 89, § 9.

It will be noted that in this statute neither the word "instantaneous" nor "immediate" is used. The test is not life or death, as was applied by the Supreme Court of Massachusetts in construing the statute relating to the survival of actions in *Kearney v. Railroad Co.*, 9 Cush. (Mass.) 108, *Hollenbeck, Adm'r, v. Railroad Co.*, 9 Cush. (Mass.) 478, and *Bancroft v. B. & W. Ry.*, 11 Allen (Mass.) 34. The statute there under consideration provided that "the action of trespass on the case, for damage to the person, shall hereafter survive, so that in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against his executor or administrator, in the same manner as if he were living." It is similar to section 8 of chapter 89 of the Revised Statutes of 1903 of Maine. The court there logically held that the only question involved in the construction of that statute was whether the sufferer survived the injury. If he did, a right of action accrued without regard to the consciousness or mental capacity of the sufferer.

A right of action could only survive if it once existed and it could exist if the sufferer survived the injury for any appreciable time. The test was the continuance of life after

the accident, and not the length of time nor want of consciousness during that time.

Following this construction, the Massachusetts court in a subsequent case, where the injured party survived 10 minutes in an unconscious state, logically held that a cause of action accrued to the intestate in his lifetime and survived to his personal representative, but, as there was no evidence to warrant the jury in finding that the deceased endured any conscious pain or suffering, further held that only nominal damages could be recovered. *Mulcahey, Adm'r, v. Washburn Car Wheel Co.*, 145 Mass. 281, 14 N. E. 106, 1 Am. St. Rep. 458.

Counsel for defendant cite these cases as decisive of the one at bar, and claim that the act of 1891 should be construed with equal strictness, that under the facts here a right of action accrued to the sufferer to be enforced by his personal representative, and that this statutory action cannot be maintained.

This brings us to the construction of the statute of 1891, which is quite different from that of the survival statute before considered. What did the Legislature mean by granting a right of action, although death ensues where the act, neglect, or default is such as would have "entitled the party injured to maintain an action and recover damages in respect thereof" if death had not ensued. We think the plain intent was to give not an empty right of action, but a right that should bring substantial damages, not merely a right to sue but a right to recover.

Prior to its passage, if death was instantaneous, there was no remedy whatever, and, if the injury was immediately followed by a comatose condition for a longer or shorter period and that by death, there was no real remedy; for, although the personal representative had a right of action under the survival statute, the damages were nominal as in *Mulcahey, Adm'r, v. Washburn Car Wheel Co.*, supra. The right was a husk without the kernel. To obviate this injustice and to grant compensation to the family of the injured party, the act of 1891 was passed, and a fair, just, and reasonable interpretation of that statute is that it gave relief where no substantial relief existed before, and that includes both injuries producing immediate death where no action could before be brought, and those producing at once a condition of insensibility, continuing without cessation until death, where an action could be brought but only nominal damages could be recovered.

Whether the unconscious condition continues for minutes or hours or days the reason of the rule still prevails and the statute applies.

The decisions in this state are in harmony with this view. The court held in *State v. Maine Central R. R. Co.*, 60 Me. 490, and *State v. Grand Trunk Railway*, 61 Me. 114,

14 Am. Rep. 552, under the indictment statute, that death must be immediate, without attempting to define the precise meaning of the term. In *Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660, which came to this court on a demurrer to the declaration and was the first case under the Civil Act of 1891, the court for the first time defined the meaning of "immediate" in these words; the same justice drawing the opinion as in both the indictment cases above referred to:

"We do not say that the death must be instantaneous. We have never so held. Very few injuries cause instantaneous death. 'Instantaneous' means done or occurring in an instant, or without any perceptible duration of time; as the passage of electricity appears to be instantaneous. * * * And, when we say that the death must be immediate, we do not mean to say that it must follow the injury within a time too brief to be perceptible. If an injury severs some of the principal blood vessels and causes the person injured to bleed to death, we think his death may be regarded as immediate, though not instantaneous. If a blow upon the head produces unconsciousness and renders the person injured incapable of intelligent thought or speech or action, and he so remains for several minutes and then dies, we think his death may very properly be considered as immediate, though not instantaneous. Such a discrimination may be regarded by some as excessively exact or nice, and therefore hypercritical. But in stating legal propositions it is impossible to be too exact; and, while other courts and some writers of text-books have used indiscriminately the words 'instantaneous' and 'immediate,' and the adverbs 'instantaneously' and 'immediately,' we have not regarded them in this class of cases as meaning precisely the same thing, and have preferred to use the words 'immediate' and 'immediately' as being more comprehensive and elastic in their meaning than the words 'instantaneous' and 'instantaneously,' and better calculated to convey the idea which we wish to express. Of course, an instantaneous death is an immediate death; but we have not supposed that an immediate death is necessarily and in all cases an instantaneous death."

The word "immediate" is, as the court say, an "elastic term," depending upon the facts of each case. This construction recognizes a statutory right of action in case of a blow producing unconsciousness that continues until death. The doctrine admitted, it matters not how long a period of unconsciousness may intervene.

In *Conley v. Portland Gaslight Co.*, 96 Me. 281, 52 Atl. 656, which also came to this court on demurrer to the declaration, the court emphasizes the same view in the following language:

"As construed by our court in *Sawyer v. Perry*, supra, it is obvious that the statute of 1891 in question affords a right of action

for 'injuries causing death' substantially like that given to employees by the employers' liability act in Massachusetts. The second section of that act (chapter 270, Pub. St. 1887) gives a right of action 'where an employé is instantly killed, or dies without conscious suffering'; and it was held in *Martin v. Boston & Maine Railroad*, 175 Mass. 502, 56 N. E. 719, that an action could not be maintained under this statute in a case where the injured person survived and endured conscious suffering less than one minute after the injury. See, also, *Hodnett v. Boston & Albany Railroad*, 156 Mass. 83, 30 N. E. 224; *Green v. Smith*, 169 Mass. 485, 48 N. E. 621; *Broderick v. Higginson*, 169 Mass. 482, 48 N. E. 269, 61 Am. St. Rep. 296; *Willey v. Boston Electric Light Co.*, 168 Mass. 40, 46 N. E. 395, 87 L. B. A. 723. Whether, in the case at bar, it might not reasonably be considered an immediate death within the meaning and purpose of our statute, if the decedent immediately became unconscious after his injury and remained in a comatose state for 20 minutes or even for several hours or days, until life became extinct, it is unnecessary here to determine."

In the case under consideration this question is squarely raised, and it is the opinion of the court that the suggestion in *Conley v. Portland Gaslight Company* is sound, and that the statute of 1891 was designed to cover cases both of instantaneous death and of total unconsciousness following immediately upon the accident and continuing until death, and the duration of that period of unconsciousness is immaterial. The defendant's contention upon this point fails.

2. Contributory Negligence.

The cause of the accident was the intestate's act in attempting to pass beneath the swiftly moving belt at such a point that he was hit by the Jackson hooks. The danger was an obvious one, at least the belt itself was obvious, and the danger of contact with it, whatever the fastening, was apparent to any man using his senses. It was not necessary that he should appreciate the danger in all its details. *Connelly v. Woolen Co.*, 163 Mass. 153, 39 N. E. 787. But the evidence is convincing that the intestate did know and appreciate the particular danger of which complaint is now made. These hooks had been placed upon the belt about six months before the accident, and had been in continuous use since. Admitting that they could not be seen when the belt was in motion, yet the engine was shut down every Sunday morning for the day in order that the engine, shafting, and belting might be inspected and the plaintiff as engineer was present during that time. He had full opportunity to know and must have known what these fastenings were. This is confirmed by the testimony of two witnesses, one of whom testified that Mr. Perkins helped

him mend the belt on engine No. 3, which was similar to No. 4 and under Perkins' charge, and the other testified that Perkins once told him he "would hate to get hit by them." The conclusion that Perkins knew the exact condition is irresistible. Assuming that duty called the intestate to the open space beyond the belt, he had two routes open before him by which to reach it, one admittedly safe, the other attendant with danger; one enabling him to pass beneath the belt between the second pillar and the rear wall where there was a passageway of three and a half feet between the second pillar and the pump and a clear space between the top of his head and the belt of from one to three feet, and the other between the two pillars where the belt was about six inches below the top of his head, and he must stoop low if he could pass beneath it at all.

He chose the latter, the obviously unsafe route, and he alone must bear the consequences. In *American Linseed Co. v. Heins*, 141 Fed. 49, 72 C. C. A. 538, the employé made a similar choice, and on this point the court say: "There was no necessity justifying his conduct in passing over the revolving drum. He could have reached the place to which he desired to go by means of a platform which at least in comparison with the way he did adopt was entirely safe. His failure to choose the safe way was under the decisions of this court negligence."

In *Morris v. Railway Co.*, 108 Fed. 747, 47 C. C. A. 661, the court declare the rule as follows: "When there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is negligence for him to select the more dangerous method, and he thereby assumes the risk of injury which its use entails." To the same effect are *Russell v. Tillotson*, 140 Mass. 201, 4 N. E. 231; *Galvin v. Railroad Co.*, 162 Mass. 533, 39 N. E. 186; *Leard v. Paper Co.*, 100 Me. 59, 60 Atl. 700. This was not the case of an emergency call and a quick hurrying order from a foreman which the servant instinctively obeyed, as in *Millard v. Railway Co.*, 173 Mass. 512, 53 N. E. 900, and *Jensen v. Kyer*, 101 Me. 103, 63 Atl. 389. Here the servant acted voluntarily and deliberately, and made the short cut which he must have known was dangerous had he stopped to think, or else he attempted it thoughtlessly. Either view would prevent recovery.

It is fair to assume that he did think of the danger and relied upon his own judgment to avoid it because the only witness who saw the accident states that he saw him stooping as he approached the belt.

But to attempt to pass voluntarily and unnecessarily beneath a rapidly moving belt at such a point that he was liable to be struck by it and owing to his own error in judgment

was in fact struck by it was clearly negligence on his part.

Analogous cases of a set screw upon a revolving shaft emphasize this accepted doctrine. *Rooney v. Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *Ford v. Mount Tom Sulphite Co.*, 172 Mass. 544, 52 N. E. 1065, 48 L. R. A. 96; *Demers v. Marshall*, 172 Mass. 548, 52 N. E. 1066; *Id.*, 178 Mass. 9, 59 N. E. 454. In *Kennedy v. Merrimack Paving Co.*, 185 Mass. 442, 70 N. E. 437, where an experienced machinist attempted to step over a revolving shaft, the plaintiff's right of recovery was denied in these words: "The plaintiff was a man of experience; and, while he testified that he did not know of the existence of the old collar on the shaft, he had ample opportunity to ascertain its existence. The defendant was not bound to change his machinery or to point out to the plaintiff the fact of the existence of the set screw on the collar. The danger from the revolving shaft was apparent, and as such shafts have collars fastened to them by set screws, a fact well known to the plaintiff, his getting so near the shaft as to be caught was an act of negligence. Moreover, he could have gone by a safer way, and, unless he chose to take the risk of stepping over a revolving shaft, he could have stopped the engine over the running of which he had full control."

The fact that others took the same route in doing the same work is immaterial. *Gillette v. Electric Co.*, 187 Mass. 1, 72 N. E. 255. That fact rendered the way no less dangerous nor their conduct less negligent. It is common knowledge that experience sometimes renders men careless in the performance of duties, and leads them to take chances that the ordinarily prudent man under the same circumstances would not take.

It is needless to multiply authorities. After a careful consideration of the whole evidence, we feel satisfied that the unfortunate accident to the plaintiff's intestate is attributable to the want of due care on his own part.

This view of the case renders it unnecessary to consider the question of negligence on the part of the defendant or the exceptions.

Motion sustained.

Verdict set aside.

(77 N. J. L. 157)

STATE v. NUGENT et al.

(Supreme Court of New Jersey. Nov. 9, 1908.)

ELECTIONS (§ 323*) — PRIMARY ELECTIONS — FRAUDULENT CONSPIRACY—INDICTMENT.

In an indictment charging a conspiracy to procure illegally and fraudulently votes at a primary election, the allegation was that such primary election was held by a "certain political party of this state, to wit, the Democratic party." Held, that the indictment is defective in failing to define the political party, in the language of the statute, as one which had, at

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

an election for members of the General Assembly next preceding the holding of the primary, polled for members to the General Assembly at least 5 per cent. of the whole number of votes cast in the district in which and for which the nominations were made.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 358; Dec. Dig. § 328.*]

(Syllabus by the Court.)

Application for certiorari to review an indictment of James R. Nugent and others, charging a conspiracy to procure illegal and fraudulent votes at a primary election for delegates to state, county, and city conventions. Indictment quashed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Louis Hood and Wilbur Mott, Prosecutor of the Pleas, for the State. Samuel Kalisch, for defendants.

VOORHEES, J. This writ of certiorari brings under review an indictment found against James R. Nugent, Philip Loeser, Joseph J. Kenny, Abraham Schwartz, John Shannon, John Rogers, Robert E. McGuire, Frank Corbitt, and Otto Filliger by the grand jury of the county of Essex, charging a conspiracy to procure, illegally and fraudulently, votes at a primary election held at Newark by a political party on the 10th day of September, 1907, for the choice of delegates to state, county, and city conventions. The basis of the indictment is sections 214 and 215 of "An act to regulate elections, Revision of 1898" (P. L. 1898, p. 330), under subdivision "Primary Meetings."

By section 214 it is enacted that "No person not at the time entitled to vote by the laws of this state, at the special, general and local elections held in this state, shall vote at any primary meeting or caucus called or held by any political party or political organizations of this state for the nomination or selection of persons to be voted for at any such elections, nor shall such person vote unless he is a legal resident of the political division in and for which such primary meeting or caucus is held." By the next section it is made a misdemeanor if any person not entitled to vote as aforesaid shall offer to vote at any such primary meeting, or if any person or persons shall counsel or procure any one, knowing or having reason to believe that such person is not entitled to vote, to vote thereat. It is likewise made a misdemeanor if any person having votes at such primary shall vote or offer to vote at a primary held by any other political party.

A supplementary act was passed in 1903 (P. L. 1903, p. 603). The first section of this supplement enacts: "In addition to the elections for filling public offices that now are, or hereafter may be, held under the laws of this state, there shall also be held primary elections for the selection of delegates to con-

ventions of political parties and for the nomination of candidates for certain public offices as hereinafter provided." And it then declares that certain elective officers required to be voted for by the voters of more than one ward or township shall be nominated at a convention of delegates chosen "at primary elections held pursuant to this act," and that all candidates to be voted for by the members of a single ward or township shall be nominated directly. The second section provides that only such persons as shall be registered for the ensuing general election shall be qualified to vote. The third section enacts: "A political party within the meaning of this act shall be a political party which at the election for members of the General Assembly next preceding the holding of any primary election held pursuant to this act polled for members of the General Assembly at least five per centum of the total vote cast in the territorial district or division in and for which the nominations are made or delegates are chosen."

The charge in the indictment is that on September 10, 1907, there was held in each election district of the city of Newark "a primary meeting and election by a certain political party of this state, to wit, the Democratic party, duly and in due form of law and under and pursuant to the laws of the state of New Jersey," and reciting that the city of Newark was then a city having by the next preceding state census a population exceeding 30,000, mentioning the districts at which the primary meeting and election was held, and the convention for which delegates were to be voted, and the offices for which candidates were to be nominated. The indictment then charges that the defendants, "wickedly devising and intending at said primary meeting and election of the said certain political party of the state of New Jersey, to wit, the Democratic party, to be held on the 10th day of September in the year 1907, to procure divers persons known to them not to be qualified voters to vote thereat, and to procure divers persons to vote thereat in more than one election district, and to procure divers persons to vote thereat upon names other than their own, on the said 10th day of September, in the year of our Lord 1907, with force and arms, at the said city of Newark, in the county of Essex aforesaid, and within the jurisdiction of this court, did unlawfully and willfully combine, unite, confederate, conspire, and bind themselves by agreement to unlawfully, willfully, and corruptly procure Joseph Torrello to vote at the primary meeting and election aforesaid to be held as aforesaid in the First election district of the Fourth ward of the city of Newark aforesaid, in the county aforesaid, and before the board of registry and election of the said election district, constituted and organized according to law and sitting at the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

place within the said election district provided for by law, well knowing the said Joseph Torrello not to be a qualified voter in the said election district at the primary meeting and election aforesaid to be held as aforesaid, and not to be by law entitled to vote therein and thereat, by reason that he did not legally reside within the said election district," and, continuing, charging certain other overt acts done in pursuance of said conspiracy, and then charges "that in pursuance of and according to said conspiracy, combination, confederacy, and agreement between themselves had as aforesaid," and to enable "the said nonqualified voters to vote at said primary election, the defendants * * * did unlawfully, willfully, and corruptly counsel, aid, advise, assist, and abet the said Joseph Torrello in voting in the name of Joseph White, * * * by then and there unlawfully, willfully, and corruptly counseling, aiding, advising, assisting, and abetting the said Joseph Torrello to appear in person before the board of registry and election of the election district aforesaid, and to knowingly and falsely pretend and represent that his name was Joseph White, * * * and that he, the said Joseph Torrello, in the name of Joseph White, was entitled to the right of suffrage in the election district aforesaid at the primary meeting and election aforesaid," and further charges that thereby he was falsely registered under the name of Joseph White, and that after such registry he "did give in and cast his vote at the primary meeting and election aforesaid in the name of Joseph White, well knowing himself not to be a resident and qualified voter of the said election district at the said primary meeting."

The primary law is concerned simply with providing a method for the selection of persons to be voted for at a public election. This was unknown to the common law, and rests entirely upon the statute by which it was created and defined. *State v. Woodruff*, 68 N. J. Law, 89, 52 Atl. 294. This indictment fails to state that there was held a primary meeting by a party which had, at an election for members of the General Assembly next preceding the holding of a primary, polled for members of the General Assembly at least 5 per cent. of the whole number of votes cast in the district in which and for which nominations were made. It does state that such primary election was held by a "certain political party of this state, to wit, the Democratic party." This is uncertain and equivocal. It may mean a political party such as is popularly known as the Democratic party, or it may mean a definite political organization, such as the act concerning elections defines. This at once presents a situation where it is essential in an indictment that the court and the defendant should be in-

formed which meaning is to be attributed to the phrase or word used. We think, therefore, that the indictment is defective in failing to define the political party in the language of the statute as one which had, at an election for members of the General Assembly next preceding the holding of the primary, polled for members to the General Assembly at least 5 per cent. of the whole number of votes cast in the district in which and for which the nominations were made.

The crime charged is a purely statutory one, and the indictment should charge with certainty and precision all matters in which the illegality consists, where the act per se is not unlawful. To vote at a primary election held by a political party or organization not within the terms of the act would manifestly not be illegal; for such party could not hold an effective primary. The charge must go further, and set out that the primary was held by a political organization defined by the statute. The statutory offense is voting at a primary held by a political party which casts at least 5 per cent. of the total vote at the next previous election for members of the General Assembly, and under authority of *Roberson v. Lambertville*, 38 N. J. Law, 69, the description of the crime must in all respects correspond with the statute.

Nor is this view overcome by the argument advanced by the state that the court is informed of the fact that the Democratic party had, at an election preceding the primary, polled more than 5 per cent. of all the votes cast, because by section 108 of the act of 1898 (P. L. p. 291) the board of county canvassers is charged with making two statements of the result of the election, and by section 110 such board must deliver one of these statements to the Secretary of State, who is charged with filing the same, whereby it will be apparent whether or not the Democratic party was qualified to hold a primary; the court taking judicial notice of the archives of the Secretary of State. Upon turning to section 108 it is apparent, from the form of certificate there given, that the political party of the candidates voted for is nowhere mentioned or required to be mentioned in such statement. But, if it be conceded that the court would take judicial notice of such return as a matter of proof, assuming that such return did contain the political faith of the persons certified to have been voted for, yet it does not follow that the indictment should not set forth that the political party was of the Constitution prescribed by the statute.

For this reason, therefore, the indictment should be quashed. This conclusion renders it unnecessary to examine the other points made by counsel for the defendants.

(77 N. J. L. 80)

STATE v. NUGENT et al.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. ELECTIONS (§ 328*)—VIOLATIONS OF ELECTION LAWS—INDICTMENT—SUFFICIENCY.

An indictment for violation of P. L. 1905, p. 224, par. 2, making a person who shall willfully counsel, procure, or abet the registering of the name of any person on a registry list of an election district, knowing that such person is not entitled to vote therein, guilty of a misdemeanor, which states the number of the district and the ward within which it lies, sufficiently shows that the district is a legally constituted election district.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 328.*]

2. ELECTIONS (§ 328*)—VIOLATIONS OF ELECTION LAWS—INDICTMENT—SUFFICIENCY.

An indictment for a violation of P. L. 1905, p. 224, par. 2, making a person who shall willfully counsel, procure, or abet the registering of the name of any person on a registry list of an election district, knowing that such person is not entitled to vote therein, guilty of a misdemeanor, is not required to allege that the false registration was made with intent to vote at a general election, as such intention is not a part of the defined statutory offense.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 357; Dec. Dig. § 328.*]

3. ELECTIONS (§ 312*)—VIOLATIONS OF ELECTION LAWS—PROCURING FALSE REGISTRATION.

P. L. 1905, p. 224, par. 2, making a person who shall willfully counsel, procure, or abet the registering of the name of any person on a registry list of an election district, knowing that such person is not entitled to vote therein, guilty of a misdemeanor, does not extend merely to influence exercised directly upon the board of registry, as by presenting to the board an affidavit of persons who have not been registered as persons who are entitled to be, but includes the persuading of a voter to personate another voter, or to do any act which may result in the registration of a name of a person not entitled to vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 337; Dec. Dig. § 312.*]

4. ELECTIONS (§ 312*)—VIOLATIONS OF ELECTION LAWS—FALSE REGISTRATION—JOINT OR SEVERAL.

The offense defined by P. L. 1905, p. 224, par. 2, making a person who shall willfully counsel, procure, or abet the registering of the name of any person on a registry list of an election district, knowing that such person is not entitled to vote therein, guilty of a misdemeanor, is not such an offense as is incapable of being committed by more than one person, but there may be a joint counseling, procuring, or abetting, for which more than one person may be convicted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 337; Dec. Dig. § 312.*]

5. INDICTMENT AND INFORMATION (§ 82*) — SUFFICIENCY—JOINT OFFENSE.

An indictment of more than one person for an offense committed jointly is not required to employ the word "jointly" in describing the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 225; Dec. Dig. § 82.*]

Application for certiorari to review an indictment of James R. Nugent and others for violation of P. L. 1905, p. 224, par. 2, making a person who shall willfully counsel, pro-

cure, or abet the registering of the name of any person on a registry list of an election district, knowing such person is not entitled to vote, guilty of a misdemeanor. Application overruled.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Samuel Kalisch, for application. Louis Hood, opposed.

REED, J. This indictment is against joint defendants. The indictment charges that on October 22, 1907, at the city of Newark, in the county of Essex, the board of registry and election for the Sixth election district of the First ward of the city of Newark, being then organized according to law, was then and there in session, at the place within the said election district provided for by law, to register the names of persons residing in the said district entitled to the right of suffrage therein at the general election to be held on November 5, 1907, whereupon the four defendants, in the said county, did then and there unlawfully and willfully aid, advise, assist, and abet one William Brown, alias Thomas Curran, in registering the name of Thomas Curran on the registry list of said election district, well knowing the said William Brown, alias Thomas Curran, not to be entitled to vote therein at the said election, by then and there unlawfully and willfully counseling, aiding, advising, assisting, and abetting the said Thomas Curran to appear in person before the said board of registry, and to unlawfully, knowingly, and falsely pretend and represent to the said board of registry that his name was Thomas Curran and that he resided at No. 33 Atlantic street, in the said election district, and that he was entitled to the right of suffrage at the said general election, and by willfully counseling, aiding, advising, assisting, and abetting the said Curran, and request the said board of registry to register the name of Thomas Curran, residing at No. 33 Atlantic street, upon the said registry list as a person residing in said district and entitled to the right of suffrage therein, which said registering of Thomas Curran the said board of registry then and there made; the said defendants then and there well knowing that Curran was not in fact Thomas Curran, residing at No. 33 Atlantic street in the said district, and that he was not entitled to vote in the said district at the said election by reason of his nonresidence therein.

The indictment is founded upon the following clause in paragraph 2 of the supplement to "An act to regulate elections" (P. L. 1905, p. 224): "Whoever shall willfully counsel, procure, and advise, assist or abet in the registering of the name of any person on a registry list of an election district or precinct, knowing such other person is not en-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

titled to vote therein, * * * shall be guilty of a misdemeanor."

It is first charged that the indictment is faulty in failing to set out facts to show that the district was a legally constituted election district. We think that the statement of the number of the district and the ward within which it lies was sufficient.

It is insisted that there is no statement that the false registration was made with the intention to vote at the alleged general election. It is sufficient to say that such intention is not a part of the defined statutory offense. The statute makes the misdemeanor complete when the defendant willfully aids and assists in the registration of a person not qualified to vote, knowing of his disqualification.

Again, it is insisted that the clause in paragraph 2 of the act of 1905, *supra*, only includes instances where the influence is to be exercised upon the members of the board of registry directly, by inducing them to place fraudulent names upon the list, as, for instance, by presenting to the board of registry an affidavit of persons who have not been registered as persons who are entitled to be registered and to vote in the district. It is therefore insisted that merely advising a person to register his name, knowing him to be disentitled to vote, is not within the language of the statute. We think differently. We think the counseling and procuring of the registration of the name of any other person on a register includes the persuading of the person to personate another voter, or to do any act which may result in the registration of a name not entitled to vote. The procuration need not directly affect the board of registration; but if it puts in motion an act operating either upon the voter or upon the board, which results in getting a false name upon the registry list, it is within the act.

The last objection pressed is that the statutory offense is distinct in its nature, and that a single act is incapable of being committed by more than one person. It is insisted, therefore, that the conviction of these defendants jointly is a legal impossibility. The question is, can two or more persons willfully counsel, procure, aid, advise, assist, or abet in the false registration of a name? Says Mr. Bishop: "The test to determine whether an offense may be deemed joint or not, has been stated by an American judge (Robertson, C. J., in *Com. v. McChord*, 2 Dana [Ky.] 242) as follows: 'It is to consider whether each offender be guilty in the same degree of the same crime so that he might be separately convicted, even though another was the actual perpetrator. If each may be so convicted, their guilt is joint; but otherwise, it is several.'" Mr. Bishop continued: "Thus," says Mr. Starkie, "in a case of obtaining money under false pretenses,

if several defendants act in concert together, though the pretense be conveyed by words spoken by one of them, yet they may be all jointly indicted under the statute. * * * So where several are jointly concerned in the publication of the same libel.'" 1 Bish. Cr. Pro. p. 467 et seq. See, also, 2 Bish. Cr. Pro. p. 811. So if two or more persons should together visit another whom they knew to be not entitled to vote, and one of the visitors should offer money to the person visited to induce him to register as a voter, or should counsel that person to register as a voter, and it appeared that each visitor had contributed to the offered bribe, or each visitor joined in giving their approval to the words and acts of their spokesman and leader employed to induce the person to falsely register, in such a situation each would be indictable for the specific act, and thus all would be jointly indictable. We think, therefore, that there may be a joint counseling, aiding, and procuring, and that, therefore, the charge of these four defendants in one indictment is permissible.

It is to be further remarked that, when the indictment is against more defendants than one for an offense committed by them jointly, it need not employ the word "jointly" in describing the offense. 1 Bish. Cr. Pro. p. 471.

The application is overruled.

(77 N. J. L. 84)

STATE v. NUGENT et al.

(Supreme Court of New Jersey. Nov. 9, 1908.)

1. CONSPIRACY (§ 43*)—ELECTION FRAUDS—INDICTMENT—SUFFICIENCY.

An indictment charging that defendants unlawfully combined, united, confederated, conspired, and bound themselves to procure another to vote at a general election, knowing that he was not qualified, is not open to the objection that the words employed are not apt to charge a criminal conspiracy, because the words "the defendants did bind themselves by an agreement" do not necessarily import that the agreement was between themselves, but leave open the possibility that the agreement might have been between each defendant and some third person.

[Ed. Note.—For other cases, see Conspiracy. Cent. Dig. §§ 87, 91; Dec. Dig. § 43.*]

2. INDICTMENT AND INFORMATION (§ 110*)—CONSPIRACY—ELECTION FRAUDS—LANGUAGE OF STATUTE.

The indictment is not open to the objection for the further reason that it is couched in the language of Crimes Act (P. L. 1898, p. 806) § 37, as amended by Act March 22, 1899 (P. L. 1899, p. 214), which section does not merely indicate the punishment for a crime known to the common law, but defines the crime itself.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 110.*]

3. CONSPIRACY (§ 43*)—ELECTION FRAUDS—INDICTMENT—SUFFICIENCY.

An indictment charging a conspiracy to procure disqualified persons to vote, and to procure qualified persons to vote in more than one election district and to vote under names other than their own at a general election, but spe-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cifically charging a conspiracy to procure a certain person to vote in a certain election district in a certain county, fixes the place where the purpose of the conspiracy was to be executed.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 43.*]

4. CRIMINAL LAW (§ 97*)—CONSPIRACY—JURISDICTION.

So far as concerns jurisdiction, the question is as to where a conspiracy was entered into, and not where its purpose was to be executed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 97.*]

5. CONSPIRACY (§ 84*)—FRAUDULENT VOTING — "PERVERSION OR OBSTRUCTION OF THE DUE ADMINISTRATION OF LAW."

Fraudulent voting at an election, whether consisting of voting disqualified persons, repeating, or voting under the names of other voters, is a "perversion or obstruction of the due administration of law," which by Crimes Act (P. L. 1898, p. 805) § 37, as amended by Act March 22, 1899 (P. L. 1899, p. 214), is made the subject of a criminal conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 34.*]

6. CONSPIRACY (§ 43*) — INDICTMENT — SUFFICIENCY.

An indictment charging specific facts bringing defendants within Crimes Act (P. L. 1898, p. 805) § 37, as amended by Act March 22, 1899 (P. L. 1899, p. 214), making persons who shall combine to commit any act for the perversion or obstruction of the due administration of the law guilty of a misdemeanor, and charging them so as to inform defendants with absolute certainty of the character and nature of the offense, is sufficient, though not charging that defendants conspired to commit an act for the perversion or obstruction of the due administration of the law.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 91; Dec. Dig. § 43.*]

7. CONSPIRACY (§ 27*)—FAILURE TO ACCOMPLISH PURPOSE—EFFECT.

Where there is a design to procure a disqualified person to vote, followed by an overt act in pursuance of that design, the conspiracy is complete, though its purpose fail and the person does not actually vote.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 39; Dec. Dig. § 27.*]

8. CONSPIRACY (§ 27*)—OVERT ACT.

The fact that there is a distinct statutory provision for punishing the counseling of false registration or false voting in no way impairs the charge of a conspiracy to procure a disqualified person to vote, and the charge of procuring such person to register as the overt act in pursuance of such conspiracy, as counseling by a single person is quite distinct from the combined counseling of several persons.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 27.*]

9. CONSPIRACY (§ 27*)—OVERT ACT.

Aiding and abetting in the false registration of a person is a sufficient overt act in execution of a conspiracy to have such person fraudulently vote at the following election.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 27.*]

10. INDICTMENT AND INFORMATION (§ 61*)—EVIDENCE—JUDICIAL NOTICE.

Whether the court will take judicial notice of the location of an election district is a question of evidence, and not of pleading.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 183; Dec. Dig. § 61.*]

11. ELECTIONS (§ 328*)—VIOLATION OF ELECTION LAWS—INDICTMENT—SUFFICIENCY.

A description of the election district by number and ward in an indictment alleging a design to procure a fraudulent vote therein was sufficiently certain, without setting out the boundaries of the district.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 328.*]

12. INDICTMENT AND INFORMATION (§ 125*)—MULTIFARIOUSNESS.

An indictment for conspiracy is not multifarious because charging a design having a multitude of objects.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 125.*]

Application for certiorari to review an indictment of James R. Nugent and others, charging a conspiracy to procure a person to vote at a general election, well knowing that he was not a qualified voter. Application overruled.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Samuel Kalisch, for applicants. Louis Hood, for the State.

REED, J. The indictment in question charges that the defendants did unlawfully and wickedly combine, unite, confederate, conspire, and bind themselves by agreement to unlawfully and corruptly procure one W. B. to vote at a specified general election in the Sixth election district of the Second ward of the city of Newark, well knowing the said W. B. not to be a qualified voter in said election district at that election.

It is insisted that, regardless of other objections to the indictment, the words employed are not apt to charge a criminal conspiracy. The alleged defect pointed out is that the words "the defendants did bind themselves by an agreement" do not necessarily import that the agreement was between themselves, but leave open the possibility that the agreement might have been between each defendant and some third person or persons. There is no doubt that the forms in indictments for conspiracy contain the charge that the defendants did agree together, or that the defendants did among themselves conspire and agree together; but it seems impossible to ascribe to the other words, "combine, confederate, conspire," any meaning other than that the defendants mutually engaged to accomplish the purposes charged. When it is said that A. and B. confederated or conspired to do an act, the words seem to have a well-defined significance. The etymological, technical, and popular significance of these words, when predicated of two or more persons, is that they reciprocally will to assist in a common enterprise; and the enterprise being common, and the will of all the defendants being common, the agreement was common and between each and all of the defendants. This is the equivalent for agreeing together to perform the act. Besides, the charge is couched

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in the language of section 37 of the crimes act (P. L. 1898, p. 805), as amended by the act of 1899 (P. L. 1899, p. 214). This section does not merely indicate the punishment for a crime known to common law, but defines the crime itself. I therefore think the statement of conspiracy, from the point of view in which it is attacked, is sufficient.

It is again insisted that the indictment does not show that the defendants conspired to commit a crime in the county of Essex. Assuming that such a charge was essential under the statute, it nevertheless appears in the indictment. The general purpose of the conspiracy as set out was to procure disqualified persons to vote, and to procure qualified persons to vote in more than one election district and to vote upon names other than their own upon a general election held in this state on a certain date; but the specific charge is that they conspired to procure a certain person to vote in a certain election district in Essex county. This fixes the place where the purpose of the conspiracy was to be executed. But the real point, so far as concerns jurisdiction, is, where was the conspiracy entered into? *Dealy v. U. S.*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545. And the indictment charges it to have been in the county of Essex.

But it is said that it is not charged that the conspiracy was to commit a crime, and that, as the crime of conspiracy is limited by section 37 of the act concerning crimes as that section was amended in 1899 (P. L. 1899, p. 214), the only ground upon which this indictment can stand is that the purpose to be accomplished by the conspiracy was the commission of a crime; and it is insisted that, while the purposes to be accomplished were crimes under section 2 of the act of 1905 (P. L. 1905, p. 224), yet that section has been repealed by a later act in 1905 (P. L. 1905, p. 402), the thirty-fifth section of which later act, it is insisted, provides for the sole punishment of acts which under the previous acts were crimes; the punishment being a penalty to be recovered in a civil action. It is to be observed that the legislation contained in section 35 of the later act seems to be entirely aside from the purpose indicated in the title of the act. The purchase of voting machines, and the regulation of the use of voting machines, can hardly be said to express a purpose to legislate for the punishment of illegal voting, which punishment has always been provided for in the crimes act or in the act to regulate elections.

But the question of repealer is unimportant. It is unimportant because the assumption that the indictment is valid only if it charges a design to commit crime is untenable. Assuming, for the purpose of defendants' argument, that section 37 of the crimes act (P. L. 1898, p. 805), as amended in 1899 (P. L. 1899, p. 214), covers the whole field of criminal conspiracy, and that this section, notwithstanding *State v. Norton*, 23 N. J. Law,

33, excludes any matter as the subject for a criminal conspiracy save those pointed out in the statute, yet the matters included within this statute are not confined to a combination to commit a crime. One of the purposes, a combination to effect which is a conspiracy, is, in the language of this section, "a design to commit an act for the perversion or obstruction of justice or the due administration of the laws." Now the fraudulent voting at an election, whether in the shape of voting disqualified persons, repeating, or voting upon the names of other voters, is a perversion or obstruction of the due administration of law. It is as palpably so as was the tampering with ballot boxes, dealt with in the case of *Moschell v. State*, 53 N. J. Law, 498, 22 Atl. 50, affirmed 54 N. J. Law, 390, 25 Atl. 964. In that case an indictment for conspiracy was sustained upon these grounds. Therefore it would not matter whether these acts of fraudulent voting were criminal or penal acts, or neither criminal nor penal. They were in any aspect perverse of the due administration of the law. It is true that the instrument does not charge that the defendants conspired to commit an act for the perversion or obstruction of justice or the due administration of the law. But it does charge specific facts which bring the defendants within the ban of the statutory language, and charges those facts so as to inform them with absolute certainty of the character and nature of the specific charge, and this was all that was requisite. *State v. Thatcher*, 35 N. J. Law, 445; *State v. Startup*, 39 N. J. Law, 423.

Again, it is insisted that no overt act is properly pleaded. The overt acts pleaded are that the defendants in pursuance of their conspiracy aided and abetted the disqualified persons whom they had conspired to have vote to falsely register their names or the names of others on a certain registry list as persons qualified to vote. It is first said that there is no charge that such persons voted or offered to vote; and, secondly, that there is a distinct statutory provision for punishing a person who shall counsel the registration of any name of any person knowing him not to be entitled to a vote, and there is also a distinct provision for punishing any one who shall counsel a person to vote on election day. In the first place, the act which the defendants conspired to effect need not be accomplished. If there was a design to procure a disqualified person to vote, followed by an overt act in pursuance of that design, the conspiracy was complete, although for some reason its purpose failed and the person did not actually vote. Secondly, the fact that there is a provision for punishing the counseling to false registration, or counseling to false voting, in no way impairs the charge of a conspiracy to procure a disqualified person to vote, and the charge of procuring such person to register as an overt act. Indeed, it may be observed that counseling by a single person is quite distinct from the combined counseling of several per-

sons. It is the power, and consequently the danger that springs from the union of influence of many minds and wills to bring about the result, that constitutes the criminality of a conspiracy. Respecting the essential act in execution of the joint design required by the statute, we think that the registration is such a step in the assertion of the right to vote, and in the equipment of the person asserting the right, with the privilege of voting, that, where there is a design to vote fraudulently, then a fraudulent registration is an act taken in the execution of that purpose. It follows that the aiding and abetting in the false registration of W. B. was an overt act in carrying into execution the design to procure W. B. to vote at the following election.

It is again objected that an election district is not a political division of the state of which the court will take judicial notice; that therefore the charge of a design to procure a person to vote in a certain numbered election district in a certain ward in a city is insufficient for want of certainty. Whether the court will take judicial notice of the location of an election district is a matter of evidence, and not of pleading, and we think that a description of the election district by number and ward was sufficiently certain, without setting out the boundaries of the district.

It is again insisted that the indictment is multifarious, in that it charges a design having a multitude of objects to be accomplished. But this objection is answered by the opinion of Beasley, C. J., in *Noyes v. State*, 41 N. J. Law, 418. The requirements of an overt act in no way modify the principle that the confederacy is a single act, and that it may include in its purpose any number of particulars.

Our consideration, therefore, of these and other points urged on behalf of the application, leads us to the conclusion that the application must be refused.

(75 N. J. E. 74)

FISCHER v. FISCHER et al.

(Court of Chancery of New Jersey. Nov. 19, 1908.)

1. WILLS (§ 538*)—CONSTRUCTION—"IN CASE OF HIS DEATH."

Where there is a bequest to one and "in case of his death" to another, the expression "in case of his death" unexplained by the context refers to the event of death happening before the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1162-1164; Dec. Dig. § 538.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3468-3469.]

2. WILLS (§ 538*)—CONSTRUCTION—"IN CASE OF HIS DEATH."

An absolute bequest to a person, followed by the expression "in case of his death," cannot be construed to mean "at his death" or "from his death"; the element of contingency being absent in that case, as no proper force could then be given to the expression, "in case of."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1162-1164; Dec. Dig. § 538.*]

3. WILLS (§ 538*)—CONSTRUCTION—"IN CASE OF."

Where the context of the will is silent, the words, "in case of," and similar expressions, referring to the death of a prior legatee in connection with some collateral event, apply to the contingency happening as well after as before the death of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1162-1164; Dec. Dig. § 538.*]

4. WILLS (§ 625*)—CONSTRUCTION—ESTATE DEVISED.

Testatrix, by the first paragraph of her will, gave her entire estate to her son and his wife. By the second paragraph she imposed on both the burden of supporting her infirm husband for life, and by the third declared that, in case the son should die before his wife, his widow should then become the owner of the property in common with her two children, with the added condition that, in case she remarried, the two children should become the owners of the entire estate. Held that, as to testatrix's real estate, the will created an estate in fee by the entirety in testatrix's son and his wife with limitation over by way of executory devise in the event of the son's death before his wife, irrespective of the death of testatrix, and, at the son's death, the estate by the entirety was defeated by the happening of the contingency named, and the fee passed to the widow and her two children in equal shares; the fee in the widow's share being defeasible in case of her remarriage, in which event the entire estate passed to the children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1447-1450; Dec. Dig. § 625.*]

Suit by Mary N. Fischer against George A. Fischer and another to quiet title to land. Judgment for defendants.

The bill is filed by complainant against her two minor children to quiet the title to certain real estate which was owned by the grandmother of the two minors at the time of her decease and disposed of by her will. In effect, the bill is to procure a construction of the provisions of that will touching certain real estate therein referred to.

The will of Kunigunde Fischer (the mother of the father of the two defendant minor children, and the mother of the husband of complainant) provided as follows:

"First, after my lawful debts are paid I give and bequeath and devise all my real estate being my house known as 'number (108) one hundred and eight Monroe Street' in the city of Hoboken, county of Hudson, and state of New Jersey as well as, all my personal estate, goods and chattels of whatever nature and kind soever to my beloved son Otto A. Fischer and his wife Mary N. Fischer and their heirs and assigns forever.

"Second, my dear husband Charles August Fischer who had been and is now in feeble health and will be taken care of by my son and his wife so that they have to care for all his necessities and wants and will receive from them as pocket money four (4) dollars cash every month during his lifetime.

"Third, in case my son Otto August Fischer should die before his wife it is my will that as long as his wife Mary N. Fischer does

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not remarry and will be his widow, that in this case she becomes the heir to the property with her two children Anna and George, otherwise the property has to go to these two children alone as their inheritance from their grandmother."

The will bears date March 13, 1901. Kungunde Fischer, testatrix, died April 12, 1901. Charles August Fischer, the husband of testatrix named in the second paragraph of the will, died November 8, 1901. Otto Fischer, the son, died April 15, 1906. Mary N. Fischer, the son's wife named in the will, and the two minor children Anna and George, grandchildren of testatrix, are still alive, and Mary N. Fischer (complainant) has not remarried. The bill is filed by Mary N. Fischer, widow of the son, against her two minor children Anna and George. It is contended in behalf of complainant that upon the death of testatrix an estate by the entirety vested in the son Otto A. and complainant, and that, upon the death of Otto A., an absolute estate became vested in complainant, and that the two minor grandchildren of testatrix in consequence take nothing under the will.

William S. Stuhr, for complainant. Samuel A. Besson, for defendants.

LEAMING, V. C. (after stating the facts as above). It will be observed that testatrix by the first paragraph of her will devises an absolute estate to her son Otto and his wife. By the third paragraph two successive contingencies are introduced to the effect, first, that, if the son Otto dies before his wife, the property shall go to the wife and the two grandchildren; and, second, if the wife thereafter remarries, the property shall go wholly to the two grandchildren. The question is therefore presented whether the death of Otto before his wife is a contingency which testatrix intended to be operative only in the event of the contingency occurring before the death of testatrix, or as a contingency to be equally operative in the event of the contingency happening after the death of testatrix. As the contingency did not occur until after the death of testatrix, her intention in the respect named must be ascertained.

The provisions of the will which are to be here construed relate to both the real and personal property of testatrix; and the contention in behalf of complainant is that the gift falls within the well-recognized rule of construction that, where there is a bequest to one person and "in case of his death" to another person, the expression "in case of his death," unexplained by the context of the will, will be understood as referring to the event of death happening before the death of testator. While the rule of construction referred to is in most cases applied to bequests of personal property, the same rule has by some authorities been applied to devises of real estate. The precise purpose and

application of the rule should therefore be considered in this case.

Conceding the rule of construction referred to as applicable to the same extent in devises of real estate as in bequests of personal property, I am unable to reach the conclusion that the contingency of the death of Otto referred to by testatrix was intended by her to relate to the death of Otto only in the event of the death of Otto occurring before the death of testatrix. Where a bequest is made to one person with a gift over in case of his death, courts have uniformly held that the expression "in case of his death" must be understood to mean in case of his death before the death of testator, or in case of his death before distribution where a period of distribution may be said to be contemplated. But the reason of that rule is apparent and well understood; and, as is the case with any general rule, it is difficult to find justification for its retention when the reason for its application disappears. The expression "in case of his death" imports a contingency in the mind of testator, and yet death is not a contingency, but, on the contrary, is the most certain of all events. Hence an absolute bequest to a person followed by the expression "in case of his death" cannot be understood to mean "at his death" or "from his death," because in that case the element of contingency is absent and no proper force is given to the expression "in case of." To give full meaning to the words "in case of," something that is a real contingency must be understood to have been in the mind of testator. So, in order to give entire force to the expression, it is necessary to connect with the death of the legatee some circumstance which is not certain but which is contingent. That circumstance is necessarily the contingency of the death of testator before the death of the devisee. Such expressions are therefore understood to mean the contingency of death of the legatee before the death of the testator. The tendency of courts to favor the vesting of estates is also thought to have had an influence in establishing the rule of construction referred to. But it seems manifest that, where death is referred to in connection with some collateral event which is in itself a pure contingency, the reason for the rule is absent, so far as it seeks to determine testator's intent by giving force to all expressions of the will. In the will now under consideration the contingency referred to is as follows: "In case my son Otto Augustus Fischer should die before his wife." This is a pure contingency, and I am aware of no logical reason that can be found for adding to this contingency the additional contingency that Otto shall also die before testatrix, if the intention of testatrix is to be sought by giving appropriate force to all of the provisions of her will. In consequence, in 2 Jarman on Wills, p. 640, the author has, with some hes-

itancy, it is stated, defined a second rule as follows: "The general rule is that, where the context is silent, the words ('in case of' and similar expressions) referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well after as before the death of the testator." The following cases which are reviewed by the author sustain the rule as it is there defined: *Allen v. Farthing*, 2 Mad. 310; *Child v. Gilbert*, 3 My. & K. 71; *Smith v. Stewart*, 4 De G. & S. 253. I am aware that the rule last referred to fails to find entire recognition in many adjudicated cases. These cases in the main relate, so far as I have examined them, to bequests over in case of the death of the first legatee without issue. In such cases the event of death without issue does not appear to be uniformly treated as a collateral event, and an absolute estate is held to vest in the first legatee if alive at the time of distribution.

But I find it unnecessary to base my conclusions upon the rule above quoted from the text of Jarman on Wills. All authorities appear to agree that, where the context of the will discloses any manifestation of an intent upon the part of testator to refer to death subsequent to testator's death, such manifestation of intent will be recognized and regarded as controlling, even though such manifestation of intent may be but slight. The English cases to that effect are reviewed and followed by Chancellor McGill in *Burdge v. Walling*, 45 N. J. Eq. 10, 16 Atl. 51. I find in the subject-matter of the present will evidences of the intention of testatrix to limit the estate of her son Otto in the event named, irrespective of whether his death occurred before or after her death. By the first paragraph of the will the entire estate of testatrix is given to her son Otto and his wife absolutely. By the second paragraph the will imposes upon both the son and wife the burden of supporting the infirm husband of testatrix during his life, and paying him \$4 per month during that period. The third paragraph contemplates the contingency, now in question, of the death of the son, and provides, in substance, that, in case the son should die before his wife, his widow (complainant herein) should then become owner of the property in common with her two children, grandchildren of testatrix, with the condition added that, in the event of her (complainant) remarrying, then the two grandchildren of testatrix should become owners of the entire estate. This provision, designed to defeat the estate of complainant, and to secure to the grandchildren of testatrix the entire estate in the event of the remarriage of complainant, is one so usual that its purpose can scarcely be mistaken. It seems manifest that testatrix entertained a defined purpose to guard against the pos-

sibility of a second marriage of her daughter-in-law to the detriment of her children by the son of testatrix. If this purpose of testatrix can be discerned, it seems manifest that this contingency is one which cannot be assumed to have been intended to be guarded against only in the event of the death of the son before the death of testatrix. It will be observed, also, that the second paragraph of the will enjoins both the son Otto and his wife to care for the enfeebled husband of testatrix during his lifetime, and to pay to him a weekly stipend. This also indicates that testatrix had in mind the death of her son after her death, at least so far as the provisions of that paragraph of the will are concerned; for the necessity of support and the provisions of the will touching support, which are directed alike to the son and daughter-in-law, could only become operative at the death of testatrix.

Touching the real estate in question, I think it entirely clear that the will created an estate in fee by the entirety (*Den v. Hardenbergh*, 10 N. J. Law, 42, 18 Am. Dec. 371) in Otto and his wife, with limitation over by way of executory devise in the event of the death of Otto before his wife, irrespective of whether Otto's death occurred before or after the death of testatrix. At the death of Otto, the estate by the entirety was defeated by the happening of the contingency named, and the fee passed to complainant and her two children in equal shares, with the fee of complainant in her share made again defeasible in the event of her remarriage, in which latter event the whole estate will pass to the two children absolutely. This appears to be in accordance with the manifest intent of testatrix, and I find no rule of construction or principle of law touching the disposition of real estate by devise inconsistent with the creation of the estates above defined.

LAWTON v. BEDELL et al.

(Court of Chancery of New Jersey. Oct. 24, 1908.)

1. CORPORATIONS (§ 155*)—FRAUD ON STOCKHOLDERS — SETTING ASIDE WORKING CAPITAL.

Evidence, in a suit to require the declaring of a dividend by a corporation, held to show that a resolution of two of the three directors, setting aside all its earnings, and more, as a working capital, was a fraud on the only other stockholder, the third director.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 561, 567; Dec. Dig. § 155.*]

2. CORPORATIONS (§ 155*)—FRAUD ON STOCKHOLDERS—DIVIDENDS—REMEDIES.

Where two of the three directors of a corporation, one a nominal stockholder only, by resolution set aside all its earnings as a working capital, in fraud of the only other stockholder, the third director, they at his suit will be required to declare a dividend of all the net

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

earnings not needed for the legitimate purposes of the company's business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 561, 567; Dec. Dig. § 155.*]

3. CORPORATIONS (§ 308*)—SALARIES—FRAUD.

B. owned 20 shares of stock of a corporation, and L. owned the remaining 12. One of B.'s shares was put in the name of his sister to qualify her as a director, and she and B., as directors, took from L. the office of president, and discharged him from the company's employ, though he had brought it most of its business; the reason given being that it was to reduce expenses. There was, however, no other reduction of expenses, and in addition to setting aside all the prior earnings as a working capital, they increased B.'s salary, though enough business to even pay this was not done thereafter. *Held*, that B. was not entitled to the full amount of such salary as against L.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1340-1342; Dec. Dig. § 308.*]

4. CORPORATIONS (§ 181*)—DIRECTORS—ACCESS TO BOOKS.

A director of a corporation is entitled to access to all its books.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 674; Dec. Dig. § 181.*]

Suit by Lawton against Clinton W. Bedell and another. Decree for complainant.

Anderson Price, for complainant. William T. Carter, Jr., for defendants.

HOWELL, V. C. (orally). This corporation, by name Lawton, Bedell & Co., was organized under the general corporation laws of New Jersey in the month of October, 1905, with a capital of \$3,100, all of which I understand was paid up in some way or other; but concerning that there is no question in this case. The charter contains in its sixth paragraph a provision that the board of directors shall have power, without the assent or vote of the stockholders, among other things, to fix the amount to be reserved as a working capital. The cause of action in this case will turn very largely upon that paragraph.

The corporation began business at the time of its organization. During the first year it made a very small amount of money, \$40, as one of the witnesses testifies. But during the second year, and during the third year, it made considerable profits, so that at the end of the third year, or say in the month of March, 1908, it had a surplus which was considerably larger than its capital, possibly twice as large. I think the complainant insists that it was about three times as large; but, at any rate it was a substantial surplus, and consisted very largely of cash in bank. About six months before March, and before the events that happened in March, 1908, Mr. Lawton, the complainant, became dissatisfied with his position in the corporation, and desired either to buy or sell, and made such a proposition to Mr. Bedell. In the meantime, and during the whole of that six months, very little business came in, and, as I take it from the testimony, it was up to

Mr. Lawton to see that the business was brought in, and, in fact, he says so, and boasts of his failure to do so, because he says that during the existence of the company he brought in pretty nearly \$80,000 worth of business. While there is no testimony that there were disagreements between the two principal owners, I take it that the feeling between them was not very cordial. Mr. Lawton, the complainant, was the holder of 12 shares of the stock of the company. Mr. Bedell was the holder of 19 shares. There was one other share that was held by a man named Talman, which, in October, 1906, was transferred to Miss Bedell, a sister of Clinton W. Bedell. That one share of stock was a qualification share undoubtedly, and belonged to Mr. Clinton W. Bedell. It was put by him in the name of his sister, evidently for the purpose of qualifying her to become a member of the board of directors. She is a school teacher in New York, and does not live in New Jersey, has no interests here apparently; and she thereupon became a director of the corporation. Now the culmination of all this was in the month of March, 1908. At a meeting of the directors held at that time a great many things were done which convince me of the character of this attempted transaction. In the first place Mr. Lawton, without any reason being assigned, was dismissed from employment of the company. He was elected a director, but there was taken from him the office of president, which he had previously held and he was put out on the world without any means of obtaining his livelihood, unless he could get dividends from this corporation. The reason given by Mr. Bedell for turning him out was that it was done for the purpose of reducing expenses. The expense it reduced was \$35, the weekly salary of Mr. Lawton, and his traveling expenses, whatever they were; but, in order to offset that, Mr. Bedell immediately raised his own salary from \$35 to \$40, and there was a continuation of all the other expenses of the business. There does not seem to have been any reduction at all, while in the meantime, and since that action was taken, Mr. Bedell has succeeded in getting two small jobs aggregating, as he says, \$3,000 (possibly \$3,500 or \$4,000), on which the profit is expected to be 10 to 15 per cent., not enough to pay the expenses which have been incurred by him. Since the resolution was passed in March he has been in absolute control; has continued the business; has continued the expenses; has raised his own salary; and has retained a stenographer at \$12 a week. He has paid out \$500 to a man for commissions for getting business, for which he has received nothing. He has warned the public against trusting Mr. Lawton, the complainant, and seems to have done everything he possibly could in the direction of running the company for his own benefit and advantage, and for the detriment

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and disadvantage of Mr. Lawton. Now with this large surplus in cash on the 30th day of March, the board of directors—that is, Mr. Bedell and Miss Bedell—by a vote of two to one, vote not to pay any dividends until the month of January, I think it was 1900. They likewise vote a resolution setting apart \$10,000 as a working capital. Now they did not have \$10,000 in the treasury to set apart, to start with; and, in the second place, there was no business in sight which required any such sum of money. As I said during the course of the hearing, the mere passage of the resolution to make it \$10,000 did not give them any greater faculties or any greater facility for taking on business than they had before, because they had to take on business in order to make money up to \$10,000. They could not get it until they took on business and transacted the business and made profits out of it. So I think that the attempt to set aside the \$10,000 as a working capital is a clear fraud, and done for the purpose of tying up the surplus of this corporation in the hands of the treasurer so that it would not be possible for Mr. Lawton to get any dividends out of it. The case strikes me very much like the case of *Laurel Springs v. Fougerey*, 50 N. J. 756, 28 Atl. 886, in the Court of Appeals. In that case there were three men who formed a corporation, and they were equal stockholders, and two of them combined to defraud the third. Here there are three people, although only two having interests, and one of them, the creature of Mr. Bedell, who is not interested in the company at all to any beneficial or considerable amount, but who is a mere factotum, joins with him for the purpose of putting down the other one. It is really one against one. It is really 20 against 12—20 shares against 12 shares. Now no court would stand that kind of a transaction, and I am going to follow the direction of the Court of Appeals in the case of the *Laurel Springs Land Company v. Fougerey*, 50 N. J. Eq. 756, 28 Atl. 886. Mr. Justice Garrison wrote that opinion, and he says: "Generally, suits to compel the declaration of dividends must be in the name of the corporation, but where the corporation is a defendant, and the majority of directors are parties charged with frauds in this very respect, the suit will proceed to a decree upon the complainant's rights. In the present case the prayer of the complainant should be met by a decree requiring the defendant, as directors, to declare a dividend of all the net earnings not needed for the legitimate purposes of the company's business." Now the duty of the board of directors under that is to come together and de-

clare a dividend of all the net earnings that are not needed for the legitimate purposes of the company's business. Mr. Justice Garrison says further: "And in order that the matter may remain under the scrutiny of the court, the decree directing the defendants to account and elect as to salary or commissions should be supplemented by requiring them to declare such reasonable dividends, and to do so from time to time as the financial status of the business may warrant, with leave to the complainant to apply to the Court of Chancery for relief in the premises if it be necessary for him so to do." The decree then will be in accordance with the declaration in that opinion.

Now one other thing. The question of salaries ought to be dealt with in this same case. It appears that Mr. Bedell, after turning out Mr. Lawton, raised his own salary to \$40 per week, so that during the weeks that have elapsed since the 30th day of March he has drawn the sum of \$1,200 in cash from the surplus of the company, because according to his own statement, the profits which he says could be made out of the two contracts that the company was engaged in executing, and which amounted to say \$3,000—and there was talk of a little larger sum than that also—would be 10 to 15 per cent. Under those circumstances I do not think that Mr. Bedell has any right, under the case in New Jersey, to take any such sum of money as that. He voted it to himself; he was the director who was in charge; he was the 20-share man, 1 share standing in the name of his sister. That hardly needs a citation of cases, but I will call your attention to the old case of *Gardner v. Butler*, 30 N. J. Eq. 702, on that point, which has been followed down to the present time, and the case of *Hayes v. Pierson*, 85 N. J. Eq. 353, 45 Atl. 1091, 58 Atl. 728, which is quite a recent case, in which the stockholders unanimously agreed upon a salary of \$4,000 for the president of the corporation, all done in good faith, too, at the time, and the corporation failed inside of a year and a half. The president of the corporation was required to give up the \$4,000 for a good share of that time.

There is one other badge of fraud that I ought to speak of, and that is the denial of Mr. Bedell to Mr. Lawton of access to the books. Undoubtedly, as a director of this corporation, he has the right of access to all of the books of the corporation, because as director he was charged with the duty of knowing what was going on. He could not know what was going on unless he could see the books.

I think that disposes of the case.

**NEW JERSEY BLDG., LOAN & INV. CO.
v. McNULTY.**

(Court of Chancery of New Jersey. Oct. 12, 1908.)

**1. BUILDING AND LOAN ASSOCIATIONS (§ 42*)
—LOANS — MORTGAGES — FORECLOSURE —
LIABILITIES OF BORROWING MEMBERS.**

Where a mortgage given to a building association by a borrowing member thereof was matured by the insolvency of the association, the member as mortgagor could not be charged with any part of the running expenses of the association imposed only by the laws of the association and expressly limited to the stock, nor could he be charged with any sum as a reduction charge in the book value of his stock assigned as collateral; the expenses and reduction charges relating only to the value of the stock not involved in determining his liability under the mortgage.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 66; Dec. Dig. § 42.*]

**2. BUILDING AND LOAN ASSOCIATIONS (§ 42*)
—LOANS—CONTRACTS—INSOLVENCY OF ASSO-
CIATION—EFFECT.**

The insolvency of a building association holding mortgages to secure loans to members who assigned their stock as collateral renders the sums borrowed payable immediately regardless of the contract, and the association may, at its option resort either to the mortgage or to the stock, or to both if necessary, for the collection of the debt, but neither party can force a sale of the stock, the value of which is not ascertainable until the final act of winding up the insolvent association.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 42.*]

**3. BUILDING AND LOAN ASSOCIATIONS (§ 42*)
—CONTRACTS—CONSTRUCTION.**

The provisions in the articles of a building association providing that shareholders in good standing may withdraw the amount paid in monthly installments on their stock, and that, on such withdrawals, members shall receive interest for the average time such payments have been made to the association, are dependent on the association being a going concern, and they cannot apply during insolvency, which at once abrogates such provisions of the contract between the association and the members, and the loan fund into which such installments of dues were paid, as well as other estates of the association, must be held until the losses thereof and the costs of liquidation have been ascertained.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 16; Dec. Dig. § 42.*]

**4. BUILDING AND LOAN ASSOCIATIONS (§ 42*)
—LOANS — MORTGAGES — LIABILITY OF BOR-
ROWING MEMBER.**

Where a mortgage given to a building association by a borrowing member was matured by the insolvency of the association, the member, as mortgagor, was to be debited only with the amount of his loan and interest thereon, and was to be credited only with interest and premiums paid, and interest on such premiums calculated by the application of the rule of average payments, and he could not be credited with dues paid on his stock, and dividends allowed thereon before the association became insolvent.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 66; Dec. Dig. § 42.*]

Suit by the New Jersey Building, Loan & Investment Company against Anthony McNulty to foreclose a mortgage. Decree of foreclosure.

The following is the opinion of Special Master Rellstab, appointed to report on exceptions to the master's report:

"The complainant is a building and loan association in the course of liquidation. The defendants are shareholders and borrowing members of said association. The association advanced them \$2,000 on their shares of stock, and, to secure this loan, the defendants gave it their bond and mortgage for that amount, and, as additional collateral, assigned to it their shares in such association. The complainant is foreclosing said mortgage, and the master, to whom the case was referred with directions to ascertain the amount due upon said mortgage, reported that said defendants should, in addition to the principal and accrued interest of said loan, be charged \$64 on account of operating expenses and \$56.83 in reduction of the book value of the defendants' shares of stock, and that they should be credited with all payments made by them as dues, interest, and premiums (being all the payments made by them to said association on account of such shares and loan), and also with the sum of \$52.64 dividends declared. The master found that there was due to the complainant on the date of his report the sum of \$1,029.19. To this finding the defendant excepted.

"These exceptions, in terms, are as follows:

"First Exception. For that the master having reported that the said defendants should be charged with the sum of \$64 for expenses, in addition to legal interest on the said bond and mortgage, and that defendants insist that it is contrary both to law and equity to so charge them with such expenses.

"Second Exception. For that the said master having reported that the said defendants should be charged with the sum of \$56.83, as a reduction charge, in addition to legal interest. And said defendants insist that it is illegal to charge them with said sum, and that no such charge can be made in ascertaining the amount due on the said bond and mortgage.

"Third Exception. For that the said master in his report has failed to credit the said defendants on the mortgage debt, with the value of the stock, the shares of which were assigned as collateral security to the mortgage debt, as set forth in the complainant's bill of complaint, as in equity said master should have done.

"Fourth Exception. For that the value of said stock was not ascertained by sale and credited on the said bond and mortgage before the said master by his report ascertain-

ed the amount for which the mortgaged premises should be sold. And the said defendant claims the right to require that the said stock should be sold by the complainant, and the proceeds applied to the payment of the amount due on the said bond and mortgage, before recourse is had by the complainant to the said mortgaged premises.

"Fifth Exception. For that the said master in his report should have credited on the said bond and mortgage only the interest that had been paid on the said bond and mortgage, and the premiums that had been paid at the rate of \$10 paid monthly for 89 months, together with interest on said premiums so paid, and the said master erred in crediting the said bond and mortgage with the whole amount that had been paid for dues, interest, and premiums, and also a certain sum amounting to \$52.64, stated to be for dividends allowed, and the said defendants claim that, on account of the matter mentioned in this exception, the said master has not reported properly in accordance with the principles of equity."

"The master in his findings acted upon the theory that in this foreclosure all the rights of the parties, whether arising out of the defendants' relation to the association as shareholders or as borrowers, should be settled. The exceptions are predicated on a like theory; the exceptants contending, however, that the master erred in the application thereof to the defendants' prejudice. The first and second exceptions attack the debit side, and the remaining exceptions the credit side of the master's computation. I am of the opinion that the theory adopted by the master and approved by the exceptants is untenable as far as this foreclosure is concerned.

"As to the first and second exceptions, there is nothing in the bond and mortgage that requires the obligors to pay any portion of the running expenses of the association. This liability is created by article 18 of the association articles and by-laws, but it is expressly limited to the stock, and section 1, as amended, directs that five cents be deducted from the monthly installment on each share of such stock; and section 4 directs that one per cent. of the maturity par value shall be deducted from the first yearly payment. These shares of stock owned by the defendants are properly chargeable with their proportionate share of such expenses, but in this controversy, which relates only to the defendants' liability as borrowers, such expenses amounting to \$64 may not be added to the loan. The reduction charge of \$56.83, being a reduction of 14½ per cent. in the book value of the shares, is untenable for the same reason. Both these expenses and reduction charges relate only to the value of the shares, and are not to be considered in a foreclosure suit, where the rights of the defendants as shareholders are not necessary to be adjudicated.

"The third and fourth exceptions charge that the master failed to credit the defendants' mortgage debt with the value of the stock which the complainant held as collateral security for the payment of such loan.

"The master credited such debt with 89 monthly payments of dues, interest, and premiums, which was all that they had paid into the association, either as borrowers or shareholders, also the whole of the dividends allotted on their shares. The value of the shares could be no more than had been paid on account thereof plus their share of the net earnings. If the defendants were entitled to a credit on their bond of the value of their shares, the master's allowance exceeded the value of such shares, for the evidence taken in this cause shows that the dividends declared were made on the supposition that the premiums paid by the borrowing members as well as the earnings therefrom were assets of the association to be distributed among the shareholders.

"In *Harris v. Nevins*, 68 N. J. Eq. 684, 63 Atl. 172, the Court of Errors and Appeals held that 'in the computation of the amount payable upon a mortgage made to a building and loan association by one of its members, and which has become due by reason of the insolvency of the association, the mortgagor is entitled to have credited upon the principal of the mortgage all sums paid by him as premiums for the loan.' It follows as a necessary deduction that, if the association had not considered the premiums paid by borrowers as assets of the association, the dividends allotted on the defendants' shares would have been considerably less than declared. By the assignment of the defendants' shares to the association as collateral security for the payment of said loan, indorsed on the defendants' said bond, the association was authorized to make sale or withdraw the same in case the defendants defaulted in payment of dues, interest, etc., and to apply the proceeds of such sale or withdrawal to payment of said loan. This authorization, as well as the obligation of the bond and mortgage of the defendants to pay dues and premiums, was of force only as long as the association was a going concern. In *Weir v. Granite State Provident Association*, 56 N. J. Eq. 234, 38 Atl. 643, approved in *Nevins v. Harris*, supra, it was considered as settled law that in case of bonds and mortgages given by borrowing members of such association which afterwards became insolvent that such insolvency worked a rescission of the contract, and that the sums borrowed became immediately due and payable, regardless of the terms of payment fixed by the contract. By the assignment to the association of such shares as additional collateral for the payment of the mortgage debt, such association had the right in case the loan became due to resort to either the mortgaged premises or such stock for the collection of such debt, or to both

if it became necessary so to do. In such case the defendant could not control the association as to which collateral should be first enforced. In what respect is their position superior now that the association is insolvent? There is nothing in the terms of their contracts, as borrowers or shareholders that entitles them to first have their shares of stock disposed of before the mortgaged premises are resorted to. Before insolvency, the association had the right to waive any default of the borrowing members and extend the time of payment. With the advent of insolvency, however, the duty to convert the assets into cash in order to liquidate its obligations became imperative. While the association was a going concern, the value of the outstanding shares was a mere matter of bookkeeping. The total of installments paid on the shares plus net earnings constituted the value of all the shares, and the value of any given number of shares was easily determined by computation. Insolvency, however, changed all this. Considerable of what were assets before are now liabilities. Before insolvency, all premiums paid by borrowers and the earnings therefrom belonged to the shareholders, and were so treated and formed a part of all dividends that had been declared on the stock. Not so after the advent of insolvency. From that time under the cases last cited, all premiums paid by borrowers with interest had to be credited on their loans. All previous declarations of dividends, which entered into the book values of the shares, are now proven to be erroneous. A new listing of assets and restatement of values must be made, and, as a closing up of the association's business is now the only thing left, such values cannot be determined till all the assets shall have been collected, the costs of liquidation paid, and the amount left for distribution among the shareholders ascertained.

"In *Weir v. Granite, etc., Ass'n*, supra, a similar claim was denied. In that case the insolvent association held the stock of the borrower as collateral security. The borrower sought credit for the dues paid by him on such stock. V. C. Reed held that the borrowing member was not entitled to credit on the mortgage debt for any of the dues paid on account of the shares of stock, and that the only equitable rule is to require such borrower to await the final distribution of the assets of the association, and then take what his shares are proved to be worth.

"In *Hoagland v. Saul* (N. J. Ch.) 53 Atl. 704, it was held: 'On foreclosure of a mortgage given to a building and loan association, the stock held by the mortgagor, and assigned as collateral to the mortgage, should be sold, and the proceeds credited on the mortgage debt, before recourse to the mortgaged premises.'

"This holding, and the reasoning of V. C. Gray in support thereof, to my understanding is contrary in principle to the holding

and reasoning of V. C. Reed in *Weir Case*, supra. The facts in both cases were substantially alike. Both associations were insolvent; both defendants were borrowing members; both had paid dues, on account of the stock as well as interest and premium on the loan; each sought to obtain credit on the mortgage debt for such payment of dues. In both cases the right to credit the dues on such debt was denied, but in the *Saul Case* the learned Vice Chancellor practically allowed such credit by requiring the stock held as collateral to be sold, and the proceeds to be applied to such debt before the taking of final decree. In this latter case the learned Vice Chancellor sought to adjust the rights of the defendant as a shareholder as well as a borrower, seemingly overlooking the distinction between the two clearly pointed out in the *Weir Case* and the conclusion there reached that the borrowing members' rights as a shareholder were in no respect superior to those of a nonborrowing shareholder, and that the borrower must, like them, await the final wind-up of the insolvent association before obtaining the value of their shares of stock. By section 2, art. 14, of association's articles, it is provided that shareholders in good standing may withdraw amount paid in monthly installments on their stocks; and by section 3 of the same article it is provided that on such withdrawals members shall receive 6 per cent. interest per annum for the average time such payments have been made to the company. Manifestly these provisions as to the right to withdraw and the terms upon which such withdrawals are to take place are dependent upon the association being a going concern. They cannot apply during insolvency. Insolvency, at once abrogates such provisions of the contract between the association and the shareholders. In addition to cases cited, see those noted in 6 Cyc. 130. The loan fund into which such installments of dues were paid, as well as other assets of the association, must be held till the losses of the association and the cost of liquidation have been ascertained.

"In the very nature of the case it cannot be otherwise. If the borrowing member could withdraw from the association and receive the so-called value of his shares, every other member (borrower or nonborrower) could do the same. Upon what basis could such values be determined? Certainly no rational basis is suggestible. At best, the amount fixed would be a guess, with a strong probability that either the withdrawing member or those who awaited the final accounting would suffer loss. To force a sale of the stock with the purpose of crediting the bond with the proceeds would necessarily entail a loss upon some one. Insolvency having abrogated the express contract between the parties, neither party should be permitted to force the sale of the stock, the value of which is not ascertainable till

the final act of winding up the insolvent concern. There can be no final accounting till all the loans have been paid, and the borrowing member cannot prevent a decree for the amount due by him on his bond merely because, in the final wind-up, he may be entitled to receive something on the shares owned by him. The borrowing member occupies a dual relation. Some, but not all, of the terms of the contract with the association in both relations, are necessarily abrogated by the association's insolvency. With respect to his contract as a borrower, he, as a result of the abrogation, is treated as if he were not a shareholder at all. Under the decisions of the Court of Errors and Appeals, in the Nevins Case, *supra*, he is charged with the entire amount of the loan secured, with legal interest, and is credited with all payments made by him by reason of such loan. His payments as interest are credited as such, and his payments of premiums together with interest to be calculated thereon are credited to him as made on account of the principal of such loan. Assuredly insolvency has worked no harm to him as a borrower. With respect to his contract as a shareholder, he must be treated as if he were not a borrower, and take his stand with the nonborrowing members, and share with them in whatever hardships or losses are ultimately to be charged against the stock of the company. The learned Vice Chancellor in *Hoagland v. Saul*, *supra*, in support of his conclusion that the stock of the borrower held as collateral by the association, should be sold and the proceeds applied in reduction of the mortgage claim before final decree should be made, cited *Ass'n v. Patterson*, 27 N. J. Eq. 223. In this case, as well as *Ass'n v. Conover*, 14 N. J. Eq. 219 relied upon in the *Patterson* Case, the association was not insolvent. Furthermore, in both of these cases there were subsequent mortgages, and, as neither of these second mortgages had any lien upon the shares of stock which the mortgagors had assigned to the first mortgagee as collateral, a marshaling of the assets to preserve the equities of these subsequent incumbrances was necessary.

"In my opinion the cases of *Weir v. Granite State Prov. Ass'n*, and *Hoagland v. Saul*, *supra*, are not in harmony on this subject. If they were, I should be constrained to follow the latter without regard to my personal views. As I read them, however, they are irreconcilable on the right of the borrower to have his loan credited with the probable value of his shares of stock held by the association as collateral. With such a conflict of authority confronting me I am forced to adopt the case which appears to me to furnish the rule that best safeguards all the equities. In my judgment the reasons given by V. C. Reed in the *Weir* Case, and which were concurred in the Court of Errors

and Appeals, furnish the true rule to be applied on this question. For the reasons given in support of the conclusions reached in such case, and those herein mentioned, I am of the opinion that the defendants in this case are not entitled to a credit upon this mortgage debt of the value of their shares of stock held by the association as collateral, and that the amount due by them to such association in this foreclosure suit is to be determined by the relation such defendants bear to said association as borrowers, and not as shareholders.

"As to the fifth exception: This challenges the principle adopted by the master in making his credits, and in effect charges that he erred in crediting the bond with the whole amount paid for dues and dividends declared, and further that he erred in not crediting such bond with interest on the paid premiums.

"I am of the opinion that this exception must be sustained. The case of *Weir v. Granite State Provident Ass'n*, *supra*, is directly in point. It expressly decides that such borrower is entitled to interest on premiums paid on account of loan, and that he is not entitled to any credit for dues paid on account of his stock; and inferentially such case decides that no profit (dividends) derived from the stock payments inure to the borrower as such, but only to him as a stockholder.

"Summarized, my conclusions are as follows:

"First. That the master whose findings are here under review on such exceptions erred in debiting the borrower with the expense and reduction charges, and in crediting them with the dues paid on the shares of stock, and the dividends allowed thereon before the association became insolvent and for failing to credit them with the interest on premiums paid.

"Second. That the borrower is to be debited only with the amount of his loan and the legal rate of interest thereon, and is to be credited only with the interest and premiums paid, and interest on such premiums.

"Third. That, as these premiums were paid at intervals, the interest thereon be calculated by the application of the rule of average payments.

"Fourth. That the date of the report of the former master be taken by the witness who calculated the interest on such premiums as the date to which such interest was calculated, and, as this was acquiesced in by counsel for all parties, such date be adopted for the same purpose, and also because a ready comparison of the results here reached with those reported by the former master will thus be afforded.

"And I further report that the schedule hereto annexed, and making part hereof, contains a statement and account of the principal and interest money due to the com-

plainant on its said mortgage found in accordance with my conclusions as aforesaid, and to which I, for greater certainty, refer."

Schedule No. 1.

Dr.

Bond bearing date the 17th day of December, 1896, in the penal sum of \$4,000, conditioned for the payment of \$2,000, with interest thereon secured by the mortgage in the complainant's bill mentioned.....	\$2,000 00
Interest thereon at 6 per cent. from December 17, 1896 to April 15, 1907—10 years, 3 months, and 28 days.....	1,239 34
	<u>\$2,239 34</u>

Cr.

By 89 monthly payments of \$10 each, as interest.....	\$ 890 00
By 89 monthly payments of \$10 each as premiums on loan.....	890 00
By legal interest on such monthly payments of premiums calculated on the rule of average payments, accepting 5 1/8 years as the average period.....	275 90
	<u>\$2,055 90</u>
Amount due complainant the 15th day of April, 1907.....	\$1,183 44

Barton B. Hutchinson, for complainant.
Charles T. Cowenhoven, for defendant.

WALKER V. C. This is a foreclosure case. The defendant Anthony McNulty applies by petition to open the final decree, to set aside the execution, and to set aside the master's report so far as it denies to the petitioner the right to have certain shares of stock in the complainant company, an insolvent corporation, sold before the mortgaged premises are sold. The matter is presented in this form because no exceptions were filed to the master's report, the excuse given being that counsel for the defendant was to have had actual notice, by arrangement of the parties, of the filing of the report, which notice he did not receive, and a final decree was entered ex parte upon the report in due course and an execution issued before he became aware of the situation.

For the purpose of deciding the question here presented I shall assume that the arrangement was as claimed on behalf of the defendant. The case then stands in the posture of an application to open a judgment by default, in order to accomplish which the party applying must show both surprise and merits.

Coming to the question of merits, I find that the petitioner is without them. The question presented on this application was fully tried out before the able master who made the report, and he supported his finding by the citation of authorities, and, in my judgment, his reasonings deduced from those authorities are correct, and were cor-

rectly applied to the facts of this case. The result is that the prayer of the petition must be denied.

(81 Conn. 378)

FINNUCAN v. FEIGENSPAN.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. GUARANTY (§ 27*)—CONSTRUCTION—INTENT OF PARTIES.

A contract of guaranty is to be construed according to what is fairly to be presumed to have been the understanding and intent of the parties, and the language used will not be extended by any strained construction to enlarge the guarantors' liability.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 28; Dec. Dig. § 27.*]

2. GUARANTY (§ 27*)—CONSTRUCTION—EVIDENCE.

To discover the intent of parties to a contract of guaranty, their situation and the circumstances connected with the transaction may be considered, and their language interpreted with the help of that evidence.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 28; Dec. Dig. § 27.*]

3. GUARANTY (§ 38*)—CONSTRUCTION.

Defendant having agreed to loan a person \$450 and furnish him merchandise necessary for a saloon business, certain others agreed to guarantee to defendant payment for merchandise to be thus furnished and the repayment of the \$450, not exceeding the sum of \$750. *Held*, that the guaranty was not a continuing one, but only a guaranty of repayment of the \$450 and of the purchase price of merchandise in a further amount which would bring the total of cash and goods up to \$750, and, where the principal had made payments on the cash loan, the sureties' liability was diminished to the extent of the payments with interest thereon, though his indebtedness to defendant aside from the payments exceeded \$750.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 47; Dec. Dig. § 38.*]

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action by Martin J. Finnucan, administrator, against Christian Feigenspan, corporation. Judgment for plaintiff, and defendant appeals. **Affirmed.**

On or about December 5, 1896, one Martin J. Finnucan was desirous of engaging in the business of selling spirituous and intoxicating liquors in Ansonia. He did not have the necessary means, and applied to the defendant, a Newark, N. J., corporation, having an agency in Ansonia, to furnish them to him. In response to this application, the defendant agreed to loan Finnucan \$450 in cash, and to furnish him certain merchandise of its manufacture necessary for the conduct of the business upon condition that security to indemnify it against loss for such loan and furnishing of merchandise was given. Finnucan thereupon appealed to Mrs. Corr and Mamie Finnucan to provide the demanded security, and thereupon they agreed with the defendant "to guarantee to the defendant payment for merchandise to be thus furnished by the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs 1907 to date, & Reporter Indexes

defendant to said Martin J. Finnucan and the repayment of said sum of \$450 to be thus loaned to him by the defendant, not exceeding the sum of \$750." On the same day, in pursuance of this agreement, Mrs. Corr and Mamie Finnucan executed in favor of the defendant their note for the sum of \$750, payable on demand, with interest, and, to secure the note, a mortgage on a piece of land belonging to them. The defendant thereupon loaned Finnucan the \$450 as agreed, and supplied merchandise for the conduct of the business, which was begun December 12, 1896. Finnucan carried on the business for about three months. During this time the defendant continued to furnish merchandise. At the end of that time, the business having proved unprofitable, and the defendant having refused to continue selling to Finnucan, he turned over the business, including the license, to the defendant and another person secured by the defendant to continue the business. The goods furnished Finnucan by the defendant amounted to \$464.50, and, when he ceased business, he was indebted to the defendant in that sum therefor, and also for the cash loan of \$450. Later in 1897 he made to the defendant seven payments of \$37.50 each, making in all \$262.50, which were specifically made on account of the \$450 loan. What became of the apparent credit for the transfer of the business and license is not stated. Mrs. Corr died in January, 1898, and Daniel E. McMahon was appointed by the court of probate to sell her real estate, including the mortgaged premises, to discharge the liens of record out of the proceeds, and to pay over the balance to the administrator of her estate, who was the defendant's local agent. McMahon sold the property as directed, and out of the proceeds paid to the defendant in discharge of said mortgage \$972, being the principal of said mortgage note with interest thereon from its date to the date of the payment, December 12, 1901. At the time McMahon made this payment, he was not informed that any payments had been made by Finnucan on account of his indebtedness for which said security had been given, and believed that none had been made. Said several payments, with the interest thereon to said December 12, 1901, amounted to \$311.55, for which amount judgment was rendered.

Charles C. Ford, for appellant. Bernard E. Lynch and Frederick M. McCarthy, for appellee.

PRENTICE, J. (after stating the facts as above). The plaintiff confessedly is entitled to recover back from the defendant any ex-

cess of the payment made to it by McMahon over and above the sum which it was then entitled to receive by virtue of the guaranty obligation entered into by Ellen Corr and Mamie Finnucan, together with the interest on such overpayment. This obligation was created by a parol agreement in pursuance of which the note and mortgage given by the guarantors were made and delivered to the defendant as collateral security for the performance of the obligation assumed. These instruments do not express the principal contract entered into. They embody an incidental contract only. The court has found the terms of the parol guaranty contract, the circumstances which led up to its creation, and the situation surrounding the parties at the time of its creation. This contract, which measures the extent of the obligation of Mrs. Corr and her co-guarantor, is to be construed, like other contracts, according to what is fairly to be presumed to have been the understanding and intent of the parties, and the language used will not be extended by any strained construction for the purpose of enlarging the guarantors' liability. *Gay v. Ward*, 67 Conn. 147, 161, 34 Atl. 1025, 32 L. R. A. 818; *Lewis v. Dwight*, 10 Conn. 95, 100; *White v. Reed*, 15 Conn. 457, 467. For the purpose of discovering the intent of the parties, their situation and the circumstances connected with the transaction may be considered, and their language interpreted with the help of that evidence. *Bartholomew v. Muzzy*, 61 Conn. 387, 393, 23 Atl. 604, 29 Am. St. Rep. 206. Reading the language used by these parties in this way, it cannot be fairly said that it embodies a continuing guaranty. Its fair import is that the obligors agreed to guarantee the repayment by Finnucan of the \$450 cash advanced and the payment by him of the purchase price of merchandise to be furnished for the business in a further amount which would bring the total of cash and goods up to \$750. Upon two occasions strikingly similar guaranty contracts have had a similar construction. *Hall v. Rand*, 8 Conn. 560; *White v. Reed*, 15 Conn. 457.

The court was therefore not in error in holding that the payments made by Finnucan to the defendant, all of which were made on account of the \$450 loan, were in reduction of the indebtedness which was the subject of the guaranty, and that the payment by McMahon, being for the whole amount of \$750 and the interest thereon, was an overpayment of the amount actually due from the guarantors by the amount of the several Finnucan payments and the interest thereon since they were made.

There is no error. The other Judges concurred.

(81 Conn. 463)

NUTMEG PARK DRIVING CORPORATION v. FISKE.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

LANDLORD AND TENANT (§ 86*)—LEASE—OPTION FOR RENEWAL—ACCEPTANCE—EFFECT.

Where a lease gave the lessee the option of renewing it on the same terms, on notice to the lessor six months before the lease expired, the option was in the nature of a continuing offer by the lessor of a new lease, and when the lessee gave notice that he would continue to lease the premises, and the lessor accepted, the rights of the parties became fixed, without further action on the lessee's part.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 275; Dec. Dig. § 86.*]

Appeal from Superior Court, Fairfield County; Silas A. Robinson, Judge.

Action by the Nutmeg Park Driving Corporation against Louis A. Fiske for rent, and to compel defendant to execute a renewal lease. There was a judgment for plaintiff, and defendant appeals. No error.

The plaintiff leased to the defendant certain premises known as Nutmeg Driving Park, for the term of two years from the 1st day of December, 1904, at the annual rental of \$1,200, payable semiannually in advance. The lease, which was in writing, contained the following provision: "It is further mutually agreed that the lessee shall have the option at the expiration of this lease of renewing the same upon the same terms for a period of three years, provided he gives the lessor written notice of his intention to avail himself of said option six months before said lease expires. Should said lessee avail himself of said option, then at the expiration of said period of three years said lessee shall have the privilege of a further lease for the period of five years at the annual rental of fifteen hundred (\$1,500) dollars, payable in semiannual payments in advance, provided he gives the lessor the same notice as is above provided for the first renewal." The defendant entered into possession, occupied during the two years, and paid the stipulated rent therefor. On June 1, 1906, and six months before the expiration of the two-year term of the lease, the defendant sent the plaintiff's agent in charge of the rental of the premises a telegram containing the words "Will continue lease on Nutmeg Park," and at the same time a letter addressed to said agent, as follows: "Shall continue to lease Nutmeg Park as per agreement." On June 5th the agent wrote to the defendant in reply: "We are in receipt of your favor dated June 2d, notifying us that you avail yourself of the option given in the lease of the 'Nutmeg Park' property, as per the terms of said lease. We hereby accept the same." The defendant has failed to execute a lease for any period subsequent to December 1, 1906, although a draft of one for the term of three years

thereafter, conformable in its provisions to the original lease, was tendered him for execution in July, 1906, and since the sending of said telegram and letter he has not, down to the time the action was commenced, February 18, 1907, communicated with either the plaintiff or its agent with reference thereto. The possession of the premises has not been surrendered to the plaintiff. The rent of the premises for the original term has been paid. No rent has been paid for any subsequent period. Between June 1, 1906, and December 1, 1906, the plaintiff had offers to lease the premises, and to dispose of them, which were refused in reliance upon the terms of the original lease and the defendant's two communications of June 1, 1906.

Frank J. Kinney, for appellant. William B. Boardman, for appellee.

PRENTICE, J. (after stating the facts as above). The defendant contends that the court erred in holding that under the terms of the lease of June, 1904, he, as the lessee, could avail himself of the option of renewal before its expiration, December 1, 1906; in holding that he could be held responsible for the additional period of three years without his having done two things, to wit, first, given, on June 1, 1906, written notice of his intention to avail himself of the option given him; and, second, availed himself, on December 1, 1906, of the option, and in holding that he could be held liable for the additional period of three years, in case he did no more than give written notice of his intention to avail himself of the option.

The defendant's conception of the construction to be given to the original lease is that the act by which its renewal could be accomplished was one which could be performed only after its termination; that the exercise of this right of renewal was conditioned upon the performance, six months earlier, of an act indicative of an intention to renew when the lease expired; that this first act could have no effect beyond the preservation of the right of renewal; that both acts were requisite to effect a renewal; and that neither could be anticipated in point of time. It is unnecessary to consider all these propositions. It might, for instance, be assumed that the terms of the original lease placed it in the power of the defendant to postpone the time for the exercise of his election until the expiration of the first lease, by his giving of a six months' notice of intention, and even that it gave him no right to effect a renewal until that time, and yet the defense must fail, since even upon this theory there would be no justification for the claims that an election could not be made before the expiration of the lease with the plaintiff's acquiescence, and that the provision for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the giving of notice of intention had other importance than as a means of keeping alive the right of election until it should be exercised. The option which the lease gave to the defendant was in the nature of an offer on the plaintiff's part of a new lease upon the terms stated. *Willard v. Tayloe*, 75 U. S. 557, 564, 19 L. Ed. 501; *Boston & Maine R. Co. v. Bartlett*, 57 Mass. 224, 227. When accepted, as provided, the rights and obligations of the parties would become fixed. *Brown v. Slee*, 103 U. S. 828, 837, 26 L. Ed. 618; *Boston & Maine R. Co. v. Bartlett*, 57 Mass. 224, 227; *Guyer v. Warren*, 175 Ill. 328, 335, 51 N. E. 580. The defendant's letter and telegram of June 1, 1906, contained, in unequivocal language, an acceptance of the offer which the lease embodied, and the reply confirmed them as having that effect. The defendant's right of election was thereby fully exercised, and the rights and liabilities of the parties fixed.

No other questions are presented by the appeal.

There is no error.

(81 Conn. 339)

SALZMAN v. CITY OF NEW HAVEN.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

MUNICIPAL CORPORATIONS (§ 733*) — DEFECTIVE STREETS—INJURIES FROM RAIN.

A city, which in making repairs of a highway leaves the earth therein insufficiently packed, whereby water from a heavy rain occurring during the night passes through the excavation and into an adjoining cellar, is not liable for the damage (Gen. St. 1902, § 2020), providing that any person injured in person or property by means of a defective road may recover damages from the one bound to keep it in repair, applying only to injuries in traveling on the highway.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1547; Dec. Dig. § 733.*]

Appeal from City Court of New Haven; Albert McC. Mathewson, Judge.

Action by Henry Salzman against the City of New Haven for injury to plaintiff's premises from surface water. From judgment for defendant on the sustaining of a demurrer to the complaint, plaintiff appeals. Affirmed.

Benjamin Slade, Maxwell Slade, and David H. Slade, for appellant. Edward H. Rogers and Edward P. O'Meara, for appellee.

RORABACK, J. This is an action against the city of New Haven to recover damages for an injury to the plaintiff's premises from a flow of surface water by the alleged negligence of the defendant.

The material facts set forth in the complaint are as follows: On the 27th day of October, 1907, and for a long time prior thereto, the plaintiff owned certain premises on Commerce street, in the city of New Haven.

On said 27th day of October, 1907, the city of New Haven, acting by its duly authorized agents and servants, was engaged in excavating the public highway or road in front of the plaintiff's premises, and on said date it was the duty of the defendant to keep said public highway or road in good repair and safe condition. As a result of the carelessness and negligence on the part of the defendant's agents and servants the highway in front of the plaintiff's premises was carelessly and negligently left open or insufficiently packed or filled. During the night season between the 27th day of October, and the 28th day of October, 1907, a heavy rainstorm occurred, and the water from such rainstorm entered said highway, and as a result of the negligent condition in which said part of the highway was left, as hereinbefore described, the water passed through the said opening or excavation insufficiently packed and under the sidewalk in front of said premises and through the foundation of the plaintiff's buildings and into the cellar thereof. As a result of the acts aforesaid, the foundation of the plaintiff's building was greatly damaged, and the water entering said cellar destroyed 25,000 bottle covers or packages and 75 barrels, and otherwise injured the plaintiff's building. To the complaint the defendant demurred for the following reasons: "Because it appears from the complaint that the alleged negligent acts of the defendant were done by it within the limits of its public highway and within the limits of its jurisdiction, and that the alleged injury to the plaintiff resulting therefrom is wholly incidental to, and consequential upon, the exercise by the defendant of its lawful powers. Because the liability imposed by statute on the defendant in the building and maintenance of its public highways extends to and includes only such injuries as result directly from the neglect and failure of the defendant to keep said public highways in good repair and safe condition, and the only allegation of negligence in the complaint from which the alleged injury to the plaintiff resulted is its failure to keep its public highway or road in good repair and safe condition, and said alleged injury did not, as appears from the complaint, result directly, but incidentally and consequentially, from said failure of the defendant to keep its public highway or road in good repair and safe condition. Because it does not appear from the complaint that the defendant's acts from which the alleged injury resulted were done wantonly or unnecessarily, or that any wanton or unnecessary damage was done to the plaintiff by reason of any of the defendant's acts." The demurrer was sustained.

It appears from the complaint that the negligent acts complained of were performed within the limits of a public highway, and were done by the defendant while in the performance of a governmental duty, and for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the public use and benefit. It is not averred that these acts were performed wantonly or maliciously, or that any wanton or unnecessary damage was done. It is alleged that the defendant is liable for leaving the excavations in the highway open and insufficiently packed, so that surface water from a heavy rainstorm in the night season passed through the excavation into and upon the plaintiff's property causing him damage. The law wisely provides that an action will not lie to recover damages for an injury which did not result from any direct action of the municipality, but occurred as a consequential injury incident to the discharge of its duty and lawful powers. "When authority is vested in the municipal corporation, by charter or statute, to improve streets and establish street grades, and, in the exercise of that power, changes are made in the surface of the city's highways, by which surface water is caused to collect on or flow over the adjacent land of private owners, there is no implied liability, on the part of the municipal corporation, for such indirect and consequential injuries, provided the city does not exceed its lawful power. *Tiedman on Municipal Corporations*, § 354a, p. 732." In the recent case of *Rudnyal v. Harwinton*, 79 Conn. 91, 63 Atl. 948, an action for discharging surface water upon adjoining land, this court held that in building and repairing highways a town is engaged in the performance of a public governmental duty imposed upon it by the state (Gen. St. 1902, § 2013), and is not liable in damages for consequential injuries to land of an adjoining proprietor, incident to the discharge of that duty, unless so made by statute. In the preceding case the special circumstances under which a municipality can be made liable for the discharge of surface water is stated to be as follows: "Whatever may be the constitutional limit of the powers of towns under Gen. St. 1902, § 2031, respecting the drainage of highways, they certainly have no right to collect in ditches alongside the highway the surface water flowing from lands above it, and discharge such water, by means of sluices across the road, upon the lower premises of an adjoining owner, when by a moderate expenditure of money the water would have been carried off so as not to injure such premises." One principle enunciated by this decision is that a municipal corporation has no right to collect surface water from adjoining lands and its streets into an artificial channel, and then discharge it upon the land of an adjoining proprietor. In the present case no such elements of liability appear from the allegations set forth in the plaintiff's complaint. The grievance of which the plaintiff complains is that by the negligent repair of a certain public highway by the defendant, surface water from a heavy rainstorm in the night season passed in and upon his premises causing him damage. That such a complaint does not allege a cause of action, is too well set-

tled in this state to be seriously questioned. *Rudnyal v. Harwinton*, supra; *Downs v. Ansonia*, 73 Conn. 33, 46 Atl. 243; *Sisson v. Stonington*, 73 Conn. 348, 47 Atl. 662; *Byrne v. Farmington*, 64 Conn. 367, 30 Atl. 138; *Bronson v. Wallingford*, 54 Conn. 513, 9 Atl. 393; *Judge v. Meriden*, 38 Conn. 90.

But the plaintiff contends that the sufficiency of his complaint can be safely tested by the provisions of section 2020 of the General Statutes of 1902, which in part provide that "Any person injured in person or property by means of a defective road or bridge, may recover damages from the party bound to keep it in repair." This is a statute creating a liability for an injury to the person or property by means of any defect or want of repair in the highway. This liability is a limited one, and not to be extended beyond the special purposes of protecting persons from injury while traveling on such highway. *Seidel v. Woodbury*, 81 Conn. 65, 70 Atl. 58; *Bartram v. Sharon*, 71 Conn. 686-694, 43 Atl. 143, 46 L. R. A. 144, 71 Am. St. Rep. 225; *Makepeace v. Waterbury*, 74 Conn. 360-362, 50 Atl. 876; *Upton v. Windham*, 75 Conn. 288-291, 53 Atl. 660, 96 Am. St. Rep. 197. Public highways are to be built and kept in repair by the towns within which they are situated, so that they shall be safe and convenient for any person traveling thereon. This requisition, imposing upon all municipal corporations a serious and weighty obligation, by necessary implication authorizes them to do all acts necessary to the complete and faithful discharge of their duty in this particular. They may therefore bestow labor upon all parts of the located way, and make such changes in the natural surface of the soil as will add to the convenience or safety of the traveler. If, in consequence of such changes, the water accumulating upon the surface of the way, by the fall of rain or the melting of snow, passes onto adjoining lands in different places, or in somewhat greater quantities in particular places than it otherwise would have done, that is to be considered as one of the natural, probable, or necessary consequences resulting from the establishment and maintenance of the way; and therefore no action will lie for such injury, as for tort, but the damage must be regarded as a matter contemplated in the location of the road. *Flagg v. City of Worcester*, 13 Gray (Mass.) 603.

In *Bronson v. Borough of Wallingford*, supra, which was an action for an injury to the plaintiff's land by the turning on of water and sewage, it was held that municipal corporations, so long as their acts are kept within the authority of the statute, are not liable for the damage done to such adjoining land by the water turned upon it, and therefore are not liable to the owner of land abutting the highway in an action for negligence in permitting a sluiceway or culvert to become obstructed, in consequence of which water was set back upon his premises. It was also held

in this case that the statute (Gen. St., Revision 1902, § 2031), as to draining highways, had no application, and that this statute went so far as to exempt municipal corporations from damages from draining water from highways onto private lands, "unless it appears that the work was done in such a way as to do unnecessary damage, or that the water was drained into some place prohibited by the statute." Nothing of this character is alleged in the complaint now before us. The plaintiff places special emphasis upon the cases of *Danbury & Norwalk Railroad Company v. Norwalk*, 37 Conn. 109, and *Mootry v. Danbury*, 45 Conn. 550, 29 Am. Rep. 708. The present case is unlike *Railroad Company v. Norwalk*, in which a railroad was carried through a densely populated village by a deep cut running under the principal street, which crossed it by a bridge, the station being located on the side of the street and supported by the walls of the excavation. The town undertook to construct a drain, which was to discharge the water of the street into the cut under the bridge, to the injury of the wall and the railroad. The railroad in its location and construction intercepted the natural course of the drainage of the locality, and it was indispensable that a drain be constructed for the street, but it appeared that at a greater, but not unreasonable, expense one could be constructed that would not injure the railroad company. In *Mootry v. Danbury* the authorities of the town of Danbury built a bridge in such a manner as to set back the water of a stream upon the plaintiff. The present case presents no such conditions. It appears from the plaintiff's complaint that the surface water from a heavy rainstorm, by reason of the action of the defendant, the natural features of the ground, and the force of gravity, passed on and over the plaintiff's lot. The discharge of water was unusual, of a temporary and unexpected character. There is a wide distinction between a liability to deal with surface water falling on land from a heavy rain storm, and the right to set back the water of a stream by a permanent structure.

There is no error. The other Judges concurred.

(81 Conn. 458)

Appeal of BORMANN.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. INTOXICATING LIQUORS (§ 104*)—LICENSES—REMOVAL PERMITS.

An application for a removal permit under Gen. St. 1902, § 2669, relating to liquor licenses, in applying the provision of section 2645 that an application for a license may be denied when it appears that there already exists sufficient licensed places in the vicinity, might be treated as, in effect, an original application for a license when the result of granting it would

be to unduly increase the number of saloons in a particular locality.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 109; Dec. Dig. § 104.*]

2. INTOXICATING LIQUORS (§ 104*)—LICENSES—"RENEWAL."

A "renewal" of a license, within Gen. St. 1902, § 2647, as amended by Pub. Acts 1907, p. 750, c. 200, provided that no liquor license, excepting a renewal, shall be granted in the residential and manufacturing parts of a town, is a granting to the same person of the same privilege granted to him the previous year to sell in the same place; and hence an application for a removal permit was properly not treated as an application for a renewal, where it was found that the new location was unsuitable and more unsuitable than the original location.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 109; Dec. Dig. § 104.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6085, 6086.]

3. INTOXICATING LIQUORS (§ 104*)—LICENSES—SUITABILITY OF LOCATION—EVIDENCE.

On application for a removal permit under a liquor license, that the licensee had agreed with manufacturers that he would not sell to their employes during certain hours was evidence that the location was unsuitable for a saloon.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 109; Dec. Dig. § 104.*]

4. INTOXICATING LIQUORS (§ 104*)—LICENSES—REMOVAL PERMITS—REFUSAL—APPEAL.

The questions presented by an appeal under Gen. St. 1902, § 2669, from a decision of the county commissioners on an application for a removal permit under a liquor license, are whether the county commissioners acted legally, and whether they exceeded or abused their powers.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 109; Dec. Dig. § 104.*]

Appeal from Superior Court, Fairfield County; Ralph Wheeler, Judge.

County Commissioners of Fairfield County having granted a removal permit to Frank P. Bartley under a license to sell intoxicants, Henry H. Bormann appealed to the superior court, and Bartley appeals from a judgment vacating the permit. Affirmed.

Howard W. Taylor, for appellants. James E. Walsh and William H. Cable, for appellee.

HALL, J. On November 1, 1907, the county commissioners of Fairfield county granted to Frank P. Bartley a license to sell spirituous and intoxicating liquors at No. 60, on the west side of River street, in Danbury, and on January 27, 1908, granted him permission to remove his place of business to No. 59 on the east side of River street. Upon the appeal from said removal permit taken by the appellant Bormann, a taxpayer of said town, the superior court held that the granting by the county commissioners of said removal permit was not a reasonable exercise of their power and discretion, and was illegal, and set the same aside. Section 2669 of the General Statutes of 1902 provides that "every license for the sale of spirituous and intoxicating liquors shall specify the town

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the particular building or place in such town, in which such spirituous and intoxicating liquors are to be sold, and shall not authorize any sale in any other place or building. * * * The county commissioners may indorse upon said license permission to the person so licensed to remove from one building to another in said town, but the applicant for said permission shall specify the building to which he wishes to remove, and the commissioners shall not permit such removal or transfer except upon due notice and hearing as now provided by law for original applications, and the law concerning appeals from county commissioners shall apply to such cases."

The superior court found these facts: For some years prior to January 27, 1908, said Bartley had conducted a licensed saloon business at No. 60 River street, occupying the premises under lease from month to month. In October, 1907, one Cono Stavolo, with the knowledge of Bartley, purchased the premises from the latter's lessor by deed recorded November 7, 1907, and Bartley, although he had in September applied for the license for the ensuing year, which was granted November 1st, as aforesaid, and had on or before November 1st represented to one of the commissioners that he expected to continue to occupy No. 60, had before November 1st purchased the premises No. 59 River street, intending to occupy them as a saloon as soon as the building thereon could be completed, and had promised to vacate the premises No. 60 on or before November 1st. Bartley did not vacate the premises No. 60 until about the 27th of January, 1908, when his removal permit, for which he applied in December, 1907, had been granted and after proceedings in summary process had been brought against him by said Stavolo, when he removed to No. 59. On October 19, 1907, said Cono Stavolo applied for a license for No. 60 River street (having already agreed with the owner for the purchase of said premises, although he had not then received a deed of them), which application was refused by the county commissioners on the 8th of February, 1908; Stavolo having received no notice of a remonstrance filed against the granting of said application. Bartley is a suitable person to receive a license. "No. 59 River street is an entirely unsuitable place at which to grant a license for the sale of intoxicating liquors." No. 60 is less unsuitable than No. 59, and more than one saloon in this locality would be too many. The part of the city in which numbers 59 and 60 River street are situated is "practically a manufacturing and residential section," and that side of River street upon which No. 59 is situated is the main thoroughfare from a large residential district to the principal business street in the city, and is one over which a large number of school children pass. By consent of counsel the trial court viewed the locality. There has heretofore been an arrangement, known

to the county commissioners, between Bartley and some of the manufacturers that Bartley would not sell to employees of said manufacturers during certain hours. The finding states that the court regarded this arrangement "as an admission against the suitability of the place rather than as making the place suitable." Counsel for Bartley contends that because the finding states that more than one saloon in the locality of Nos. 59 and 60 would be too many, it follows that the trial court must have held, and held erroneously, that the granting of the removal permit was the granting of another license, which should have been refused under the provision of section 2645; that an application for a license may be denied when it appears that there already exists a sufficient number of licensed places in the vicinity. An application for a removal permit under section 2669 of the General Statutes might, in applying the provisions of section 2645, be treated as in effect an original application for a license, when the result of granting it would be to unduly increase the number of saloons in a particular locality. It was clearly not so regarded by the trial court in this case. The trial court confirmed the refusal of a license to Stavolo for No. 60. As there appear to have been no other licensed places in that neighborhood, the transfer of Bartley's license from No. 60 to No. 59 would have left but one saloon in that vicinity.

The applicant Bartley next argues that, from the finding that this part of the town is "practically a manufacturing and residential section" (and he concedes that the words "practically" in the finding and "purely" in the statute should be given the same meaning), it is apparent that the trial court erroneously regarded the application for a removal permit "as an original application for a new license," and not for a renewal of a license within the exception of section 2647 as amended by chapter 200, p. 750, Pub. Acts 1907, which provides that "no license, except the renewal of a license, at the discretion of the county commissioners as to the suitability of person and place * * * shall be granted in the purely residential and manufacturing parts of a town." A renewal of a license within the meaning of section 2647 as amended in 1907 is a granting to the same person the same privilege granted to him the previous year to sell in the same place. The removal permit granted by the county commissioners not only allowed Bartley to sell in a manufacturing and residential section, but at a different location from that specified in his previous licenses, and one found to be entirely unsuitable, and more unsuitable than the one where he had previously been permitted to sell. The trial court was not required to treat the removal permit as a renewal within the exception of section 2647.

Counsel for Bartley further claim that the trial court erred in regarding the fact that

there was an arrangement that Bartley would not sell to employes in the neighboring factories during certain hours as evidence of unsuitability of place. Apparently the existence of such an arrangement was proved for showing that the place was suitable. We discover no error of law in the view taken by the trial court that it rather indicated the contrary. Section 2669 of the General Statutes of 1902 expressly permits an appeal from the decision of the county commissioners upon an application for a removal permit, and the questions presented by such an appeal are: Have the county commissioners acted legally? Have they exceeded or abused their powers? *Moynihan's Appeal*, 75 Conn. 353, 361, 53 Atl. 903. The trial court committed no error of law in deciding these questions as above stated.

There is no error. The other Judges concurred.

(31 Conn. 400)

LUDDINGTON v. MERRILL

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. COURTS (§ 188*)—CITY COURTS—JURISDICTION.

Sp. Act 1895 (12 Sp. Laws, p. 65) § 22, giving the city court of Waterbury jurisdiction of "all civil actions" involving not more than \$100, and authorizing appeals from its judgments and decrees, confers jurisdiction of actions in which equitable or legal relief, or both, is demanded, and hence the court has jurisdiction of an action to foreclose a chattel mortgage securing an \$80 note.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 412; Dec. Dig. § 188.*]

2. ACTION (§ 25*)—"CIVIL ACTIONS."

The term "civil actions" as used in the practice act includes actions for equitable or legal relief, or both,

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 156-159; Dec. Dig. § 25.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1183-1193; vol. 8, p. 7603.]

3. COURTS (§ 20*)—JURISDICTION.

Under the express terms of Practice Act, § 7 (Laws 1879, p. 433, c. 83; Gen. St. 1902, § 613), all courts to which civil actions as defined by the act may properly be made returnable, excepting justice courts, may, in the absence of express law to the contrary, apply both legal and equitable remedies in determining such actions.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 20.*]

Appeal from City Court of Waterbury; Frederick M. Peasley, Judge.

Action by Frank J. Luddington against Mrs. Jay E. Merrill. From a judgment for plaintiff, defendant appeals. Affirmed.

Edward B. Relley, for appellant. Wilson H. Pierce, for appellee.

HALL, J. This is an action to foreclose a mortgage on a piano, given to secure the payment of the defendant's note for \$80. It was brought to the city court of Waterbury,

and the foreclosure of the mortgage was the only relief demanded in the original complaint. The amount of the matter in demand was therefore \$80, the amount of the debt secured by the mortgage. Gen. St. 1902, § 541. The defendant moved to erase the case from the docket, and afterwards demurred to the complaint, the ground of both the motion and demurrer being that the city court of Waterbury has no jurisdiction to grant equitable relief. The denial of the motion to erase and the overruling of the demurrer are the errors assigned in the appeal.

By section 533, Gen. St. 1902, justices of the peace are given jurisdiction of "all civil actions for legal relief, wherein the matter in demand does not exceed one hundred dollars." * * * Section 534 provides that "all civil actions for equitable relief only, wherein the matter in demand does not exceed five hundred dollars, * * * shall be brought to the court of common pleas, except in counties where there is no such court." There is such a court in the county in which this action was brought.

Section 502 provides that "all borough, city, police and town courts and the officers thereof shall have all the powers and jurisdiction which shall have been conferred upon them." Jurisdiction of civil actions was conferred by the Legislature upon the city court of Waterbury by the following language of section 22, Sp. Act 1895 (Sp. Laws, vol. 12, p. 65): "The city court shall have jurisdiction of all civil actions wherein the matter in demand does not exceed one hundred dollars, provided the parties or either of them reside within the limits of the town of Waterbury, and shall have power to hear and try the same with or without a jury as may be proper and proceed therein to final judgment and execution according to law."

* * * But from all final judgments or decrees rendered or passed by said court except * * * the party feeling aggrieved thereby may appeal. * * * No more apt words than "civil actions wherein the matter in demand does not exceed one hundred dollars" could have been used to describe actions in which equitable relief only, or legal relief only, or both equitable and legal relief, to the amount named, is demanded in the complaint. That jurisdiction of actions demanding equitable relief, as well as of those demanding legal, were intended to be conferred by this section is also indicated by the use of the word "all" with the words "civil actions," and by the provision for an appeal both from all judgments rendered and all decrees passed. As used in the practice act the term "civil actions" is clearly intended to include actions demanding equitable or legal relief, or both. To do away with the old names and forms of the different actions at law and in equity and enable a plaintiff to always demand and ob-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tain, in one proceeding called a "civil action," both such equitable and legal relief as the facts alleged in his complaint entitled him to receive were some of the principal purposes and results of the adoption of our practice act. Section 7, Practice Act (Laws 1879, p. 433, c. 83; section 613, Gen. St. 1902), provides that "In every civil action, not brought before a justice of the peace, the plaintiff may include in his complaint both legal and equitable rights, and causes of action, and demand both legal and equitable remedies." It follows that all our courts to which civil actions, as defined by the practice act, may properly be made returnable, excepting justice courts, may, in the absence of express law to the contrary, apply both legal and equitable remedies in the determination of such actions.

The city court properly denied the motion to erase, and overruled the demurrer.

There is no error. The other Judges concurred.

(81 Conn. 387)

ATWATER, Tax Collector, v. O'REILLY.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. TAXATION (§ 572*)—TAXES—COLLECTION—PROCEEDINGS.

A proceeding under Gen. St. 1902, § 2395, as amended by Pub. Acts 1907, p. 619, c. 50, authorizing the commitment of persons failing to pay military taxes, etc., is a special statutory proceeding, and is not an action governed by ordinary rules of pleading in civil or criminal cases, and its purpose is not to enable the tax collector to obtain a judgment for the amount of the taxes, nor to require him to establish before a court the validity of the same.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1132; Dec. Dig. § 572.*]

2. TAXATION (§ 578*)—MILITARY TAXES—COLLECTION—STATUTES.

Gen. St. 1902, § 2395, as amended by Pub. Acts 1907, p. 619, c. 50, authorizing the collection of military taxes by imprisonment, does not expressly or impliedly repeal the general provisions for the collection of military taxes in sections 2331, 2394, 2412, and 2093, providing for the collection of taxes by levy on taxable goods and chattels, etc., and a tax collector may proceed under the latter sections afterwards and for want of goods or chattels of a delinquent taxpayer on which to levy, and on further legal demand, the collector may levy on the taxpayer's body, and, without granting him a hearing, commit him to jail until the tax is paid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1143; Dec. Dig. § 573.*]

3. TAXATION (§ 602*)—COLLECTION—ACTIONS—COMPLAINT—SUFFICIENCY.

A complaint under Gen. St. 1902, § 2395, as amended by Pub. Acts 1907, p. 619, c. 50, authorizing the collection of military taxes by imprisonment, which describes complainant as the tax collector of a town, duly appointed and qualified, and that defendant has failed to pay the military commutation taxes assessed against him for the annual town taxes of designated years, which taxes became due on designated dates, that payment thereof was legally demanded, and that defendant failed to pay the same, is sufficient to give the court jurisdiction to

order the commitment of defendant for nonpayment of such taxes.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1222, 1223; Dec. Dig. § 602.*]

4. TAXATION (§ 106*)—MILITARY TAXES—PERSONS LIABLE.

Under Gen. St. 1902, §§ 2997, 2998, authorizing the imposition of a military tax on every person liable to military duty, etc., one apparently well and strong is not exempt from a military tax because of his poverty.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 204; Dec. Dig. § 106.*]

5. TAXATION (§ 468*)—ASSESSMENT—REDUCTION OF AMOUNT OF TAXES—VALIDITY.

Where one was liable to an annual military tax of \$2 imposed by Gen. St. 1902, §§ 2997, 2998, a resolution of a town meeting reducing the amount of the tax was ineffectual.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 837; Dec. Dig. § 468.*]

6. TAXATION (§ 602*)—COLLECTION—PROCEEDINGS.

A tax collector of a town who institutes a proceeding under Gen. St. 1902, § 2395, as amended by Pub. Acts 1907, p. 619, c. 50, authorizing the collection of military taxes by imprisonment for an order for the commitment of defendant for nonpayment of a military commutation tax, and shows that he was the tax collector, that the rate bills and warrant for the collection of the taxes were delivered to him, that payment of the tax had been demanded of defendant and refused, establishes the facts essential to the relief demanded, and, on defendant failing to show sufficient reason why the tax had not been paid, an order of commitment was proper.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1222, 1223; Dec. Dig. § 602.*]

7. EVIDENCE (§ 83*)—PRESUMPTIONS—PERFORMANCE OF OFFICIAL DUTY.

Public officers acting officially are presumed to have done their duty until the contrary appears.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 105; Dec. Dig. § 83.*]

Appeal from City Court of Meriden; Frank S. Fay, Judge.

Complaint by Francis Atwater, tax collector, against Fred O'Reilly, for an order of commitment of defendant for nonpayment of a military commutation tax. From an order of commitment entered after a hearing after overruling a demurrer to the complaint, defendant appeals. Affirmed.

Oswin H. D. Fowler, for appellant. George A. Clark and Patrick T. O'Brien, for appellee.

HALL, J. Section 2395 of the General Statutes of 1902, as amended by chapter 50, p. 619, Pub. Acts 1907, provides that "when any person shall neglect or refuse to pay any poll or military tax assessed against him, after payment of the same has been legally demanded, the collector of the town to which said tax is due, and who is authorized to collect said tax, may at any time within three years after said tax shall become due, prefer his complaint to any justice of the peace residing in said town, or to any city, town or borough court established within said town, alleging the nonpayment of said tax, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such justice of the peace or court shall thereupon cause said delinquent taxpayer to be arrested and brought before such justice or court. Such justice or court shall thereupon hear and determine such case, and if no proper or sufficient reason is shown by said delinquent taxpayer, why said tax has not been paid shall order the accused to stand committed to the jail or workhouse, in the county, until such tax with the interest thereon and all costs of the proceedings shall be paid. Any person committed to jail under the provisions of this section shall be required to do such work as his physical condition may allow, and shall be discharged when his labor at the rate of one dollar a day shall amount to said tax and costs, and thereupon the county commissioners shall pay to the tax collector of the municipality from which the delinquent was committed the amount of said tax. * * *

In the proceeding before us, the complainant is described as the tax collector of the town of Meriden, duly appointed and qualified. One paragraph of the complaint alleges that Fred O'Reilly has failed to pay the military commutation tax of \$2, assessed against him upon the rate bill, for the annual town tax of said town on the list of 1904, and which became due on the 21st of April 1905, and payment of which was legally demanded, and another paragraph contains similar allegations of the failure of said O'Reilly to pay his military commutation tax due on the 21st of April, 1907. The delinquent taxpayer demurred to the complaint upon the grounds, in substance, that it did not appear that said taxes were properly or lawfully assessed against the defendant or included in said rate bills; or that payment of the same had been legally demanded; or that the plaintiff was authorized to collect them. The overruling of this demurrer is one of the reasons of appeal.

This is not an action to which the ordinary rules of pleading in either civil or criminal cases must be applied. It is a special statutory proceeding. The purpose of it is not to enable the tax collector to obtain a judgment for the amount of the taxes, nor to require him to establish before a court the validity of the tax, his authority to collect it, and that it has been legally demanded before he can procure a delinquent taxpayer to be committed to jail. The court or justice to which such a complaint as this is preferred renders no judgment of indebtedness. Section 2395, enacted in 1901 and amended in 1905, and again in 1907, does not either expressly or by implication repeal the general provisions regarding the collection of military commutation taxes contained in sections 2381, 2394, 2412, and 2998. The collector Atwater could therefore, if he had seen fit, have proceeded under the warrant issued to him in March, 1908, under sections 2381 and 2389, described below, and for want

of goods or chattels of the delinquent taxpayer upon which to levy, and after legal demand upon him could have levied upon his body, and without granting him any opportunity for a hearing have committed him to jail until the tax was paid. The distinctive features of section 2395, as amended in 1907, are found in the provisions that any person committed to jail "under the provisions of this section" may be required to work out his military tax at the rate of \$1 a day for his labor, and to pay his own board during his commitment, and that the county commissioners are required to pay the tax to the town. Before the delinquent taxpayer can be committed under this section, he must be given an opportunity to show some "proper or sufficient reason why the tax has not been paid." The averments of the complaint, as above set forth, were a sufficient compliance with the provisions of this section to give the court jurisdiction to make the order.

By way of answer, the delinquent taxpayer alleged that he was too poor to pay the tax, and that the town, to avoid litigation regarding the validity of military taxes, had voted to accept \$1 from every person owing a military tax in full settlement of the same, and that he had tendered that sum to the tax collector. These were properly held to be insufficient reasons for failure to pay said taxes. The poverty of O'Reilly, who was found to be a young man apparently well and strong, did not exempt him from a military tax. Gen. St. 1902, §§ 2997, 2998. The resolution of the town meeting was ineffectual to reduce the amount of a tax duly laid. State ex rel. Coe v. Fyler, 48 Conn. 145-158.

In the city court these facts were proved: The complainant was elected tax collector of the town of Meriden in October, 1907, succeeding one Holt, who had held the office during the preceding 15 years. The compensation of both said collectors was fixed by salary. The plaintiff filed his bond, and received from Holt the rate bills signed by the selectmen for the uncollected back taxes, including the two against the defendant described in the complaint. In the books containing these rate bills were warrants issued and directed to said collector Holt in 1905 and 1907, respectively. In March, 1908, the selectmen of Meriden procured a warrant to be issued to the complainant for the collection of the taxes laid in the previous October and of the uncollected taxes of certain previous years, including said military taxes due from O'Reilly. In January, 1908, O'Reilly received a bill from the complainant notifying him that military taxes to the amount of \$4 were due to the collector. On the 14th of March, 1908, the complainant personally demanded payment of said taxes of O'Reilly; but he failed to pay them. At the hearing counsel for O'Reilly made vari-

ous claims of law, by objections to evidence and otherwise, among which were these: That it did not appear that O'Reilly's name, although entered upon said rate bills, was ever placed upon the enrollment list, as required by sections 2905 and 2908; and that the complainant was required to prove, and that by the writing itself, that notice of the time and place at which the collector would receive payment of taxes had been published and posted as required by section 2391 of the General Statutes. These claims are apparently based upon a misunderstanding of the real purpose of this proceeding and of the evidence necessary to be offered by the complainant to enable him to obtain an order of commitment. He was not compelled to present proof that the various town officers in assessing these taxes against O'Reilly had taken each particular step required by statute. Public officers acting officially are presumed to have done their duty until the contrary appears. *State v. Main*, 69 Conn. 123-140, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30; *Hart v. Tiernan*, 59 Conn. 521-526, 21 Atl. 1007. Having proved that he was the tax collector of the town, that the rate bills and warrant for the collection of these taxes had been delivered to him, that payment had been demanded and refused, the complainant had established all the facts which the statute required him to prove, and, the delinquent taxpayer having shown no proper or sufficient reason why the taxes had not been paid, the order of commitment was properly made.

There is no error. The other Judges concurred.

(81 Conn. 408)

BERMAN v. KLING.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. TRIAL (§ 251*)—PLEADINGS—INSTRUCTIONS—APPLICABILITY.

Where the complaint alleged a conversion of plaintiff's tools by defendant, and the conversion was the controlling issue presented, an instruction which assumed that plaintiff's cause of action was based on the neglect of defendant in breaking and leaving open plaintiff's tool chest was erroneous because not presented by the pleadings.

[Ed. Note.—For other cases, see *Trover*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

2. JUDGMENT (§ 251*)—CONFORMITY TO PLEADINGS.

A judgment based on facts found by the trial court, but not involved in the issue raised by the pleadings, is erroneous.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 437; Dec. Dig. § 251.*]

3. JUDGMENT (§ 250*)—CONFORMITY TO PLEADINGS.

A party cannot allege one cause of action, and recover judgment on another.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 436; Dec. Dig. § 250.*]

4. JUDGMENT (§ 248*)—CONFORMITY TO PLEADINGS.

Under the practice act, the right to recover is limited by the facts alleged in the complaint.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 434, 439, 440; Dec. Dig. § 248.*]

5. TRIAL (§ 251*)—ISSUES—INSTRUCTIONS—APPLICABILITY.

The instructions of the court must be correct, adapted to the issue, and sufficient for the guidance of the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

6. TROVER AND CONVERSION (§ 35*)—ISSUES—BURDEN OF PROOF.

Where, in conversion, defendant entered a general denial, plaintiff had the burden of proving that defendant either actually appropriated the property in controversy to his own use or refused to deliver it on proper demand to plaintiff, and defendant was not required to prove that he did not convert the goods to his own use.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. § 216; Dec. Dig. § 35.*]

7. TROVER AND CONVERSION (§ 7*)—ACTS CONSTITUTING CONVERSION.

An employer who allows the tools of an employé to remain on his premises after the employé has quit work, and who refuses to carry the tools to plaintiff's house or such place as plaintiff designates, and who opens the chest containing the tools for the sole purpose of repossessing himself of tools belonging to himself, is not guilty of converting the tools, though they are lost or misappropriated by some one on the employer's premises, and the employer is not liable unless it is proved that he, either by himself or by some one under his direction, misappropriated the tools.

[Ed. Note.—For other cases, see *Trover and Conversion*, Dec. Dig. § 7.*]

8. TRIAL (§ 214*)—EVIDENCE—INSTRUCTIONS.

Where evidence is offered by either party to prove a certain state of facts, and the claim is made that they are proved, and the court is correctly requested to charge the jury what the law is as applicable to the case, the court must comply.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 480; Dec. Dig. § 214.*]

9. TRIAL (§ 260*)—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THOSE GIVEN.

It is not error to refuse requested instructions sufficiently covered by the instructions given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from City Court of New Haven; Albert McC. Mathewson, Judge.

Action by William Berman against Lawrence Kling to recover the value of tinner's tools which plaintiff alleged were converted to the use of defendant. There was a judgment for plaintiff, and defendant appeals, alleging errors in refusing to set aside the verdict as being against the evidence, in refusing to direct for defendant, and for errors in the charge of the court. Reversed, and new trial ordered.

Charles S. Hamilton, for appellant. Carl A. Mears, for appellee.

RORABACK, J. The complaint, in substance, alleges: That on or about January

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1, 1908, the defendant had in his possession certain articles of personal property belonging to the plaintiff. On said day the defendant used said property, and permitted others in his employ to use them, without authority from the plaintiff, and thereby converted the same to his own use. Said property has never been returned to the plaintiff, although the plaintiff has demanded the same from the defendant.

From the finding it appears that the following facts were substantially conceded: That the plaintiff was a tinner who had been in the employ of the defendant about eight months when he stopped work in consequence of a strike. When the plaintiff left, certain tinning tools belonging to him were locked in his chest in the defendant's shop. Two or three days thereafter the defendant made search for soldering irons belonging to him which the plaintiff had been using, and, being unable to find them, the defendant opened the plaintiff's tool chest by unscrewing the hinges, and took therefrom the missing tools. A few days after the plaintiff stopped work, he called at the shop of the defendant, and found his chest open and some of his tools missing. These tools and chest had been in the possession of the defendant from the time the plaintiff stopped work on December 1, 1907, until the strike was ended about two months later. The plaintiff claimed that he had shown that his tools had never been returned to him, although demanded from the defendant. The defendant claimed to have proven that he had not touched, taken, or used, or given any person permission to take or use, the tools in question; that he simply opened the plaintiff's tool chest for the purpose of recovering his own tools which the plaintiff had stored therein. The alleged conversion of the plaintiff's tools by the defendant was the controlling issue presented by the pleadings and the claims of the parties.

The court charged the jury as follows: "If the defendant had not touched this chest, then his responsibility regarding the tools and chest would have been very slight, if any. But, according to the evidence of the plaintiff and defendant, the chest was broken into by the defendant, and according to a part of the evidence, as to which you will recall, the chest was left unlocked; that is, broken open, and not being secured by the defendant after he had broken it open. His responsibility was increased in that case, and, if you find in that case that on account of his opening the box the tools were lost or used by the defendant, then the responsibility of the defendant was by that fact increased, and he may, on account of his breaking open the chest and leaving it in this condition, become liable for the tools, provided you find it was on account of his negligence. As I say, the defendant had the right, if his tools were locked up in this chest, to open it with the least possible damage, but by do-

ing so he assumed a responsibility which was not attached to him up to that time, and then, further, if you find that he left the chest as secure after he had broken it open as it was before, then this responsibility would not be any greater than it was before that, and he would be liable only for slight care in case the tools or chest became lost." In this there was error. The complaint alleged a taking and conversion of the plaintiff's tools by the defendant. The instructions directed the attention of the jury to other and different elements of liability. The instructions did not confine the attention of the jury to the case stated in the pleadings, but the jury were given to understand that they might find against the defendant upon a cause of action foreign to the issue. This charge assumes that the plaintiff's cause of action was based upon negligence in breaking and leaving open the plaintiff's chest containing his tools. This assumption was wrong, as there was no such issue presented by the pleadings. As heretofore stated, the whole case exhibited in the complaint rested upon an alleged conversion of the plaintiff's personal property. Pleadings are essential in every system of jurisprudence, and there can be no orderly administration of justice without them; but, if a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose. It will rather serve to ensnare and mislead his adversary. *Southwick v. First National Bank of Memphis*, 84 N. Y. 420-428. A judgment based upon facts found by the trial court, but not involved in the issue raised by the pleadings, is erroneous, and cannot be upheld. *Greenthal v. Lincoln, Seyms & Co. et al.*, 67 Conn. 372, 35 Atl. 266, 377, 378. A party cannot allege one cause of action and recover judgment upon another. *Moran et al. v. Bentley*, Adm'r, 69 Conn. 392-403, 37 Atl. 1092. Under our practice act the right to recover is limited by the facts alleged in the complaint. *Powers v. Mulvey*, 51 Conn. 432, 433. The instructions of the court must be correct, adapted to the issue, and sufficient for the guidance of the jury in the case before them. *State v. Kelly*, 77 Conn. 266-274, 58 Atl. 703; *Hartford v. Champion*, 58 Conn. 268, 20 Atl. 471; *Waters v. Bristol*, 26 Conn. 398.

The defendant in writing requested the court to charge the jury as follows: "This action is brought by the plaintiff for the conversion by the defendant to his own use of certain mechanic's tools described in the complaint, and to this the defendant has entered a general denial. The burden of proof is therefore on the plaintiff to satisfy you by a fair preponderance of the evidence that the defendant either actually appropriated the goods in question to his own use, or refused to deliver them up on a proper demand made by the plaintiff. If the plaintiff has failed to satisfy you by a fair preponderance of the evidence on these

points, your verdict should be for the defendant. It is not for the defendant to prove that he did not convert the tools to his own use, but the plaintiff must prove that he did, and, if the plaintiff has failed to make out his case, the verdict goes for the defendant as a matter of course. If you find that the plaintiff was in the employ of the defendant and quit work and left his tools on the premises of the defendant, and the defendant did nothing more to or with them than to allow them to remain there, and refused to carry them to the plaintiff's house, or such place as the plaintiff designated, and that his opening of the tool chest was merely to repossess himself of tools belonging to the defendant, then your verdict should be for the defendant, for these acts would not constitute any conversion of the plaintiff's property. Even if you find that the plaintiff's tools were lost or misappropriated by some one on the premises of the defendant, that does not make the defendant liable. He cannot be liable unless it is proved by a fair preponderance of the evidence that he, the defendant, either by himself or under his direction misappropriated the tools of the plaintiff." The propositions contained in these requests were a correct statement of the law and applicable to the case. The defendant was entitled to have them given to the jury, at least in substance. An examination of the charge which is set out in full in the record discloses that these requests were not given in form or substance. On the contrary, the charge (as already indicated) contains directions to the jury inconsistent with the instructions requested. When evidence is offered by either party to prove a certain state of facts, and the claim is made that they are proved and the court is correctly requested to charge the jury what the law is, as applicable to the case, the court must comply. *Morris v. Platt*, 32 Conn. 75-82. It is not error to refuse to give requested instructions which are sufficiently covered by the instructions in the case. *Crotty v. Danbury*, 79 Conn. 380, 65 Atl. 147; *Houghton v. New Haven*, 79 Conn. 659, 66 Atl. 509; *Ridgenfield v. Fairfield*, 73 Conn. 47, 51, 46 Atl. 245; *Charter v. Lane*, 62 Conn. 121, 25 Atl. 464; *Hartford v. Champion*, 58 Conn. 269, 20 Atl. 471.

There is error, and new trial ordered.

(81 Conn. 415)

PETTUS et al. v. GAULT et al.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. PLEADING (§ 418*)—RULINGS ON DEMURRER—WAIVER.

A defendant voluntarily filing an amended or substitute answer after a former one has been adjudged insufficient on demurrer waives

the right to except to the sustaining of the demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1403; Dec. Dig. § 418.*]

2. PLEADING (§ 418*)—RULINGS ON DEMURRER—WAIVER.

The first defense in the answer admitted or denied all the allegations of the complaint. The second defense and counterclaim were held insufficient on demurrer. The court subsequently granted plaintiff's motion for answer to unanswered paragraphs of the complaint, and ordered that an answer be filed within a specified time. *Held*, that the order merely limited the time for the filing of any additional answer and an election to file an amended answer was voluntary, so that defendant by filing an amended answer waived the sustaining of the demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1403; Dec. Dig. § 418.*]

3. ATTACHMENT (§ 54*)—PROPERTY SUBJECT TO.

The interest of a mortgagee in the mortgaged premises cannot be attached.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 144; Dec. Dig. § 54.*]

4. EXECUTION (§ 38*)—PROPERTY SUBJECT TO.

The interest of a mortgagee in the mortgaged premises cannot be set off on execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 100; Dec. Dig. § 38.*]

5. JUDGMENT (§ 777*)—LIEN—PROPERTY SUBJECT TO.

Under Gen. St. 1902, § 4151, providing that no judgment lien shall be valid as to any interest in real estate which might not have been levied on under an execution on the same judgment, the interest of a mortgagee in the mortgaged premises cannot be reached by a judgment lien.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1338; Dec. Dig. § 777.*]

6. MORTGAGES (§ 476*)—FORECLOSURE PROCEEDINGS—NATURE.

Mortgage foreclosure proceedings are instituted to enable a mortgagee or lienor to cut off equities of redemption, and thus bring perfection to his incomplete title, and they do not have for their purpose the settlement of disputed titles, and investigation into the title of the mortgagee or lienor is permissible only when it is incidental to the main object of the proceedings.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1392; Dec. Dig. § 476.*]

7. JUDGMENT (§ 660*)—RES JUDICATA—ERRONEOUS JUDGMENT.

One sued a mortgagee, and attached her interest in the mortgaged premises. He subsequently filed a judgment lien on the premises. The mortgagee and equity owners were made parties to a proceeding to foreclose such lien. A judgment of foreclosure was rendered and the time limited for the several parties to redeem. No one redeemed, and a foreclosure certificate was filed of record. *Held*, that the judgment foreclosing the judgment lien was not effectual to establish in the judgment creditor title to the mortgagee's interest; such interest not being liable to attachment nor to be set off on execution, and hence not subject to a judgment lien, and a decree in favor of a party without interest in the subject to be affected is useless.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1171; Dec. Dig. § 660.*]

8. MORTGAGES (§ 1*)—NATURE—REAL OR PERSONAL PROPERTY.

A note given to evidence an indebtedness and a mortgage to secure it are personal prop-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

erty in the hands of the transferee of the note and mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1; Dec. Dig. § 1.*]

9. HUSBAND AND WIFE (§ 135*)—PROPERTY RIGHTS—STATUTES.

Under Gen. St. 1902, § 4541, providing that the personal property of any woman married after June 22, 1849, and prior to April 20, 1877, shall vest in the husband in trust, etc., the legal title to a note and mortgage securing it, assigned to a woman who married between the designated dates, vests in the husband, and the equitable title remains in her, and, on the husband's death, the trust terminates and the legal title vests in her, making her the absolute owner.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 501; Dec. Dig. § 135.*]

10. HUSBAND AND WIFE (§ 199*)—CONVEYANCE—RATIFICATION.

A married woman who assigns a note and mortgage assigned to her may ratify the assignment after the death of the husband who did not join therein.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 734; Dec. Dig. § 199.*]

11. HUSBAND AND WIFE (§ 202*)—ASSIGNMENT OF MORTGAGE—JOINDER OF HUSBAND—OBJECTIONS BY MORTGAGOR.

A married woman having the equitable title in a note and mortgage securing it transferred it; her husband, who had the legal title, not joining in the transfer. Subsequently the husband died, and thereafter the assignee brought a suit to foreclose the mortgage, making the married woman a party defendant. She acquiesced in the title of the assignee. *Held*, that the owner of the equity in the mortgaged premises could not attack the validity of the transfer on the ground that the husband did not join therein.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 737; Dec. Dig. § 202.*]

12. MORTGAGES (§ 463*)—FORECLOSURE—EVIDENCE.

Where, in a suit to foreclose a mortgage brought by the assignee of the note secured thereby, the answer admitted the giving of the mortgage, its terms, and its record, and plaintiff proved his ownership of the note and the nonpayment thereof, the court properly foreclosed the mortgage, though neither the mortgage nor a copy thereof was offered in evidence, and though there was no evidence that the mortgage had ever been in the possession of plaintiff, or that it existed at the time of the assignment to him; Gen. St. 1902, § 4127, authorizing a foreclosure of the mortgage by the owner of the debt secured.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1361; Dec. Dig. § 463.*]

13. MORTGAGES (§ 235*)—INCIDENT TO DEBT SECURED.

A mortgage securing a debt is only an incident to the debt from which it cannot be detached, and the holder of the mortgage must hold it for the benefit of the holder of the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 620; Dec. Dig. § 235.*]

14. EVIDENCE (§ 67*)—FORECLOSURE—EVIDENCE—PRESUMPTIONS.

Where, in a suit to foreclose a mortgage, the answer admitted the giving of the mortgage, its terms, and its record, a presumption arose that the condition created continued to exist which was sufficient for plaintiff's purpose until something to indicate the contrary appeared.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 87; Dec. Dig. § 67.*]

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Action by Isabella M. Pettus and another against Leonard Gault and another to foreclose a mortgage of real estate. From a judgment for plaintiffs, defendant Leonard Gault appeals. *Affirmed*.

William Burr Wright in his lifetime received from the then owners of the land described in the complaint the note and mortgage also described in the complaint. The note was given to evidence an indebtedness and the mortgage as security therefor. His daughter, the defendant Mary E. Wright Smith, on May 16, 1887, became the owner of this note and mortgage, which continued to be hers until October 12, 1900. She was during all this period a married woman living with her husband, to whom she was married prior to 1877. He died on or about January 9, 1901. On October 12, 1900, Mrs. Smith, for value received, assigned and transferred her interest in the note to the plaintiffs, who are now the good-faith owners thereof. The mortgage was not delivered to the plaintiffs, and they never had possession of it, and Mr. Smith did not join in the assignment. In the course of events one Mary E. Schofield died in December, 1898, possessed of the equity in the mortgaged premises. Pursuant to a provision of her will, its executor conveyed this equity to the Hill & Hubbell Lumber Company April 27, 1899, and shortly thereafter this company conveyed all its right, title, and interest in the premises to the defendant Gault. The defendant Gault filed an answer containing two defenses and a counterclaim. The second of these defenses asserted that on December 28, 1898, said lumber company commenced an action returnable to the town court of Norwalk against Mrs. Smith and placed an attachment therein on her right, title, and interest in the mortgaged premises; that subsequently the company had judgment for \$180 damages and \$30.15 costs; that February 9, 1899, the company, for the purpose of securing this judgment, filed a judgment lien upon the premises; that February 15, 1899, proceedings for the foreclosure of this lien were begun in said town court, Mrs. Smith and the equity owners being made parties; that judgment of foreclosure was subsequently rendered and times limited for the several parties to redeem; that no one redeemed within the times so limited, the last of which was fixed at April 26, 1899; that on April 28, 1899, a foreclosure certificate was filed of record; that thereafter, to wit, on May 6, 1899, the company conveyed the premises to the defendant Gault by a warranty deed; that the title thereupon became perfect in Gault as the absolute owner of the premises; and that the alleged assignment to the plaintiffs was subsequent to all these transactions. This defense was successfully demurred to. A substitute answer

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was then filed, which was in turn demurred to. This demurrer was sustained as to the second and third defenses. Upon the trial neither the mortgage nor a copy was offered in evidence, and no evidence was presented to show that the mortgage had been lost or destroyed, or what disposition had been made of it. The defendant Gault alone filed an answer. Mrs. Smith, the only other defendant, made default of appearance.

Edward M. Lockwood, for appellant. John O'Neill, for appellees.

PRENTICE, J. (after stating the facts as above). The first assignment of error charges that there was error in the sustaining of a demurrer filed to the second defense of the original answer of the defendant Gault. For this answer in its entirety another was later substituted, which, in its turn, was demurred to. When a defendant voluntarily files an amended or substitute answer after a former one has been adjudged insufficient on demurrer, he waives all right to except to the action of the court in sustaining the demurrer to the first answer. *Mitchell v. Smith*, 74 Conn. 125, 128, 49 Atl. 909; *Burke v. Wright*, 75 Conn. 641, 643, 55 Atl. 14. The defendant contends that his action in filing the substitute answer was not voluntary, but in compliance with an order of court. It appears that, after the second defense and counterclaim contained in the original answer had been held insufficient, the plaintiffs placed upon the short calendar a motion for answer to paragraphs of the complaint standing unanswered, and the court granted the motion, and ordered that an answer be filed within two weeks. As the first defense either admitted or denied all the allegations of the complaint, it does not appear what the reason or purpose of the motion was unless it was prompted by a desire to expedite the filing of any additional defense the defendant might wish to avail himself of. But, however this might be, the so-called order was in no sense a command to the defendant that he answer further. He was left at perfect liberty to do so or not, as he chose. The only compulsion that he was placed under was to file any additional answer that he wished to incorporate in his pleadings within the time specified if he did not wish his right to answer further cut off. The order was nothing more than a limitation of time, and in all respects save as to the matter of time he remained as free to act his will after as he was before it was made. His election to file an amended answer was in the fullest sense a voluntary act on his part, carrying with it the waiver of all right to challenge the correctness of the ruling of the court upon the demurrer to the superseded pleading.

But this defendant, by the operation of this rule, has not been deprived of any substantial benefit. The Hill & Hubbell Lumber Company, to whose rights he has succeeded, ac-

quired upon the facts pleaded in the first answer no interest in the property in question, either by the attachment attempted to be made in its action against Mary E. Wright Smith or by the judgment lien which was filed. Mrs. Smith had no other title or interest in the property than as mortgagee. Such an interest in lands cannot be attached or set off on execution. *Huntington v. Smith*, 4 Conn. 235, 237; *McKelvey v. Creevey*, 72 Conn. 464, 467, 45 Atl. 4, 77 Am. St. Rep. 321. Neither can it be reached by a judgment lien. Gen. St. 1902, § 4151. The judgment of the town court of Norwalk purporting, upon the complaint of the lumber company, to foreclose the judgment lien, although Mrs. Smith was made a party to the proceedings, was not effectual, as claimed, to establish in the company as res adjudicata a title to her mortgage interest which had not become subject to the lien foreclosed. It is doubtless true that the title of a mortgagee may to a certain extent and for certain purposes become the subject of inquiry and decision in foreclosure proceedings. *Cowles v. Woodruff*, 8 Conn. 35, 38; *Frink v. Branch*, 16 Conn. 260, 268; *Bull v. Meloney*, 27 Conn. 560, 562; *Middletown Savings Bank v. Bacharach*, 46 Conn. 513, 526; *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282, 306. It is unnecessary for the purposes of this case to analyze these cases and the prior ones of *Broome v. Beers*, 6 Conn. 198, and *Pakmer v. Mead*, 7 Conn. 149, expressing different views to determine the precise state of our law upon this subject. It is sufficient for present purposes that such proceedings do not have for their purpose the settlement of disputed titles and are not appropriate to that end. *Cowles v. Woodruff*, 8 Conn. 35-37. They are instituted to enable a mortgagee or lienor to cut off equities of redemption, and thus bring reinforcement or perfection to his incomplete title. *Bull v. Meloney*, 27 Conn. 560, 562. Such investigation into the title of the mortgagee or lienor as is permissible is one which is incidental to the main object of the proceedings. It is recognized that the assumed status of the foreclosing mortgagee or lienor is one which ought to be open to inquiry if judicial proceedings are not to be trifled with, but the issue is not necessarily presented, and is not to be regarded as necessarily adjudicated. All that the cases recognize is that the title may be made the subject of investigation for proper purposes. *Frink v. Branch*, 16 Conn. 260, 268; *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282, 306, 307. In the foreclosure in question the then plaintiff had nothing in the way of title or interest to perfect. The judgment of the court limiting a time for the exercise by Mrs. Smith of a right to redeem was but a barren ceremony. "A decree in favor of a party without interest in the subject to be affected would be useless." *Frink v. Branch*, 16 Conn. 260, 268.

The appealing defendant complains of the action of the court in rendering a judgment of

foreclosure, notwithstanding it appeared that the plaintiffs had no other title to or interest in the mortgage note and security than that derived from an assignment and transfer for value from a married woman married prior to 1877 and at the time of the transaction living with her husband. The right of the defendant to thus challenge the plaintiffs' right to prosecute their action has already been noticed. It was not, however, well made. It is not distinctly found whether Mrs. Smith, the transferee of the note, was married before or after 1849. The presumed intent of the finding, however, is that her married status and property rights are to be determined by the law as it was during the period of nearly 30 years which immediately preceded 1877. By that law the legal title to Mrs. Smith's personal estate, there being nothing to show that it was her sole and separate estate, vested in her husband as trustee. Gen. St. 1902, § 4541. This note and its security is to be regarded as personal estate. *Waterbury Savings Bank v. Lawler*, 46 Conn. 243, 245; *McKelvey v. Creevey*, 72 Conn. 464, 467, 45 Atl. 4, 77 Am. St. Rep. 321. The equitable title was in Mrs. Smith. *Belden v. Sedgwick*, 68 Conn. 560, 566, 37 Atl. 417. Upon the death of Mr. Smith in 1901, the trust terminated, and the legal title to all of Mrs. Smith's personalty vested in her, thus merging the legal and equitable estates and making her its absolute owner. *Connecticut T. & S. D. Co. v. Security Co.*, 67 Conn. 438, 442, 35 Atl. 342. Whatever title or interest in the note and its security which Mrs. Smith undertook to transfer to these plaintiffs failed to pass to them by virtue of the transfer thus became upon the death of her husband vested in her without restraint upon her power of dominion and control over them on the part of anybody. If it be assumed, therefore, that her original assignment was ineffectual to carry a good title to these plaintiffs and that she would not be estopped from questioning that title, it certainly was in her power after her husband's death to confirm and ratify either expressly or by conduct the transfer she had previously attempted to make, and it is still in her power so to do. In any event, the right to challenge

the validity of the assignment and transfer was and is one personal to her, and no other person is in a position to do so. She is a party defendant to this action. She has not chosen to question the title of these plaintiffs to the note and security sought to be enforced. On the contrary, she has chosen to remain silent and acquiesce in the validity of the title she attempted to give. The defendant Gault has no standing to act for her or to assert rights which are hers alone.

The defendant in his last reason of appeal charges that there was error in rendering the judgment of foreclosure when the mortgage or a copy thereof had not been produced at the trial, no evidence offered that the mortgage had ever been in the hands or possession of the plaintiffs, and no proof of the existence of the mortgage at the time of the alleged assignment to the plaintiffs produced. The mortgage which the answer admits to have been given to secure the payment according to its tenor of the note described in the complaint and to have been duly recorded was only an incident to the debt from which it could not be detached and distinct from which it had no determination value, and the holder or assignee of it must hold it at the will and disposal of the creditor. *Huntington v. Smith*, 4 Conn. 235, 237; *Chamberlain v. Connecticut Central R. Co.*, 54 Conn. 472, 484, 9 Atl. 244. This mortgage, therefore, whether it remained in Mrs. Smith's hands or passed into other hands or had become destroyed remained until lawfully discharged security for the note in suit after the plaintiffs received it, and, when the plaintiffs established their ownership of the note and satisfied the court of its nonpayment, their right to avail themselves of such security as the mortgage afforded was sufficiently established. See Gen. St. 1902, § 4127. As the answer admitted the giving of the mortgage, its terms, and its record, a presumption arose that the condition thus created continued to exist which would be sufficient for the plaintiffs' purpose until something to indicate the contrary appeared. *Gray v. Finch*, 23 Conn. 495, 513.

There is no error. The other Judges concurred.

McKENNA v. CURRAN & BURTON.

(Supreme Court of Rhode Island. Jan. 7, 1909.)

NEW TRIAL (§ 108*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

In an action against a master for injuries resulting from the negligence of another employé, in which there has been a verdict for the master, a new trial should not be granted on affidavits of newly discovered evidence showing that such other employé was incompetent, where there is nothing to show that such fact was known to the defendant, or could have been discovered by him, prior to the accident, by the exercise of reasonable care.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 226; Dec. Dig. § 108.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Action by John McKenna against Curran & Burton. Defendants were coal dealers, and plaintiff was employed to shovel coal in the hold of a barge. The coal was brought to the barge by means of a bucket, which was swung over the barge, and it was the duty of a trolley man to regulate the movements of the bucket. Plaintiff claimed to have been injured by the negligence of the trolley man. A verdict was rendered for defendant, and plaintiff moved for a new trial on affidavits showing that the trolley man was incompetent. The new trial was granted, and defendant brings exceptions. Exceptions sustained.

Albert B. Crafts, for plaintiff. Vincent, Boss & Barnefeld and Alexander L. Churchill, for defendant.

PER CURIAM. The affidavits of newly discovered evidence were obtained only after the most persistent efforts of persons specially employed for that purpose for months after verdict for the defendant. If the trolley tender was incompetent, there is nothing to show that the fact was known to the defendant, or could have been discovered by it, prior to the accident, by the exercise of reasonable care.

The defendant's exceptions are therefore sustained, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

HART et al. v. SUPERIOR COURT.

(Supreme Court of Rhode Island. Jan. 7, 1909.)

FORCIBLE ENTRY AND DETAINER (§ 44*)—REVIEW—CERTIORARI.

Under Pub. Laws 1908, p. 39, c. 1533 (entitled "An act concerning forcible entry and detainer") § 9, such proceeding may be removed by certiorari into the Supreme Court, and be there quashed for any irregularity.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 183; Dec. Dig. § 44.*]

Richard Hart and others petitioned for a writ of certiorari to the superior court. Writ granted.

This is a petition for a writ of certiorari preferred in accordance with the provisions of Pub. Laws R. I. p. 34, c. 1533 (Jan. Sess. 1908), entitled "An act concerning forcible entry and detainer." The petition is preferred in accordance with section 9 of said chapter, which provides: "Such proceeding may be removed by certiorari into the Supreme Court, and be there quashed for irregularity, if any such there be." The original proceeding in the superior court is upon a complaint made to a justice of said superior court of forcible entry and detainer, etc.

Julius L. Mitchell, for petitioners. William A. Heathman, for respondents.

PER CURIAM. In order that we may make the necessary examination required to pass upon the regularity of the proceedings, the writ of certiorari may issue.

STATE v. ROSENKRANS.

(Supreme Court of Rhode Island. Jan. 8, 1909.)

1. APPEAL AND ERROR (§ 316*)—CERTIFIED QUESTIONS—SUFFICIENCY.

A certified question as to whether Gen. Laws 1896, c. 155, as it stood during a specified period, without reference to the section or sections objected to, violates a specified constitutional provision, is too indefinite for consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1781; Dec. Dig. § 316.*]

2. APPEAL AND ERROR (§ 309*)—CERTIFIED QUESTIONS—MOOT QUESTIONS.

A certified question as to whether the Legislature can delegate its police power to a state board without violating Const. art. 4, § 2, vesting the legislative power in the General Assembly, cannot be considered, since it presents a moot question; the only question proper for consideration being as to the effect of actual, and not of potential, legislation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1770; Dec. Dig. § 309.*]

3. APPEAL AND ERROR (§ 809*)—CERTIFIED QUESTIONS.

Certified questions whether the General Assembly can pass a retrospective law prohibiting a dentist to continue his practice, who has lawfully practiced before the law took effect, without violating the federal constitutional prohibition against retrospective laws, whether the Legislature can take away the privilege of a citizen existing in another state to follow his profession, and deprive him of the same when he comes into this state and offers to pay the state license and pursue his profession under established qualifications presented to the board, without violating Const. U. S. art. 4, § 2, guaranteeing to citizens of each state all privileges and immunities of the citizens in the several states, and if it is not a violation of Const. U. S. art. 4, § 1, the full faith and credit clause, for one state to ignore certificates from other states through their state board, who have passed upon one's qualifications and pronounced him fit and competent to practice, and he having offered to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pay for the license to practice in Rhode Island when he presents the evidence of such certificates from other states to the board, to ignore such evidence of his established qualifications passed upon by competent authority, and provide by statute that he is guilty of a misdemeanor for practicing without a license which he has offered to pay, and has shown that he was amply qualified to practice, are not proper subjects for consideration, in that they present moot questions, and are too indefinite to be answered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1770; Dec. Dig. § 309.*]

4. APPEAL AND ERROR (§ 316*)—CERTIFIED QUESTIONS—UNINTELLIGIBLE QUESTIONS.

Certified questions as to whether it is not a violation of the state and federal Constitutions, under the claim of exercising the police power of that part of the Constitution for the guaranteeing of life, liberty, and the pursuit of happiness, for the Legislature to make it a crime for a qualified dentist, successfully and continuously practicing for 25 years, possessing the declaration of two state boards that he is fit and competent to practice, and if it is not a violation of Const. U. S. art. 4, § 4, guaranteeing to each state a republican form of government, are unintelligible, and cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1781; Dec. Dig. § 316.*]

Case Certified from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Evan B. Rosenkrans, having been indicted for practicing dentistry without registration, moved to dismiss the indictment on the ground of the unconstitutionality of Gen. Laws 1896, c. 155, and the constitutional questions involved have been certified by the superior court. Questions returned.

See, also, 68 Atl. 309.

The questions are as follows:

"No. 1. Is not chapter 155 of the General Laws of 1896 of the state of Rhode Island, as it stood at the time charged in the indictment that defendant was practicing unlawfully, without license, etc., contrary to and in violation of the provision of section 2, art. 4, of the Constitution of the state of Rhode Island?

"No. 2. Can the Legislature of Rhode Island delegate its police power to the State Board of Registration in Dentistry without violating section 2, art. 4, of the Constitution of the state of Rhode Island, vesting the legislative power in the General Assembly?

"No. 3. Can the General Assembly pass a retrospective law making it an offense for a dentist to continue his practice who was lawfully practicing before the law took effect, without violating the provision of the United States Constitution prohibiting retrospective laws?

"No. 4. Can the Legislature take away the privilege of a citizen existing in one state to follow his profession and deprive him of the same when he comes into Rhode Island, offers to pay the state license and pursue his profession under established qualifications presented to the board, without violat-

ing the provisions of the subdivision of article 4 of the United States Constitution which provides that the citizens of each state shall be entitled to all privileges and immunities of the citizens in the several states?

"No. 5. Is it not a violation of article 4, § 1, of the United States Constitution, under the full faith and credit clause, for one state to ignore certificates from other states through their state board, who have passed upon the qualifications of the defendant and pronounced him fit and competent to practice dentistry, and the defendant having offered to pay for the license to practice in Rhode Island at the time he presents the evidence of said certificates from other states to said board, to ignore said evidence of his established qualifications passed upon by competent authority, and provide by the Rhode Island statute that he is guilty of a misdemeanor for practicing without a license, which he has offered to pay for and has shown that he was amply qualified to practice?

"No. 6. Is it not a violation of the Constitution of the state of Rhode Island and that of the United States, under the claim of the exercise of the police power of that part of the Constitution providing for the guarantee of life, liberty, and the pursuit of happiness, for the Legislature of Rhode Island to make it a crime for a qualified dentist, successfully and continuously practicing for 25 years, possessing the declaration of two state boards that he is fit and competent to practice?

"No. 7. Is it not a violation of the United States Constitution, art. 4, § 4, guaranteeing to each state a republican form of government?

"It is respectfully submitted that these constitutional questions, affirmatively stated, claiming the acts of the General Assembly as unconstitutional, should be certified up forthwith to the Supreme Court of the state of Rhode Island for their decision, and the defendant prays that same may be done with all due speed, and that proceedings in the meantime be stayed."

Henry W. Greenough, Asst. Atty. Gen., for the State. George S. Engle, for defendant.

PER CURIAM. The first question is too indefinite. The opinion of the court is sought as to the constitutionality of the whole of chapter 155, Gen. Laws 1896, and its additions and amendments, within the time charged in the continuendo in the indictment, viz., January 1, 1906, to December 2, 1907. The section or sections of the statute to which objection is made cannot be definitely ascertained from the question as propounded.

The second question is a moot question. Strictly construed, it might be held to in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

quire whether the Legislature can delegate its entire police power to the State Board of Registration in Dentistry. The only question proper for consideration is as to the effect of actual, and not of potential, legislation.

The third, fourth, and fifth questions are also moot questions, and too indefinite to be answered.

The sixth and seventh questions are unintelligible.

For these reasons, the questions submitted are returned to the superior court, in order that definite constitutional questions may be certified to this court, if desired.

(109 Md. 30)

JONES v. CRISP et al.

(Court of Appeals of Maryland. Dec. 9, 1908.)

1. GIFTS (§ 30*)—INTER VIVOS—DEPOSITS IN SAVINGS BANKS.

To make a gift inter vivos of a deposit in a savings bank, there must be an actual transfer of all right and dominion over the deposit by the donor and an acceptance by the donee or some competent person for him, and the gift must transfer the property at once; and, until the gift is thus made perfect, the donor may make any other disposition of the property.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 52-57; Dec. Dig. § 30.*]

2. GIFTS (§ 30*)—INTER VIVOS—DEPOSITS IN SAVINGS BANKS.

A depositor in a savings bank who caused the deposit to be entered in the book of deposit in her name, and, in case of her death, payable to another, does not thereby make a gift inter vivos of the deposit, as she retains the absolute control over the deposit, and the transfer of the deposit has reference to a future time.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 52-57; Dec. Dig. § 30.*]

3. GIFTS (§ 30*)—INTER VIVOS—DEPOSITS IN SAVINGS BANKS.

A depositor in a savings bank caused the deposit to be entered in her name, and, in case of her death, payable to a third person. Subsequently she delivered the book of deposit to the latter, who was in possession thereof at the time of the depositor's death. A rule of the bank required the production of the book on the withdrawal of any part of the deposit. The depositor after the deposit declared that all that the third person would have to do to obtain the deposit was to take the book down to the bank and have it transferred. Held not to show a valid gift inter vivos of the deposit.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 55; Dec. Dig. § 30.*]

4. WILLS (§ 108*)—TESTAMENTARY DISPOSITION—VALIDITY.

An entry on a book of deposit in a savings bank which recites that the deposit shall be payable to the depositor, and, in case of her death, to a third person cannot operate as a testamentary disposition of the deposit to the third person, where the entry was not executed as the law requires.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 249; Dec. Dig. § 108.*]

Appeal from Circuit Court No. 2 of Baltimore City; James P. Gorten, Judge.

Bill of interpleader by the Canton National

Bank of Baltimore County against Evan Jones and others to determine the ownership of a deposit in the savings department of the bank. From a decree awarding the deposit to the estate of Frederica Crisp, deceased, William D. Jones, administrator of Evan Jones, who died after the decree, appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, and HENRY, JJ.

Robert H. Smith, for appellant. J. Cookman Boyd, for appellees.

BRISCOE, J. This is a bill of interpleader, filed on the 22d of March, 1905, in the circuit court No. 2 of Baltimore city by the plaintiff against the defendants for the purpose of establishing the ownership or title to a certain deposit of \$2,500, deposited in the savings department of the Canton National Bank of Baltimore County. The plaintiff bank disclaimed any claim or interest in the deposit, and on the 21st of June, 1905, under and by virtue of a decree of interpleader, the bank paid the sum of \$2,435.45 into court, to the credit of the cause, to await the inquiry as to who is entitled to the fund. The fund was claimed, first, by the plaintiff, now deceased, under the terms of the entry in the bank book of deposit to wit, "Frederica Crisp, in case of death, payable to Evan Jones"; secondly, by the defendant Virginia Lee Benton under and by virtue of the provisions of the last will and testament of one Joseph Crisp, deceased; thirdly, by the administrators d. b. n. c. t. a. of Joseph Crisp, deceased, as the property of his estate; and, lastly, by the administrators of Frederica Crisp, as the property of the deceased intestate. The case was heard upon bill, answers, and proof, and the decree of the court, passed on the 31st day of March, 1908, directed the fund to be paid to the administrators of the estate of Frederica Crisp as a part of her estate. The defendant, Evan Jones, having departed this life on the 5th day of May, 1908, after the date of the decree, his administrator, Wm. D. Jones, was subsequently made a party plaintiff, and, from the decree passed on the 31st of March, 1908, he has appealed.

It will be noticed that no appeal has been taken from this decree by either Mrs. Virginia Lee Benton or the administrators of Joseph Crisp, and, for the purposes of this appeal, the deposit will be treated as the property of Mrs. Crisp at the date of the deposit by her. The learned judge who decided the case below stated in his opinion that, as to the claim of Virginia Lee Benton: "I do not think the evidence establishes the fact that the fund in question is part of the estate of Joseph Crisp and so impressed with a trust as to justify me in intercepting it before it passes into the estate of Frederica

Crisp. I leave any claim Virginia Lee Benton may have against Frederica Crisp personally or as administratrix of Joseph Crisp to be asserted against the estate of Frederica Crisp."

Coming, then, to the real question presented on the appeal, and that is, did the entry in the bank book of the savings department of the Canton National Bank of Baltimore County, "Frederica Crisp in case of death subject to the order of Evan Jones," constitute a valid gift of the fund in controversy to Evan Jones under the laws of this state. The record in the case is quite a voluminous one; but, as a large portion of the testimony has no bearing upon the question we are called upon to decide, it will not be necessary for us to consider it on this appeal. The essential facts are set out in the pleadings and proof, and briefly stated appear to be these: Frederica Crisp, widow, late of Baltimore city, deceased, departed this life on the 20th day of February, 1905, intestate, and without children. On the 15th of August, 1904, she opened an account with the Canton National Bank of Baltimore County, and deposited therein the sum of \$2,500, the fund in question. The account was opened by the receiving teller of the bank by her direction, and the following entry made on a book of deposit of the savings department of the bank: "Frederica Crisp, in case of death payable to Evan Jones." This entry is in the handwriting of the teller of the bank, and the deposit book bearing the number of the account (No. 1,502) was delivered to her. The teller (Mr. Bramble) testified that Mrs. Crisp was introduced to him by Mr. Evan Jones, who came to the bank with her, but was not present when the conversation took place between them at the time of the deposit. He further stated: "Well, she came in and asked to open this account with \$2,500, and, as is the custom in a case of that kind, I asked how she wanted the book opened, and she said: 'I want this opened in my name, and, in event of death, to be payable to Mr. Jones.' I opened it in that manner, and the transaction was closed as far as we were concerned. I carried out her instructions to the letter." There was testimony to the effect that Mrs. Crisp retained possession of the book of deposit until some time in October, 1904, about four months before she died, when she gave it to the plaintiff's intestate, and that the book was in his possession at the time of her death. There was also testimony as to certain declarations of Mrs. Crisp made to members of the plaintiff's family subsequent to the deposit, and in the presence of the plaintiff, to the effect: "All your father would have to do is to take the book down to the bank and have it transferred. * * * I am satisfied your father has as much money in the bank as I have." Mrs. Jones, the wife of the plaintiff, testified that Mrs. Crisp brought the book to her house, asked her to get a piece of muslin, make a bag, and sew

the book in it. After complying with her request, she gave the book to her husband, and he put it away in the bureau drawer. The witness Nellie Jones testified that, after Mrs. Crisp came back from the bank, she handed her the book, and stated: "I want you to see how I have fixed the bank book. I have put it in both names." It also appears that one of the rules and regulations of the savings bank was: "Every person depositing shall be furnished with a book, in which the deposits and payments shall be entered; this book must be brought to the bank whenever a deposit is made or money withdrawn, that the transaction may be regularly entered thereon"—and that the bank would not pay out money deposited in the savings department without the production of the book.

Now, on this state of facts, the appellant contends that it was the clear intention of Mrs. Crisp to give the money in question to the appellant's intestate, and the delivery of the bank book to him under the circumstances of the case constituted a perfect and complete gift *inter vivos*. The law controlling a gift *inter vivos* of deposits in savings banks is well settled in this state, and it is clearly stated in *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486, to be this: To make such gift perfect and complete, there must be an actual transfer of all right and dominion over the thing given by the donor, and an acceptance by the donee, or some competent person for him, and it is essential, to the validity of such gift, that it should go into effect—that is, transfer the property, at once and completely—for, if it has reference to a future time when it is to operate as a transfer, it is but a promise without consideration, and cannot be enforced, either at law or in equity. Until the gift is thus made perfect, a *locus penitentiae* remains, and the owner may make any other disposition of the property that he may think proper. In the present case the entry in the book of deposit was Frederica Crisp, in case of death, subject to the order of Evan Jones. It appears, then, by the terms of the entry itself in the book of deposit that the fund here in question was to remain the property of the alleged donor during her life, and, only in case of her death was it subject to the order of the donee. By this entry she not only retained the absolute control and dominion over it, but could have drawn it out of the bank during her lifetime and dispose of it at her pleasure. The transfer of the fund was not to take place "at once or completely," but it had reference to a future time when it was to operate; that is, in case of death of the donee. In *Dougherty v. Moore*, 71 Md. 250, 18 Atl. 36, 17 Am. St. Rep. 524, it is said: "There is no case which decides that the donor may resume the possession and the donation continue, nor will the mere fact of possession in itself be sufficient, but it must appear that such possession was acquired with the consent of the owner, and with the intent on his part to re-

linguish all right and interest in the subject of the gift, and making it the property of the donee." Nor did the delivery of the book of deposit by the alleged donor, and the possession of it by the donee, at the time of the death of the donor, under the facts and circumstances of this case, operate to make a valid and complete gift *inter vivos* of the fund in question. *Murray v. Cannon*, 41 Md. 477; *Whalen v. Milholland*, 89 Md. 207, 43 Atl. 45, 44 L. R. A. 208. The delivery of the book of deposit in this case with the entry thereon, "in case of death, subject to order of the donee," did not constitute a delivery of the money, because the delivery of the fund was limited "in case of death of the donor." The possession of the book was entirely consistent with the form of the entry in the book, because the donee could not withdraw the money. It is very clear, we think, that she did not intend to part with the possession and dominion over the property, and, under all the decisions, this is necessary to constitute a valid and perfect gift *inter vivos*. While the donor here did not intend to relinquish her right to the fund in her lifetime, she did mean that in case of her death the donee should draw the funds then in bank. The entry, however, cannot operate as a testamentary disposition of the fund because it is not executed as the law requires. *Taylor v. Henry*, 48 Md. 557, 30 Am. Rep. 486; *Dougherty v. Moore*, 71 Md. 252, 18 Atl. 35, 17 Am. St. Rep. 524. Being of opinion, under the facts of this case, there was no valid gift *inter vivos* of the fund here in controversy, the decree of the court below will be affirmed.

Decree affirmed, the cost to be paid out of the fund by the administrators.

(100 Md. 63)

STEINMAN v. BALTIMORE ANTISEPTIC STEAM LAUNDRY CO.

(Court of Appeals of Maryland. Dec. 4, 1908.)

1. ASSAULT AND BATTERY (§ 3*)—ELEMENTS.

S., having delivered certain laundered blankets to plaintiff without collecting charges, returned, asked for the blankets, and told plaintiff he was going to take them. Plaintiff resisted, put her hands on the blankets, which lay on a chair near that on which she was sitting, when S. stated that, if she did not take her hands off the blankets, he would call a policeman and have her arrested. She turned to look for the policeman, and, as she did so, S. took the blankets and went out. While he was trying to take the blankets from the chair, his knee came in contact with her knee, causing her no pain, but she, being enceinte, suffered a subsequent hemorrhage from the shock. *Held*, that since the mere touching of one's person by another unless willful or in anger, or in a contemptuous or insolent manner, does not constitute a battery, such facts were insufficient to justify a recovery for assault and battery.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 2; Dec. Dig. § 3.*]

2. MASTER AND SERVANT (§ 302*)—ACTS OF SERVANT—SCOPE OF AUTHORITY.

A rule of defendant laundry company provided that, if drivers delivered work without col-

lecting the charge, they did so at their own risk, and must account therefor as though received. *Held*, that where a driver, having delivered certain blankets to plaintiff without receiving the charge, returned and demanded the blankets, and, in obtaining them, committed an alleged assault, his act was not within the scope of his authority, and the laundry company was not responsible therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1221; Dec. Dig. § 302.*]

3. PRINCIPAL AND AGENT (§ 166*)—RATIFICATION.

Ratification of the acts of an agent can only occur when the principal has full knowledge of all the material facts.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 627; Dec. Dig. § 166.*]

4. MASTER AND SERVANT (§ 308*)—ASSAULT BY SERVANT—RATIFICATION.

Where a laundry driver, having delivered certain blankets without collecting the charges, returned to retake them, and committed an alleged assault on plaintiff in so doing, a letter written by the laundry company's attorneys notifying plaintiff's husband to call at the laundry, and obtain the blankets and pay the charges, did not operate as a ratification of the assault.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1234; Dec. Dig. § 308.*]

Appeal from Baltimore City Court; George M. Sharp, Judge.

Action by Edith Blanche Steinman against the Baltimore Antiseptic Steam Laundry Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

Arthur L. Jackson, for appellant. W. Stewart Symington, for appellee.

PEARCE, J. This is an action of trespass *vi et armis* by the appellant against the appellee for an alleged assault and battery committed by an agent and servant of the defendant corporation in the regular course of his employment by the defendant. The defendant is a laundry company, duly incorporated.

The plaintiff, who is a married woman, to prove her case, produced only two witnesses. Her first witness was G. E. Saffron, who testified that he was route superintendent of defendant at the time of the alleged assault, and that he was required in the discharge of his duty to adjust disputes about the work done by the laundry company, the nondelivery, or misdelivery, of laundered goods, and complaints made to the laundry company, or claims presented against the company. On cross-examination he said he was authorized to compromise or settle claims under 50 cents, but for any claim over that amount he was obliged to obtain the authority of the manager of the company. He also said he was authorized to collect money due the company; that, when the wagon drivers deliver work without getting the money, they do so at their own risk; and that in such case he is au-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thorized to compromise the claims under 50 cents, but that he has no authority to arrest persons against whom the company has claims for work done. He also stated that, when a driver is sick or discharged, he takes his wagon at the laundry, and that, when he went to Mrs. Steinman's house on the day of the alleged assault, he went of his own accord to collect his own money. The plaintiff, Mrs. Steinman, was the only other witness. She testified: That Saffron came to her house on the day of the alleged assault, and said: "Let me see the blankets that were left here." That she brought the blankets, and said: "Are they the wrong blankets?" And he said: "No; they are the right blankets, and I am going to take them with me." That she said: "No; you are not," and he put his hands on the blankets, and she said, "No; you are not," and put her hands on them. That he then said: "There is a police across the street, and, if you don't take your hands off the blankets, I will call him and have the policeman arrest you." She says she thought he had a policeman with him and she turned and looked, and, when she turned, "he took the blankets and went out, and then came back and said, 'Don't tell your husband I frightened you to death;' and then I knew nothing else." She was then asked if he touched her at all, and she replied, "with his knee against my knee"; that she was sitting on a chair, and the blankets were on seat beside her; that she was then about four months advanced in pregnancy; that, when his knee touched hers, it caused no pain. She then offered to prove by herself that, after the facts above stated, she fainted, and, when she revived, found she had suffered a uterine hemorrhage, and further offered to prove by a practicing physician of 20 years' standing that he was her physician and knew she was then about four months advanced in pregnancy, and that the uterine hemorrhage testified to by her was a natural result of the nervous shock and fright caused by the conduct of Saffron as described by her. She also offered to prove that her husband about three weeks after this occurrence received a letter from Messrs. Yellott & Symington, attorneys for the laundry company, asking him to call at the laundry for "his two blankets" which he could have on payment of \$1, the charge for washing them, or they would be sent him on payment of that amount. All this offer of testimony was objected to, and to its exclusion the first exception was taken.

The defendant then offered two prayers withdrawing the case from the jury, both of which were granted. The first of these prayers asserted there was no legally sufficient evidence to entitle the plaintiff to recover, and the second that there was no legally sufficient evidence that the alleged assault was committed by the witness Saffron within the scope of his employment by the defendant. The declaration is unusually brief,

merely alleging that "the defendant by its agent and servant, in the regular course of employment, assaulted and beat the plaintiff in the city of Baltimore on May 25, 1906. And the plaintiff claims \$5,000 damages." But the averments are ample to warrant recovery, if sustained by legally sufficient evidence. It was necessary to prove (1) that an assault was committed by defendant's servant; and (2) that it was committed in the course of his employment. It would not be sufficient to show that a wrong was committed in taking the blankets from the premises and possession of the plaintiff. The exclusion of the testimony offered and the ruling upon the prayers involve but one question and may be considered together. If the proffered testimony was legally sufficient as tending to show an actual assault by Saffron, and that it was committed in the course of his employment, or that it was approved and ratified by the defendant, it should have been admitted. If it did not, it was properly excluded, and the same principles are applicable to the prayers offered.

The only evidence that Saffron touched the plaintiff's person at all was her evidence that when he took the blankets from the chair upon which they were lying, and which was beside the chair in which she was seated, his knee came in contact with her knee, causing her as she says no pain. There is no evidence whatever of any threat of violence or any attempt to use force, or of any gesture indicating such purpose. It would not be possible, if his knee had not touched hers, that an action for assault alone could be maintained, and, to warrant a recovery, the evidence must establish a battery. The weight of authority is decided that the mere touching of one's person by another, unless willfully or in anger, or in a contemptuous or insolent manner, does not constitute a battery, but it is unnecessary to review these authorities. There is no pretense here that this contact of his knee with hers was willful, angry, or insolent, and the only inference from her testimony is that it was purely accidental, as in the case of one stumbling, and, in his fall, coming in contact with the person of another.

But the plaintiff nevertheless contends that, as she claims to have had her hands resting on the blankets when Saffron took them from the chair, he was guilty of technical assault, and, to sustain this contention, she relies upon the case of *Dyk v. De Young*, 35 Ill. App. 138. In that case the defendant attempted to snatch from the hands of a married woman then pregnant a receipt which she held. In the struggle the paper was torn, and she testified that the defendant, as he grasped for the receipt, struck her in the abdomen. The court held that this was a technical assault. It is true that "anything attached to the person partakes of its inviolability," as stated in *Selwyn's Nisi Prius*, 27, and there is no occasion to criticize

the Illinois case above; its facts bringing it within that rule. But the present case is quite different. Here it is clear that, instead of using violence, the defendant resorted to a ruse to obtain the blankets. He told her: "I will call that police and have you arrested." She says, "I looked, and there was a policeman across the street, and, when I looked, he took the blankets, and went out, and then he came back, and said, 'Don't tell your husband I frightened you to death.'" The latter part of this statement is somewhat difficult to understand; but its truth or accuracy plays no part in the questions we are considering.

After a careful consideration of the facts of this case, we cannot agree that it measures up to the Illinois case, nor to the cases cited therein, and we are of opinion that there was no error in excluding the evidence offered nor in granting the defendant's first prayer. But, if an assault were made out, we think it is clear from the evidence that Saffron was not acting within the scope of his employment, and that there was no ratification of his action by the defendant. He was called as a witness by the plaintiff, and his undisputed testimony was that, when a driver leaves laundered goods with a customer without getting the money for the work, he is responsible for the money to the company, and that he went there "of his own accord to get his own money." This branch of the case is well illustrated in *McDermott v. Brewing Co.*, 105 La. 124, 29 South. 498, 52 L. R. A. 684, 83 Am. St. Rep. 225. In that case a driver of the defendant delivered beer to a customer upon a sale for cash which he was required to collect on delivery or be charged personally with the amount. He failed to collect at the time of delivery, and when he subsequently called for that purpose, he got into an altercation with one of the customer's servants over the matter, and assaulted him, and took back the unused beer to his employers. In a suit against the company for this assault it was held not liable. The court said: "The act of this driver was not in furtherance of the company's business nor in the protection of its interests. The defendant had not sent him to collect, nor was it interested in recovering losses by pursuing the violent methods which it pleased the driver to pursue. * * * He thereby sought to protect his own interests. * * * His employer had made provision to protect itself in case of the driver's failure to collect. * * * By the effect of the agreement between the defendant and the driver, it had become the latter's business." This language is as sensible as it is just. Quoad that transaction, the relation of master and servant had no existence. The same view was expressed in *Feneran v. Singer Co.*, 20 App. Div. 574, 47 N. Y. Supp. 284.

There was no evidence of ratification of

Saffron's act by defendant. Ratification requires proof of full knowledge of all material facts, and upon this point the record is absolutely silent. There is not a word to show that the defendant knew the blankets had ever been delivered to the plaintiff, or that any assault had been committed or even charged. The letter of Messrs. Yellott & Symington throws no light upon this question. It is simply a notice to call at the laundry, pay the charges, and take away the blankets, and it is nothing more. Such a notice is a natural and proper mode of calling attention to the debt, and getting rid of completed work. It would require a reckless stretch of imagination to deduce from such a notice knowledge by defendants of the alleged assault with all its circumstances, and a purpose to approve and ratify it.

For these reasons, we are of opinion the defendant's second prayer was properly granted, and the judgment will be affirmed.

Judgment affirmed, with costs to the appellee above and below.

(100 Md. 164)

DODGE et al. v. DODGE et al.

(Court of Appeals of Maryland. Dec. 9, 1908.)

1. WILLS (§ 681*)—CONSTRUCTION—TESTAMENTARY TRUSTS.

Whether a testamentary trust is personal in its character or is annexed to the office of trustee is a matter of intention, to be gathered from a consideration of the whole will and from the nature and objects of the trust created thereby.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1599; Dec. Dig. § 681.*]

2. WILLS (§ 681*)—CONSTRUCTION—TESTAMENTARY TRUSTS—"HEIRS, ADMINISTRATORS, AND EXECUTORS."

Where the words, "heirs, administrators, and executors," or words of similar import, are added to the designation of a testamentary trustee by name, the will excludes the idea of a personal trust, as it is impossible for a testator to know who the heirs, administrators, and executors of a person named as trustee may be.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1599; Dec. Dig. § 681.*]

3. WILLS (§ 681*)—CONSTRUCTION—TESTAMENTARY TRUSTS.

Testator gave his residuary estate to persons named and the "survivors and last survivor, and the heirs, executors, administrators, and assigns of such last survivor," in trust to hold the same with power to manage and sell for the benefit of his children. In other sections of the will similar words were used, except in the section where the testator authorized the trustee to render assistance to such persons as the testator might suggest in the letter to be addressed to the trustees, and except in the clause appointing the trustees guardians for the infant children of the testator. *Held*, that the trust of the residuary estate was not personal in its nature, and the court might appoint a substituted trustee.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1599; Dec. Dig. § 681.*]

4. TRUSTS (§ 191*)—POWER OF SALE—WHO MAY EXERCISE.

In the absence of a clearly expressed idea to the contrary, the power of sale conferred on

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a trustee in a will is, as a general rule, annexed to the office and passes to any person lawfully substituted in the place of the original trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243; Dec. Dig. § 191; Powers, Cent. Dig. §§ 82-98.]

5. TRUSTS (§ 160*)—APPOINTMENT OF TRUSTEE—DECREE.

Where some of the trusts created by a will are personal, and some are not, a decree appointing a substituted trustee, without making a designation as to whether the trusts are personal or otherwise, is good pro tanto, though ineffectual in attempting to invest the substituted trustee with the powers which are of a personal nature.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 207, 208; Dec. Dig. § 160.*]

6. TRUSTS (§ 169*)—DISCLAIMER BY TRUSTEE.

A disclaimer of a trust may be by acts and conduct as well as by deed, and where a trust descended on the death of the trustee to his heir, pursuant to Code Pub. Gen. Laws 1904, art. 46, § 24, and the heir was a party complainant in a suit for the appointment of a substituted trustee, the heir renounced the trust, creating a vacancy which the court might fill.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 222; Dec. Dig. § 169.*]

7. TRUSTS (§ 158*)—DEATH OF TRUSTEE—APPOINTMENT OF SUCCESSOR.

A court of equity has power, under its general powers, as well as under Code Pub. Gen. Laws 1904, art. 16, § 90, authorizing the court to appoint a trustee on the trustee appointed refusing to execute the trust, etc., to appoint a testamentary trustee on the death of the surviving trustee and on his heir renouncing the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 205; Dec. Dig. § 158.*]

8. TRUSTS (§ 160*)—APPOINTMENT—JUDICIAL APPOINTMENT.

The selection of a trustee is in the discretion of the court, though the better practice requires the court to select a resident as trustee, though there may be circumstances justifying a departure therefrom.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 204, 207; Dec. Dig. § 160.*]

9. TRUSTS (§ 169*)—APPOINTMENT—JUDICIAL APPOINTMENT.

Testator creating a testamentary trust was a resident of the District of Columbia. The original trustees appointed by the will were residents thereof. The beneficiaries of the trust resided there, and they united in a petition for the appointment as substituted trustee of a designated person who resided in the district. The larger part of the trust property was situated in Maryland in convenient proximity to the residence of such person. *Held*, that the court, in the exercise of a sound discretion, properly appointed the designated person.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 222; Dec. Dig. § 169.*]

10. TRUSTS (§ 200*)—SALE BY TRUSTEE—CONFIRMATION.

A substituted trustee of a testamentary trust sold land to a purchaser, who, after making a cash payment, filed objection to the ratification of the sale on the ground that the court was without jurisdiction to appoint a trustee, and that the substituted trustee was without power to sell. The substituted trustee reported the sale, and every person in interest in the trust was made a party to the proceedings. The report stated under affidavit that the sale was to the advantage of all the parties, and

that it was made with the approval of the children of testator. Neither party asked leave to take testimony, and the allegations of the report were not disputed by the written exceptions, which merely raised points of law on admitted facts. *Held*, that the court properly ratified the sale without proof, as against the objection that it was possible for the trust to open to let in unborn persons.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 268; Dec. Dig. § 200.*]

Appeal from Circuit Court, Montgomery County, in Equity.

Suit by William M. C. Dodge and others against Henry Henley Dodge and others for the appointment of a substituted trustee under the will of Henry Henley Dodge, deceased. There was a decree appointing a substituted trustee, and, from an order ratifying a sale by the substituted trustee, the parties aggrieved appeal. *Affirmed*.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and HENRY, JJ.

Edward C. Peter, for appellants. Robert B. Peter, for appellees.

HENRY, J. This appeal brings up for consideration the question as to the right of Joseph H. Bradley, substituted trustee under the last will and testament of the late Henry Henley Dodge, to sell certain real estate of the testator lying in Montgomery county.

In the item of the will with which we are primarily concerned, the testator devises and bequeathes the residue of his estate to Ysidora B. M. Dodge, Maurice J. Adler, and Harrison Howell Dodge, all of the District of Columbia, "and the survivors and last survivor, and the heirs, executors, administrators and assigns of such last survivor, in trust, to have and to hold the same with full power according to their, his or her best judgment and discretion, to manage and direct the same, to sell and convey and deliver the same or any part thereof, according to the quality of said estate, to lease or encumber the same or any part thereof, with full power to invest the same or any part thereof, and to change investments," etc., for the benefit of his children, etc. Maurice J. Adler and Harrison Howell Dodge renounced the trust imposed by the will aforesaid, but Ysidora M. Dodge qualified as executor and trustee and continued to act in both capacities until her death in February, 1904. In December of that year, the appellees filed a bill of complaint in the circuit court for Montgomery county, to which all the parties in interest under the aforementioned will were made parties, and which, after reciting the foregoing and other facts, stated that all parties desired the appointment of Joseph H. Bradley, of the District of Columbia, as trustee in the place of the said Ysidora M. Dodge, deceased, and praying that he, or some other suitable person or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

persons, be so appointed and be invested with all the rights and powers given to the trustees mentioned in the will. In March, 1906, Mr. Bradley was appointed trustee, as prayed, and duly qualified by filing an approved bond. Shortly thereafter, he sold a valuable tract of land to the Chevy Chase Club, a corporation, which, after making a cash payment of \$5,000, filed objections to the ratification of the sale on the ground that the court was without jurisdiction to appoint a trustee, that the said Bradley had no power to make said sale, and because the trust created by the will, upon the death of Ysidora M. Dodge, devolved upon one of the complainants in this suit, William M. C. Dodge, her eldest son and heir at law. Notwithstanding such objections, the court finally ratified and confirmed the sale on September 19, 1908, overruling the exceptions filed. From the order of ratification, an appeal was entered to this court.

It is contended by the appellants, in the first place, that the trust created by the will was personal in its nature and incapable of transmission to a trustee appointed by the court. This question has not infrequently been before this court, which has uniformly held that it is purely a matter of intention, to be gathered from a consideration of the whole will and from the nature and objects of the trust created thereby, as to whether a trust is personal in its character or is annexed to the office of trustee. Among the latest decisions on the subject is that in *Snyder v. Safe Deposit & Trust Company*, 93 Md. 225, 48 Atl. 719, where the court, speaking through Judge Pearce, reviews several earlier decisions and clearly announces the rule on the subject, and in the case of *Safe Deposit & Trust Company v. Sutro*, 75 Md. 361, 23 Atl. 732, it was held that when the words "heirs, administrators, and executors," or words of similar import, were added to the designation of the trustee by name, it had the effect of excluding the idea of a personal trust, inasmuch as it was impossible for a testator to know who the heirs, etc., of any person named as trustee by him might be. Applying this test to the will of Mr. Dodge, we find that in the section quoted, after the designation of the trustees by name, he adds, "and the survivors and the last survivor, and the heirs, executors, administrators and assigns of such last survivor," and similar words are used in all other sections of the will, except two. One of these exceptions is in the clause where the testator authorized the trustees to render assistance to such person as he may suggest in a letter to be addressed by him to them, "the character and amount of such assistance to be according to the judgment" of the said trustees, and the other exception is in the clause appointing the said trustees guardians for his infant children. In both of these instances, the words, "heirs," etc., are omitted after the designa-

tion of the trustees, while the nature of the duties imposed, particularly in the instance first cited, makes it apparent that the testator was creating a personal trust to be executed only in the discretion of the trustees actually named in the will; but the particularity with which the words "heirs," etc., are added in other sections indicates a different purpose as to them, and, generally speaking, it may be said that, in the absence of a clearly expressed intent to the contrary, the power of sale conferred upon a trustee in a will is regarded as a ministerial duty, annexed to the office, and passing to any person lawfully substituted in the place of the original trustee. It is contended in argument by the appellant that some, at least, of the trusts created by the will are personal, and that the decree naming a new trustee is invalid in not making a distinction in this respect. Accepting the statement as a fact, we think that the decree is good pro tanto, though ineffectual in attempting to invest the substituted trustee with these powers which, as above set forth, are of a personal nature.

It is further urged that, upon the death of Ysidora M. Dodge, the trust descended upon her heir at law, under the provisions of section 24, art. 46, Code Pub. Gen. Laws 1904. While this is true, the heir at law in this case is a party complainant in the suit, and this is in effect a renunciation of the trust. A disclaimer of a trust may be by acts and conduct, as well as by deed, though in this case it is one of the admitted facts that William M. C. Dodge, the heir at common law, conveyed the legal estate to the aforesaid Joseph H. Bradley, so that both by deed, as well as by conduct amounting to a disclaimer, the heir has renounced the trust, and there was a vacancy which the court was called upon to fill. It is a rule in equity, which admits of no exception, that the court never wants a trustee, and under its general powers, even if statutory authority were not given by section 90, of article 16, Code Pub. Gen. Laws 1904, it would have, under circumstances like those in the present case, power to appoint some suitable person to execute the trusts made in the will of the testator.

The objection is also made that Mr. Bradley, being a nonresident of the state, is ineligible to the office. The selection of a trustee is a matter in the discretion of the court, and, while it is a wise custom and the better practice to select a resident, yet there are circumstances which will justify a departure from the rule. The testator in this case was himself a resident of the District of Columbia, the original trustees appointed by the will where residents of the same district, the beneficiaries under the trust now reside there, and all have united in a petition for the appointment of Mr. Bradley, while the larger part of the trust property is situated in Montgomery county in con-

venient proximity to the residence of the trustee, so that its management and supervision can be easily looked after by him. The recommendation of the parties in interest is always entitled to weight, and, in view of this and the other facts recited, we think the court exercised a sound discretion in appointing Mr. Bradley to the vacant trusteeship. Story's Equity, vol. 2, § 976; A. & E. Encyc. vol. 28, p. 960; Miller's Equity, § 315.

Another, and final, objection made in the appellant's brief is that the allegations in the trustee's report of sale should have been supported by proof, and that, inasmuch as it is possible for the trust to open to let in unborn persons, the report should have stated that the sale was to the advantage of such unborn cestuis que trustent. We do not think that either, under the circumstances, was necessary. Neither party asked for leave to take testimony, and the allegations of the report were not disputed by the written exceptions filed, which merely raised some points of law upon admitted facts. It would be entirely speculative for the court to hold that the interest of persons unborn would not be identical with those of living cestuis que trustent. Every person in esse, having an interest in the trust, was made a party to the proceedings, and the report states, under affidavit, that such sale was to the advantage of all the parties, and that it was made with the approval of the children of the testator. We think this sufficient, under the circumstances stated, to warrant the action of the court in ratifying the sale.

Order affirmed, the costs to be paid out of the estate.

(109 Md. 63)

SIMS et al. v. AMERICAN ICE CO.

(Court of Appeals of Maryland. Dec. 4, 1908.)

1. RAILROADS (§ 481*)—FIRES—EVIDENCE.

In an action for the destruction of plaintiff's property by fire alleged to have been emitted from defendant's dinky engines operated in railroad construction near the property destroyed, evidence that witnesses had seen the engines throw sparks shortly before the fire when working near the property, and that the sparks had set fire to combustible material near the tracks, was admissible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1721-1722; Dec. Dig. § 481.*]

2. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—EVIDENCE.

Where a witness had previously testified, without objection, that on the morning plaintiff's buildings were destroyed by fire, as on previous mornings, witness saw defendant's dinky engines at work, and, just before they got to the buildings, open the exhaust and throw cinders 10 or 15 feet high, defendant was not prejudiced by the admission of evidence of other witnesses that they had seen the engines throw sparks when working near plaintiff's property shortly before the fire.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

3. RAILROADS (§ 481*)—FIRE—EVIDENCE.

In an action for the destruction of plaintiff's buildings by fire alleged to have been set out by defendant's engines, evidence that the engines of another railroad company, while passing through different sections of the county, would throw sparks sufficient to fire rubbish and other inflammable materials, was inadmissible for remoteness.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717-1722; Dec. Dig. § 481.*]

4. EVIDENCE (§ 376*)—DOCUMENTS—CLERK'S ENTRIES—AUTHENTICATION.

Entries made by a clerk, who had no interest at the time to state an untruth, and in the regular course of business, are admissible on proof of his handwriting, after his death or in case of his absence from the state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1634, 1637; Dec. Dig. § 376.*]

5. RAILROADS (§ 485*)—FIRES—INSTRUCTIONS.

An instruction that if plaintiff's icehouses with their contents were destroyed by fire communicated from defendant's engines, and defendants did not exercise reasonable care to avoid injury to property along the line by having their engines properly constructed and in good condition, plaintiff was entitled to recover, was correct.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 485.*]

6. RAILROADS (§ 482*)—FIRES—PROXIMATE CAUSE.

Defendants could not be made liable for the alleged destruction of plaintiff's property by fire emitted from defendant's engines on a mere probability that the fire was so caused, but only on a preponderance of proof thereof and on evidence of defendant's negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730-1736; Dec. Dig. § 482.*]

Appeal from Circuit Court, Harford County; Geo. L. Van Bibber, Judge.

Action by the American Ice Company against Charles A. Sims and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

M. M. Fahey and John S. Young, for appellants. John C. Rose, for appellee.

BRISCOE, J. The appellee, a body corporate, brought this action against the appellants to recover damages for the destruction by fire of certain property, situate on the east bank of the Susquehanna river, in proximity to a railroad, operated by the appellants, near Frenchtown, Cecil county, Md. The suit was instituted in the circuit court for Cecil county, but on suggestion of the defendants the case was removed to the circuit court for Harford county. The second trial of the case resulted in a verdict for the plaintiff for the sum of \$8,000, and, from the judgment entered thereon, the defendants have appealed.

The record in the case presents 16 bills of exceptions. Fourteen of them relate to the rulings of the court upon the evidence. The seventh exception was abandoned at the hear-

ing, and the sixteenth was taken to the action of the court in granting the plaintiff's prayer, and in rejecting the defendants' first, second, third, fourth, fifth, sixth, and eleventh prayers, and in overruling the defendants' exception to the plaintiff's prayer. The defendants' seventh, eighth, ninth, and tenth prayers were granted, and will be hereafter considered in the discussion of the propositions of law raised on the various exceptions set out in the record.

It appears from the evidence that the appellee, at the time of the fire, was the owner of an icehouse with certain appurtenant buildings, consisting of a stable, engine, boiler house, etc. The ice storage house contained 6,600 tons of ice, worth \$1.11 a ton. The appellants were engaged, at the time of the fire, in certain railroad construction work for the Pennsylvania Railroad Company, and were operating what are called "dinkey engines" of about 10-ton weight hauling cars with dirt and other material over tracks laid for the purpose from a point on the Philadelphia, Baltimore & Wilmington Railroad to a point on the Columbia & Port Deposit Railroad. These construction tracks were located about 6 to 10 feet distant from the icehouse, and ran on the east front of the property of the appellee, between the Pennsylvania Railroad track and the icehouse. The fire occurred about 24 minutes after 10 o'clock, on the morning of June 16, 1905, and in the end of the icehouse next to the railroad. The icehouse measured 90 feet 7 inches from east to west by 160 feet 4 inches from north to south. It was 93 feet 3 inches from the northeast corner of the icehouse to the center of the Baltimore & Ohio Railroad (the bridge across the Susquehanna river), from the northwest corner of icehouse to center line of Baltimore & Ohio Railroad is 80 feet, and 64 feet from the northwest corner of the icehouse to the pier of the railroad company. The tracks of the Pennsylvania Railroad also passed along the east side of the icehouse; the nearest of those tracks being about 20 feet from the icehouse. The declaration alleges that the property was destroyed by fire caused by sparks thrown out by an engine which was operated by the defendants on a railroad in close proximity to the plaintiff's icehouse. The negligence was charged to have consisted in the selection and equipment of the engines furnished and by the lack of ordinary care in the operation of the engines by the defendants' employes.

The first question presented by the record arises upon the first, second, third, fourth, fifth, and sixth exceptions, and relates to the admission of testimony of various witnesses to the effect they had seen the dinkey engines, when working near the defendants' property, throw sparks shortly before the fire, and that these sparks had set fire to combustible material near the dinkey tracks. The court, we think, properly overruled the objections to this testimony and

permitted it to be given to the jury. In *Annapolis & Elkridge R. R. Co. v. Gantt*, 39 Md. 115, and in *Green Ridge Railroad Co. v. Brinkman*, 64 Md. 53, 20 Atl. 1024, 54 Am. Rep. 755, this character of testimony was held to be admissible for the purpose of establishing the fact from which the jury may find negligence on the part of the defendant. Judge Bartol in delivering the opinion of the court in *Gantt's Case*, supra, said: "Here the evidence was confined to the time of the occurrence, within a week of the happening of the fire on the plaintiff's property, and pointed directly to the condition of the defendant's engines, tending to prove that they were not in suitable repair at the time of the injury, and we think both upon reason and authority it was admissible for the purposes mentioned." All of these exceptions present the same legal question, and for the reasons stated we are clearly of opinion that the testimony was properly admitted. But apart from the admissibility of the testimony objected to in these exceptions, the witness Lewis had previously testified, without objection, that on the morning of the fire, as on previous mornings, he saw the dinkey engines of the defendants at work, and just before they got to the icehouses they would open, exhaust, and throw cinders 10 or 15 feet high out of stack, greater the blast, more cinders would fly out of the stack, and his testimony was not subsequently excluded.

The testimony contained in the eighth exception was properly rejected. The fact that engines on the Baltimore & Ohio Railroad, while passing through different sections of Harford county, would throw out sparks and fire sufficient to set fire to rubbish and other inflammable materials, could throw no light upon the question whether the fire complained of here was caused by the engines of the defendants. It did not tend to show negligence in the case under consideration and was in no way connected with the fire in question. It was too remote and simply tended to prove that an engine was capable of setting fire to property near its railroad.

The ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth exceptions were taken to the admission in evidence of certain entries made by one Wall, who had been inspector of engines, in the service of the Baltimore & Ohio, as to the inspection of locomotives made by him. These entries were made in a book of the Baltimore & Ohio Railroad, and were made at the time of the inspection of the engines. The entries were in the handwriting of Wall, who had left the service of the road and was absent from the state, and his whereabouts unknown. The witness Given testified that they were in the handwriting of Wall and were made in the regular course of official duty. We find no error in the admission of this testimony. In *Heiskell v. Rollins*, 82 Md. 15, 33 Atl. 263, 51 Am. St. Rep. 455, it was said: "It has long been held that entries made by a clerk

in the regular course of business, he having no interest at the time in stating an untruth, should be received in evidence after the clerk's death on proof of his handwriting, and such entries are equally admissible where the witness is absent from the state." *Reynolds v. Manning & Co.*, 15 Md. 523; *Morris & Co. v. Columbia Iron Works*, 76 Md. 357, 25 Atl. 417, 17 L. R. A. 851.

The fifteenth exception was taken to the action of the court in overruling a general objection to certain witnesses being allowed to testify in rebuttal. We do not deem it necessary to go into a recital of the testimony embraced in this exception. An examination of the record will show it was strictly and directly in rebuttal of the evidence by the defendants' witnesses to the effect that a Baltimore & Ohio Railroad freight train, bound east, passed the east end of the bridge about the time of the fire throwing out smoke and cinders, and shortly afterwards the icehouse was seen on fire. The evidence was clearly competent for the purposes offered, and, being evidence in rebuttal, was largely in the discretion of the trial court.

We come now to a consideration of the rulings of the court upon the prayers set out in the sixteenth exception. The plaintiff's prayer is as follows: The jury are instructed that if they shall find from the evidence that the plaintiff's icehouses with their contents were destroyed by fire communicated from the defendants' engines, and shall further find that the defendants did not exercise reasonable care and diligence to avoid as far as practicable injury to the property along the line of the road upon which their engines were operated by having their said engines properly constructed and in good condition, then their verdict must be for the plaintiff. This prayer as applicable to the facts of this case is entirely free from objection and was properly granted by the court. There is testimony in the record tending to establish every hypothesis of the prayer, and the special exception that there was no evidence that the defendants' engines were not properly constructed was rightly overruled. There was evidence that the dinkey engines had no spark arresters in them at the time of the fire, that they had been taken out, and none of them had netting in their smoke box. There was also evidence to the effect that the Tyrone, one of the engines, stopped in front of the icehouse before the fire, and that it had no spark arrester in it. In *Ryan & McDonald v. Gross*, 68 Md. 380, 12 Atl. 115, 16 Atl. 302, the court, held it was the duty of the defendants to see that the spark arrester was in proper repair, and, if it was not in proper repair, in consequence of which sparks escaped from the engine and set fire to rubbish along the road, and spread thence to the plaintiff's land, these facts were sufficient to justify the jury in finding negligence on the

part of the defendants, and that the destruction of the plaintiff's property was the direct and natural consequence of such negligence. But apart from this, the jury were instructed, by the defendants' ninth prayer, that, to entitle the plaintiff to recover in this case, it must prove by a preponderance of testimony two facts, first, that the locomotives of the defendants emitted the sparks that set fire to the icehouses of the plaintiff, and, second, that the defendants were guilty of negligence in the management of the engine that emitted the sparks that set fire to the icehouses of the plaintiff, and if the testimony in this case should be such as to leave the minds of the jury in a state of equipoise as to either of the facts, their verdict must be for the defendants. And by the defendants' eighth prayer the jury were further told that if from the evidence it is equally probable that the fire originated from any cause, other than the defendants' engines, the defendants are not liable in this action, and their verdict must be for the defendants; that the defendants cannot be made liable in this action on a mere probability that the fire was caused by their engines, but only on the preponderance of proof that it was so caused, and then only upon proof of negligence on the part of the defendants.

The theory of the defendants' case, we think, was fully submitted in their granted prayers, and they obtained all the law they were entitled to. The defendants' first, second, third, fourth, fifth, sixth, and eleventh prayers were properly refused. The first, second, third, and fourth prayers were demurrers to the evidence and could not, under the facts of the case, have been granted. The fifth and sixth prayers submitted the same propositions covered by the defendants' eighth and ninth prayers, and were properly refused. The eleventh prayer was manifestly erroneous. It asserted a proposition not bearing upon the case, and its rejection could not have injured the defendants.

Finding no error in the rulings of the court, and as the case was one to be submitted to the jury upon the facts, the judgment will be affirmed.

Judgment affirmed, with costs.

(100 Md. 93)

GENERAL ACCIDENT, FIRE & LIFE ASSUR. CO. v. HOMELY.

(Court of Appeals of Maryland. Dec. 9, 1908.)

1. TRIAL (§ 139*)—JURY QUESTION—WEIGHT OF EVIDENCE.

The weight of the evidence is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 332; Dec. Dig. § 139.*]

2. INSURANCE (§ 669*)—ACTIONS—INSTRUCTIONS—CAUSE OF DEATH.

In an action on an insurance policy for death by accidental injury, an instruction that if insured was injured by being struck by a bale of hay, and on the next day there was a welt

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on his back, and an examination on the fourth day thereafter showed a tension of the muscles of the back, and three days thereafter insured died of acute nephritis caused by the accident, and was free from all disease until his death except that caused by the accident, plaintiff could recover, while not affirmatively requiring a finding that his death was caused by the accident independent of all other causes, did so in effect.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.*]

3. DEATH (§ 17*) — DISEASE — PROXIMATE CAUSE.

Where death results from a disease caused directly by an accident, the accident is the proximate cause of the death, which is regarded as having resulted from the accident independently of all other causes.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 19; Dec. Dig. § 17.*]

4. INSURANCE (§ 668*) — ACTIONS — QUESTION FOR JURY—CAUSE OF DEATH.

In an action on an insurance policy for death by accidental injury, where it was undisputed that insured was struck by a bale of hay, and was thereafter ill, whether the accident was the proximate cause of his illness and subsequent death held for the jury under the medical testimony.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 668.*]

5. INSURANCE (§ 669*) — ACTIONS — INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where the policy sued on, in addition to stipulating for a certain amount in case of death from purely accidental causes, also provided for payment of one-fifth of that sum if the injury, fatal or otherwise, was due wholly or in part to disease or bodily infirmity, instructions which barred any recovery at all unless death was due wholly to accidental causes were properly refused.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.*]

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by Harriet Homely against the General Accident, Fire & Life Assurance Company. From a judgment for plaintiff, defendant appealed. Affirmed.

Argued before BOYD, C. J., and BRISCOE, SCHMUCKER, BURKE, THOMAS, and WORTHINGTON, JJ.

Charles W. Main, for appellant. Jefferson D. Norris, for appellee.

SCHMUCKER, J. The appellee sued the appellant company in assumpsit in the superior court of Baltimore city upon a policy of insurance issued by it upon the life of her son, George H. Gardiner. The verdict and judgment below were in her favor for the full amount of the policy, and the company took the present appeal.

The policy sued on is of the now familiar class which furnish indemnity to a designated beneficiary for loss accruing from accidental and external injuries, fatal or otherwise, to the assured. The expressions employed in the earlier part of the policy limit the liability of the company to losses resulting from external accidental agencies "independently of all other causes," but in a

later clause of the document a modified liability is distinctly assumed for loss from "injury fatal or otherwise or disability due wholly or in part, directly or indirectly, to disease or bodily infirmity." The portion of the policy providing for that modified responsibility of the company is known as clause "h," and is in the following language: "In event of injury or loss, fatal or otherwise, of which there shall be no external or visible mark on the body, or injury, fatal or otherwise, or disability due wholly or in part directly or indirectly to disease or bodily infirmity, * * * then and in all such cases referred to in this paragraph the limit of the company's liability shall be one-fifth of the amount which would otherwise be payable under this policy anything herein to the contrary notwithstanding." The declaration in the case before us only avers an insurance against death resulting directly and independently of all other causes from bodily injuries effected through external, violent, and accidental means, but declares upon the policy designating it by its number and date.

There is but one bill of exceptions in the record, and that is to the court's action on the prayers. The plaintiff offered but one prayer, which the court granted. It asked the court to instruct the jury "that if they shall find from the evidence that on October 20, 1906, George H. Gardiner was insured in the defendant company against death by accident, and that upon that date the said George H. Gardiner sustained an injury through being struck by a bale of hay upon the back or side, and that upon the day following said accident there was a welt upon his back, and that on the fourth day after the accident an examination of the said Gardiner by two practicing physicians disclosed a tremor, tension, and sensitiveness of the muscles of the back, and that on the 27th day of October, 1906, the said George H. Gardiner died of acute nephritis, caused by the said accident, and, if they shall further find that said Gardiner was at the time of said accident and until his death free from disease, except acute nephritis, caused by the accident, and that from and after the said accident he was unable to perform his duties, then their verdict may be for the plaintiff." The court rejected the defendant's first and third prayers, and granted its second prayer as modified and its fourth prayer as originally offered. The first of these prayers asked the court to take the case from the jury for want of legally sufficient evidence to entitle the plaintiff to recover. The second placed upon the plaintiff the burden of proof that the death of the insured was caused by external, violent, and accidental means, and concluded with the words: "And, if those injuries alone did not occasion his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

death, then the verdict must be for the defendant." The court struck out the concluding words, and granted the prayer as thus modified. The third prayer declared that if the jury found from the evidence that at the time of the accident the insured was suffering from a pre-existing disease, in the absence of which the accident would not have caused his death, and that he died because the accident aggravated the disease or the disease aggravated the effects of the accident, then their verdict must be for the defendant. There is evidence in the record tending to show the following state of facts: The assured was an unmarried colored man about 40 years of age, who had been employed for more than 6 years prior to his death at the Warwick stables in Baltimore city. He was a person of unusual strength, in apparently good health, and was uniformly industrious and attentive to his duties. He took an occasional drink of liquor, but was not intemperate in his habits. On Saturday afternoon, October 20, 1906, when he was at work on the ground floor of the stable, a bale of hay was thrown down the hatchway from an upper story of the building, and struck the ground nearby him, and then, rebounding, struck him on the back, and knocked him down. He was picked up by his fellow workman and complained of pain in his back where the hay struck him. He showed his back to one of them, Harrison Hayden, who testified that he saw a bruise there, and rubbed it with liniment. Gardiner remained at the stable the remainder of the afternoon, and wanted to go on with his work, but his comrades would not permit him to do so. After going home on Saturday evening, he never returned to the stable, but, after suffering for some days from acute nephritis accompanied by violent convulsions, died on October 27th. Dr. E. B. Iglehart, a physician and surgeon of 19 years' practice and an instructor of surgery in the Johns Hopkins Medical School, testified that he, in company with Dr. Frank Smith, examined Gardiner after his accident, and that he gave evidence of having received an injury. The doctor said, in that connection: "I found a definite muscle spasm on the right of his back and some tenderness on pressure over his back on the left side." That to his mind the man's condition was entirely consistent with having been struck by a bale of hay. A hypothetical question was then put to the doctor stating the circumstances of Gardiner's accident, subsequent illness and death, and asking him to state with those facts before him, taken in conjunction with the facts discovered by him in his examination, what in his opinion caused the man's death. He replied: "I don't see how the accident can be ruled out as the factor of his death. I don't see how the accident could be ruled out." In response to further questions, he said that a blow over the kidneys would

cause acute nephritis with uraemic poisoning, which frequently produces death. Being asked on cross-examination whether he considered Gardiner's injury as the sole cause of his death, he replied: "I should have to give a certificate to that effect if I signed his death certificate, seeing him only once as I did. That is all I can say. I should have been compelled to fill out his certificate that the man died of traumatic nephritis, the result of a blow, as I had seen him only once." Dr. Frank Smith fixed the date of the joint visit of Dr. Iglehart and himself to Gardiner as October 23, 1906, three days after the accident. He expressed views as to the nature and cause of Gardiner's illness and death similar to, but less positive than, those of Dr. Iglehart. The record contains, as it always does in such cases, expert medical testimony of an opposite tenor introduced on behalf of the defendant. Several witnesses also testify that they saw the person of the assured after the accident and could see no bruises or other evidences of injury thereon; but the question of the weight of the evidence is one for the jury. We find no reversible error in the action of the learned judge below upon the prayers.

The plaintiff's prayer, which was evidently intended to refer to a recovery of a verdict for a death of the assured from accidental causes alone, does not affirmatively require the jury to find that his death was caused by the accident independently of all other causes, but it does so in effect by requiring them to find that he died of acute nephritis caused by the accident, and, also, that he was at the time of the accident and until his death free from disease except the acute nephritis caused by the accident. It has been held in a number of cases that, where the death is from a disease which was itself caused by the accident, the latter is to be regarded as the true and predominant cause of the death, and the disease as a mere link in the chain of causation, and the death is to be regarded as having resulted solely from the accident independently of all other causes. *Freeman v. Mercantile Accident Ins. Co.*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753; *Delaney v. Modern Accident Club*, 121 Iowa, 528, 97 N. W. 91, 63 L. R. A. 603; *Fetter v. Fidelity Co.*, 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560; *Horsfall v. Pac. Mut. Life Ins. Co.*, 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846; *Carey v. Preferred Acci. Ins. Co.*, 127 Wis. 67, 106 N. W. 1055; *Cent. Acci. Ins. Co. v. Rembe*, 220 Ill. 151, 77 N. E. 123, 5 L. R. A. (N. S.) 933, 110 Am. St. Rep. 235; *Fidelity & Casualty Co. v. Johnson*, 72 Miss. 333, 17 South. 2, 30 L. R. A. 206, and cases collected in note thereto. The defendant's first prayer was properly refused. The uncontradicted evidence showed the occurrence of the accident to Gardiner in the stable, and his subsequent

illness and death. The testimony of Drs. Iglehart and Smith was certainly legally sufficient to go to the jury upon the question of the causal connection between the accident and the death under the authority of the cases above cited by us, as well as the cases of *City Pass. Railway v. Kemp*, 61 Md. 74, and *P. B. & W. Ry. Co. v. Mitchell*, 107 Md. —, 69 Atl. 422. Nor was there any error in modifying the defendant's second prayer or in rejecting its third one, because both the third prayer and the second one in its original form totally disregarded the operation of clause "h" of the policy sued on, which made the company liable to the extent therein stated for injury, fatal or otherwise, to the assured due wholly or in part to disease or bodily infirmity.

Finding no error in the rulings of the court below, we will affirm the judgment appealed from.

Judgment affirmed, with costs.

(109 Md. 111)

STINSON v. ELLICOTT CITY & CLARKSVILLE CO.

(Court of Appeals of Maryland. Dec. 4, 1908.)

1. APPEAL AND ERROR (§ 102*)—DECISIONS REVIEWABLE—NATURE OF DECISION—ON DEMURRER.

An appeal lies from an order overruling a demurrer to a bill.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 688-698; Dec. Dig. § 102.*]

2. APPEAL AND ERROR (§ 369*)—PROCEEDINGS FOR TRANSFER OF CAUSE—PAYMENT OF FEES OR COSTS.

The right of appeal from an order overruling a demurrer to a bill does not depend upon the payment of the \$10 and costs which Code Pub. Gen. Laws 1904, art. 16, § 154, requires to be paid by a party whose demurrer is overruled, and nonpayment thereof is not ground for dismissing the appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1908; Dec. Dig. § 369.*]

3. INJUNCTION (§ 118*)—ACTIONS FOR INJUNCTIONS—PLEADING—BILL.

The general rule that a bill in equity must contain a clear statement of the facts upon which plaintiff relies for relief is applied rigorously to a bill for an injunction.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 223-242; Dec. Dig. § 118.*]

4. INJUNCTION (§ 118*)—ACTIONS FOR INJUNCTIONS—PLEADING—BILL.

If a turnpike company's right of way, sought to be protected by an injunction, is claimed by the plaintiff under a deed or other writing from a third person, the deed, or a copy of it, should be filed with the bill, or sufficient reason for its nonproduction given, and a bill which is defective in this respect is demurrable.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 242; Dec. Dig. § 118.*]

5. INJUNCTION (§ 118*)—ACTIONS FOR INJUNCTIONS—PLEADING—BILL.

If a turnpike company's right of way, sought to be protected by an injunction, is not claimed under a deed or other writing, the plaintiff's bill should state how it acquired its

rights, and what they were; and, if the plaintiff's rights as against the defendant, and the width of its right of way, are left in doubt by the bill, it is demurrable.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 223-242; Dec. Dig. § 118.*]

6. INJUNCTION (§ 118*)—ACTIONS FOR INJUNCTIONS—PLEADING—BILL.

A party's right to an injunction ought not to be left in doubt by the bill, and the defendant ought not to be required to guess what plaintiff relies on.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 223-242; Dec. Dig. § 118.*]

7. EQUITY (§ 223*)—PLEADING—DEMURRER—GENERAL DEMURRER.

Where plaintiff's right to an injunction is left in doubt by the bill, and no other relief could be granted, if such defect did not exist, a demurrer to the bill should be sustained, though it also contains a prayer for general relief.

[Ed. Note.—For other cases, see *Equity*, Dec. Dig. § 223.*]

Appeal from Circuit Court, Howard County; Wm. Henry Forsythe, Jr., Judge.

Action by the Ellicott City & Clarksville Company against William H. Stinson. From an order overruling a demurrer to the bill, defendant appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

Edward M. Hammond, for appellant. Joseph L. Donovan, for appellee.

BOYD, C. J. This is an appeal from an order overruling a demurrer to a bill of complaint, filed by the appellee against the appellant. The bill alleges that the plaintiff under its charter constructed a turnpike road leading from Ellicott City to Clarksville, in Howard county, "and that by virtue of a grant from the late John R. Clarke, who was then the owner of the property hereinafter referred to, and which is now owned by William H. Stinson, as hereinafter referred to, your complainant was granted the right to go upon the property and build through and upon said property the pike hereinbefore referred to, and that they have exercised the said right and privilege for the past 30 years or more." It then alleges that, while the roadway was in peaceful possession of the complainant, and it was enjoying the privileges granted by its charter "and by the grant from the said John R. Clarke," the defendant, who owned and resided upon the farm, binding upon said turnpike, without the consent of the plaintiff, and against its protest, with his servants and employes entered upon the turnpike and dug a large number of holes in it, placed posts in said holes from four to five feet in height, and built a fence commonly called a "post and rail fence," and is about to build more fence of a like character upon the pike. It further charges that the fence will greatly lessen the width of the pike, will endanger lives and property of persons having occasion to

use it, will prevent the cleaning of the drains and ditches in connection with the pike, and will subject the complainant to great loss and injury. It also charges that the fence is so constructed that the Citizens' Telephone Company has been compelled to place its poles outside of the fence and in the roadway, which greatly adds to the danger of all persons using the pike, but it does not state how that company acquired the right to so place its poles. The bill prays for a writ of injunction, enjoining and prohibiting the defendant from digging holes in and upon the pike, and planting posts therein, from constructing the fence, and commanding him to remove the fencing already constructed by him on the pike. There is also a prayer for general relief. A copy of the charter of the plaintiff was filed with the bill, but no deed or other exhibit. A motion to dismiss the appeal was made on the ground that the appellant had not paid the \$10 and costs referred to in section 154, art. 16, Code Pub. Gen. Laws 1904. That section provides that the party whose demurrer is overruled or withdrawn without leave of court, "shall pay to the opposite party the sum of ten dollars, and the costs thereof, and be in contempt until the said sum of money and costs are fully paid, unless the court shall otherwise specifically order." The appellee relied on *Gilbert v. Arnold*, 30 Md. 29, to sustain its motion. In that case the court had announced its determination to overrule a demurrer which had been filed, and to grant an injunction prayed for, and had prepared an order to that effect, which was not filed at the time "at the request of, and in courtesy to, the solicitors for the defendants," who desired time to examine into their right to withdraw the demurrer and file their answer, after the opinion had been announced and the order signed. They then, without leave of the court, filed an order with the clerk withdrawing the demurrer, and filed their answer. On the same day the order of the court overruling the demurrer and granting the injunction was placed on file. This court held that, as the defendants were in contempt for the nonpayment of the fine and costs, they had no right to file their answer, and the court below was justified in acting upon the bill and exhibits without considering the answer; but, as it appeared that the fine and costs were paid before the appeal was taken, the answer would be considered "in so far as to entitle the defendants to the right of appeal from the order granting the writ of injunction." That had reference to the statute, now section 27, art. 5, Code Pub. Gen. Laws 1904, which required the answer of the party appealing from an order granting an injunction to be first filed. It is manifest that that decision does not sustain the motion to dismiss this appeal. The question involved was the right to file an answer, without leave of the court, after withdrawing a demurrer without first obtaining leave to do so. Such

action of the defendants put them in contempt by the terms of the statute, and they had no right to file their answer without obtaining leave of the court—at least until they purged themselves of the contempt by paying the \$10 and costs. No such question could have arisen in this case, as the court below expressly granted leave for the defendant to file an answer; and, unless it was satisfied that the demurrer was intended for vexation and delay, the court was directed by section 153, art. 16, to require the defendant to file an answer. But, beyond all that, the very question involved in this appeal is whether the court below rightfully overruled the demurrer—the result of which action, if sustained, not only required the defendant to answer, but subjected it to the payment of the fine and costs. That a defendant may appeal from an order overruling a demurrer to a bill of complaint is settled by *Chappell v. Funk*, 57 Md. 463, *Hyattsville v. Smith*, 105 Md. 321, 66 Atl. 44, and other cases in this state, and it has never been thought necessary for this court to inquire whether the \$10 and costs were paid before entertaining the appeal, which would be proper, if not necessary, if the right of appeal depended upon the payment of them. Such a rule would require a defendant to do, in part, what he is asking this court to determine whether the court below rightfully required him to do. The motion to dismiss seems to assume that if a bond had been given to stay the operation of the order, the motion could not have prevailed, as it alleges that no such bond had been given, but a bond is only given to stay the operation of an order or decree, and the question whether the \$10 and costs can be collected pending this appeal is not involved in this case, but merely whether the appeal will lie. As we have no doubt as to the latter, the motion to dismiss the appeal will be overruled, without relying on the fact that there is nothing in this record to show that the fine and costs have not been paid.

Without deeming it necessary to enter into a discussion of the question as to how a right of way can be acquired by such a corporation as the appellee, or whether a grant must be in writing and executed as provided by article 21, Code Pub. Gen. Laws 1904, as the appellant has done in his brief, it would seem to be clear that we must either construe the language of the bill to mean that the grant was acquired by deed or some instrument in writing, or we must hold that the bill failed to inform the court how it was acquired. It certainly does not give any definite information as to what was acquired, for it might be, so far as the bill discloses, either a narrow or a wide strip of land, and in either event some part of the land that was not in fact acquired. As is said in *Miller's Eq. Proc.* 687, "The general rule that every bill in equity must contain a clear statement of the facts upon which the plain-

tiff relies for relief is applied with much rigor to a bill for an injunction," and it was impossible for the defendant to ascertain from this bill what the plaintiff's rights to the property were, or were claimed to be. If we assume that it meant to allege that the plaintiff claimed under a deed or other writing from John R. Clarke, then a copy, or the original, should have been filed, or some sufficient reason for its nonproduction given. *Hankey v. Abrahams*, 28 Md. 588, *Miller v. Balto. Co. Marble Company*, 52 Md. 642; *Baltimore v. Coates*, 85 Md. 531, 37 Atl. 18. That such omission is ground for demurrer is decided in *Miller v. Marble Co.*, *supra*, where it is said that the defect is not waived by the demurrer, for it "admits only the truth of the facts stated in the bill, so far as they are relevant and well pleaded." If, on the other hand, the plaintiff does not rely on a deed or a contract in writing, the bill should state how it did acquire the rights sought to be protected, and what they were; for, even if it be true that the plaintiff had acquired a right of way over this land from Clarke, there may still be some question whether it so acquired it as to be binding on the defendant, or whether it acquired such a width as to authorize a court of equity to grant an injunction against the defendant from constructing the fence complained of or compelling him to remove that already constructed. When a party seeks the aid of a court, by a writ of injunction, his right to it ought not to be left in doubt by the allegations of the bill, and the defendant ought not to be required to guess what the plaintiff does rely on. The bill should be more specific on that important subject than this one is.

As under the allegations of the bill no relief could be granted other than that of an injunction, if the defect above pointed out did not exist, the prayer for general relief can be of no avail, and for the reasons we have given the demurrer ought to have been sustained. We will remand the case so that the lower court can grant leave to amend the bill, if desired by the plaintiff.

Order reversed, and cause remanded; the appellees to pay the costs, above and below.

(108 Md. 682)

FRALINGER v. COOKE.

(Court of Appeals of Maryland. Nov. 20, 1908.)

1. MUNICIPAL CORPORATIONS (§ 667*) — STREETS—CHANGING TO ALLEY—CONTRACTS—RIGHTS OF CITY.

Where an agreement was made by property owners on a street to close the street and make it into an alley, and in pursuance of that agreement the recommendation was placed before the city council and acted on and the alley constructed, the city had the same power over the alley as any other alley in the city, and could

grant minor privileges, such as the erection in the alley of bay windows, etc.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1443; Dec. Dig. § 667.*]

2. MUNICIPAL CORPORATIONS (§ 667*) — ENCROACHMENTS ON ALLEY—STATUTES.

Baltimore City Charter (Laws 1898, p. 241, c. 123, as amended by Laws 1900, p. 117, c. 109), authorizing the erection of encroachments on an alley on notice being given to the adjoining property owners of the filing of the application therefor, is not merely directory as to notice; and, where notice is not given, the appearance of a property owner by attorney, after the application has been acted upon, is not equivalent to notice previously given.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1443; Dec. Dig. § 667.*]

3. MUNICIPAL CORPORATIONS (§ 667*) — ENCROACHMENTS ON ALLEY—APPLICATION—NOTICE—"ADJOINING PROPERTY OWNERS."

Baltimore City Charter (Laws 1898, p. 241, c. 123, as amended by Laws 1900, p. 117, c. 109), provides that the board of estimates may grant minor privileges, such as the erection on alleys of bay windows, steps, etc., on the service of a copy of the application therefor on the "adjoining property owners" before filing the application with the board. *Held*, that service need not be made on an owner of property on the opposite side of the alley, since the quoted words referred to property owners on the same side of the alley, whether the fee be in the city or in the property owners.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1443; Dec. Dig. § 667.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 189, 190.]

4. MUNICIPAL CORPORATIONS (§ 671*) — ALLEYS — ENCROACHMENTS — INJUNCTIVE RELIEF.

Where encroachments are erected on an alley in pursuance of lawful permits from the city, any damage or inconvenience resulting to another property owner therefrom is *damnum absque injuria* and gives no ground for injunction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.*]

5. MUNICIPAL CORPORATIONS (§ 671*) — ENCROACHMENTS ON ALLEY — DAMAGES — INJUNCTIVE RELIEF.

Where a property owner on an alley without a permit from the city erects a fence encroaching on the alley from 1½ to 3 inches, and the fence causes no special damages, either actual or threatened, to a complaining property owner on the alley, injunctive relief will be denied, especially where it is shown that complainant's fence also encroaches on the alley.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.*]

6. INJUNCTION (§ 13*) — GROUNDS — TRIVIAL WRONGS.

A writ of injunction should not be issued for trivial or nominal wrongs.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 13; Dec. Dig. § 13.*]

Appeal from Circuit Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by Anna E. Fralinger against Theodore Cooke to enjoin encroachments on an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

alley. From an order dissolving the injunction, complainant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

Allen C. Girdwood and Henry Duffy, for appellant. Vernon Cook, for appellee.

HENRY, J. The appellant, who was the plaintiff below, is the owner of a lot abutting on what was formerly Myers street, a public highway of Baltimore city, and the appellee is the owner of a lot abutting on the opposite side of the same street. The principal thoroughfare in that section of the city is Fort avenue, which runs parallel with Myers street, and only about 80 feet distant therefrom. Myers street was formerly about 40 feet wide, but extended only a short distance, connecting Covington street with Jackson street, and it was deemed advantageous to the property owners on both sides thereof that it should be narrowed, leaving open only a 10-foot alleyway. In pursuance of this plan, the following agreement was made: "In consideration of the sum of one dollar in lieu of damages and provided the bed of Myers street reverts to me, I hereby agree to grant and assign to the signers of the annexed petition, owners of property binding on Myers St. from Covington to Jackson St., according to and in proportion to their respective interest in said property, whether fee simple or leasehold, all my right and interest in a strip of land of the width of their respective lots and with a depth southerly seven feet to a ten-foot alley, there situate, for the use of the property binding thereon; and I further agree to move all fences of all the signers of the annexed petition, pave the balance of their yards and pave the said ten-foot alley opposite their said lots. And I further agree to indemnify and save harmless the said signers of the annexed petition from any loss or damage arising from any assessments for benefit or any other charges whatever. Witness my hand and seal this ——— day of Se—, Nineteen hundred and three. Theodore Cooke. [Seal.]" And the following petition, or recommendation, signed by all the owners of property abutting on the aforesaid street, about 20 in number, including the appellant, was presented to the mayor and city council of Baltimore city: "We, the undersigned, owners of property on Myers St., hereby recommend that the mayor and city council of Baltimore city close said Myers St., upon the following conditions: 1st. That an alley 10 feet wide, located 7 feet south of the southern outline of our property, be left open for the use of our said property. 2nd. That if the bed of said Myers St., after closing the said St., should revert to Theo. Cooke, the said Theo. Cooke will grant the respective signers the said lots, in lieu of

said damages, a strip of land of the width of their respective lots and with a depth of seven feet to the said 10-foot alley, and that the said Theo. Cooke shall move all fences, pave the balance of our yards and pave the said 10-foot alley, and further agree to indemnify and save harmless the undersigned from any loss or damage arising from any assessments for benefits, or any other charges whatever." Acting upon the recommendation, Myers street was closed by the city council, leaving open an alleyway 10 feet wide, as aforesaid. The appellee fulfilled all the terms of the agreement on his part to be performed, but it is charged in the bill of complaint, hereinafter referred to, that he "has lately commenced the erection of a store and dwelling at the southeast corner of Covington street and the 10-foot alley laid out in accordance with the agreement, and has encroached on said alley in no less than seven different places, namely, bay window at corner 1 foot on said alley; base of side bay window $6\frac{1}{2}$ inches in the alley, and the total projection above ground 3 feet 3 inches; one doorway, with step in alley; 3 cellar areaways, each 1 foot 1 inch on alley, and running 3 feet 3 inches; fence from $1\frac{1}{2}$ to 3 inches in alley." The appellant filed her bill of complaint in the circuit court for Baltimore city, seeking to enjoin the completion of said building, with the encroachments in the alley as aforesaid. The court directed the injunction to issue, and the appellee, the defendant below, after answering the bill, moved for the dissolution of the injunction. Testimony was taken, and at the hearing the court dissolved the injunction, and from such order of dissolution an appeal has been taken to this court.

The testimony shows that the appellee obtained permits, executed in the usual form, from the board of estimates for the erection of all the alleged encroachments on the alley, except the fence, paying therefor the amounts charged by the city for such privileges, but that no copy of the application was served upon the appellant before the filing of the same with the board of estimates, though after the granting of the permits, the appellant's attorney appeared before the said board, and urged the revocation of the same, and that, notwithstanding such protest, the board declined to revoke them. By the charter of Baltimore city (Laws 1898, p. 241, c. 123, as amended by Laws 1900, p. 117, c. 109) the mayor and city council are given ample power over the streets, bridges, lanes, alleys, and thoroughfares of the city, and the board of estimates, by section 37 of said charter, is given power to grant, upon application, permits for the erection on said streets and alleys of "bay windows, hitching posts, areaways, steps, storm doors," etc., all of which are denominated as "minor privileges," "provided, however, that copies of said application be served upon the adjoining property owners

by said applicant before filing said application before said board." It is obvious that when Myers street, originally 40 feet wide, was narrowed to a 10-foot alley, in pursuance of the agreement and recommendation above set forth, the alley became subject to municipal control in the same manner as other streets, lanes, and alleys of the city. There is nothing in the proceedings for closing the street, nor in the agreement of the appellee, to indicate a different purpose, or that such alley should become the private property of the abutting owners. It became subject to the same regulations and uses, under city control, as the original street was, and there is no contractual relation between the parties hereto which would forbid the appellee or any other person, owning property thereon, from applying for and receiving such privileges as respects the alleyway as the city had the right to grant. The primary and essential character of the alley as a highway being undisturbed, and the right to grant the franchises specified being conceded, the point is made that the permits were unlawful because no copy of the application was served upon the appellant before it was filed with the board of estimates, as called for by the charter of the city. We cannot adopt the view suggested by the appellee that this requirement as to notice was merely directory, or that the subsequent appearance of Mrs. Fralinger, by attorney, before the board of estimates, and the action of the board on the protest then made, was equivalent to notice previously given. In this connection we may adopt the language of the court in the case of *Baltimore City v. Poole*, 97 Md. 71, 54 Atl. 683: "The section contemplates a hearing before action is taken, when the mind is open and unbiassed, and not after action when an *ex parte* conclusion has been reached, and the natural and inevitable disposition to sustain the position taken has been aroused."

But we think the solution of the difficulty turns upon the point as to whether the appellant, whose property abutted on the same street as that of the appellee, and directly opposite thereto, was an adjoining property owner within the meaning of the law. While the record does not show as to whether the fee of the street, which separates their properties, is owned by the city or the appellee, yet, if it should appear that it belonged to the latter, subject to the public easement, it would be extremely technical, and would be straining the law beyond a reasonable construction to hold that the two properties adjoined. We think this section is soundly interpreted by the board of estimates in holding that it refers to property adjoining on the same side of the street, and not to property abutting on the same street, but on the opposite side thereof. This interpretation is borne out by the signification of the word "adjoining," which carries with

it the idea of actual contact and touch, as well as by the reason of the law itself concerning these privileges, which ordinarily only affect the convenience of property owners on the same side. Entertaining this view, we hold that the appellant was not entitled to notice of the application, and that, the appellee being the owner of the adjoining property on each side of the property to be improved, no formal notice was necessary, and that therefore the permits mentioned were lawfully granted by the board of estimates, and the alleged encroachments were lawfully erected by the appellee. Under these circumstances, we think the principle laid down by this court in the case of *Garrett v. Janes*, 65 Md. 260, 3 Atl. 597, cited in both briefs, is applicable. There a structure to be used as a portico was erected by Garrett in front of his residence on Mount Vernon Place, in Baltimore, extending 9 feet from the building line, in conformity with a special ordinance of the city relating to Mount Vernon Place, passed by virtue of proper legislative authority. On a bill filed to restrain the erection of such a structure, the court held that it was lawfully erected; and, even if some measure of inconvenience was suffered by the complainant, who was an adjoining property owner, such damage was *damnum absque injuria*, and afforded no case for legal redress. In the case we are now considering there was no special ordinance respecting Myers street, but the board of estimates was directly authorized by the Legislature, upon the conditions mentioned in the act, to grant permits for such privileges as have been hereinbefore enumerated on any street or alley of the city. The encroachments on the alley were lawfully erected by the appellee; and, as in our opinion it falls in with the decision announced in the *Garrett v. Janes* Case, *supra*, it is unnecessary for us to consider the point raised in the briefs and in the argument as to whether the damage to the appellant was of such a substantial character as to entitle her to the remedy for which the suit was instituted.

But this latter point is involved when we come to consider the fence, for which no permit was obtained, and which extends, according to the testimony, from 1½ to 3 inches on the alley. There was no testimony to show that this fence caused the complainant any special damage whatever, either actual or threatened, and it appears from the record that the fence of the appellant also encroached a few inches on the same alley. Both were perhaps unintentionally located, and were apparently unobjectionable, as the appellant herself testifies that the encroachment was imperceptible to her, and that she was not aware the fence was on the alley until the survey was made. Certainly it does not inflict upon the complainant such a substantial or irreparable injury

as would call for the interposition of a court of equity. The writ of injunction should not be issued for mere trifling or nominal wrongs. Cyc. vol. 1, p. 173; *Fort v. Groves*, 29 Md. 188; *Purdy v. Manhattan Electric Railway Co.*, 36 N. Y. St. Rep. 45, 13 N. Y. Supp. 295; *Woodbury v. Marine Society*, 90 Me. 18, 37 Atl. 323.

Decree affirmed, with costs.

(109 Md. 117)

BENTON v. STOKES.

(Court of Appeals of Maryland. Dec. 9, 1908.)

1. APPEAL AND ERROR (§ 32*)—DECISIONS REVIEWABLE — CASES ORIGINATING BEFORE JUSTICES OF THE PEACE.

No appeal lies to the Supreme Court from the action of the circuit court on appeal from a justice of the peace if the justice has jurisdiction.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 32.*]

2. LANDLORD AND TENANT (§ 303*)—PROCEEDINGS TO RECOVER POSSESSION—JUSTICES OF THE PEACE—JURISDICTION.

Under Code Pub. Gen. Laws 1904, art. 53, § 1, providing that a lessor desiring to repossess himself after the expiration of the term shall give notice in writing to the tenant, and, if the tenant refuses to comply, the lessor, his heirs, executors, administrators, or assigns, may make complaint in writing to a justice of the peace, a notice to quit and a complaint to recover possession, signed by the lessor's agent, were sufficient to confer jurisdiction on the justice.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 303.*]

3. PRINCIPAL AND AGENT (§ 25*)—LEASE—ESTOPPEL.

Where a tenant signed, and occupied premises under, a lease reciting that R. and F. were the landlord's agents to rent the property, the tenant was estopped to deny such authority.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 44; Dec. Dig. § 25.*]

4. PRINCIPAL AND AGENT (§ 100*)—AGENT FOR LANDLORD—PRESUMED AUTHORITY.

A landlord's agent having authority to rent property is presumed to have authority to give notice to quit to the tenant.

[Ed. Note.—For other cases, see *Principal and Agent*, Dec. Dig. § 100.*]

5. PRINCIPAL AND AGENT (§ 171*)—ACTS OF AGENT—RATIFICATION.

Where a landlord declared in a petition to a justice of the peace that she had made the lease and gave a notice to quit, she thereby ratified the act of her agent in making the lease and giving such notice.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 655; Dec. Dig. § 171.*]

6. JUSTICES OF THE PEACE (§ 97*)—REPRESENTATION OF LITIGANT BY COUNSEL.

A petition by a landlord to recover possession in a suit before a justice of the peace was properly signed by her counsel; it appearing to have been her petition, and the prayer for relief being in her behalf.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 333; Dec. Dig. § 97.*]

Appeal from Circuit Court, Prince George's County.

Action by Nellie E. Stokes against William H. Benton. From a judgment of the

circuit court affirming a judgment of a justice of the peace directing restitution of certain premises, defendant appeals. Dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, and WORTHINGTON, JJ.

T. Van Clagett, for appellant. C. B. Colvert, for appellee.

SCHMUCKER, J. This is an appeal from a judgment of the circuit court for Prince George's county, which affirmed upon appeal the decision of a justice of the peace awarding restitution of certain demised premises to the appellee as landlord. The proceeding before the justice had been taken by the appellee against the appellant as her tenant under the provisions of article 53, Code Pub. Gen. Laws 1904, relating to tenants holding over. At the trial of the case in the circuit court, the appellant moved to quash the proceedings for want of jurisdiction in the justice of the peace to entertain them, but the court overruled the motion, and affirmed the judgment. The appellant then appealed from the order overruling the motion to quash and from the judgment of affirmance.

The vital question presented for our determination by the record is whether the justice had jurisdiction of the proceeding instituted before him; for, if he had, it is settled by numerous decisions of this court that no appeal lies to us from the action of the circuit court upon the appeal from the justice to that tribunal. *Cole v. Hynes*, 46 Md. 184; *Herzberg v. Adams*, 39 Md. 312; *Mears v. Remare*, 33 Md. 250; *Darrell v. Biscoe*, 94 Md. 684, 51 Atl. 410; *Hopkins v. P. W. & B. R. R. Co.*, 94 Md. 257, 51 Atl. 404; *Roth v. State*, 89 Md. 524, 43 Atl. 769. The material facts appearing from the record are as follows: On July 12, 1906, a written lease under seal for the demised premises, consisting of an improved lot of land in Hyattsville, was made between the parties to this appeal for the term of one year, to begin on July 30, 1906, at the rent therein stipulated payable in monthly installments, with a provision that the lease was to continue in force from term to term, with the right to either party to terminate it at the end of any term "by giving at least sixty days' previous notice thereof in writing." This lease recited on its face that it was made "between Rogers & Farden, agents for Nellie E. Stokes, landlord, and Wm. H. Benton, tenant." On May 20, 1907, Rogers & Farden, as agents of the appellee, served on the appellant a notice to quit the premises at the end of the year on July 30th midnight. This notice was in the usual form, and was signed "Rogers & Farden, agents for Nellie E. Stokes." On September 19, 1907, the appellant filed with Arthur Carr, a justice of the peace for Prince George's county, her petition, alleging her ownership of the demised

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

premises, their occupancy by the appellant as her tenant for a term which expired at midnight on July 31, 1907, the service upon him of the notice to quit, and his refusal to give up the premises. The petition concluded with a prayer for a summons against the appellant, requiring him to show cause why restitution of the premises should not be made to the petitioner. This petition, although in the name of the appellee "Nellie E. Stokes," was not signed by her, but by "James C. Rogers, Atty. for Nellie E. Stokes." Upon the filing of the petition, summons was issued as prayed for against the appellant, and, he failing to appear in response thereto, the case was adjourned for one week, and then, after "trial had" before the justice, the judgment for the restitution was rendered, from which the appeal to the circuit court was taken.

No objection is made by the appellant to the contents of the notice to quit or the petition to the justice. The two grounds stated by him in his motion to quash the proceedings in the circuit court, and relied on in his brief in this court, for denying the jurisdiction of the justice of the peace to entertain the appellee's petition, are that neither the notice to quit nor the petition to the justice were signed by the appellee herself, and that, therefore, they failed to so comply with the provisions of article 53, Code Pub. Gen. Laws 1904, as to give the justice jurisdiction. We do not regard either one of these grounds of objection as sound. Section 1, art. 53, Code Pub. Gen. Laws 1904, provides both for giving the notice to quit and filing the petition to the justice of the peace. Its language is: "In all cases where any interest in real estate shall be let or leased for any definite term or at will and the lessor his heirs, executors, administrators or assigns shall desire to repossess the same after the expiration of the term for which it was demised and shall give notice in writing one month before the expiration of said term or determination, of said will, to the tenant or the person actually in possession of the premises to remove from the same at the end of said term, and if the said tenant or person in actual possession shall refuse to comply therewith the lessor, his heirs, executors, administrators or assigns may make complaint thereof in writing to any justice of the peace of the county wherein such real estate is situate." It is to be observed that this section merely authorizes the lessor to "give notice in writing" to the tenant at the time therein mentioned, and, in the event of the refusal of the tenant to comply therewith, "to make complaint thereof in writing" to the justice without specifying the form of the notice or the method of its service, or indicating the style or details of the complaint to be made to the justice other than to require both to be in writing. It does not in terms require either instrument to be signed by the landlord in person. Under these circumstan-

ces, it must be presumed that the Legislature intended that the notice to the tenant must be such as to clearly inform him by whom or on whose behalf it was sent, to what property it related, and of what facts it was intended to inform him.

In *Cook v. Creswell*, 44 Md. 581, it was contended that a landlord's notice to quit, almost identical in terms with the one now before us, was bad because it was addressed to and served upon the tenant's husband, instead of the tenant herself, but our predecessors held it to be good, saying in that connection: "A notice to quit will be held good if upon the whole it is intelligible and so certain that the tenant cannot reasonably misunderstand it. An obvious mistake in some part will not invalidate it, if it is otherwise so explicit that the party receiving it cannot be misled. * * *" In *Clark v. Kellher*, 107 Mass. 406, the notice was addressed to John Clark, whose full name was Thomas B. Clark. Ames, J., in considering this mistake, uses the following language: "The notice to quit was sufficient and lawful both in substance and the mode of service. There was no uncertainty as to the party from whom it emanated or the tenement to which it applied, and there could have been no doubt that it was intended for the family who occupied that tenement." Upon the principles thus announced, there can be no doubt of the sufficiency of the notice now under consideration.

The appellant having signed and sealed the lease of July 12, 1906, and gone into possession of and occupied the demised premises under and by virtue of that lease, is estopped from denying the truth of the recital contained on its face that Rogers & Farden were the agents of the appellee to rent the property. A landlord's agent having authority to rent a property is presumed to have like authority to give to the tenant a notice to quit. 24 Cyc. 1331; *McClung v. McPherson*, 47 Or. 73, 81 Pac. 567, 82 Pac. 13. Furthermore, the appellee as landlord subsequently ratified the act of her agent in making the lease and giving the notice to quit by declaring in her petition to the justice of the peace that she had made both of them. It is equally clear that the signing of the petition to the justice by the counsel of the appellee was both appropriate and sufficient. It professed on its face to be her petition, and the prayer for relief was on her behalf. It was said in the opinion of this court in *Welkel v. Cate*, 58 Md. 105, that the office of justice of the peace has never been considered a court of law because a court of law within the meaning of the Constitution is a court of record; yet that office is almost as old as the common law itself. Originally justices of the peace were merely conservators of the peace, but at an early day in England they were invested by statute with limited judicial powers in both civil and criminal matters. They are classed among judicial officers by the Con-

stitution, which provides for their appointment, and declares that their jurisdiction shall be the same which they theretofore exercised or should thereafter be prescribed by law. A litigant is not required to conduct proceedings before them by counsel, but it has long been a recognized method of practice to do so, and we think that the filing of her petition by the appellee over the signature of her counsel in the present case constituted a compliance with the requirements of article 53, Code Pub. Gen. Laws 1904, in that connection. As the justice of the peace before whom the present proceedings were instituted had jurisdiction to entertain them, the judgment of the circuit court affirming his decision was final, and no appeal lies therefrom to this court, and the present appeal must be dismissed.

Appeal dismissed, with costs.

(75 N. H. 133)

DRESSER v. TOWN OF HOPKINTON.

(Supreme Court of New Hampshire. Merri-mack. Dec. 1, 1908.)

TAXATION (§ 274*)—PERSONAL PROPERTY—PLACE—RESIDENCE OF OWNER.

Under Pub. St. 1901, c. 53, § 1, providing that personal property shall be taxed to the owner at the place of his residence, and under sections 10, 12, 16, and 18, excepting from section 1 animals and stock in trade, vessels, and boats, wood, lumber, etc., a steam derrick used in the erection of a mill by the owner in a place other than his residence is not subject to tax in such latter place; the exceptions not covering steam derricks.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 448; Dec. Dig. § 274.*]

Exceptions from Superior Court, Merri-mack County; Wallace, Chief Justice.

Petition by John W. Dresser against the Town of Hopkinton to abate a tax. From a judgment abating the tax, defendant brings exceptions. Exceptions overruled.

April 1, 1907, the defendants assessed against the plaintiff a tax of \$9.50 upon a steam derrick which was then in that town for a temporary purpose, being used there in the erection of a mill. On that date, and for more than 20 years previously, the plaintiff had his residence and domicile in Franklin. He was duly notified of the tax, seasonably applied to the selectmen for an abatement, and, upon their refusal, seasonably filed his petition. In 1907 he was taxed on the same property in Franklin. Upon the foregoing facts it was ordered that the tax be abated, and the defendants excepted.

Leach, Stevens & Couch, for plaintiff. Dudley & Lowe, for defendant.

BINGHAM, J. As a rule, personal property is taxable in the town in which the owner resides. Pub. St. 1901, c. 53, § 1; Kent v. Exeter, 68 N. H. 469, 44 Atl. 607. There

are, however, exceptions to this rule (Pub. St. 1901, c. 53, §§ 10, 12, 16, 18; Conn. River Lumber Co. v. Columbia, 62 N. H. 286; Coe v. Errol, 62 N. H. 303; Winkley v. Newton, 67 N. H. 80, 36 Atl. 610, 35 L. R. A. 758; Winnipiseogee Paper Co. v. Northfield, 67 N. H. 865, 29 Atl. 453; Conn. Valley Lumber Co. v. Monroe, 71 N. H. 473, 52 Atl. 940); but no provision of law making an exception of the class of property here in question has been pointed out, and an examination of the statutes has disclosed none. The abatement was properly granted.

Exception overruled. All concurred.

(75 N. H. 148)

LAWRENCE v. TOOTHAKER et al.

(Supreme Court of New Hampshire. Coos. Dec. 1, 1908.)

1. MUNICIPAL CORPORATIONS (§ 170*)—CONTRACTS—LIABILITY OF OFFICERS—EVIDENCE.

Evidence held not to support a finding that, when a city board of education contracted with an architect to draw plans for a schoolhouse, the members of the board intended to bind themselves personally, or that the architect understood that they so intended.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 380, 391; Dec. Dig. § 170.*]

2. MUNICIPAL CORPORATIONS (§ 170*)—OFFICERS—CONTRACT—NOTICE OF STATUTORY POWER.

Where a person contracted with a city board of education in its official capacity, he was chargeable with knowledge whether the board had statutory power to make the contract which would ordinarily be a question of law, and, the contract not being within the board's authority to make, he could not recover thereon from the members of the board personally, where both parties acted in good faith, believing the board had the requisite authority, in the absence of their guaranty of their authority.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 391; Dec. Dig. § 170.*]

Exceptions from Superior Court, Coos County; Chamberlain, Judge.

Action by Archibald I. Lawrence against Oliver H. Toothaker and others. Verdict for plaintiff, and case transferred from the superior court on defendants' exception. Exception sustained, and verdict set aside.

The evidence tended to show the following facts: The plaintiff is an architect, and the defendants constituted the board of education in Berlin at the time of the contract in question. The defendants requested the plaintiff to make plans for a school building to take the place of one which had been burned, and, after some negotiations between the parties, a contract was agreed upon for his employment. Soon afterward the defendants notified the plaintiff to cease working on the plans, as they did not wish to use them. He replied that he should hold them to the contract. He charged his services to the city of Berlin, and understood

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that he was dealing with the board of education. In a suit against the city on this account he was unsuccessful, upon the ground that the board of education had no authority to bind the city. Both parties acted in good faith in making the contract.

Scott Sloane, for plaintiff. Matthew J. Ryan and Edmund Sullivan, for defendants.

WALKER, J. The evidence is not sufficient to support a finding that at the time the contract was made the defendants intended to bind themselves personally, or that the plaintiff understood they did. No express promise on the part of the defendants was made, and it was not suggested by the plaintiff that the defendants were to be deemed the responsible contracting parties. Nor is there any evidence that the defendants suppressed any material facts relating to their authorization to bind the city. Both parties acted in good faith, upon the assumption that the defendants were authorized to make the contract as representatives of the city; and, in accordance with that understanding, the plaintiff gave credit to the city. It may be conceded that the defendants, as the board of education, had no authority to contract with the plaintiff for and in behalf of the city, and that the attempted exercise of such authority was futile. But it does not follow that the defendants bound themselves to pay for the plaintiff's services. *Ogden v. Raymond*, 22 Conn. 379, 384, 58 Am. Dec. 429. The board's want of statutory power to do what it attempted to do was as within the cognizance of the plaintiff as that of the defendants. *Richards v. Columbia*, 55 N. H. 96, 99; *Sprague v. Cornish*, 59 N. H. 161. The plaintiff was chargeable with knowledge of their official limitations; and, having voluntarily contracted with them in their official capacity and given credit to the city for the performance of the contract, he is in no position to claim that the defendants are personally responsible on the contract, in the absence of an express promise by them to incur that responsibility, unless the law would imply a promise of guaranty that they had the requisite power. But "where all the facts and circumstances surrounding the case are known to both the agent and third party, but there is a mutual mistake as to a matter of law—as the principal's liability or the legal effect of the agent's written authority—the agent cannot be held personally responsible by reason of the mere fact that the principal cannot be held, unless the agent by some apt expression guarantees the contract or assumes it himself." 2 Cl. & Sk. Ag. 582b; *Jefts v. York*, 10 Cush. (Mass.) 392. And this principle of law is equally applicable when public officers, like the defendants, assume to bind the public by their contracts with third parties. Their authority is statutory; and whether their attempted ex-

ercise of it in a particular case is authorized is ordinarily a question of law, which the other contracting party has ample opportunity to investigate and decide for himself. If for any reason he is unwilling to incur that risk, an express guaranty by the other that he acts within the scope of his authority would be necessary to render the latter liable on the contract. *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82; *Brown v. Rundlett*, 15 N. H. 360; *Farnam v. Davis*, 32 N. H. 302. Cases like *Weare v. Gove*, 44 N. H. 196, do not conflict with this result. It was there expressly recognized (page 197 of 44 N. H.) that the agent cannot be held "where the promisee, being fully informed of the facts upon which the assumed authority rests, forms his own judgment, and contracts for and relies upon the engagement of the principal alone. In such a case it would be unjust that the agent should be bound because such was not the contract."

As the reported evidence negatives the idea that the parties intended that the defendants should be individually liable on the contract, and as there is no evidence that they guaranteed their authority, or were guilty of any fraud upon the plaintiff, the defendants' motion for a verdict should have been granted.

Exception sustained. Verdict set aside. All concurred.

(76 N. H. 111)

DANFORTH v. FISHER.

(Supreme Court of New Hampshire. Hillsborough. Nov. 4, 1908.)

1. MASTER AND SERVANT (§ 302*)—INJURIES TO THIRD PERSONS—DEVIATION FROM INSTRUCTIONS.

Where a chauffeur was told to take defendant's automobile to a hotel at a specified time, and, instead, takes the automobile in another direction to call on a friend, and, while returning, runs against plaintiff's horse, which ran away and injured plaintiff, defendant is not liable for the injuries, a master not being liable for an injury caused by his servant not acting within the scope of his employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1220; Dec. Dig. § 302.*]

2. MASTER AND SERVANT (§ 302*)—DANGEROUS INSTRUMENTALITIES—AUTOMOBILE.

The owner of an automobile is not liable for injuries resulting from its use merely because he is the owner, and regardless of whether the person in charge of the automobile was acting under his directions at the time of the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1217-1221; Dec. Dig. § 302.*]

3. MASTER AND SERVANT (§ 302*)—INJURIES TO THIRD PERSONS—INCOMPETENCY OF SERVANT.

Knowledge by the owner of an automobile that his chauffeur is a reckless driver will not make the owner liable for injuries which occurred at a time when the chauffeur was using the automobile for his own use, contrary to the directions of the owner.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1220; Dec. Dig. § 302.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Exceptions from Superior Court, Hillsborough County; Chamberlin, Judge.

Action by Clarence Danforth against Fred W. Fisher for personal injuries received by being thrown from his wagon in the running away of his team, which was run into by defendant's automobile. A nonsuit was ordered and plaintiff excepts. Exception overruled.

Osgood & Osgood, for plaintiff. Branch & Branch, for defendant.

YOUNG, J. 1. However it may be in other jurisdictions, in this state the test to determine whether a master is liable to a stranger for the consequences of his servant's misconduct is to inquire whether the latter was doing what he was employed to do at the time he caused the injury complained of. If he was, the fact that he was not doing it in the way expected is immaterial. Rowell v. Railroad, 68 N. H. 358, 44 Atl. 488. But, if at the time he did the act which caused the injury he was not acting within the scope of his employment, the master is not liable. Cordner v. Railroad, 72 N. H. 413, 57 Atl. 534; Turley v. Railroad, 70 N. H. 348, 47 Atl. 261; Searle v. Parke, 68 N. H. 311, 34 Atl. 744; Page v. Hodge, 63 N. H. 610, 4 Atl. 805; Andrews v. Green, 62 N. H. 436; Grimes v. Keene, 52 N. H. 330, 335; Wilson v. Peverly, 2 N. H. 548. At 5 o'clock on the day of the accident McCauley, who was employed by the defendant as a chauffeur, took the automobile from the place where it was kept, drove to the defendant's store, and awaited orders. He was told to get his supper and to be at the New City Hotel with the automobile at a quarter before 7 o'clock. After he had eaten supper, instead of taking the car to the hotel according to the defendant's order, he drove to West Manchester, a mile or two distant from his boarding place, and in an opposite direction from the hotel, for the purpose of calling upon a friend. At the time of the accident he had finished his call, and was on his way to the hotel. Although the evidence shows that McCauley was the defendant's servant, and that he drove the automobile against the plaintiff's horse and caused the animal to run away, it also shows that he took the automobile without the defendant's permission and went with it on an errand of his own; that he was acting for himself, and not for the defendant, at that time. As it cannot be found from the evidence that McCauley was doing what he was employed to do at the time the plaintiff was injured, there was no error in the order of nonsuit.

2. The plaintiff contends that the law of this state on the subject is not in harmony with the view which obtains in most common-law jurisdictions. That his contention is not well founded will appear from an examination of the authorities. Perlstein v. Company, 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959; McCarthy v. Timmins, 178

Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490; Stone v. Hills, 45 Conn. 44, 29 Am. Rep. 635; Fiske v. Enders, 73 Conn. 338, 47 Atl. 681; Doran v. Thomsen, 74 N. J. Law, 445, 66 Atl. 897; Quigley v. Thompson, 211 Pa. 107, 60 Atl. 506; Lotz v. Hanlon, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922; Thorp v. Minor, 109 N. C. 152, 13 S. E. 702; Lewis v. Amorous, 3 Ga. App. 50, 59 S. E. 338; Reaume v. Newcomb, 124 Mich. 137, 82 N. W. 806; Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946; Slater v. Company, 97 Minn. 305, 107 N. W. 133; Evans v. Company, 121 Mo. App. 286, 101 S. W. 1132; Jones v. Hoge, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216; Patterson v. Kates (C. C.) 152 Fed. 481; 26 Cyc. 1538; 20 Am. & Eng. Enc. Law, 163 et seq.; 34 Cent. Dig. tit. Master & Servant, §§ 1219, 1220.

3. The defendant is not liable merely because he was the owner of the automobile by which the plaintiff was injured. If the Legislature can enact that an automobile or its owner shall be liable for any injury the driver may do to others whenever the latter would be, it has not seen fit to do so. Nor is there any force in the plaintiff's contention that the owner of an automobile is liable to strangers in the same way and to the same extent he would be if it were a wild animal. If it were the law of this state that one who has a dangerous element or a wild animal on his premises is liable for all the damage it does after escaping from his control, that rule would have no application to the facts here presented. In this case the automobile did not escape from the defendant's control. It was taken from him by McCauley. There is nothing inherently dangerous about an automobile any more than about an axe. Both are harmless so long as no one attempts to use them, and both are likely to injure those who come in contact with them when they are used for the purpose for which they were intended. The case does not stand exactly as it would if the defendant had employed McCauley to care for his horse, and the latter had driven the animal to West Manchester, and left it unhitched in the street while he made a call upon his friend. In such case, if the horse ran away and injured a third person, there would be a basis for the argument that McCauley's wrongful act in driving the horse to West Manchester was the occasion, and his leaving it unhitched was the cause of the injury. Hayes v. Wilkins, 194 Mass. 223, 80 N. E. 449, 9 L. R. A. (N. S.) 1033, 120 Am. St. Rep. 549; Ritchie v. Waller, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361; Loomis v. Hollister, 75 Conn. 275, 53 Atl. 579; Joel v. Morison, 6 Car. & P. 501.

4. If it were conceded that McCauley was a reckless operator and that the defendant was aware of that fact, it could not be found that the continued employment of a careless

servant by the defendant was the legal cause of the plaintiff's injury. Knowledge that McCauley was habitually careless in the operation of the automobile has no tendency to prove that the defendant ought to have known or anticipated that he would steal the vehicle, or use it for his own purposes contrary to the owner's explicit order; and, unless that fact is found, it cannot be said that the defendant's fault in employing a chauffeur whom he knew to be reckless was the cause of the plaintiff's injury.

The question whether the plaintiff could recover if the defendant had known McCauley was likely to use the automobile without permission is not in issue, and no opinion is intended to be expressed thereon.

Exception overruled. All concurred.

McCARTER, Atty. Gen., v. DUNGAN et al.
(Court of Chancery of New Jersey. Dec. 7, 1908.)

1. INJUNCTION (§ 92*)—SUBJECTS OF RELIEF—USE OF PUBLIC PROPERTY.

Equity will hesitate to interfere by preliminary injunction with the management of an armory building, where the persons intrusted with the management thereof are manifestly exercising in good faith their best judgment and discretion in the use of the building.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 164; Dec. Dig. § 92.*]

2. MILITIA (§ 17*)—USE OF ARMORY—INJUNCTION.

The use of an armory building erected for the militia for amusement purposes is lawful, where it can be said reasonably that the amusements are essential to the needs of the militia, and the use is not injurious to the property itself; and where an amusement conducted in the building can reasonably be said to be necessary to maintain the interest of the members of the militia, or tends to aid the procurement of re-enlistments or in procuring new enlistments, equity will not interfere.

[Ed. Note.—For other cases, see Militia, Dec. Dig. § 17.*]

3. MILITIA (§ 17*)—USE OF ARMORY—INJUNCTION.

The fact that an amusement conducted in an armory building was of such a nature that the members of the militia could not participate therein, except as spectators, did not show an improper use of the building justifying relief by temporary injunction, provided the single and primary purpose was to supply such amusements as were necessary to maintain the interest of the members as distinguished from a purpose to make money, especially where the use of the building for drilling purposes was not interfered with.

[Ed. Note.—For other cases, see Militia, Dec. Dig. § 17.*]

Suit by Robert H. McCarter, Attorney General, against Nelson Y. Dungan and others. Heard on bill for injunction on return of order to show cause. Denied.

John H. Backes, for complainant. Nelson Y. Dungan, pro se.

LEAMING, V. C. (orally). I adhere to the views which I expressed at the time the former application for a preliminary injunction was made in this case; and I entertain the view that the present record discloses no conditions so essentially different from those existing at the time of the former application as to warrant preliminary relief at this time. I think that this court should, by a preliminary writ at least, hesitate to interfere with the management of an armory building when the persons who are by law intrusted with the management are manifestly exercising, in good faith, their best judgment and discretion in the use of the building, and are devoting it to uses which they believe to be essential and conducive to the general benefits and needs of the military organization, unless, of course, it should be made to plainly appear that the managing officials are so clearly mistaken in their views that their judgment cannot be properly accepted as an exercise of a discretion which the law has imposed upon them. I also entertain the view that the use of an armory building for amusement purposes is entirely lawful when it can reasonably be said that the amusements for which it is used are essential to the esprit de corps of the regiment. If uses are indulged which tend to materially injure the corpus of the armory building, and are in that manner destructive of the state's property, or if amusements are engaged in for purely commercial purposes, a different question is presented; but, where the amusements which are conducted in the building are not injurious to the property itself, and where it can reasonably be said that they are necessary to maintain the interest of the members of the guard and tend to aid the procurement of re-enlistments, or aid in procuring new enlistments, or operate to stimulate general interest and attendance in the regular drill and instruction work, it seems to me entirely clear that such uses come within the contemplated uses for which the armory is erected.

In the case as it was first presented the amusements which were sought to be enjoined were dancing and roller skating, and in those amusements the members of the regiments participated with the public, and in that way shared in the active enjoyment of the amusements, not only as spectators, but as participants. The complaints which are now made embody one new condition, so far as the amusement which was conducted in the armory building in September is concerned, in that that amusement appears to have been of such a nature that the members of the organization could not participate in it except as spectators; and that, I think, is the only occasion in which the armory has been used for entertainment purposes in a manner in which the members of the Guard

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have not been active participants, or have not been privileged to become active participants. I cannot think, however, that that fact in any way introduces a new principle. It still leaves the controlling inquiry, as I think I stated it when the matter was first under consideration, whether or not, as a fact, the use which is in question is such a use as is primarily for the purpose of increasing the interest of the members of the organization, and conducive to that general purpose, or whether the use is simply a commercial use; and the affidavits now on file are positive and convincing to the effect that the single and primary purpose of the officers of the organization is to supply such amusements as are necessary to maintain the interest of the members, and that the amusements in question have been inaugurated and are being conducted to that end, and that the revenues derived by the admission fees which are charged are a matter of no concern further than to make revenues commensurate or, if possible, a little in excess of the expenses incident to the entertainments. It would be doing violence to the affidavits on file to make a finding of fact that any entertainment has been given in the armory building in question that has not had for its primary aim the stimulus of an interest on the part of the members of the organization itself, as distinguished from any purpose to make money. It may be that a bicycle track approaches near to, if it does not pass over, the boundary line between an appropriate and inappropriate use. A bicycle track necessarily occupies space that is primarily intended for drilling purposes; but the evidence is that the drilling floor was appropriated for the bicycle track at a time when drilling had been suspended for the summer season and when the floor was not needed for any other purpose, and that the track was removed before the part of the floor which had been occupied was needed for drilling purposes. I think the evidence is also of such a nature as to necessitate the finding that the presence of the bicycle track on the armory floor in no way injured the floor or other parts of the building.

I am entirely convinced that, so long as the amusements which are afforded are within the lines which I have undertaken to indicate—that is, so long as the amusements which are held appear to be in pursuance of a reasonable exercise of discretion upon the part of the officers in charge, to the sole end and purpose that the interest of the individual members of the military organization may be increased and the needs of the regiment in that manner conserved, and not for the purpose of making money—a court of equity should not interfere in the use. I will advise an order denying the prayer for a preliminary injunction.

(222 Pa. 371)

HARTJE v. HARTJE.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

COURTS (§ 242*)—APPELLATE JURISDICTION—DECREE IN DIVORCE.

Under Act May 5, 1899 (P. L. 250) § 7, from a decree allowing counsel fees and alimony in divorce, appeal lies to the superior, and not the supreme, court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 242.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by Hartje against Hartje for divorce. From a decree allowing counsel fees and alimony, defendant appeals. Remitted to superior court.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

PER CURIAM. This is an appeal from decree allowing counsel fees and alimony in divorce. The decree being for the payment of more than \$1,500 would appear, *prima facie*, to come within the principle, if not the exact terms, of the decision in *Prentice v. Hancock*, 204 Pa. 123, 53 Atl. 763, and the appeal, therefore, would lie in this court. But the same act (May 5, 1899 [P. L. 248]) on which *Prentice v. Hancock* was based, in section 7 gives the superior court jurisdiction over "appeals in proceedings in divorce." The original proceeding in the court below was for divorce, and an appeal at any previous stage of it would certainly have lain to the superior court. The fact that this is a money decree does not prevent it from being still a part of the same proceeding. There is no real repugnance between the different sections of the act. Section 1(c), for purpose of jurisdiction in appeals, classifies all money judgments according to their amount, without reference to the nature of the action, while section 7 deals with proceedings in divorce as a special class, without reference to a possible money judgment which may be incident to the action. This being made a special class, the legislative intent is clear to take it out of the general classification in section 1.

The appeal is remitted to the superior court.

(222 Pa. 356)

DAVIS et al. v. WESTMORELAND COUNTY RY. CO.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

1. STREET RAILROADS (§ 117*) — INJURY TO CHILD—NEGLIGENCE OF MOTORMAN.

Where a motorman sees a child running parallel to the tracks, so that a step or two might bring her upon them, the danger to such child is not so imminent as to excuse him for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

failing to see another child, about two years old, in dangerous proximity to the tracks; and the question of his negligence is for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 253; Dec. Dig. § 117.*]

2. NEGLIGENCE (§ 136*)—INJURY TO INFANT— NEGLIGENCE OF PARENT — QUESTION FOR JURY.

Where the wife of a miner leaves a child 2 years old in charge of her daughter 10 years old while the husband is at work, the question of the parent's negligence, where the younger child is injured by a street car, is for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 352; Dec. Dig. § 136.*]

Appeal from Court of Common Pleas, Westmoreland County.

Action by Loretta Davis, by her father, John E. Davis, and John E. Davis in his own right, against the Westmoreland County Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

At the trial it appeared that on August 12, 1907, the mother of Loretta Davis left Loretta in charge of another daughter, 10 years old, and went on an errand. The father of the child, John E. Davis, was at the time at work in the mines where he was employed. During the absence of the parents Loretta was run over by an electric car, and seriously injured. There was evidence that, immediately before the accident, the motorman's attention had been diverted by a little girl running parallel with the tracks, and in somewhat dangerous vicinity to them.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Wm. A. Stone, Jas. S. Beacom, David L. Newill, Stephen Stone, and Albert P. Meyer, for appellant. Chas. O. Crowell, Curtis H. Gregg, and Sidney J. Potts, for appellees.

PER CURIAM. When the larger child ran out of the house and along the tracks, the motorman's attention was naturally and properly directed to her. Though she was not on the tracks, she was running parallel to them, and so close that a step or two might bring her upon them at any instant. But the danger to her was not so imminent as to justify him, as a matter of law, in closing his eyes to other obstructions or risks in his path. He was bound to keep a general lookout in the performance of his duties.

It is negligence in a traveler along the streets of a city not to keep a general lookout where he is going. This was the rule held in regard to a foot passenger in *Robb v. Connellsville Boro.*, 137 Pa. 42, 20 Atl. 564, and *Harris v. Commercial Ice Co.*, 153 Pa. 278, 25 Atl. 1133, and the same rule was applied to the driver of a vehicle in *Graham v. Philadelphia*, 19 Pa. Super. Ct. 292. This being the law in regard to negligence in an ordinary traveler, a fortiori applies to the motorman in charge of a car. Whether in this case he did

so, as far as the circumstances permitted, or whether, notwithstanding the primary call upon his attention, he should have seen the smaller child in time to avoid it, was a question of fact which only a jury could answer.

On the second question the negligence of the parents in allowing so young a child to be upon the street under the circumstances is equally clearly a question for the jury. *Woeckner v. Erie Electric Motor Co.*, 182 Pa. 182, 37 Atl. 936; *Jones v. United Traction Co.*, 201 Pa. 346, 50 Atl. 827.

Judgment affirmed.

(222 Pa. 362)

• COLLIER v. KNOX.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

1. HIGHWAYS (§ 184*) — RUNAWAY TEAM — NEGLIGENCE.

The mere fact that a team ran away does not itself imply negligence.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 472; Dec. Dig. § 184.*]

2. HIGHWAYS (§ 184*) — RUNAWAY TEAM — NEGLIGENCE.

When plaintiff passed a lane leading from defendant's house to a public road, he saw defendant's team standing in the lane. He drove slowly past, and when he got 200 feet down the road, he heard a warning to look out, and was struck by the runaway team. Held, that a nonsuit was properly entered.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 184.*]

Appeal from Court of Common Pleas, Lawrence County.

Action by William H. Collier against Alexander G. Knox. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

C. H. Akens, for appellant. J. Norman Martin and A. Martin Graham, for appellee.

PER CURIAM. There was no evidence of negligence on the part of defendant. The only testimony as to the facts of the occurrence was from the plaintiff himself, and was to the effect that, when he passed the lane leading from defendant's house to the public road, he saw the team of defendant standing in the lane, and a man standing at the head of the horses. He drove slowly past the end of the lane, and when he had gotten 180 or 200 feet down the road, he heard a warning to "look out," and immediately after was struck by the runaway team. In all this there is no evidence of negligence. The mere fact of a runaway does not by itself imply negligence, nor would even leaving a team standing in a private lane do so. But in this case the affirmative evidence is that when last seen, only a few moments before the collision, there was a man standing at the horses' heads. The cas-

es cited by the appellant of horses left unhitched and unattended on a city street stand upon an entirely different footing.

Judgment affirmed.

(222 Pa. 364)

WILSON v. BROWN.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

MASTER AND SERVANT (§ 286*) — INJURY TO SERVANT—EVIDENCE.

In an action to recover for injuries while in defendant's employment by being struck by a falling plank, *held*, that a compulsory nonsuit was properly entered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

Appeal from Court of Common Pleas, Butler County.

Action by William B. Wilson, Jr., against Frederick S. Brown. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

The following is the opinion of Galbreath, P. J., of the court below:

"This suit was brought by the plaintiff against the defendant for recovery of damages alleged to have been sustained by him by an injury received while in defendant's employ in the construction of concrete piers or abutments on the line of the Pittsburgh & Western Railway Company. In the construction of said piers, wooden forms were used for the purpose of giving shape to and retaining the concrete in place until it had settled and hardened. The work of building up the piers was by sections, and, as each section hardened, the forms were removed from the concrete and placed further up for the purpose of constructing in the same manner another section on top of that already constructed. These wooden forms were held together by 10-penny nails 'toed in' as described by the witnesses. When the construction of the pier had reached considerable height, on February 25, 1907, the workmen, including the plaintiff in this case, were engaged in removing the wooden forms; the plaintiff being engaged down upon the ground near the base of the pier. Several of the planks had already been pried loose by the workmen engaged on the pier and had fallen to the ground. The plaintiff was standing at the foot of the pier, not directly under the place where the planks were being pried off, but around the corner of the pier, and so seemed to be removed from any danger consequent upon the falling plank. The testimony in the case indicates that the freezing weather had caused the planks to adhere to the concrete so that some considerable force had to be expended in prying them loose. During the progress of this work, when one of the planks had been loosened at one end with a

bar, as testified to by the witnesses, said plank swung out and around the corner of the pier, falling at the side, not directly underneath, as had the other planks which had been removed, but at the point where the plaintiff was standing, striking him and doing the injury which is complained of. On part of plaintiff it is contended that this was due to defective construction on part of the defendant of the forms used in building up the concrete, that the 10-penny nails used for that purpose were not sufficient, and that the failure to use heavier nails was the cause of the swinging out of the plank, which caused the plaintiff's injury. There is nothing in the evidence in this case, we think, from which it can be reasonably inferred that the swinging out of the plank in the manner testified to by the witnesses was in any degree due to the manner of construction of the wooden forms, or that the same thing would have been less likely to have occurred if larger nails or spikes had been used. It cannot be said that the adhering of the plank, which caused the injury, at one end after the other had been pried loose, was in any way due to the fact that the nails used were not of larger size. The testimony in the case indicates that the accident was one of those occurrences which, while unfortunate, could not reasonably have been foreseen and guarded against, or that, if there were negligence on the part of any one or in any respect, it was not the negligence of the defendant in the construction of the wooden forms, but rather on the part of the plaintiff's fellow workmen, who were taking the forms apart. We are not convinced therefore that this is a case which should have been submitted to the jury; there being no evidence from which any reasonable inference of the defendant's negligence could be drawn. For this reason, the motion of plaintiff's counsel to take off the compulsory nonsuit is refused."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN and STEWART, JJ.

John M. Greer, John B. Greer, and Thos. H. Greer, for appellant. Wishart & Dickey and R. P. Scott, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the court below.

(222 Pa. 372)

ENTERPRISE TRANSIT CO. v. COLLINS et al.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

BOUNDARIES (§ 6*) — SURVEYS — ABSENCE OF MONUMENTS.

Where the north corner and west corner of a survey are marked on the grounds, and the northwesterly line between them is fixed, the southwesterly line will be located by the official courses and distances, where there are no monu-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ments on such line made for that line to stop it short of such distances.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 47; Dec. Dig. § 6.*]

Appeal from Court of Common Pleas, Forest County.

Action by the Enterprise Transit Company against T. D. Collins and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The case turned upon the location of the southeastern line of warrant No. 5,270; the plaintiffs claiming the land in dispute under warrant No. 5,132 which was three days junior to No. 5,270. It was undisputed that the northern and western corners of No. 5,270 were well-marked trees, and that the northwestern line was fixed by these monuments. The return of survey called for a line from the northern corner south 45° degrees east, 320 rods, to a spruce. At the time of the trial the spruce had disappeared, and no living person could tell the place of its location. Warrant No. 5,270 was alleged by the plaintiffs to be one of a body of 100 warrants issued to George Mead and was returned as having four marked corners on the ground. The plaintiffs claimed to fix the location of the missing spruce by protracting other lines of adjacent warrants of the same block, and in so doing fixed the width of said warrant at 283.9, instead of 320, rods; the strip of 36.1 rods wide being the land in controversy. The defendants contended that the place of the spruce and the southeastern line of said warrant should be fixed by running the official courses and distances from the monuments found on the north and west, as long as no other marks were found to stop it short.

The court (Lindsey, P. J.) charged as follows:

"This is an action of trespass brought by the Enterprise Transit Company, plaintiff, against T. D. Collins and others, defendants, to recover the value of timber alleged to have been cut and taken away from the plaintiff's lands which are described in the statement of claim. The answers to the points presented by counsel for the parties will determine whether or not the plaintiff has a right to recover, and we will now answer those points:

"Second. The principal question of location for the jury to determine in this case is the dividing line upon the ground between the plaintiff's warrant No. 5,132 and the defendants' warrant No. 5,270, and that is to be determined by ascertaining the true location upon the ground of the southeastern line of warrant No. 5,270. Affirmed.

"Third. The returns of survey of the several George Mead warrants Nos. 5,266, 5,267, 5,268, 5,269, and 5,270 each calls for the warrant lying northeast of it respectively, that is to say, the return of survey of 5,266 calls

for 5,265 as its adjoiner upon the northeast, 5,267 calls for 5,266, 5,268 calls for 5,267, 5,269 calls for 5,268, and 5,270 calls for 5,269 as its adjoiner upon its northeast boundary, so that each of said warrants respectively is the leading warrant for the tract lying immediately as its adjoiner to the southwest. And in locating the southeastern line of said tier of Mead warrants, we must follow the footsteps of the surveyor in ascertaining the said line, and the monuments he marked or called for therein, as the landmarks of the several tracts mentioned of which it forms the southeastern boundary. Refused.

"Fourth. Warrant No. 5,267 is to be located from its undisputed monuments given in evidence in this case, to wit, the spruce for its northern corner, the spruce for its eastern corner, the white oak for its southern corner, and the white oak for its western corner. Refused.

"Fifth. Warrant No. 5,268 is to be located from its undisputed eastern, northern, and western monuments given in evidence in this case, to wit, the white oak for its eastern corner, the white oak for its northern corner, and the service berry for its western corner, and the location of its southern corner is to be determined by the intersection of the undisputed lines upon the ground leading southwest from the white oak eastern corner, and southeast from the service berry western corner their official courses, in Salmon creek at the reputed location of the black oak called for in the return of survey of said warrant No. 5,268. Refused.

"Sixth. Warrant No. 5,269, in the absence of other evidence of the place of the location of the spruce called for in its return of survey for its southern corner, is to be located by ascertaining upon the ground its northwest line between the location of the spruce western corner and its service berry northern corner, and the location upon the ground of its eastern line between the location upon the ground of said service berry northern corner and the place fixed by the jury as the location of the black oak southern corner of No. 5,268, and the southern corner of No. 5,269 will be ascertained by protracting the southeastern line of No. 5,268 southwest parallel with the northwest line of 5,269, its official course, until it intersects a line running from the spruce western corner southeast parallel with its northeastern line, its official course, and the point of intersection of said lines will be the southern corner of said warrant No. 5,269. Refused.

"Seventh. Warrant No. 5,270 will be located in the same manner by ascertaining upon the ground the northwest line between its black oak western corner now standing, and the location of its spruce northern corner, and the location upon the ground of its northeast line between the location of its spruce north corner and the point ascertain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed for the location of the southern corner of 5,269, and the southern corner of said warrant No. 5,270 will be ascertained by projecting the southeastern line of No. 5,269 southwest parallel with the northwest line of 5,270, its official course, until it intersects a line running from said black oak western corner southeast parallel with its northeastern line, its official course, and the point of intersection of said lines will be the southern corner of the defendants' warrant No. 5,270.

"We are unable to take the view in relation to this case that the counsel for the plaintiff has taken in these points last read, being the third, fourth, fifth, sixth, and seventh, and we therefor answer them in the negative.

"Defendants' points:

"(1) Under the law and the evidence the plaintiff is not entitled to recover, and the verdict must be for the defendants. Affirmed.

"(2) Inasmuch as the north corner and the west corner of the defendants' survey is undisputed, and there are no monuments on the southeasterly side made or adopted for that line to stop it short of its official distance, that southeasterly line is to be located by the official courses and distances, and by such location the plaintiff cannot recover, and the verdict must be for the defendants. Affirmed.

"(3) The location of 5270 cannot be limited or controlled by the black oak of 5,268 and 5,269 at Salmon creek nearly two miles distant, and the verdict must be for the defendants. Affirmed.

"The Court: Under the answers to the points, gentlemen, there can be no recovery in the case. We thus take the responsibility of deciding the case, and there is nothing for you to do but to render your verdict for the defendants."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

D. I. Ball and A. C. Brown, for appellant. Thomas H. Murray, Ritchie & Carringer, and A. L. Cole, for appellees.

PER CURIAM. The judgment is affirmed on the charge and answers to the points by the learned judge below.

(222 Pa. 368)

GUTHRIE et ux. v. BALTIMORE & O. R. CO.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

RAILROADS (§ 350*)—ACCIDENT AT CROSSING—EVIDENCE—QUESTION FOR JURY.

In an action against a railroad company for personal injuries at grade crossing, held,

that the negligence of defendant was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1163; Dec. Dig. § 350.*]

Appeal from Court of Common Pleas, Washington County.

Action by M. G. Guthrie and wife against the Baltimore & Ohio Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Norman E. Clark and Winfield McIlvaine, for appellant. T. F. Birch, for appellees.

PER CURIAM. The crossing at which the accident occurred is conceded to be exceptionally dangerous, and at the time was incumbered with cars, etc., which obstructed the view. The plaintiff, driving towards the crossing, stopped at a point about 80 feet from the tracks, looked through a driveway or opening to the east, where a view could be had for a distance of about 500 feet, and, seeing or hearing nothing, drove on to a further point variously stated from 50 to 25 feet, and again stopped, looked, and listened. A freight train was pulling out from the siding at this point, and when it had cleared the crossing the driver looked again, having a clear view to the east for about 800 feet, started to cross, and was struck by an express train coming from the east on the main track. At the time of starting several persons, including a brakeman on the rear of the freight train pulling out, called and motioned to the driver, who unfortunately mistook the signals to mean "come on" instead of "keep back."

This is a brief outline of the chief elements in a rather complicated situation, but it is sufficient to show that the plaintiff's driver was endeavoring to observe the rule, and not dashing ahead in reckless disregard of it. Whether he used the diligence and caution which the situation required was therefore a question for the jury. *Ely v. Pittsburgh, etc., Ry. Co.*, 158 Pa. 233, 27 Atl. 970; *Beach v. Penna. R. R. Co.*, 212 Pa. 567, 61 Atl. 1106; *Howard v. B. & O. R. R. Co.*, 219 Pa. 358, 68 Atl. 848.

How far the driver was excusable for regarding what he took to be invitation or advice to drive on was also a matter for the jury. It depended altogether on the circumstances and is not susceptible of subjection to a fixed rule. It is urged by appellant that the brakeman was not in the position of a watchman for the crossing, and therefore his action, even if it had been, as the driver thought it was, an invitation to drive on, could not bind the railroad; but that is not its application. It was not evidence of defendant's negligence, but evidence tending to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rebut contributory negligence on the part of plaintiff. The absence of official character in the person giving the advice did not go to the admissibility but to the weight of the evidence. To drive on in the face of an understood warning to keep back, no matter from whom received, would certainly be some evidence of negligence, and for like reason an invitation or advice to come on would be evidence to negative negligence, not so strong as in the other case, for in positions of risk or danger every one is bound to use his own senses in acting with care, but nevertheless evidence of such weight as the jury should accord it under the circumstances.

Judgment affirmed.

(222 Pa. 355)

EASTMAN v. TROTTER WATER CO.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

INJUNCTION (§ 137*)—GROUNDS—EMINENT DOMAIN.

In a bill to restrain a water company from exercising the right of eminent domain, on the ground that it is a corporation for private uses, a preliminary injunction is properly denied, where it is shown that defendant is a public service corporation.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 137.*]

Appeal from Court of Common Pleas, Fayette County.

Suit by T. N. Eastman against the Trotter Water Company. From a decree refusing a preliminary injunction, plaintiff appeals. Affirmed.

The following is the opinion of Umbel, P. J., of the court below:

"And now, July 28, 1908, the within bill being presented in open court, together with the injunction affidavits and bond, after due consideration and under the authority of Moore et al. v. Trotter Water Company, No. 475, in equity of this court, where the constitutional questions here raised were passed upon, and it was established to the satisfaction of the court that the defendant is a public service corporation, and not merely a corporation for private uses, it is ordered, adjudged, and decreed that the prayer of the bill be denied, and a preliminary injunction be, and the same is hereby, accordingly, refused."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

A. E. Jones, for appellant. W. F. McCook, and E. H. Reppert, for appellee.

PER CURIAM. This is plainly a case for final hearing.

Appeal dismissed.

(222 Pa. 350)

CLARION COUNTY v. CLARION TP.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

1. STATUTES (§ 123*)—TITLE OF ACT.

Act April 20, 1905 (P. L. 237), being an act to provide for the maintenance of turnpikes for public use, free of toll, is not unconstitutional for failing to express the subject of the act in the title.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 123.*]

2. STATUTES (§ 131*)—AMENDMENT—VALIDITY.

Act April 20, 1905 (P. L. 237), relating to appropriation of turnpikes for public use, free of tolls, is not a violation of Const. art. 3, § 6, prohibiting the revival, amendment, or extension of any law by reference to its title; it not being an amendment to Act June 2, 1887 (P. L. 310), § 11, but a new law covering the whole subject and complete in itself.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 199; Dec. Dig. § 131.*]

3. TAXATION (§ 40*)—EQUALITY—CONSTITUTIONAL LAW.

Act April 20, 1905 (P. L. 237), relating to appropriation of turnpikes for public use, is not a violation of Const. art. 9, § 1, demanding uniformity of taxes; the law not involving any question of legality of taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 69; Dec. Dig. § 40.*]

Appeal from Superior Court.

Action by Clarion County against Clarion Township. From a judgment of the Superior Court, affirming a judgment in favor of defendant, plaintiff appeals. Affirmed.

The following is the per curiam opinion of the Superior Court:

"The general question for decision in this case is whether or not it is the duty of Clarion county to repair and maintain a portion of a certain turnpike that was condemned, and for which condemnation damages were paid by the county. The decision of this question, it is conceded by counsel for appellant, depends upon the proper determination of the question whether Act April 20, 1905 (P. L. 237), and Act April 25, 1907 (P. L. 104), are constitutional. The court below decided both questions in the affirmative. The precise question was decided by the Superior Court in February last, in the case of Commonwealth ex rel. v. Van Bowman et al., upon appeal from the judgment of the court of common pleas of Cumberland county. That case was not reported at the time the present appeal was taken or argued. Consequently, it had not come to the notice of counsel. Nothing has been suggested in the argument which was not fully considered in the decision referred to, and we see no occasion to add anything to the opinion rendered by our Brother HENDERSON in that case.

"The judgment is affirmed."

The following is the opinion of HENDERSON, J., in the Superior Court, in Commonwealth ex rel. Dist. Atty v. Van Bowman, et al., 35 Pa. Super. Ct. 410:

"The appellants except to the decree of

the court below, on the ground that the act of assembly under which the proceeding was instituted is unconstitutional. The first objection is that its title is defective, and therefore repugnant to section 3 of art. 3 of the Constitution. The title is 'An act to provide for the repair and maintenance or improvement, by the proper county, city or borough, of turnpikes heretofore or hereafter appropriated or condemned, or any part thereof, for public use free of tolls.' Then follows the enactment of section 1: 'That when any turnpike, or part thereof, has been, or may thereafter be, appropriated or condemned for public use, free of tolls, under any existing laws, and the assessment of damages therefor shall have been paid by the proper county, such turnpike, or part thereof, shall be properly repaired and maintained at the expense of the county, city or borough in which the turnpike, or part thereof lies.' There is certainly no such omission to set forth in the title the subject of the act as brings it under the constitutional prohibition. It would be a superfluous repetition to engage in the discussion of this question. Many cases hold that it is sufficient if the title fairly gives notice of the real subject so as to reasonably lead to an inquiry as to what is contained in the body of the act. Some of the later cases are: *Franklin v. Hancock*, 204 Pa. 110, 53 Atl. 644; *Bridgewater Borough v. Bridge Co.*, 210 Pa. 105, 59 Atl. 697; *Middletown Road*, 15 Pa. Super. Ct. 167; *Com. v. Meads*, 29 Pa. Super. Ct. 321. Courts approach the consideration of the constitutionality of a statute with the desire and duty to sustain it, if that be practicable, and its invalidity must very clearly appear before that fact will be declared. All of the provisions of the act under consideration, except the repealing clause, are contained in section 1. The title not only directs attention to the subject of the act, but is a full syllabus of it, and contains about one-third of the number of words found in the statute. The act has but one subject; that is, the maintenance of certain highways by the county, city, or borough where such highways exist, and this is set forth more fully and clearly in the title than is usual, and much more so than in many statutes whose constitutionality in this respect has been sustained by the Supreme Court.

"It is further objected that the act is in violation of section 6 of art. 3 of the Constitution, which prohibits the revival, amendment, or extension of any law by reference to its title alone. The argument is that the act is merely a part of a system devised for opening toll roads for the use of the public, and is an amendment to section 11 of Act June 2, 1887 (P. L. 310). The answer to this is that the statute is in form and legislative intention a new law covering the whole subject and changing the legislation of the act of 1887. It is complete in itself. Its meaning is apparent on its face, and it does not

require the re-enforcement of any other statute to give it effect. Such an act does not violate the Constitution, though it may operate to alter or repeal a prior act. *Searight's Estate*, 163 Pa. 210, 29 Atl. 800; *Greenfield Ave.*, 191 Pa. 290, 43 Atl. 225; *Emsworth Borough*, 5 Pa. Super. Ct. 29. A casual glance at the statutes will disclose the evolution of the law on many subjects brought about by independent enactments incorporating new provisions which in effect amended previous legislation on the same subjects, but it never was supposed that such enactments could only be made constitutional by connecting them in terms with prior legislation. Section 2 repeals all inconsistent acts, and there is no foundation for the position that there is an amendment within the constitutional provision referred to.

"It is further contended that the act violates section 1 of article 9 of the Constitution, which demands uniformity of taxation. This objection is met by the reply that the subject of the statute is not one of taxation at all. There is no constitutional obligation on any municipal district to maintain public highways. The duty is imposed by statute, and it is a matter of legislative discretion whether a highway shall be maintained by the county or by a local municipal district. It is not a matter of legal concern to the taxpayers of a borough or city that the county assumes the cost of the maintenance of a public road in a township. A county bridge and the approaches thereto are a part of a public highway often wholly in one township and are erected and maintained at the charge of the county, but no one contends that the township may not be relieved from the cost of such part of a public highway by proper proceedings in the court of quarter sessions. In such a case all of the taxpayers of the county are required to contribute to the erection and maintenance of the bridge, which before it was made a county charge, was a burden upon the local district. Highways are for the use of the public, generally, and if, by reason of difficulty of construction or cost of maintenance, it is deemed advisable that one of them be constructed or maintained out of the county fund, taxpayers of another township or borough have no standing to object on the ground of inequality of taxation. The cost of the maintenance of roads is necessarily greater in some districts than in others, owing to the larger mileage, the quality of the soil, and the topographical conditions. The section of the Constitution under consideration does not forbid the Legislature to authorize the construction or maintenance of a part or the whole of a public highway at the expense of the county. We think the learned counsel are in error in supposing that any question of equality of taxation is involved in the case.

"The contention that the act is local or special legislation is not maintainable. The law is general in its terms and is applicable

throughout the commonwealth. Every person is affected by it who is brought within the relations and circumstances provided for. The mere fact that local results may be produced through its operation does not necessarily render it unconstitutional. A law may by classification or otherwise produce diversity of result, and yet be general where the classification is based on a real distinction. It is for the Legislature to determine the expediency of the law. *Evans v. Phillips*, 117 Pa. 228, 11 Atl. 630, 2 Am. St. Rep. 655; *Lehigh Valley Coal Co.'s Appeal*, 164 Pa. 44, 30 Atl. 210; *Stegmaier v. Jones*, 203 Pa. 47, 52 Atl. 56; *Com. v. Brown*, 210, Pa. 29, 59 Atl. 479; *Middletown Road*, 15 Pa. Super. Ct. 167. Every county similarly situated as to condemned or abandoned turnpikes is within the operation of the statute. None are excluded because of any local condition or circumstance.

"It is also argued that there is an inconsistent election allowed to county commissioners with reference to the manner of maintaining the road because of Act June 26, 1895 (P. L. 336). These acts are not incompatible and relate to different subjects. The latter act provides for the permanent improvement of certain public highways and makes such improved highways county roads. The act of 1905 (Act April 20, 1905 [P. L. 237]) relates solely to the repair and maintenance or improvement by the proper county, city, or borough of appropriated or condemned turnpike roads. If any question of election arose, the opinions in *Middletown Road*, 15 Pa. Super. Ct. 167, and *Lehigh Valley Coal Co.'s Appeal*, 164 Pa. 44, 30 Atl. 210, fully answer the argument. None of the objections to the constitutionality of the law are sustained.

"The decree is affirmed."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. T. Reinsel, for appellant. W. D. Burns, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the Superior Court, for the reasons stated in *Com. v. Van Bowman*, 35 Pa. Super. Ct. 410.

(222 Pa. 369)

MUNNS v. PITTSBURG RYS. CO.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

In an action to recover for the death of a motorman, a nonsuit held properly entered on evidence showing contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by Mamie Munns against the Pittsburgh Railways Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

The following is the opinion of Kennedy, P. J., in the court below:

"This action is brought for the recovery of damages to the plaintiffs for the death of the decedent, which, they allege, was caused by the negligence of the defendant company. The deceased was at the time in the employ of the defendant company as motorman, and was operating the car to which the accident occurred. The statement and claim of the plaintiffs is that the car left the track on a bridge which was built by and belonged to the city of Pittsburgh, and over which the defendant company had no control. The testimony as to the condition of the track on the approach to the bridge does not, therefore, seem to have anything to do with this accident, and the testimony with reference thereto was properly excluded; the allegation in plaintiffs' statement and the testimony with regard thereto showing that the accident occurred by the car leaving the track on the bridge.

"The deceased had been in the employ of the defendant company for some time previous to the accident, and had operated cars on the line where the accident occurred. The testimony does not show any negligence on the part of the defendant company which proximately occasioned the accident. It seems, from the testimony on behalf of the plaintiffs, that the motorman was operating the car at the time at an undue rate of speed, and that he disregarded the notice to stop at the approach to the bridge, and that the accident was caused by his own contributory negligence. The length of time that he was in the employ of the company and crossing over this particular bridge tended to show that he assumed the risk of the employment. This being the case, and there being no negligence on the part of the defendant company shown creating any liability to these plaintiffs, and the testimony showing, also, that the decedent under the circumstances was guilty of negligence, we do not think that this nonsuit should be taken off.

"The rule to show cause is discharged."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Rody P. Marshall and Thos. M. Marshall, for appellant. William A. Challener, Clarence Burieligh, and James C. Gray, for appellee.

PER CURIAM. The judgment is affirmed, on the opinion of the court below refusing to take off the nonsuit.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(Ed. Conn. 423)

SIMEOLI v. DERBY RUBBER CO.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. TRIAL (§ 105*)—RECEPTION OF EVIDENCE—FAILURE TO OBJECT—EFFECT.

Where, in a servant's action for injuries, the complaint properly described several acts of negligence as the causes of plaintiff's injuries, and all of them were proved, the fact that several others were also established without objection should not defeat a recovery.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.*]

2. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—PLEADING—VARIANCE.

In a servant's action for injuries while operating a rubber rolling machine, there was no variance between averments in the complaint that defendant's superintendent ordered plaintiff to hurry and feed faster and directed him to work on the machine, and proof that the superintendent ordered plaintiff to put in another shovelful of powder, and not to pick the rubber dough up in pieces, but to take it up altogether, and shove it in, plaintiff not being required to allege the precise words by which he was directed to work on the roller.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 264.*]

3. JUDGMENT (§ 101*)—DEFAULT JUDGMENT—PLEADINGS TO SUSTAIN.

In a servant's action for injuries, the complaint held to sufficiently allege that plaintiff was directed to work on a certain machine and to contain a sufficient description of the acts of negligence proved to sustain a judgment rendered on a hearing in damages after default.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 101.*]

4. MASTER AND SERVANT (§ 261*)—INJURIES TO SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PLEADINGS.

Where, in a servant's action for injuries, the complaint directly alleged that the injuries were caused by defendant's negligence, a separate averment that the negligence of plaintiff did not contribute to the injury or that he was in the exercise of due care was unnecessary.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 849-854; Dec. Dig. § 261.*]

5. MASTER AND SERVANT (§ 260*)—INJURIES TO SERVANT—COMPLAINT—SUFFICIENCY.

Where, in a servant's action for injuries while working on a machine, it sufficiently appeared by the averments of the complaint that defendant knew of the unsafe conditions described and of the plaintiff's inexperience, and that plaintiff, who was 17 years old and who had worked on the machine but a few days and without adequate instructions, had not the knowledge or means of knowledge possessed by defendant of the danger of the work, the complaint was not defective for failing to aver that plaintiff did not have equal means of knowledge with defendant of the alleged unsafe conditions.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 260.*]

6. RELEASE (§ 15*)—DAMAGES FOR INJURIES TO PERSON—VALIDITY.

In a minor servant's action for injuries, the court properly held invalid a release of damages executed by plaintiff; it appearing that after plaintiff, who was ignorant of the English language, had left the hospital, he was called into defendant's office and his signature to a

release obtained, no interpreter or other person or friend of plaintiff being present.

[Ed. Note.—For other cases, see Release, Dec. Dig. § 15.*]

7. RELEASE (§ 52*)—INVALIDITY—PLEADING—NECESSITY.

In a servant's action for injuries, plaintiff was not required to plead the invalidity of a release of damages pleaded on a hearing in damages after default.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 92; Dec. Dig. § 52.*]

8. RELEASE (§ 24*)—SETTING ASIDE—CONDITIONS PRECEDENT.

Where in a servant's action for injuries, it appeared that payments of plaintiff's wages and a part of his hospital bills were voluntarily made by defendant, and not under any agreement of settlement, a return of the sums so paid was not a condition precedent to the annulment of a release of damages executed by plaintiff.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 45; Dec. Dig. § 24.*]

9. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR.

The exclusion of a question was not prejudicial to appellant where the witness afterwards answered practically the same question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

10. APPEAL AND ERROR (§ 971*)—REVIEW—EVIDENCE—DISCRETION OF COURT.

Where, in a servant's action for injuries, plaintiff's father was asked on cross-examination whether he did not understand that if defendant's manager paid certain bills and did certain things that would settle the case, and he answered "No," whether the question, "What do you suppose he was doing this for?" should have been allowed, was so far discretionary with the trial court in determining the proper limits of cross-examination that its exclusion was not a sufficient ground for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 971.*]

Appeal from Superior Court, New Haven County; Alberto T. Roraback, Judge.

Action by Joseph Simeoli against the Derby Rubber Company for personal injuries. Heard in damages after default. Judgment for plaintiff, and defendant appeals. No error.

This is an action for damages for an injury sustained by the plaintiff, a boy about 17 years of age, by having his hand caught between the revolving grinding rolls of a machine in the defendant's factory, designed for the crushing or rolling of rubber, and upon which the plaintiff was working as an employé of the defendant. These acts of alleged negligence of the defendant are described in the complaint. The floor in front of the machine was not level, but pitched downward at a sharp grade, and the machine stood at the top of the incline. Large amounts of water were negligently allowed to drain and run over the floor around the machine, and the wet, slippery, and inclining floor was unsafe to work upon, all of which was well known to the defendant. That portion of defendant's factory around said machine was not a reasonably safe place

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for defendant's employes to work, owing to said wet, slippery, and unlevel floor. The grinding rolls of said machine were not guarded so as to prevent persons falling against said machine. There was no shipper, brake, or other device by which the machine could be stopped within reasonable time in case of accident. There were no cleats fastened to the floor to prevent defendant's operatives from slipping and falling against the rolls of the machine. The plaintiff, a boy aged 17 years, had been employed by the defendant in said factory about one week, and was ignorant of the dangers connected with the operation of said grinding machine. The plaintiff, while feeding said machine, was ordered by B. M. Warren, defendant's superintendent in charge of said factory, to hurry and feed faster. While attempting to carry out the orders of said superintendent and work faster, the plaintiff slipped on the wet and inclined floor about said machine, and fell against same, and his right hand was caught between said rolls, and all four fingers of said hand were so badly crushed that same had to be amputated. The plaintiff never received any caution or instruction from the defendant in regard to the operation of said machine or the danger connected therewith.

The following facts were found by the trial court:

The defendant corporation is engaged in the manufacture of reclaimed rubber, using therefor in its factory several machines practically alike and all operated by a shaft running underneath them, driven by a water wheel. The machine itself consisted of two cast-iron hollow cylindrical rolls, 3 feet long and 16 inches in diameter, set in the same horizontal plane, parallel to each other, and, when in operation, revolving toward each other, from 19 to 21 revolutions per minute. The top of these rolls was 44 inches above the level of the floor in front of the machinery, and the two rolls were supported at each end by iron frames. By turning certain screws, the front roll could be moved toward or away from the rear roll so as to increase or diminish the space between the rolls. Under the rolls was a stock box for catching material which had passed down between the two rolls. These rolls were for crushing and grinding powdered rubber fed through between them, which to be well ground must pass through them several times. The machine on which plaintiff was hurt was so constructed that it could not be stopped without stopping the water wheel itself; and, to stop the machine, it was necessary for some person to go to the water wheel pit, about 30 feet away, and turn a wheel by which the water wheel was gradually slowed down and stopped. A rubber grinding machine like that on which plaintiff was injured, with no device for stopping it in case of accident, without stopping the main power itself, is unusual and extraordi-

nary. When what is called "washing" was done on these machines, large quantities of water were allowed to drop on and flow onto the rolls and run onto the floor, and the floor in front of and around the machines was always wet when the machines were used for washing, and a board or block was placed on the floor and used by the operator to stand on so as to keep his feet dry. The use of the same machines for both sheeting and washing was unusual and peculiar to defendant's mill, and was dangerous, because it made the floor slippery and unsafe. On or about September 8, 1906, the defendant's superintendent assigned the plaintiff, an Italian boy about 17 years old, who entered the employ of the defendant on the 22d of the previous month, to work on the rolls. He gave plaintiff no caution or instruction regarding the operation of any of the machines, except to say in English, which it did not appear the plaintiff understood: "Men on machines must keep their eyes open, and all machinery must be watched." He gave plaintiff no caution or warning about the inclining floor, or the danger of slipping on same, or the danger of the movable block slipping on which he was ordered to stand. One Rocco, at the direction of the defendant's superintendent, showed the plaintiff the operation of the machines and pointed out how the machines were adjusted, and how the sheets of rubber were formed between the rolls, and plaintiff was told by him not to get his fingers between the rolls or to put them beyond a certain point, or he would lose them. Rocco was not a proper or competent person to instruct green hands like the plaintiff in the operation of the machines. On the third day after he had been turned over to Rocco for instruction, plaintiff was left to operate the machines alone, and continued to operate one alone up to the time he was injured. On September 13th plaintiff was making rubber sheets on one of said machines. This operation consisted of putting three shovelfuls of powdered rubber on top of the rolls. After being ground between them, the powder becomes a plastic mass, and drops in pieces into the stock box below. The operator picks up these pieces with his hand, and throws them on top of the rolls again. The superintendent had assigned plaintiff to work on this particular machine the day before. During the day he told the plaintiff he was working too slow, and that he must work faster, and make as many as the others did. Just before the accident, the plaintiff had put three shovelfuls of the powdered rubber into the machines several times, but it did not mix well. The superintendent told him to put in another shovelful of powder, which he did. He then attempted to pick up the pieces of dough in the stock box, to throw them onto the rolls, when the superintendent said: "Don't pick it up in pieces. Take it up altogether, and shove it in." Plaintiff then put the pieces of rubber

dough together in an attempt to obey the order of the superintendent. To do so he was obliged to lift this mass, which weighed some 60 or 70 pounds, out of the stock box, and put it forward from his body so that it would drop between the rolls and feed in. He attempted to do this while standing upon the block, and the position he was required to assume to make the necessary movements caused the block to slip backwards, and away from the machine for about two feet because of the slippery and inclined floor, and by such slipping, and without negligence on his part, he was thrown against the machine, and his right hand went between the two revolving rolls. He cried out, and seized the frame of the machine with his other hand and endeavored to prevent his right hand from feeding into the rolls. A fellow employé attempted to hold him away from the drawing force of the rolls, and shouted to Rocco to stop the water wheel, who went to the wheel pit and attempted to stop the water wheel, but did not succeed, and the plaintiff by his own efforts disengaged his hand. The rolls were revolving slowly, and, had this machine been equipped with any of the safety devices in common use at that time they could have been stopped almost instantly, and probably before plaintiff had received any substantial injury whatsoever to his hand, at least before the serious injury actually suffered had been received. The four fingers of the plaintiff's right hand were so badly crushed between the rolls that amputation of the fingers became necessary.

While plaintiff was in the hospital, his father and mother called at the office of the defendant, and, through an interpreter, told the vice president and general manager of the company that they wanted to know what the company was going to do. The manager told them that the company would give plaintiff a permanent job, and told the father to come to work at once. The father commenced work in defendant's factory September 24, 1906, and was employed there until February 4, 1907, when he was discharged. The plaintiff returned to work at defendant's factory November 11, 1906, and remained there until January 21, 1907, doing sweeping and similar work. On December 14, 1906, the plaintiff was called into the office and his signature to a release of all his claims against the defendant was obtained by the bookkeeper and the superintendent of the defendant company. No interpreter or any other person, friendly to or in the interest of plaintiff, was present when the release was signed. The consideration expressed in the release was \$107.50 received from the defendant. The defendant had voluntarily paid wages to the plaintiff since his injury, and part of his hospital bill, amounting in all to \$75.50, but these payments were not made as a part of any agreement. The persons who procured the plaintiff's signature claimed to have told him that the paper was a release of all his claims

against the defendant in return for his doctor's bill and hospital bill and wages, and that he could work for the defendant company at regular pay as long as he did not get lazy. Soon after the release had been obtained, the plaintiff and his father were discharged. It was the intention of defendant's superintendent to obtain this release without consideration, and the same was procured in such a manner that it would be grossly inequitable to hold the plaintiff to be bound thereby.

The trial court found that the defendant was negligent in the following particulars: In maintaining said unlevel and inclining floor; in failing to provide wooden cleats or lattice-work for the employés to stand upon and prevent slipping; in causing large quantities of water to be discharged on the floor in front of the sheeting machines, thereby causing it to become slippery; in failing to exercise reasonable care to provide a reasonably safe place in which plaintiff was required to work in respect to said conditions; in operating the machines without any safety device to stop same without stopping the water wheel; in failing to give plaintiff adequate instruction and caution in regard to the operation of said machine, and in ordering and permitting plaintiff to operate the mills alone until he had become more experienced; in ordering plaintiff to stand upon the moveable block without instruction and caution that the floor was unlevel, and, when wet, likely to be slippery, and that the block was likely to slip; in trying to hurry and force plaintiff, a green boy, to accomplish as much work on the machine as experienced men; and ordering him not to feed the rubber dough in pieces, but to lift it in all at one time. The court further found that the plaintiff was in the exercise of reasonable care under the conditions prevailing, and that his injury did not result from a cause of danger that was obvious to him, and rendered judgment for the plaintiff for \$1,500 damages.

Upon the trial the plaintiff's father, having been called as a witness in rebuttal to contradict defendant's claims as to what was said at the time the plaintiff's father and mother called at defendant's office and had a conversation with defendant's general manager, was asked on cross-examination this question: "Well, you understood, didn't you, that if Mr. Askam [defendant's general manager] paid the doctor's bill and the hospital bills, and Joseph's wages, and did the rest of the things he said he would do, that that would settle the case?" This question was excluded upon plaintiff's objection. Subsequently on cross-examination he was asked: "Did Mr. Askam, or any one, say anything to you at the time of that conversation * * * which led you to believe or understand that if Mr. Askam and the company did what Mr. Askam said he or it would do that it would settle Joseph's claim against the company?" The witness having answered

"No," was asked: "What did you suppose he was doing this for?" The court sustained plaintiff's objection to this question.

Seymour C. Loomis, for appellant. J. Birney Tuttle, for appellee.

HALL, J. (after stating the facts as above). In his appeal to this court the defendant claims that the superintendent's orders to the plaintiff to "put in another shovelful of powder" and "not to pick it (the rubber dough) up in pieces," but to "take it up altogether and shove it in," was the real cause of the accident, and that these acts of negligence are not alleged in the complaint, and were therefore erroneously made the basis of the judgment for substantial damages. The complaint states a good cause of action, and properly describes several acts of defendant's negligence as the causes of the plaintiff's injury. All of them having been proved, the fact that several others were also established without objection ought not to defeat the plaintiff's recovery.

But proof that these two orders were given is not variant from the averments of the complaint that the superintendent ordered the plaintiff "to hurry and feed faster," and directed him to work upon this machine. The plaintiff was not required to state in his complaint the precise words by which he was directed to work on this roller. The complaint contains a sufficient averment that he was so directed, and a sufficient description of the acts of negligence proved, to sustain the judgment rendered upon a hearing in damages after a default. *Anderson v. United States Rubber Co.*, 78 Conn. 48, 52, 60 Atl. 1057. The complaint contains a direct allegation that the plaintiff's injury was caused by the defendant's negligence. A separate averment that the negligence of the plaintiff did not contribute to the injury or that he was in the exercise of due care was therefore unnecessary. *Brockett v. Fair Haven & W. R. Co.*, 73 Conn. 428, 433, 47 Atl. 763.

It is contended that the complaint is insufficient because it fails to aver that the plaintiff did not have equal means of knowledge with the defendant of the alleged unsafe conditions; and *Keefe v. National Folding Box Co.*, 66 Conn. 38, is cited as sustaining this claim. In that case the complaint alleged that the plaintiff was negligently put to work in placing colored paper saturated with poison in a box greatly heated with steam. It was held upon demurrer that the facts alleged failed to sustain the averments that the defendant was bound to know of the presence of the poison, and that, so far as appeared, the plaintiff's means of knowing it were as good as the defendant's. In the case before us it appears sufficiently clear from the averments of the complaint that the defendant knew of the unsafe conditions described,

and of the plaintiff's inexperience, and that the boy 17 years old who had worked on the machine but a few days, and that without adequate instructions, had not the knowledge or means of knowledge possessed by the defendant of the danger of the work which he was directed to perform. Assuming that the defendant might upon the hearing in damages have availed itself of a legal discharge from all liability, the trial court properly treated the release presented in evidence by the defendant as invalid. The infancy of the plaintiff, his ignorance of the English language, and the circumstances under which the release was procured were sufficient reasons for setting it aside. As it was presented upon a hearing in damages, the plaintiff was not required to plead its invalidity, and, as the payments by the defendant of plaintiff's wages and a part of his hospital bills are found to have been voluntary and not made under any agreement of settlement, it was not necessary to make the return of the sum so paid a condition to the annulment of the discharge.

The defendant was not prejudiced by the exclusion of the question asked the plaintiff's father on cross-examination whether he did not understand that, if Mr. Askam paid certain bills and did certain things, that would settle the case, since the witness afterward answered practically the same question. Whether the next question, "What did you suppose he was doing this for?" should have been allowed was so far a matter of discretion with the trial court in determining the proper limits of cross-examination that its exclusion is not a sufficient ground for a new trial. Other assignments of errors in rulings upon questions of evidence not pursued in defendant's brief are not noticed.

We discover no ground for the claim that the trial court did not apply the proper tests of negligence in holding upon the facts found that the defendant failed to sustain the burden imposed upon it by the default of either disproving the negligence with which it was charged or of proving contributory negligence upon the part of the plaintiff.

There is no error. The other Judges concurred.

(81 Conn. 454)

Appeal of STAVOLO.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. INTOXICATING LIQUORS (§ 75*)—PROCEEDINGS TO PROCURE LICENSES—APPEAL FROM DECISION—MATTERS REVIEWABLE.

On appeals from decisions of county commissioners granting an occupant of premises a removal permit, and refusing to grant the owner of the premises a liquor license, which were tried together in the superior court, whether the commissioners had exceeded their powers in granting the occupant a license to the premises before the removal permit was granted, and aft-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

er the owner had purchased the premises, but before his deed was recorded, was not in question in the superior court; no appeal having been taken from the granting of that license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 75.*]

2. INTOXICATING LIQUORS (§ 102*)—LICENSES—“RENEWAL LICENSES”—STATUTORY PROVISIONS.

A liquor license granting the same privilege to the same person to sell in the same place is a renewal license within Gen. St. 1902, § 2647, providing that no license except a renewal of a license shall be granted in purely residential or manufacturing parts of a town, with certain exceptions, but a license granted to a different person would not be a renewal.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 102.*]

3. INTOXICATING LIQUORS (§ 69*)—LICENSES—SUITABILITY OF PLACE—QUESTION OF FACT.

Whether premises at which a license to sell liquors is asked is a suitable place for a saloon is a question of fact.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 69.*]

4. INTOXICATING LIQUORS (§ 69*)—LICENSES—SUITABLE PLACE FOR SALOON.

Neither the fact that county commissioners had granted a renewal liquor license for a certain location in a residential and manufacturing part of a town, nor that they had granted the same person a removal permit to a more unsuitable location on the opposite side of the street, would as matter of law render the former location a suitable place for which to grant a license which was not a renewal; there being one saloon in the locality.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 69.*]

Appeal from Superior Court, Fairfield County; Ralph Wheeler, Judge.

Application by Ceno Stavolo for a license to sell intoxicating liquors. From a judgment of the superior court, affirming the action of the county commissioners in refusing a license, applicant appeals. Affirmed.

James E. Walsh and William H. Cable, for appellant. Howard W. Taylor, for appellees.

HALL, J. This appeal from the refusal of the county commissioners to grant a license to the appellant, Ceno Stavolo, to sell spirituous and intoxicating liquors at No. 60 River street, in the town and city of Danbury, and Bormann's Appeal, 71 Atl. 502, were tried together in the superior court, although argued separately in this court. Many of the facts stated and views expressed in the latter case are applicable to the decision of this appeal.

In affirming the action of the county commissioners in the present case the superior court found these facts: The appellant, Ceno Stavolo, purchased the premises No. 60 River street by deed dated October 26, 1907, and recorded November 7, 1907. On October 19, 1907, he applied to the county commissioners for a license, which was refused on the 8th of February without notice to him of a remonstrance which had been filed. He is a suitable person to receive a license, but No. 60 River street is an unsuitable place for a

saloon, although less so than No. 59, on the opposite side of the street. This locality is practically a manufacturing and residential part of the city. More saloons than one in this vicinity would be too many. For more than 10 years previous to January 27, 1907, one Frank P. Bartley had occupied the premises No. 60 River street under a parol lease from month to month from the owner, and had there conducted a licensed saloon business. After the purchase of the place by Stavolo, with the knowledge of Bartley, the latter agreed to vacate the premises on or before November 1, 1907. He afterward refused to do so, and remained in possession until about January 27, 1908, and until after a judgment in an action of summary process had been rendered against him, and in favor of Stavolo, for the possession of said premises. Bartley had previously, on the 9th of September, 1907, applied for a license for No. 60 River street, which was granted to him by the county commissioners on the 1st of November, 1907. No appeal was taken from the granting of such license, and on the 27th of January, 1908, the county commissioners granted the application of Bartley, made December 26, 1907, under section 2669 of the General Statutes of 1902, for a removal permit from No. 60 to No. 59, the appeal from the granting of which is Bormann's Appeal, *supra*.

The appellant in the present case claimed in the trial court that since he, Stavolo, was the owner of the fee, he, and not Bartley, should have received from the county commissioners the license for No. 60 River street; that the fact that a license was granted to Bartley for No. 60 did not prevent the county commissioners from granting a license to the appellant for No. 60; that the license granted to Bartley for No. 60 was not a renewal license; and that as a matter of law No. 60 was a suitable place to be licensed. Whether the county commissioners exceeded their powers in granting the license to Bartley for No. 60 on the 1st of November, and before Stavolo's deed of No. 60 was recorded, was not a question in the superior court, as no appeal was taken from the granting of that license. The superior court sustained the appellant's claim that the granting of the license to Bartley did not as a matter of law prevent the granting of a license to the appellant. The trial court rightly held that the license granted Bartley on November 1, 1907, was a renewal within the meaning of section 2647 of the General Statutes of 1902. It granted the same privilege to the same person to sell in the same place specified in his license of the previous year. Bormann's Appeal, *supra*. A license granted to Stavolo would not have been such a renewal, since it would have been a license granted to a different person.

Whether or not No. 60 was a suitable place for a saloon was a question of fact. Neither

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the proper granting by the county commissioners of a renewal license to Bartley for No. 60, which under section 2647 they might in their discretion as to suitability of person and place grant even in a purely residential or manufacturing part of the town, nor what has been held to have been an improper granting to Bartley by the county commissioners of permission to remove his saloon from No. 60 to the more unsuitable location No. 59, rendered the former place as a matter of law upon the facts found a suitable place for which to grant a license which was not a renewal.

There is no error in the judgment of the superior court. The other Judges concurred.

(81 Conn. 372)

CANDEE v. CONNECTICUT SAVINGS BANK et al.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. GIFTS (§ 30*)—“GIFT INTER VIVOS”—REQUISITES—DEPOSIT IN SAVINGS BANK.

To establish a gift inter vivos of a deposit in a savings bank, it must appear, not only that the depositor intended a gift, but also that he executed his intention and completed the gift by acts sufficient to pass title.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 52-57; Dec. Dig. § 30.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3091-3093; vol. 8, p. 7671.]

2. GIFTS (§ 30*)—INTER VIVOS—REQUISITES—“USE.”

A depositor in a savings bank formed a fixed purpose of giving the deposit to her brother, and that the deposit should at once become his property. She had lost her bank book, and delivered to her brother an order on the bank, directing it to pay the entire deposit to him. At the time of the delivery of the order to him, she stated that she gave him the deposit “subject to her use of the same” for life. Held to show an intention to make an absolute gift; the word “use” as applied to the use of money being the profit derived therefrom.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 52-57; Dec. Dig. § 30.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7228-7237, 7825.]

3. GIFTS (§ 18*)—INTER VIVOS—RESERVATION BY DONOR.

A reservation by the donor of the use and enjoyment of the subject of the gift is not necessarily inconsistent with the absolute character of the gift, and a gift accompanied by such reservation may be valid.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 81; Dec. Dig. § 18.*]

4. GIFTS (§ 22*)—INTER VIVOS—DELIVERY.

A gift is perfected when the donor places in the hands of the donee the means of obtaining possession of the contemplated gift, accompanied by acts clearly showing an intention to divest himself of all dominion over the property.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 37; Dec. Dig. § 22.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3084-3087; vol. 8, p. 7670.]

5. GIFTS (§ 30*)—INTER VIVOS—DELIVERY.

A depositor in a savings bank, intending to make a gift of the deposit, signed an order di-

recting the bank to pay to the donee the entire deposit. The depositor had lost her bank book, and, to assist her in making the gift, an officer of the bank drew the order, and stated that it was necessary for her to sign it to make the transfer effectual. The bank on obtaining the signed order made a memorandum on the donor's ledger account that the donee held an order for the entire deposit. The bank and the donee recognized the validity of the order. Held that, as between the depositor and the donee, the gift was complete, though the bank might have required a production of the bank book or security to keep it harmless from consequences of payment without it, and though the bank might have required witnesses to the depositor's signature to the order.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 52-57; Dec. Dig. § 30.*]

6. GIFTS (§ 30*)—INTER VIVOS—DELIVERY.

There may be a valid gift of a deposit in a savings bank in the donor's name, though he retains possession of the bank book.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 52-57; Dec. Dig. § 30.*]

7. CONTRACTS (§ 77*)—“GOOD CONSIDERATION.”

Since a good consideration is that of blood or natural affection, a gift made for such a consideration prevails, unless it interferes with the rights of creditors and purchasers.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 286-290; Dec. Dig. § 77.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3115, 3116.]

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action in the nature of interpleader by David P. Candee against the Connecticut Savings Bank and against Clarence E. Thompson, executor of Jane A. Isbell, deceased, to recover a deposit in defendant bank. From a judgment for plaintiff, defendant Clarence E. Thompson, executor, appeals. Affirmed.

Howard O. Webb, for appellant. George E. Beers and George M. Wallace, for appellee.

RORABACK, J. On May 29, 1905, one Jane A. Isbell had on deposit in the Connecticut Savings Bank the sum of \$363.14 which she was desirous of giving to her brother, the plaintiff. When Mrs. Isbell died in November, 1906, said fund was still on deposit in said bank, which refused payment because of conflicting claims made by the plaintiff and one Clarence E. Thompson, executor of the last will and testament of Mrs. Isbell. The court of common pleas for New Haven county having rendered judgment for the plaintiff, the defendant Thompson in his appeal to this court, by several assignments of error, raises the following question: Was there a valid gift of the money in the Connecticut Savings Bank from the deceased, Jane A. Isbell, to the plaintiff, Candee, so that the money belonged to him?

In order that a deposit of money in a savings bank to the credit of another person shall operate as a gift inter vivos, it should appear, not only that the depositor intend-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed a gift, but also that he executed his intention and completed the gift by an act or acts sufficient to pass title. *Main's Appeal*, 73 Conn. 638, 48 Atl. 965. It appears that Mrs. Isbell was an old lady, a childless widow, and that she had the pecuniary ability to make the gift. She entertained an affectionate feeling for her brother, who was in needy circumstances. Her conduct leading up to and in giving an order transferring the deposit in the Connecticut Savings Bank indicated a fixed purpose upon her part that the money in the bank should at once become the property of the plaintiff. It nowhere appears that she ever entertained any other desire, or changed her intention upon this subject. Having lost her bank book, she followed the instructions of the bank, and signed and delivered an order which one of its officers had drawn, which she gave to the plaintiff, stating that she gave him the fund "subject to her use of the same during her lifetime." This order, with the accompanying circumstances, is not only satisfactory evidence of an executed intention to give, but in the absence of the book was all that the donor could do to perfect the gift. Upon the facts found independently of the expression "use of the same for her lifetime," an intention to make an absolute gift is clearly shown. This expression does not make the gift conditional or uncertain, but simply postpones the day of enjoyment. She intended that the fund should at once become the property of the plaintiff, and there was no attempt to make the gift effectual after death. The elementary definition of the "use" of money is the benefit or profit to be derived therefrom. Taking this whole expression together with the circumstances under which it was used, the only intelligent construction to be given to it is that the words "use of the same for her lifetime" simply included the income or profit of the money in the bank. A reservation by the donor of certain proprietary rights in the subject of the gift such as the use and enjoyment thereof is not necessarily inconsistent with the absolute character of the gift, and gifts accompanied by such reservations have been repeatedly upheld. *Bone v. Holmes*, 195 Mass. 496, 81 N. E. 290; *Smith v. Savings Bank*, 64 N. H. 230, 9 Atl. 792, 10 Am. St. Rep. 400; *Green v. Tulane*, 52 N. J. Eq. 169, 23 Atl. 9; *Hope v. Hutchins*, 9 Gill & J. (Md.) 77; *O'Neill v. Greenwood*, 106 Mich. 572, 64 N. W. 511; *Smith v. Youngblood*, 68 Ark. 255, 58 S. W. 42.

It is claimed that there was not a complete delivery of the money deposited in the bank. It is not necessary that there should be a manual delivery of the thing given; nor is there any particular form or mode in which the transfer must be made. The gift may be perfected when the donor places in the hands of the donee the means of obtaining possession of the contemplated gift, accompanied with acts and declarations clear-

ly showing an intention to give and to divest himself of all dominion over the property. *Main's Appeal*, 73 Conn. 638, 48 Atl. 965; *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663; *Scott v. Berkshire County Savings Bank*, 140 Mass. 157, 2 N. E. 925; *Howard v. Windham County Savings Bank*, 40 Vt. 597; *Milholland v. Whalen*, 89 Md. 212, 43 Atl. 43, 44 L. R. A. 205; *Sayre v. Weil*, 94 Ala. 466, 10 South. 546, 15 L. R. A. 544; *Goelz v. People's Savings Bank*, 31 Ind. App. 67, 67 N. E. 232. The plaintiff's claim is based on an order in these words: "New Haven, Conn., May 29, 1905. Connecticut Savings Bank of New Haven: Pay David Candee the entire amount on my deposit book number 70653. Jane A. Isbell." With full knowledge of the loss of the bank book and of Mrs. Isbell's intention to give the money to the plaintiff, and for the purpose of assisting her in carrying out this intention, one of the officials of the savings bank filled out this order and delivered it to the plaintiff, informing him that it would be necessary for him to obtain the signature of Mrs. Isbell to make the transfer effectual. This was obtained, and the plaintiff returned to the bank with the order signed, and presented the same. Then the bank, by one of its officers, made a memorandum upon the page of the ledger containing Mrs. Isbell's account, reading as follows: "May 29th, 1905, David P. Candee holds order for the entire amount." In May, 1906, the plaintiff by an order signed by him without the bank book drew the interest which had accrued on this fund. This order, signed by Mrs. Isbell, was intended by her to operate as a donation and transfer of the money therein specified. The bank, with full knowledge of her intention, recognized and accepted it for the purpose for which it was made. Mrs. Isbell did all in her power to deliver to the plaintiff the means of reducing to his possession the money on deposit in the bank. She could not at any time after making the gift have maintained an action for the recovery of this money from the bank. There is nothing to show that the defendant administrator had any better claim for the fund than the decedent whom he represents. The administrator is bound by this transfer as if a purchase had been made for a valuable consideration. It is claimed that the alleged transfer was incomplete, in that said order was not witnessed and was unaccompanied by the bank book, as required by the laws of said bank. An examination of the by-laws of the bank fails to disclose any requirements that orders for the payment of money shall be witnessed. The blank form of the order used by the bank for the purpose of making transfers of deposits contained a requirement that it "must be dated, signed, witnessed, and accompanied by the book." Mrs. Isbell, intending to make a transfer of her deposit by means of such an order, signed it, and the bank, relying upon

her signature, accepted and acted upon it without a witness. If the bank was not satisfied with its execution, it should have been returned, with notice of its defective character. This regulation for withdrawing deposits was for the protection of the bank and its depositors. Mrs. Isbell would not have been permitted to have taken advantage of this informality, and her legal representative is now precluded from asserting or proving that the transfer was invalid because the order was imperfectly executed. The bank, having prepared the order and accepted it after it was signed, waived the requirement as to its being witnessed. A by-law of the Connecticut Savings Bank which was a part of the contract with their depositors provided "that, when the deposits are withdrawn, the pass book shall be presented; and no payment shall be made except to depositors or upon their written order accompanied in all cases by the pass book." Mrs. Isbell, wishing to transfer her money on deposit, could not present her bank book as the regulation of the bank required (and as she had agreed to do) but did as the bank directed by signing the order which the bank had prepared to make the transfer effectual. The bank before payment to the plaintiff might have required additional evidence as to the loss of the book and a bond with satisfactory securities to keep the institution harmless from all consequences of such payment. The bank has not claimed any protection because of the existence of this by-law, and Mrs. Isbell's administrator should not be allowed to question it. This by-law was intended for the protection of the bank and depositors against fraud and forgery, and cannot affect this inquiry as to who now owns this fund.

Section 631 of the General Statutes of 1902 authorizes the assignee an equitable and bona fide owner of any chose in action not negotiable to sue thereon in his own name. There may be a valid gift of the money on deposit in a savings bank in the donor's name, although the donor retains possession of the book. *Buckingham's Appeal*, 60 Conn. 143, 22 Atl. 509; *Kerrigan v. Rautigan*, 43 Conn. 17; *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Taylor v. Henry*, 49 Md. 550, 30 Am. Rep. 486; *Stone v. Bishop*, 4 Cliff. 593, Fed. Cas. No. 13482. This order was given upon a sufficient consideration to support an assignment or transfer of property. A good consideration is that of blood or natural affection and a gift made for such a consideration ought to prevail unless it be found to interfere with the rights of creditors and purchasers. The order was intended by the donor to operate as a donation and transfer of the money deposited in the bank which was there subject to the disposition of the donor. The bank

and the plaintiff both accepted the order for the purposes for which it was given, and upon one occasion have recognized its validity. The order was a sufficient instrument to transfer title to the donee of the money, and, being accompanied by a delivery and acceptance, constituted a valid transfer of the funds as a gift to the plaintiff.

There is no error. The other Judges concurred.

(31 Conn. 336)

MORSE v. CONSOLIDATED RY. CO.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. STREET RAILROADS (§ 93*)—OPERATION—INJURIES TO PERSONS—DUTY OF MOTORMAN.

A motorman in the operation of his car should conduct himself as a reasonably prudent man would under the circumstances to prevent injury to a person on the track.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 195; Dec. Dig. § 93.*]

2. STREET RAILROADS (§ 112*)—OPERATION—ACTIONS FOR INJURIES—RIGHT OF ACTION—NEGLIGENCE.

Even if a four year old child could not be guilty of contributory negligence, in an action against a street railroad for her death by being struck by a car, plaintiff was not excused from showing her conduct and situation when she was injured as bearing upon the company's negligence.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 112.*]

3. STREET RAILROADS (§ 112*)—OPERATION—ACTION FOR INJURIES—PROOF—CAUSE OF INJURY.

In an action against a street railroad for causing the death of an intestate, plaintiff must show not only defendant's negligence, but that it was the proximate cause of the accident.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 228; Dec. Dig. § 112.*]

4. STREET RAILROADS (§ 114*)—OPERATION—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—CAUSE OF INJURY.

That a street car was running at an excessive speed at the time of the accident did not of itself show that that was the cause of the accident.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 114.*]

5. STREET RAILROADS (§ 114*)—OPERATION—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

The proximate cause of injury to plaintiff's intestate by being struck by a street car could be proved by circumstantial evidence, and need not be established beyond a reasonable doubt, but it must be established by facts affording a logical basis for an inference as to the cause, and could not be left to speculation.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 114.*]

6. STREET RAILROADS (§ 114*)—PERSONAL INJURIES—ACTIONS—DIRECTION OF VERDICT.

In an action for the death of plaintiff's intestate by being struck by a street car, where intestate's conduct and situation at the time of the accident was not shown, so that the cause of the accident and the company's negligence was wholly speculative, a verdict was properly directed for the company.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 114.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. EVIDENCE (§ 244*) — ADMISSIONS — ADMISSION BY AGENT—AUTHORITY.

Evidence to prove declarations by the motorman two or three minutes after the injured person was taken from beneath the car, as to how the accident happened, was properly excluded in an action against the company for the injuries; the motorman not being the company's agent for the purpose of making admissions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 932; Dec. Dig. § 244.*]

8. EVIDENCE (§ 123*) — RES GESTÆ — STATEMENTS AFTER EVENT—PERSONAL INJURIES.

The declarations being no part of the transaction out of which the action arose, and being a mere narrative of a past event, were inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 365; Dec. Dig. § 123.*]

Appeal from Superior Court, New Haven County; Joel H. Reed, Judge.

Action by Caleb A. Morse, administrator, against the Consolidated Railway Company. From a judgment for defendant on a directed verdict, plaintiff appeals. Affirmed.

Charles S. Hamilton and Caleb A. Morse, for appellant. Harry G. Day and Thomas M. Steele, for appellee.

THAYER, J. The plaintiff seeks to recover damages for injuries received by his intestate in being struck and dragged along the highway by one of the defendant's cars. He alleges that the injuries were caused by the negligence of the defendant, in that its motorman in charge of the car ran it at an excessively high rate of speed, and did not have it under control, and failed to give the intestate any warning of any kind of the approach of the car, and also failed to stop it or get it under control after he discovered her peril. The parties were at issue to the jury upon a denial of these allegations. The plaintiff introduced his evidence and rested his case, and thereupon the defendant, without introducing any evidence, rested its case, and requested the court to instruct the jury to return a verdict for the defendant. The court complied with this request, and its action in so doing presents the chief question raised by the plaintiff's appeal.

It is not claimed that the court erred in directing the verdict, provided there was no evidence in the case from which the jury could reasonably find a verdict for the plaintiff. The claim is that there was such evidence. Viewing the plaintiff's evidence from the aspect most favorable to him, the following are the only facts essential to the issues which are directly established by it: The intestate was a deaf and dumb girl four years and one month of age. On the morning of her injury her mother had given her a pencil and piece of paper, and left her upon the veranda of their home to amuse herself. Shortly thereafter, the girl was at a store upon the southerly side of the street and diagonally across from her home. A few minutes later, she was observed upon the side-

walk in front of the store, facing toward the street as if about to step down into the traveled path. The width of the street was not proven; but, as shown by photographs which were in evidence, it was wide enough for the double tracks of the defendant's railway and a traveled path for vehicles upon each side of the tracks. The street was straight for several hundred feet easterly of the place of the accident, and was not much traveled. A few minutes after the intestate was observed on the sidewalk in front of the store one of the defendant's cars came along, bound west upon the northerly or west-bound track. The attention of one of the witnesses was attracted to it by the loud sounding of the gong. She also heard the car stop with a jolt. After the car was stopped, it was backed a trifle by the defendant's servants, and they then removed the intestate from under the fender, which was down, in front of the car. She was bruised, and her clothing was torn. The piece of paper which her mother had given her to play with was found upon or near to the northerly rail of the west-bound track, about 70 feet easterly of the point where she was taken from under the fender. The dirt along the track between the two points "was kind of brushed up." There is an ascending grade toward the west, how steep did not appear, between the two points. There is a downgrade, a short flat or hollow and an intersecting highway which the car had passed before reaching the place where the paper was found. The injury occurred shortly after 9 o'clock in the morning. The weather was damp and misty. It had rained earlier in the morning.

As respected the intestate, it was the duty of the defendant's motorman in the operation of its car to conduct himself as a reasonably prudent man would do under the circumstances existing at the time. To determine whether he did so the jury must have those circumstances before them in the evidence. They could not properly be allowed to guess or surmise how the accident happened. Whether the motorman was guilty of negligence toward the girl depends upon their situation at the time relative to each other. The evidence entirely fails to show what this was. The girl may have been proceeding directly across the car tracks. She may have been at play upon them, or, having crossed them in safety, she may have turned suddenly, and darted upon the track immediately in front of the car to secure the paper or pencil or some other object dropped by her. If we assume that, as claimed by the plaintiff, a child of her age cannot be charged with contributory negligence, this did not excuse the plaintiff from showing what her conduct and situation was at and just previous to her being struck as bearing upon the question of the motorman's negligence. It is claimed that the jury would have been warranted in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

finding that the child was struck at the place where the paper was found, and that, from the distance which the car went before it was stopped, it must have been driven at an excessive rate of speed, and so that the motorman was negligent. But the plaintiff was bound to prove, not only that he was negligent, but that such negligence was the proximate cause of the intestate's injury. The improper speed of the car may have concurred in point of time with the intestate's injury without being the cause of it. Excessive speed being proved, the cause of the accident would still be a matter of conjecture with the jury. While the cause of the accident could be proved by presumptive evidence, and need not be established beyond a reasonable doubt (*Bradbury v. South Norwalk*, 80 Conn. 298, 301, 68 Atl. 321), the plaintiff was bound by his evidence to remove the cause from the realm of speculation and to establish facts affording a logical basis for the inferences which he claimed (*Childs v. Adams Express Co.*, 197 Mass. 337, 338, 84 N. E. 128; *Saxe v. Walworth Mfg. Co.*, 191 Mass. 338, 341, 77 N. E. 883, 114 Am. St. Rep. 613; *Bond v. Smith*, 113 N. Y. 384, 21 N. E. 128). To have submitted the case to the jury upon the evidence introduced would have been to permit them to draw from conjectural and not from proven facts the inference that the defendant's negligence was the cause of the intestate's injuries. This could not properly be done, and the court was right in directing the verdict.

Evidence offered by the plaintiff to prove declarations of the motorman as to how the accident happened, made two or three minutes after the child had been taken from under the car, and before the car had left the place, was properly excluded. The motorman was not the defendant's agent for the purpose of making admissions. The statement called for was in no way a part of the transaction out of which the claimed cause of action arose, but would have been a mere narration of a past event. As such it was hearsay and inadmissible. *McCarrick v. Kealy*, 70 Conn. 642, 645, 40 Atl. 603.

There is no error. The other Judges concurred.

(81 Conn. 351)

GREIST v. GOWDY.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. MORTGAGES (§ 305*)—PAYMENT—CHANGE IN FORM OF INDEBTEDNESS.

No change in the form of the indebtedness will discharge the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 889-894, 898; Dec. Dig. § 305.*]

2. MORTGAGES (§ 306*)—PAYMENT AND CHANGE IN TIME OF PAYMENT—RENEWAL NOTE.

No change in the mode or time of payment will discharge the mortgage, and hence, if an indorser secured by mortgage is compelled to

pay a note, and for that purpose indorses a renewal note for the same debt or a part thereof, and is compelled to pay the renewal note, he is protected by the mortgage securing his first indorsement.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 890-893; Dec. Dig. § 306.*]

3. MORTGAGES (§ 306*) — PAYMENT — WHAT CONSTITUTES—RENEWAL NOTE.

The indorser of a renewal note, secured by mortgage, was absent when it became due, and the mortgagor, the payee bank, and another, arranged to have such other temporarily advance the money to take up the note for the indorser's protection, it being understood that the indorser should retain his mortgage security, and that the bank would discount the mortgagor's note for \$500 of the debt, if it was again indorsed by the indorser, all of which was done, and the mortgagor returned the money temporarily advanced to take up the note. *Held*, that the transaction was not a payment of the note taken up, and the indorsement of the \$500 note was merely a renewal of the original note, so that it was secured by the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 890-893; Dec. Dig. § 306.*]

4. APPEAL AND ERROR (§ 1008*)—FINDINGS—CONCLUSIVENESS.

Payment of a mortgage debt is a question of fact, and the trial court's finding thereon is conclusive unless an error of law was committed in reaching it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3969; Dec. Dig. § 1008.*]

5. APPEAL AND ERROR (§ 171*)—PRESENTATION OF GROUNDS—QUESTIONS NOT RAISED BELOW.

The claims of law should be construed with reference to the matters in fact being litigated.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1053; Dec. Dig. § 171.*]

6. MORTGAGES (§ 274*)—TRANSFER OF EQUITY OF REDEMPTION—RIGHT OF PURCHASER TO CONTEST MORTGAGE—AMOUNT DUE.

Where the purchaser of mortgaged property at a sale was allowed to show on foreclosure the amount due on the mortgage debt at that time, he cannot complain that he was not allowed to contest the amount due.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 274.*]

7. MORTGAGES (§ 274*)—TRANSFER OF EQUITY OF REDEMPTION—RIGHTS OF PURCHASER.

While the purchaser of the equity of redemption could rely upon the mortgage as a general description and limitation of the lien, he could not rely upon the mortgagor's statements, made without the mortgagee's assent, as to the amount due, or assume that the conditions of the mortgage had been performed.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 274.*]

8. APPEAL AND ERROR (§ 241*)—EXCEPTIONS TO FINDINGS—FAILURE TO EXCEPT.

Assignments of error in finding facts cannot be considered on appeal as brought up under Gen. St. 1902, §§ 795, 796, where the motion below to correct the findings did not have annexed written exceptions to findings or refusal to find, as required by the statute.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 241.*]

9. APPEAL AND ERROR (§ 564*)—PROCEEDINGS BELOW.

Under Gen. St. 1902, § 797, permitting the evidence and rulings to be filed and certified within one week after the filing of the finding

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the claims for correction therein set forth in the assignments of error on appeal, and authorizing the extension of the time of filing, the trial court's order of certification will be construed as an extension of time, and the motion to correct the evidence and rulings under the statute will be considered, though they were incorporated more than a week after the findings were filed; no proceedings to correct having been taken under sections 795 and 796.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 564.*]

Appeal from Superior Court, New Haven County; Alberto T. Roraback, Judge.

Action by P. Raymond Greist against William H. Gowdy. From a judgment for plaintiff, defendant appeals. Affirmed.

On August 24, 1906, the Congress Laundry Company mortgaged land to the plaintiff to secure a demand note to the plaintiff for \$1,000, and also to secure the plaintiff's indorsement upon a four months' note for \$1,500 payable at a bank. The mortgage was duly recorded. The condition properly described the notes, contained certain agreements of the mortgagee, one of which was to apply the proceeds of sales of stock to the payment of the indorsed note, unless such payment was waived by the mortgagee in writing, and then provided "that the said grantor in the event of its not paying said note so indorsed, is justly indebted to the said grantee in the further sum of fifteen hundred dollars (\$1,500) with interest; the total amount of twenty-five hundred dollars (\$2,500) being payable within twenty (20) months from the 4th day of September, 1906, in payments of five hundred dollars (\$500) every four months from date. Now, therefore, if said promises and agreements are well and truly kept according to agreement and said money is paid according to the terms above set forth, then this deed shall be void, otherwise to remain in full force and effect." The defendant became the owner of the mortgaged property, subject to incumbrances, by purchase from the receiver of the laundry company, July 1, 1907. Upon the trial no question was made as to the note for \$1,000, but the parties were at issue upon the question whether, as against this defendant, the mortgage could be enforced as to a note of the laundry company for \$500, dated March 13, 1907, indorsed by the plaintiff and claimed by him to be a renewal of so much of the original note of \$1,500; the other \$1,000 of said \$1,500 note having been paid by the laundry company. Concerning said indorsed note, the trial court has found in substance, that when it first came due it was renewed with plaintiff's indorsement, and that when the first renewed note came due the company paid \$500 on account, and the indorsed renewal was for \$1,000 coming due March 4, 1907. When said note of \$1,000 became due, the laundry company was unable to meet its liability thereon. At this time the plaintiff

was absent, and the Greist Manufacturing Company, at the request of the laundry company, and under an agreement made between the said Greist Company, the laundry company, and the bank, agreed temporarily, for said laundry company and the plaintiff, to advance the money to meet the payment of the indorsed note for \$1,000, and thereby to protect the plaintiff's indorsement thereon until such time as the plaintiff would return, the Greist Company taking as temporary security for said advancement the personal note of Martley, treasurer of the laundry company. It was further agreed by all the parties above mentioned that the bank would discount the laundry company's note for \$500, if the plaintiff would indorse the same as heretofore; the said note being a continuation of the original \$1,500 note successively renewed, as theretofore stated. The plaintiff returned on March 13, 1907, and as agreed, indorsed said laundry company note of \$500 in order to obtain the balance of the said \$1,500 note given originally by the laundry company. Said note at its maturity was paid by the plaintiff, after it had been protested by said bank. From money received from the sale of its own stock the laundry company returned to the Greist Company the \$1,000 so advanced by it, and thereupon said Greist Company returned to said Martley said temporary note of \$1,000. The advancement of said \$1,000 by the said Greist Company and the return of said sum to said Greist Company by the laundry company, was without any intention to pay, cancel, or release said original indorsed mortgage note of \$1,500, successively renewed as heretofore stated, and in fact no release, receipt, or quitclaim deed was given by the plaintiff or by said Greist Company to said laundry company; nor was it the intention of any of the parties that said advancement was a payment or liquidation of the liability under the original indorsed \$1,500 mortgage note. But it was the intention of all the parties that the plaintiff should retain his mortgage security to protect him on account of his indorsement of the last-mentioned note. The court held that the indorsed note for \$500 was included within the mortgage security, and rendered judgment accordingly. From this judgment the defendant appeals, assigning several reasons which, so far as the court overruled them, amount on the merits to the single reason that the court erred in holding that the renewal note of \$500 was covered by said mortgage. Minor reasons are that the defendant could contest the amount due on the mortgage, that the defendant might rely upon the mortgage and the books of the mortgagor for the ascertainment of the amount due, and that the court erred in finding facts without evidence.

Richard H. Tyner, for appellant. William F. Alcorn and Harry W. Asher, for appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

GAGER, Superior Judge (after stating the facts as above). The condition in the mortgage described an indorsed note for \$1,500. If the indorsed note of March 13, 1907, for \$500 represented in fact a part of the original indorsed note of \$1,500, then this note for \$500 is secured by the mortgage. It is familiar law that no change in the form of the indebtedness or on the mode or time of payment will discharge the mortgage. *Bolles v. Chauncey*, 8 Conn. 391; 1 Jones, Mortgages, § 924. This principle also extends to renewal indorsements. If an indorser by reason of his indorsement is compelled to pay the note, and under this necessity indorses a renewal note for the same debt, or a part thereof, and is, by reason of his renewal indorsement, obliged to pay the renewal note, this is a damage necessarily resulting from the first indorsement against which he is entitled to indemnity under the condition of the mortgage. *Pond v. Clarke*, 14 Conn. 335, overruling upon this point *Peters v. Goodrich*, 3 Conn. 146; *Smith v. Prime*, 14 Conn. 472; *Boswell v. Goodwin*, 81 Conn. 74, 81 Am. Dec. 169; 1 Jones, Mortgages, § 934. This proposition is not formally disputed by the defendant, though the point is made in his second reason of appeal. The defendant does, however, insist that the \$500 note is not in fact a renewal of any obligation incurred under the first indorsement, because when the renewal of the \$1,000 indorsed note became due, March 4, 1907, it was paid by the laundry company, and that the \$500 note of March 13th was for a new loan, and therefore not secured by the mortgage. This question of payment is one of fact and the finding is conclusive against the defendant's claim.

It appears that when the renewal note for \$1,000 came due, the plaintiff indorser was absent. The note was payable at a bank, and the laundry company effected an arrangement with the bank and with the Greist Company, a corporation of which the plaintiff was president and manager, by which this corporation, for the protection of the plaintiff until he should return, temporarily advanced the money necessary to take up the note, upon the agreement that the plaintiff should retain his mortgage security, that the arrangement was temporary, and not a payment, and that when the plaintiff returned, the bank would discount the laundry company's note for \$500 of this \$1,000, if plaintiff would again indorse, thus continuing the plaintiff's original liability to the extent of \$500. The Greist Company took the personal security of the treasurer of the laundry company, and later the laundry company returned to the Greist Company the money advanced by it. The whole arrangement was for the purpose of tiding over the situation caused by the plaintiff's absence until his return, and upon the specific agreement of all parties that, as between the plaintiff and the laundry company, the transaction was not in any sense to be a payment of the note, a dis-

charge of the plaintiff's liability thereon, or a release of his security. Payment or non-payment is a question of fact, and the conclusion of the trial court is final, unless in reaching it the court below committed some error of law prejudicial to the plaintiff, and which entitles him to a new trial. *Carroll v. Weaver*, 65 Conn. 76, 31 Atl. 489. We perceive no such error. The transaction, in substance, was the deposit of the amount of the debt with the agreement that it should not operate as payment, and it finally resulted in the making of a partial payment upon the indorsed note for \$1,000, and the indorsing of a new note for the balance of \$500, and this \$500 was the unpaid balance of the original indorsed note of \$1,500. *Howe v. Lewis*, 14 Pick. (Mass.) 329.

In his brief the defendant claims that, even if the note for \$500 should be held secured by the mortgage, the judgment is erroneous, because by the terms of the condition the debt was payable in installments, and only \$1,000 was due at the time the foreclosure was brought. This claim was not made before the trial court. The finding shows that no contest was made over the note of \$1,000 for borrowed money. The sole question before the court was whether the mortgage secured the note for \$500, and the claims of law are to be construed with reference to the matters in fact being litigated. Had this claim been made, it would, perhaps, have necessitated a second foreclosure suit, and we may assume that the defendant confined himself before the trial court to the vital question in the case, in order to avoid needless litigation and costs. Had the claim been made, the answer would have been that the mortgagee did not devote the proceeds of the sale of stock to the payment of the note for \$1,500, as required by the express terms of the condition. Another reason of appeal is that the defendant could contest the amount due the plaintiff on the mortgage. The defendant purchased the interest of the laundry company at a receiver's sale. He was permitted to show, and did show, the amount actually due on the mortgage at the date of his purchase, and has no reason to complain on this account. It is also claimed that the purchaser had the right to rely upon the statements in the mortgage, and on the books of the mortgagor, as showing the amount due. This claim was properly overruled. It is true that he could rely upon the mortgage as a general description and limitation of the lien, but it is too plain for argument that he could not, as against the mortgagee, rely upon the mortgagor's statements, made without the assent of the mortgagee, as to the amount due, nor could he assume that the contract contained in the condition had been performed by the mortgagor. The remaining reasons of appeal are based on alleged errors in finding facts. These reasons are not properly before this court under sections 795 and 796 of the General Statutes of 1902, because

the record shows that the motion made to the trial judge to correct the finding did not have annexed to it written exceptions to any finding of fact therein, or to any refusal to find a fact as requested, which by the statute could be made the subject of an appeal to the Supreme Court of Errors. These reasons of appeal may, however, be considered as based on section 797 of the statutes, which provides, in substance, that in lieu of the motion to correct and exceptions, provided for in sections 795 and 796, the evidence and rulings may, within one week after the filing of the finding, be filed and certified, and the claims for correction therein set forth in the assignments of error on appeal. The plaintiff excepts to the consideration of this motion to correct, on the ground that the motion to make the evidence and rulings part of the record came too late. It was in fact made more than two weeks after the finding was filed. But section 797 authorizes the judge to extend the time, and we think his order of certification should be construed as an extension of time under the statute, and we treat the motion to correct the finding as properly before us; no proceedings under sections 795 and 796 having been commenced.

An examination of the entire evidence has satisfied us that the finding is amply supported by the evidence, and the reasons of appeal relating to the correction of the finding are overruled, and the claim for a correction is denied.

There is no error. The other Judges concurred.

(81 Conn. 451)

BRISTOL v. PITCHARD et al.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. JURY (§ 13*)—RIGHT TO TRIAL BY JURY—ISSUES COGNIZABLE IN EQUITY.

The issues closed in a suit based on the fraudulent obtaining of money being such as prior to January 1, 1880, would have been property cognizable in equity, and the various claims for judgment being all made "by way of equitable relief," plaintiff under Gen. St. 1902, § 720, had no absolute right to a jury trial; and defendant had an absolute right to a trial by the court, in the absence of an order to the contrary.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35-83; Dec. Dig. § 13.*]

2. JURY (§ 13*)—RIGHT TO TRIAL BY JURY—DISCRETION OF COURT.

Under Acts 1905, p. 441, c. 236, providing that, on application by either party, the court may order trial by jury of any issues of fact joined in an action demanding equitable relief, refusal or granting of the jury trial is in the discretion of the trial court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35-83; Dec. Dig. § 13.*]

3. PLEADING (§ 236*)—AMENDMENT—DISCRETION.

Refusal of leave, asked two years after commencement of the action, though soon after decision on it, to amend the body of the complaint and to add a claim for damages "by way of le-

gal relief," was in view of the long time the cause had been pending, and successive amendments of the complaint already made, in the discretion of the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

4. APPEAL AND ERROR (§ 886*)—REVIEW—AMENDMENT OF FINDING OF LOWER COURT—APPLICATION—SERVICE ON ONE OF SEVERAL COUNSEL.

Service on one of several counsel for the same party of an application, under Gen. St. 1902, § 801, to the Supreme Court for correction of a finding by the trial court, is service on all.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 886.*]

5. APPEAL AND ERROR (§ 886*)—RECORD—APPLICATION TO AMEND—FAILURE TO ANSWER.

The application to the Supreme Court under Gen. St. 1902, § 801, for correction of a finding of the trial court, not being answered within seven days, as required by Practice Book 1908, p. 270, § 14, is to be taken as true.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 886.*]

6. APPEAL AND ERROR (§ 886*)—CORRECTION OF RECORD—DENIAL OF APPLICATION.

Application to the Supreme Court under Gen. St. 1902, § 801, for correction of findings of the trial court, though not answered, and so to be taken as true, will be denied where none of the corrections are necessary to support or calculated to strengthen appellant's claims of law.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 886.*]

Appeal from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Action by Darius Bristol, administrator of Robert B. R. Bristol, deceased, against Walter Pitchard and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Howard W. Taylor, for appellant. Leonard J. Nickerson, for appellees.

BALDWIN, C. J. The only exceptions pursued by the appellant relate to the refusal of a trial by jury.

The original complaint was by a conservator, and charged the defendants with fraudulently obtaining money from the ward by taking advantage of his mental weakness under a trust to help him take care of it, but with the design of unlawfully appropriating it, which they afterwards did. The plaintiff claimed "by way of equitable relief" several specified kinds of judgment; the last two being: "(4) A money judgment for \$550 damages. (5) Such other general or specific, legal, and equitable relief, or both, as the plaintiff shall be entitled to." By successive amendments of the writ, different plaintiffs were substituted, and the complaint slightly remodeled, but the averments as to the matters of fraud and trust and the two last prayers for judgment remained substantially the same. Issues of fact were duly joined.

With certain exceptions not material on this appeal, "civil actions involving such an issue of fact as, prior to January 1, 1880,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

would not present a question properly cognizable in equity," must be entered in the docket as jury cases on the written request, seasonably made, to the clerk, by either party, and may be so entered at any time by order of the court. Gen. St. 1902, § 720. The plaintiff made such request in due season, and also moved for an order of court, that the case should be put upon the jury docket for the trial of the main issues. This motion was denied. The issues closed were plainly such as prior to January 1, 1880, would have been properly cognizable in equity, and the various claims for judgment were all made "by way of equitable relief." The plaintiff, therefore, had no absolute right to a jury trial, and the defendant, who did not wish one, had an absolute right to a trial by the court, in the absence of an order by the court to the contrary. *Fuller v. Johnson*, 80 Conn. 493, 495, 68 Atl. 977. There can also be no question that all the issues of fact were such as might have been submitted to a jury. Pub. Acts 1905, p. 441, c. 236; *Meriden Sav. Bank v. McCormack*, 79 Conn. 260, 262, 64 Atl. 338. But whether the court should or should not grant the plaintiff's motion for an order to that effect fell within its judicial discretion, and error cannot be predicated on its denial. Very soon after the decision upon it, but two years after the commencement of the action, the plaintiff moved for leave to amend the body of his complaint and also to add a claim for damages "by way of legal relief." Leave was denied, and, in view of the long period during which the cause had been pending, and the successive amendments to which the complaint had been already subjected, this ruling was fully within the discretion of the court. An application to rectify the finding under Gen. St. 1902, § 801, was made by the plaintiff, duly verified, and service was seasonably made on one of the counsel for the appellees. Several months afterwards another of their counsel to whom they had intrusted the argument of this appeal, and who had had no previous notice of the proceeding, found the application in the printed record, and at once filed an answer denying certain paragraphs of the application. Service on one of several counsel for the same party is service upon all, and, for want of an answer within seven days, the application was taken as true. Practice Book 1908, p. 270, § 14; *Avery v. White*, 79 Conn. 705, 66 Atl. 517. It was, however, denied because none of the corrections asked were necessary to support or calculated to strengthen the plaintiff's claims of law. *Adams v. Turner*, 73 Conn. 33, 47, 46 Atl. 247.

Other reasons of appeal are specified, but they are too obviously without merit to justify discussion.

There is no error. The other Judges concurred.

(81 Conn. 433)

In re FISK et al.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. EVIDENCE (§ 384*)—PAROL EVIDENCE—ADMISSIBILITY.

The question of the admission of parol evidence is one of judicial procedure, depending on the law of the forum.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 384.*]

2. EVIDENCE (§ 462*) — PAROL EVIDENCE — DEEDS.

While parol evidence is inadmissible to contradict an absolute deed, it is admissible to show the deed was given under certain circumstances and pursuant to a parol agreement as to the use to be made of it; this not varying the contract expressed in the deed, but simply showing it to have been made as a step in execution of and in conformity with a prior undertaking.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2134; Dec. Dig. § 462.*]

3. TRUSTS (§ 2*)—PAROL TRUST AS TO LAND IN ANOTHER STATE.

The validity of the parol trust on which a deed of land in another state was given, the parties and the beneficiaries being inhabitants thereof, and the deed and trust agreement being there made, is to be determined by the law of that state.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 2; Dec. Dig. § 2.*]

4. FRAUDS, STATUTE OF (§ 125*)—AGREEMENT AS TO LAND.

Gen. St. 1902, § 1089, providing that no action shall be maintained on an agreement for sale of any interest in real estate, unless the agreement be in writing, does not make such a parol agreement invalid.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 125.*]

5. TRUSTS (§ 96*)—TRUSTS EX MALEFICIO—PAROL EVIDENCE.

Under the statute of frauds of Illinois, declaring void all trusts of land not manifested and proved by a certain kind of writing, provided that resulting trusts or those created by construction, implication, or operation of law need not be in writing and may be proved by parol, if one, a husband, occupying a fiduciary relation to another, his wife, in failing health and nearing her end, takes advantage of these circumstances to obtain from her a deed of land on an oral agreement to hold the title for the benefit of third persons, their children, and afterwards repudiates the obligation thus assumed, he is chargeable in equity on parol proof of such facts with constructive fraud, from which the law raises a trust ex maleficio.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 148; Dec. Dig. § 96.*]

6. TRUSTS (§ 339*)—LIABILITY OF TRUSTEE—CHANGE OF DOMICILE.

The personal obligation of a trustee ex maleficio by reason of his repudiation of the parol trust, on which land was conveyed to him, to hold it for the benefit of others, follows him on his selling the land and removing to another state.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 500; Dec. Dig. § 339.*]

7. TRUSTS (§ 109*)—TRUST EX MALEFICIO—PAROL PROOF.

Gen. St. 1902, § 1089, providing that no action shall be maintained on an agreement for sale of any interest in real estate unless the agreement be in writing, does not render incompetent parol evidence to prove an accountability

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for the proceeds of a sale of land by reason of a trust *ex maleficio*, arising from the repudiation by the grantee of the land of the parol trust, on which the conveyance was made to him, that he should hold the land for the benefit of others.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 109.*]

8. TRUSTS (§ 373*)—ENFORCEMENT—FINDINGS—CONSISTENCY.

A finding that F. held a receipt in full from D. dated 1879 is consistent with a finding that F. never repaid the \$70,000 theretofore advanced to him by D., the court being authorized in inferring that the conveyance by F. in 1879 to his wife, as a gift from D., her father, of the property bought by F. with the \$70,000, was accepted by D. as a discharge of F.'s liability for the advancement, and that such discharge was evidenced by the receipt.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 373.*]

9. TRUSTS (§ 359*)—RIGHT OF ACTION.

The parol trust on which a dying wife conveyed land to her husband, that he should hold it for the benefit of their children, being for their sole benefit, they have by reason thereof an equitable right of action on his repudiating such trust, and so becoming a trustee *ex maleficio*.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 359.*]

10. EXECUTORS AND ADMINISTRATORS (§ 256*)—CLAIMS AGAINST ESTATE—DISPUTED CLAIMS—REVIEW.

That fraud is not specifically charged in the claim presented to commissioners of a decedent's estate, or in the statement of claim on appeal to the superior court, and is not found in terms by such court, is immaterial; the facts stated, standing unexplained, showing constructive fraud as matter of law.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 256.*]

11. EXECUTORS AND ADMINISTRATORS (§ 256*)—CLAIMS AGAINST ESTATE—DISPUTED CLAIMS—REVIEW.

The claim presented to the commissioners against a decedent's estate, and, as first presented by claimants on appeal to the superior court, alleged that land was conveyed to deceased under an agreement that at his death it, if not sold, should be conveyed to claimants, or, if sold, that on his death the proceeds should be paid to claimants, and that it was sold by him. *Held*, that under Gen. St. 1902, § 642, allowing on such an appeal an amendment of the statement of claim not changing the cause of action, an amendment alleging that the land was conveyed to deceased on an agreement that he would hold the lands in trust for claimants was permissible; the legal effect of such agreement being that, if he died without performing it, claimants would be entitled to claim the lands, if not sold, or, if they had been sold, their proceeds, and the real object of claimants, as disclosed by either form of expression, being the same.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 256.*]

12. EQUITY (§ 87*)—APPLICABILITY OF STATUTE OF LIMITATIONS.

As to an equitable action so to a proceeding to enforce an equitable claim, the statutes of limitation do not apply, except so far as resort may properly be had to them by way of analogy on the question of laches.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 242; Dec. Dig. § 87.*]

13. EXECUTORS AND ADMINISTRATORS (§ 202*)—CLAIMS AGAINST ESTATE—TIME FOR PRESENTATION.

Persons seasonably presenting a claim against their father's estate are not chargeable with laches, the claim arising from an agreement of trust for them by the father, which he concealed from them, so that it came to their knowledge after his death.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 202.*]

Appeal from Superior Court, New Haven County; Alberto T. Roraback, Judge.

Louis A. and Leonard D. Fisk appealed from commissioners disallowing their claim against the estate of Eugene D. Fisk, deceased, to the superior court, which allowed the claim, and the estate of deceased, his second wife, and her children appeal. *Affirmed*.

William B. Stoddard, for appellants. E. Henry Hyde and Edmund Zacher, for appellees.

BALDWIN, C. J. The finding of the superior court states these facts: Louis A. and Leonard D. Fisk are the only children of Eugene D. Fisk by his first wife, who was a daughter of Leonard Daniels, of Hartford, in this state. In May, 1877, his father-in-law agreed to furnish him \$70,000 for the purchase of a basket factory in Chicago; taking a mortgage upon it for that amount. Eugene D. Fisk soon afterward bought this property, taking title in his own name, and paid \$70,000 for it, which he received from Mr. Daniels. Later all parties agreed that, instead of giving such a mortgage, the factory should be conveyed to Mrs. Fisk as a gift from her father, which was done in January, 1878. In January, 1880, another tract of land in Chicago was conveyed to Mrs. Fisk as a gift from her father, for the purchase of which he furnished the funds to Mr. Fisk, the cost being \$27,728. Mr. and Mrs. Fisk resided at Chicago for some time prior to May 30, 1881. April and May, 1881, she was dangerously ill from quick consumption, and did not expect to recover. On May 30th she held the record title to the two pieces of land given her by her father and to a third parcel which had been bought and paid for by Mr. Fisk out of his own funds. Her husband prepared an absolute conveyance to himself, dated May 30, 1881, of these three parcels, and all her other property, real and personal, in Chicago. This he induced her to execute and deliver to him upon his promise that he would hold the property conveyed, as she desired, in trust for her two children, of whom the elder was then 12 years old. She also acted in reliance on this promise, and having trust and confidence in him, and without other consideration. The conveyance was acknowledged on June 20, 1881, and she died July 1st. Upon her death he took possession under it, and from time to time sold off the property, receiving \$13,750 for the parcel which he had

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1901 to date, & Reporter Indexes

originally himself paid for, and \$217,000 for the two parcels given to his wife by her father. He married again in 1896, and had children by his second wife. At the time of his death in 1905 he was an inhabitant of Guilford, in this state, and was in possession of about \$100,000 derived from the sale in 1902 of one of the parcels of land given to his wife by her father. He never accounted to his children by his first wife for any property or the proceeds of any property conveyed to him by their mother, but converted all the proceeds to his own use, and endeavored to turn them over to the use and benefit of his second wife and his children by her. He also concealed the fact that he held the property conveyed to him by his first wife in trust for Louis A. and Leonard D. Fisk, and they had no knowledge or notice of the trust until after his death. They presented a written claim against his estate, worded as follows: "Estate of Eugene D. Fisk, To Louis A. Fisk and Leonard D. Fisk, Dr. To amount due us on account of real estate situated in Chicago, Illinois, conveyed to said Eugene D. Fisk by our mother during her lifetime, and after her death sold by him, under an agreement on the part of the said Eugene D. Fisk that at his death said real estate, if not sold, should be conveyed to us, or, if sold, that upon his death, the proceeds thereof should be paid over to us, \$300,000." The commissioners disallowed it wholly. The superior court allowed so much of it as represented the proceeds of the lands given to their mother by her father; they making no claim to the proceeds of the other parcel.

The evidence upon which the finding of facts was based was mainly documentary. The only direct evidence that Eugene D. Fisk received the conveyance from his wife under an agreement to hold the property on a trust for the appellants lay in parol, and came from one Mary Anderson, who was present when the deed was delivered, and was one of the attesting witnesses. Its reception was objected to on the ground that parol evidence was inadmissible to contradict an absolute deed or to establish an express trust in real estate. Both these objections were properly overruled.

The first related to a question of judicial procedure, and depends wholly upon the laws of Connecticut. By that law parol evidence cannot be introduced to contradict an absolute deed, but may be admitted to show that such a deed was given under certain circumstances and in pursuance of a parol agreement as to the use to be made of it. This does not vary the contract expressed in the deed. It simply shows it to have been made as a step in execution of and conformity with a prior undertaking. *Collins v. Tillou*, 26 Conn. 868, 68 Am. Dec. 398; 3 Wigmore on Evidence, § 2437.

The second objection raises a question of private international law. The deed was executed in Illinois between two of its domi-

ciled inhabitants, and all the property conveyed was situated there. The parol trust under which the appellants claimed that it was given was in favor of two other of its domiciled inhabitants. The statute of frauds of that state then provided that "all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of no effect; provided, that resulting trust or trusts created by construction, implication or operation of law, need not be in writing and the same may be proved by parol." This proceeding, which is founded on an agreement for a transfer of real estate to be held in trust, is brought in a state into which the grantee in the deed had, long after its delivery, removed his domicile. Our statute of frauds (Gen. St. 1902, § 1089) provides that "no civil action shall be maintained * * * upon any agreement for the sale of real estate, or any interest in or concerning it * * * unless such agreement, or some memorandum thereof, be made in writing, and signed by the party to be charged therewith, or his agent." The Illinois statute is that trusts of land other than those resulting or created by construction, implication, or operation of law which are not proved by a certain kind of writing are void. The Connecticut statute is that no action shall be maintained on agreements for the sale of any interest in real estate which are not proved by such a writing. It does not make them invalid. The validity of a contractual obligation is ordinarily governed by the law of the state or country with reference to which it was assumed. *Medbury v. Hopkins*, 3 Conn. 473. The obligation of Eugene D. Fisk, which parol evidence was offered to prove, was assumed, if at all, in Illinois, and was of a contractual nature, as the law construed it. The law of that state was at once the *lex loci celebrationis*, the *lex domicilii* of all the parties in interest, and the *lex rei sitæ*, as respects the property to which the obligation related. Illinois law, therefore, must determine whether the obligation was of any validity. The provisions which have been quoted of the Illinois statute of frauds have been repeatedly the subject of judicial construction by the courts of that state, and the established doctrine is that if one occupying a fiduciary relation toward another who is in failing health and nearing his end takes advantage of these circumstances to obtain from the latter a conveyance of real estate, on an oral promise to hold the title for the benefit of a third person, and afterward repudiates the obligation thus assumed, he is notwithstanding the statute chargeable in equity on parol proof of such facts with constructive fraud, from which the law raises a trust *ex maleficio*. *Stahl v. Stahl*, 214 Ill. 131, 73 N. E. 319, 68

L. R. A. 617, 105 Am. St. Rep. 101. Mr. Fisk occupied such a relation toward his wife, and the transaction between them, of which the deed from her formed a part, is therefore subject to the rules of law thus stated. By these his relations to the appellants became at least after her decease of a fiduciary character, and they were equitably entitled to hold him to account. This substantive liability he could not escape by removing to another state. His obligation to the appellants was a personal one, and followed him wherever he might go. Wharton on Conflict of Laws, § 276, "c," "d." They are not now seeking to fix an equitable charge upon lands in Illinois. The lands have been sold. The title thus conveyed they do not seek to disturb. It is the personal obligation of their father either to hold the lands, or, should he sell them, to hold the proceeds for their benefit, on which they found their claim.

The question remains whether this liability can be proved in a court of Connecticut by parol in view of our statute of frauds. It is unnecessary to determine whether that statute applies to proof of such a transaction as that between Mr. and Mrs. Fisk respecting real estate in Illinois. If it does, parol evidence was still admissible to show that the decedent was indebted to the appellants, at the time of his decease, for the proceeds of sales made by him of the Illinois lands. This is not a proceeding for the specific performance of an agreement of trust, or to charge a trust upon any particular fund; but simply to recover from an estate, as general creditors, certain moneys received under a parol promise to account for it to them. In suits on contracts it is often necessary and permissible to show incidentally an express trust by parol as one of the circumstances out of which an equitable duty may arise. *Todd v. Munson*, 53 Conn. 579, 589, 4 Atl. 99; *Pomeroy on Equitable Jurisprudence*, § 1055. Parol evidence may be inadmissible to support a claim of title to lands, and yet competent to prove an accountability for funds derived from a sale of lands by one holding a title acquired under and in partial execution of an agreement to account. *Crocker v. Higgins*, 7 Conn. 342; 3 *Wigmore on Evidence*, § 2454. An application to rectify the finding, under Gen. St. 1902, § 801, by striking out some paragraphs and adding others, has been made and denied. It was based on the assumption that the conclusions of fact were contrary to the evidence, or without evidence. But two of the reasons stated in support of the application merit mention here. One was that Eugene D. Fisk held a receipt in full for all demands from Mr. Daniels, dated December 30, 1879. This was entirely consistent with the finding that he had never repaid the \$70,000 advanced to him by Mr. Daniels prior to January, 1878. The trial court was well warranted in inferring that

the conveyance of the property paid for by those funds to Mrs. Fisk at that time as a gift from her father was accepted by him as a discharge of the liability of her husband for the advancement, and that such discharge was evidenced by the receipt. The other reason was that undue credence and weight were accorded to the parol testimony of the attesting witness to the deed of 1881 from Mrs. Fisk to her husband, given after so long a lapse of time, when his lips had been sealed by death. We have reviewed this testimony in connection with the other evidence, and find nothing to justify the correction asked.

It is insisted that, if any cause of action existed against the decedent, it was only one in favor of the estate of Mrs. Fisk. But, while the agreement of trust was not made by the appellants, it was made by their dying mother for their sole benefit. They therefore have an equitable right of action by virtue of its terms. *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169. Fraud is not specifically charged in the so-called "Reasons of Appeal" filed in the superior court, nor in the claim presented to the commissioners, nor is it found in terms by the trial court. It is, however, necessarily implied from the other facts which have been stated. They show in equity, standing as they do unexplained, constructive fraud as matter of law. *Dowd v. Tucker*, 41 Conn. 197, 204. In all appeals of this character the appellant is required to file in the superior court, unless otherwise ordered, such a statement of the amount and nature of his claim and of the facts upon which it is based as would be made in a complaint in a civil action. *Practice Book* (1908), p. 207, § 14. Instead of so doing, the appellants in this proceeding filed a paper erroneously entitled (see reporter's note to *Donahue's Appeal*, 62 Conn. 372, 26 Atl. 399) "Reasons of Appeal," which consisted simply of a copy of their claim as presented to the commissioners, and an averment that they appealed from its disallowance. Gen. St. 1902, § 642, provides that "in all hearings * * * before the superior court on appeal from the doings of commissioners" the claimant "shall have liberty to amend any defect, mistake, or informality, in the statement of the claim, not changing the ground of action." The appellants next proceeded to substitute for their original statement what they termed "Substituted Reasons of Appeal." This paper contained substantially the same statements as those set forth in the finding, followed by the averment that "said claim" was seasonably presented to the administrator, which allegation was denied in the answer, but found true by the court. The question is thus presented whether the claim presented to the superior court rests on a different ground of action from that presented to the commissioners. The agreement alleged in the latter

was that at the death of Eugene D. Fisk the Chicago lands, if not sold, should be conveyed to the appellants, or, if they had been sold, the proceeds paid over to them. The agreement alleged in the former was that he would hold these lands in trust for them; the particular nature of the trust not being otherwise described. The legal effect of such an agreement would be that, if he died without performing it, the appellants would be entitled to claim the lands, if not sold, or, if they had been sold, their proceeds. Under the liberal construction given to our statutes of amendments, the ground of action was not changed by the substituted statement. The real object of the claimants, as disclosed by either form of expression, was the same. Merwin's Appeal, 72 Conn. 167, 172, 43 Atl. 1055; Huntington's Appeal, 73 Conn. 582, 585, 48 Atl. 766.

The answer of the appellees set up the lapse of 24 years since the alleged agreement. The present proceeding is to enforce an equitable claim, and stands on the footing of an equitable action. To such an action our statutes of limitation do not apply, except so far as resort may properly be had to them by way of analogy. *Budington v. Munson*, 33 Conn. 489. The question is one of laches, and that the appellants are not chargeable with any, results necessarily from the fact that their father concealed the agreement of trust from them, so that it first came to their knowledge after his death.

There is no error. All concur.

(31 Conn. 466)

NEW YORK, B. & E. RY. CO. v. MOTIL.
(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. RAILROADS (§ 61*) — BUYING LAND FOR ROADBED.

Under the general railroad law (Gen. St. 1875, p. 817, tit. 17, c. 2, pt. 9, § 6), conferring on a company organized under it power to "hold such real estate as may be convenient for accomplishing the objects of its organization," and the "Act concerning corporations" (Pub. Acts 1883, p. 232, c. 3), authorizing any private corporation to purchase such real estate as its purposes shall require, it may purchase the fee simple to land for a roadbed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 137; Dec. Dig. § 61.*]

2. RAILROADS (§ 69*) — DEEDS — ESTATE CONVEYED.

The effect of a deed to a railroad in terms apt for conveying an absolute estate in fee, and providing that the land was to be held by the company and its "successors and assigns forever to their own proper use and behoof," and not limiting the uses to which the land could be used, was not reduced by the prior description of the premises as covered by the location of the railroad.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 69.*]

3. RAILROADS (§ 69*) — DEEDS — CONDITIONS SUBSEQUENT.

The provision in a deed to a railroad that it was to trestle a pond did not reduce its

title from a fee, but merely put on it a contractual duty, or imposed a condition subsequent on the grant, which did not affect its title; no forfeiture for breach of condition having been claimed.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 69.*]

4. RAILROADS (§ 82*) — EXTINCTION OF RIGHT TO BUILD — EFFECT ON PROPERTY RIGHTS.

The extinction of the right of a railroad company to build its road did not extinguish its general right of property in land conveyed to it in fee.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 213; Dec. Dig. § 82.*]

5. CORPORATIONS (§ 28*) — DEFECT IN ORGANIZATION — DE FACTO CORPORATION.

Defect in the organization of a corporation did not prevent its being a corporation de facto, or disqualify it from acquiring, holding, and conveying land.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 70; Dec. Dig. § 28.*]

6. CORPORATIONS (§ 617*) — QUO WARRANTO — EFFECT OF JUDGMENT ON PROPERTY RIGHTS.

The adjudging on quo warranto proceedings that a corporation has no legal existence did not destroy such rights of property as it then held.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 617.*]

7. CORPORATIONS (§ 619*) — QUO WARRANTO — EFFECT OF JUDGMENT ON PROPERTY RIGHTS.

The adjudging in quo warranto proceedings that a corporation has no legal existence transferred the custody of the property of the supposed corporation from the directors acting as such for a corporation de facto to the directors acting as trustees for those interested in succession to what had been a corporation de facto; the uses for which they thereafter held it being to satisfy any indebtedness of the supposed corporation, and to transfer any balance to the stockholders pro rata, naturally requiring a sale of the property.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 619.*]

8. RAILROADS (§ 32*) — FAILURE TO BUILD IN PRESCRIBED TIME.

Under Gen. St. 1887, § 3440, providing that, if a railroad company shall not finish its road in five years from the filing and recording of its articles, its corporate existence and powers shall cease, such failure does not ipso facto destroy the company's corporate existence, but is simply a ground for forfeiture; and, the state not instituting any proceedings to oust it of its franchises, it remains a corporation de jure.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 65; Dec. Dig. § 82.*]

9. RAILROADS (§ 14*) — REPEAL OF GENERAL LAW — EFFECT ON PRIOR CORPORATIONS.

The repeal by Pub. Acts 1905, p. 385, c. 128, of the general railroad law, not purporting to, did not affect the continued existence of any companies theretofore incorporated under it.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 14.*]

10. CORPORATIONS (§ 291*) — OFFICERS — FAILURE TO HOLD MEETING FOR ELECTION.

A private corporation failing to hold its regular annual meeting for election of officers, those then in office hold over till their successors are elected.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1252; Dec. Dig. § 291.*]

11. CORPORATIONS (§ 399*)—POWER OF OFFICER UNDER RESOLUTION OF DIRECTORS.

From plenary power given in general terms by directors of a corporation to its president, as such and as its attorney in fact, to dispose of and convey all its property, using the proceeds to make payments on its debts, authority in him to institute suit to settle title to land to satisfy prospective purchasers of its title is to be implied.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 399.*]

Appeal from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Action by the New York, Bridgeport & Eastern Railway Company against Joseph Motil, under Gen. St. 1902, § 4053, to settle title to land. Judgment for defendant, and plaintiff appeals. Reversed, and new trial ordered.

John C. Chamberlain, for appellant. Stiles Judson, for appellee.

BALDWIN, C. J. This action is to settle the title to land conveyed in 1884 by one Hodges to the New York & Connecticut Air Line Railway Company, a corporation of Connecticut duly organized under the general railroad law in 1881, for the consideration of \$626.32 then received in payment, by a warranty deed, in which he described it as "lying and being in the town of Stratford, and on each side of the center line of the location of said railroad company and of the width of four (4) rods on each side of said center line, across my said lands a distance of about nine hundred and nineteen feet in length, bounded northerly and southerly by my own land, easterly by land of Stiles W. Wheeler, and westerly by highway, reference being had to the map of the location of said railway company in the office of the town clerk of said town of Stratford. Said railway company is to tressell my pond the width of fifty feet." Habendum: "Unto the said grantees, their successors and assigns forever, to their own proper use and behoof." This strip ran through a 16-acre farm owned by Hodges, and was bought in order that it might become part of the roadbed of a railroad which the grantee was proposing to construct. The company acquired an entire right of way from New Haven to the state line of New York, surveyed it, graded a considerable part of it, and expended a considerable sum of money in advancing its purposes, but finally lost the right to complete the railroad by the expiration of the statutory period allowed for so doing, which occurred October 22, 1889. On October 16, 1889, some of its shareholders organized a new corporation, under the same law, named the New York, Bridgeport & Eastern Railway Company. The New York & Connecticut Air Line Railway Company thereupon conveyed all of its lands and right of way to one W. E. Norton, trustee, who on October 22, 1889, conveyed the same to the

new company. The organization of the latter was defective. On December 6, 1890, it reconveyed whatever it had acquired under its deed of October 22, 1889, to its grantor, and on January 24, 1891, he conveyed the same premises to the plaintiff, which is a corporation of the same name with that defectively organized, and which was properly organized earlier in the month, under the same law, to carry on the building of the same railroad. All these conveyances were made with the intention and for the purpose of using the land now in question as a part of the roadbed of a railroad. This strip had been graded and an earth embankment built on part of it, at considerable expense, by the first grantee. The plaintiff did no work upon it, but laid out a considerable sum in resurveys of its right of way and in litigation. No trestle was ever built across the pond. In 1895 the directors of the plaintiff, being satisfied that it could not construct the railroad, empowered Henry R. Parrott, its president, as such and as its attorney in fact, to dispose of and convey all its property, real and personal, using the proceeds to pay its indebtedness as far as possible. On January 6, 1896, this action was ratified by the company at a meeting of the shareholders, the vote reciting that the rights of the corporation would expire on January 8, 1896.

In 1889 Hodges had given a warranty deed of his farm to one Kowing and his wife, describing it as divided into two parts by a strip of land 8 rods wide and about 919 feet long, which he had conveyed to the New York & Connecticut Air Line Railway Company in 1884. In 1899 he gave a quitclaim deed of his right, title, and interest in this strip to Mrs. Kowing, who had acquired her husband's title under the deed of the preceding year. The strip in question was never separated from the farm by fences, and the successive owners of the farm have cultivated it to some extent. An election of officers by the plaintiff was made in 1891, at which Henry R. Parrott, one of the shareholders, was chosen a director, and he was also then made president of the company. No election of directors or appointment of president has been since made. He has always been a shareholder. In the fall of 1895 he, claiming to act as president, director, and shareholder in the plaintiff's behalf and under the votes above described, had the strip of land in dispute mapped so as to show a pentway extending through it, with adjoining building lots, caused fence posts to be set up along its sides, and advertised the lots for sale. The farm would be greatly damaged by the use of this land for building purposes. This action was instituted by Mr. Parrott in 1906 solely upon the authority of the votes above described.

The general railroad law under which the plaintiff was incorporated provided that, if

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

any company organized under its provisions should not finish its railroad within five years from the time of filing and recording its articles of association, its corporate existence and powers should cease. Gen. St. 1887, § 3440. When Hodges gave his first deed, the general railroad law conferred upon any company that should be organized under its power to "hold such real estate as may be convenient for accomplishing the objects of its organization" (Gen. St. 1875, p. 817, tit. 17, c. 2, pt. 9, § 6); and there was an "Act concerning corporations," providing that "every private corporation may, when no other provision is specifically made, receive, purchase, hold, sell, and convey real and personal estate, as the purposes of the corporation shall require, not exceeding the amount limited in its charter." Pub. Acts 1883, p. 232, c. 3. All these provisions of law continued in force until several years after the votes of the plaintiff's directors and shareholders. Gen. St. 1888, §§ 1906, 3438; Gen. St. 1902, §§ 3312, 3670. It was unquestionably "convenient for accomplishing the purposes of its organization" that the New York & Connecticut Air Line Railway Company should acquire some title to the land in question at the time when it received the deed from Hodges in 1884. It is unnecessary to inquire whether it had at this time the right to take this strip by condemnation proceedings, and whether that right would have included the power of appropriating a fee-simple estate. It certainly had the right to acquire such an estate by agreement with the owner. It paid him \$626.32, and received a warranty deed, expressed in terms apt for conveying an absolute estate in fee simple, unless they are qualified by the fact that the premises were described as within the location of the company's railroad, or by the clause as to the trestling of a pond. That they were within the location had no other effect than to make it clear that their acquisition was necessary. That the company was to trestle the pond had no other effect than either to throw upon it a contractual duty, or to impose a condition subsequent upon the grant. In the common course of things it could not build the trestle, which obviously was to be a part of its railroad structure, until it had acquired the estate. No forfeiture of the estate for breach of condition has ever been claimed, so far as appears, by Hodges or his heirs or assigns. He made no limitation in his deed of the uses to which the grantee could put the land. It was to be held by the company and "their successors and assigns forever to their own proper use and behoof." The effect of these emphatic words is not reduced by the prior description of the premises as covered by the location of the railroad. A railroad company can acquire, by agreement with the owner, a fee-simple estate in land within its location, as well as it can acquire any lesser title to it. The ex-

inction of the plaintiff's right to build its railroad therefore did not extinguish its general right of property in the disputed premises. It rather served to clear the title which could be conveyed to one desiring to purchase for the ordinary purposes of private occupancy. *Nye v. Taunton Branch R. R. Co.*, 113 Mass. 277, 279; *Thompson on Private Corporations*, § 5731.

The defect in the organization of the first corporation of the name since assumed by the plaintiff did not prevent it from being a corporation de facto, nor disqualify it from acquiring, holding, and conveying real estate. *Lamkin v. Baldwin & Lamkin Mfg. Co.*, 72 Conn. 57, 65, 43 Atl. 593, 1042, 44 L. R. A. 786; *Society Perun v. Cleveland*, 43 Ohio St. 481, 3 N. E. 357. It appears from a paragraph of the defendant's draft finding marked "proven" that in October, 1890, it was adjudged, on quo warranto proceedings, to have no legal existence. This did not destroy such rights of property as it then held. A private corporation exists mainly for the benefit of its shareholders. For their convenience and protection they are allowed to assume a corporate name, and become in law an artificial person. Whether the quo warranto proceedings were brought against the New York, Bridgeport & Eastern Railway Company or its shareholders or directors is not stated; but in either case those who had been claiming a right to exercise by that name a corporate franchise could do so no longer. This, however, did not destroy all the property held by the supposed corporation at the date of the judgment. It transferred its custody and changed its uses. The custody passed, under well-settled equitable principles, from the directors acting as directors for a corporation de facto to the directors acting as trustees for those interested in succession to what had been a corporation de facto. The uses for which they thereafter held it were to satisfy any indebtedness which might be due from the supposed corporation, and transfer the balance, if any, to the shareholders pro rata. Such a liquidation of the corporate business would naturally require a sale of what had been the corporate assets. A receiver might have been appointed for that purpose. See *Wilcox v. Continental Life Ins. Co.*, 58 Conn. 468, 477, 10 Atl. 244. Whether, in the absence of such an interference by the courts, the directors, as such trustees, could authorize a conveyance by a single shareholder and director, and, if so, what form it should have assumed, and what effect acquiescence by those interested might have in curing irregularities, it is unnecessary now to inquire, since there must be a new trial on which the facts regarding the deed of December 6, 1890 (stated in the finding to have been made by the corporation, and in a paragraph marked "proven," in the defendant's draft finding, to have been executed by Henry R.

Parrott as its president), can be more fully ascertained. See *Morawetz on Corporations*, § 1032; *Saugatuck Bridge Co. v. Westport*, 39 Conn. 337, 350; *Sullivan County R. R. v. Conn. Lumber Co.*, 76 Conn. 464, 473, 57 Atl. 287.

The lapse of five years from its incorporation without the completion of its railroad which occurred January 8, 1896, did not ipso facto destroy the corporate existence of the plaintiff. This was simply a ground of forfeiture, and it does not appear that the state has instituted any proceedings to oust it of its franchises. It remains, therefore, a corporation de jure. *New York & New England R. Co. v. N. Y., N. H. & H. R. R. Co.*, 52 Conn. 274, 284. The repeal of the general railroad law in 1905 (*Pub. Acts 1905*, p. 335, c. 126), under which it was incorporated, did not affect or purport to affect the continued existence of any companies which had already been incorporated under its provisions. When a private corporation fails to hold its regular annual meeting for the election of officers, those already occupying such a position hold over until their successors are elected. *McCall v. Byram Mfg. Co.*, 6 Conn. 437, 438; *Spencer v. Champion*, 9 Conn. 542-544. Mr. Parrott, therefore, has been since 1891 continuously a director and president of the plaintiff company. To enable him to sell any of its real estate to advantage, it would be necessary to satisfy any who might be considering its purchase that a good title could be conveyed. For this purpose, such a suit as the present would be a proper mode of determining the nature of the company's title, and authority in Mr. Parrott for its institution was therefore fairly implied in the general terms by which the directors in 1895 gave him such plenary powers as to the disposition of the estate. The court of common pleas dismissed the action on the ground that the plaintiff had no title, and did not pass on the claim of title made by the defendant. It came to this result because it found that the land had been permanently abandoned for railroad uses, and was of opinion that thereby the title conveyed in 1884 became extinguished. This error lies at the foundation of the judgment, and justice will be best promoted by a new trial as to all the issues.

There is error, and a new trial is ordered. The other Judges concurred.

(81 Conn. 358)

WOLCHO v. ARTHUR J. ROSENBLUTH & CO.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. EXPLOSIVES (§ 9*)—NEGLIGENT SALE—USE INTENDED—MATERIALITY.

That the manufacturer and seller of a preparation, the ignition of which while being used

on a stove caused a death, did not intend that it should be so used, does not affect his liability for the death, if from the labels and directions upon the cans persons of ordinary intelligence who were expected to use the preparation, and who read or had read to them the labels and directions, were informed that it might be so used.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. § 6; Dec. Dig. § 9.*]

2. EXPLOSIVES (§ 9*)—DANGEROUS USE—CONTRIBUTORY NEGLIGENCE.

That a preparation was labeled "Stoveline," was represented to be "for use on all iron work," and capable of standing a high temperature, warranted one who had no knowledge or notice of the dangerous character of the preparation to assume that it was intended to be used upon stoves, and might safely be used upon a hot stove.

[Ed. Note.—For other cases, see *Explosives*, Dec. Dig. § 9.*]

3. EXPLOSIVES (§ 9*)—DANGER—QUESTION OF FACT.

Whether it was dangerous to use upon a hot stove a particular preparation was a question of fact.

[Ed. Note.—For other cases, see *Explosives*, Dec. Dig. § 9.*]

4. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence by the trial judge who heard and saw witnesses is conclusive.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

5. EXPLOSIVES (§ 9*) — NEGLIGENT SALE — PLEADING—SUFFICIENCY.

In an action for negligently selling a preparation which, while being used on a stove, ignited, causing a death, plaintiff was not required to state in technical terms just what happened or was liable to occur when the preparation was applied to the hot stove; an averment that when used upon hot substances—in connection with an averment that decedent was injured when using it upon her kitchen stove—it became dangerous, in that it was liable to ignite and cause a fierce blaze in the nature of an explosion, difficult to control, being sufficient to permit proof that the preparation was dangerous when used upon a hot stove, because when so heated the fumes arising from the benzine contained in the preparation and uniting with the air formed a dangerous mixture, which coming in contact with the flame in or near the stove was liable to cause an explosive flame.

[Ed. Note.—For other cases, see *Explosives*, Dec. Dig. § 9.*]

6. EXPLOSIVES (§ 9*)—NEGLIGENT SALE—EVIDENCE—SUFFICIENCY.

Evidence in an action for negligently selling a preparation, which, while being used on a stove, ignited, causing a death, held insufficient to disprove defendant's negligence in failing to give notice of the inflammable character of the preparation.

[Ed. Note.—For other cases, see *Explosives*, Dec. Dig. § 9.*]

7. EXPLOSIVES (§ 9*)—NEGLIGENT SALE—CONTRIBUTORY NEGLIGENCE.

Evidence in an action for negligently selling a preparation, which, while being used on a stove, ignited, causing death, held to sustain

a finding that decedent was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Explosives, Dec. Dig. § 9.*]

8. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of testimony to show a particular fact was not prejudicial error where that fact was found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4190; Dec. Dig. § 1056.*]

9. EXPLOSIVES (§ 9*)—NEGLIGENT SALE—EVIDENCE.

In an action for negligently selling a preparation which, while being used on a stove, ignited, causing a death, defendant could not show whether there was any difference between the particular preparation and other "stovepipe enamels" as to warnings as to their use, where it did not appear that the constituents of the other preparations were the same as those of the particular preparation, nor that such other preparations were advertised to be used upon stoves, and where the names of such other preparations did not indicate that they might be used upon stoves.

[Ed. Note.—For other cases, see Explosives, Dec. Dig. § 9.*]

10. EVIDENCE (§ 594*)—UNCONTRADICTED TESTIMONY—WEIGHT.

Under the rules of the Supreme Court (Practice Book 1908, p. 268, § 10) a fact need not be treated as admitted or undisputed because no witness has contradicted testimony thereto.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Action by Henry Wolcho, administrator, against Arthur J. Rosenbluth & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Richard H. Tyner and Louis M. Rosenbluth, for appellant. William H. Ely and Charles C. Ford, for appellee.

HALL, J. While the plaintiff's intestate, Lena Wolcho, was using upon her stove a liquid mixture called "Stoveline," prepared and sold by the defendant, it suddenly ignited and set fire to her clothing, and she received injuries from which she died. The complaint alleges that said preparation "contained a large quantity of inflammable material, and, when used upon hot substances, becomes dangerous to use, in that it is liable to ignite and cause a fierce blaze in the nature of an explosion which it is difficult to control," and that the defendant negligently sold said article without warning purchasers of its dangerous character.

Concerning the sale of said article by the defendant, its composition, and characteristics, and the manner in which the deceased was injured while using it, the trial court has found these facts: The liquid preparation, called "Stoveline," is sold in half pint

cans, upon each of which are printed labels and directions, of which the following are copies:

(ODORLESS).

"STOVELINE"

TRADE-MARK.

STOVE-PIPE-ENAMEL.

For use on all Iron Work.

ONE-HALF PINT.

"STOVELINE"

TRADE-MARK.

STOVE PIPE ENAMEL.

FOR USE ON Stovepipes, Radiators, Registers, Grates, Steam and Water Pipes, Locomotives, Iron Fences, Gas Stoves, Boilers, Smoke Stacks, Furnaces, Ventilators, Sewing Machines and all other places where a smooth lasting brilliant black finish is desired.

Prevents Rust.

Will not crack or peel and will stand a high temperature.

DIRECTIONS FOR USE.

Remove cover by prying under Edge with a nail or blunt instrument. Shake and stir well and apply with bristle brush. Rusty articles should be sandpapered before Enamel is applied. One coat will produce a brilliant black finish.

A. J. ROSENBLUTH & CO.,

NEW HAVEN, CONN., U. S. A.

It is an artificial composition, composed of benzine, oils, and turpentine, and japan, the proportions of which are: Benzine, 41.41 per cent.; oils and turpentine, 15.08 per cent.; and japan, 43.56 per cent. The liquid when brought in contact with a flame or very close to a flame will ignite and burn freely, though not with a fierce flame, or one explosive in its nature. The liquid, independently of the vapor which it may give off, is not explosive. It is less dangerous than pure benzine. The benzine in the compound will give off fumes according to its temperature, and that of the

material upon which it is being used, vaporizing more rapidly as the temperature rises. These fumes, mixing with the air, are liable to form a highly and dangerously explosive mixture, which, when brought in contact with a flame, will explode or cause an explosive flame of a great strength and power. By reason of these qualities, due to the presence of benzine in the proportions stated, the compound is "a dangerous substance to use on or about any warm or hot surface, as a stove, where there is, or is liable to be, any flame with which said fumes may come in contact, whether said flame is in said stove or within the possible reach of the mixture of air and benzine fumes which may be formed in the use of said compound."

Prior to said 6th day of March, 1906, the defendant sold to R. and F. H. Kamak, of the city of Derby, who were retail dealers in paints, oils, stove polish, etc., a number of cans of said Stoveline, put up and manufactured by him, without notifying them of the dangerous character of it, and without notifying them of the danger arising from the use of it on or about hot stoves or stoves in which there was a fire. The defendant was a chemist and knew the composition of Stoveline, and was familiar with the nature and danger of the use of benzine. Since 1903 he had sold 15,000 cans of Stoveline, but had never before heard of an accident from its use. On the 1st day of March, 1906, the plaintiff's intestate purchased of said Kamaks one of said cans of Stoveline for the purpose of polishing a stove. She was not cautioned by them against using the same on a hot stove, or near any flame of fire, and she did not know that there was danger in so using it. On the 6th day of March, 1906, Mrs. Wolcho used said Stoveline in the manner directed on the can, which was read to her by her daughter, and with the brush furnished for such purpose on a stove in her kitchen. A coal fire was still burning in the stove, though it was then going out. The stove was warm, but not red hot. An ordinary lighted kerosene lamp stood on a table some five or six feet from the stove. The door and windows of the kitchen were closed. She was holding the can of Stoveline in one hand, and with the other applying the Stoveline to the oven door upon the front of the stove, the stove covers being on and the doors closed, and no flame apparent from the top or sides of the stove, when said compound caught fire, the benzine in the can ignited, and burst into flame, and set fire to the clothes of the plaintiff's intestate; and, as a result, she was so severely burned that she died on April 6, 1906. She was in the exercise of reasonable care in so using said mixture.

In the trial court the case was heard in damages upon the defendant's default, and his consequent prima facie admission of liability, upon the grounds alleged in the complaint, and his assumption of the burden of disproving such liability.

The defendant contended in the court below, as he does in this court, that he sustained this burden of proof by establishing, among other things, (1) that the preparation in question was not manufactured or sold for use on stoves, but as a "stovepipe enamel"; (2) that its use even upon a hot stove was not dangerous; (3) that, if it has proved to be dangerous, the defendant was not negligent in selling it without notice of its inflammable character; and (4) that the plaintiff's intestate was negligent in using it upon a hot stove.

Regarding the first proposition which the defendant claims to have established, it is immaterial that the defendant did not intend that "Stoveline" should be used on stoves if from the labels and directions upon the cans persons of ordinary intelligence, who were expected to use this article, and who read, or had read to them, the labels and directions on the cans, were informed that it might be used on stoves. The name "Stoveline" on the label, the statement that it is "for use on all iron work," and that it would "stand a high temperature" are in our opinion clearly sufficient to justify the conclusion reached by the trial court that one who had no knowledge or notice of the dangerous character of this mixture might reasonably have supposed that it was intended to be used upon stoves, and might safely be used upon a hot stove.

Second, whether it was dangerous to use this preparation upon a hot stove, was a question of fact, upon which the evidence was conflicting, and the decision of the trial court, who heard and saw the witnesses who testified upon this question, is final. The danger of so using it, as stated in the finding, is not materially variant from that alleged in the complaint. The plaintiff was not required to state in technical terms and with scientific accuracy exactly what happened or was liable to occur when this mixture was applied to a hot stove. The averment that when used upon hot substances (in connection with the averment that Mrs. Wolcho was injured when using it upon her kitchen stove) it became dangerous, "in that it was liable to ignite and cause a fierce blaze in the nature of an explosion which is difficult to control," was sufficient to permit proof that the mixture was dangerous to be used upon a hot stove, because, when so heated, the fumes arising from the benzine contained in the compound, and uniting with the air, formed a dangerous mixture, which coming in contact with a flame in or near the stove was liable to cause an explosive flame.

Upon the third claim we find no facts inconsistent with the conclusion of the trial court that the defendant failed to disprove his alleged negligence. The facts found—that he was a chemist; that he knew the composition of Stoveline, and was familiar with the inflammable nature and danger of the use of benzine, and that the labels which

he placed upon the cans contained no notice or warning of such danger, if they do not establish his negligence—do not prove his freedom from negligence, nor does the fact found that during his two or three years' previous experience in the sale of this article he had heard of no accident from the use of it.

The fourth claim, that the facts show that the plaintiff's intestate was guilty of contributory negligence, cannot be sustained. The trial court has not only held that the defendant failed to sustain his burden of proof upon this question, but has found that Mrs. Wolcho was in the exercise of reasonable care in using this polish as she did. We find no error in law in such decision. The directions upon the cans were read to Mrs. Wolcho. Her belief that the mixture was intended for use upon a stove was not an unreasonable conclusion from the language of the labels and directions, and, having reasonable ground for believing that Stoveline might properly be used as a stove polish, the use of it for that purpose upon a hot stove was not negligence as a matter of law. The ruling excluding the testimony of the defendant that he had never heard any complaint about this material before the accident was not injurious to the defendant, as it is found as a fact that he had heard no complaint.

One Dr. Stanley, a witness for the defendant, having testified that he had experimented upon other mixtures similar to Stoveline, naming one called "Sapolin" and another called "P. G. E.," was asked how their component parts compared with those of Stoveline; and one Meyer, a witness for the defendant, having testified that he had dealt several years in Stoveline and other "stovepipe enamels," was asked whether there was any difference in them as to directions or warnings as to the use of them. Both these inquiries were properly excluded. First, it does not appear to have been shown that the constituent parts of the other mixtures were precisely the same, and in the same proportions as those of Stoveline; further, it did not appear that these other mixtures were advertised to be used upon stoves, or were in fact used upon stoves. One of these witnesses describes them as "stovepipe enamels." They may have been only advertised to be used, as the defendant claims Stoveline was, for other purposes than as a stove polish. They evidently were sold under different names than Stoveline, and the names under which they were sold do not appear to indicate that they were to be or might be used upon stoves; as it is claimed the word "Stoveline" does. The fact that mixtures similar to Stoveline, and dangerous to be used upon a hot stove, had without notice of such danger been generally sold for other purposes, did not tend to prove that the defendant was not negligent in selling the ar-

ticle in question as one which might be safely used upon a hot stove. Later in the trial the defendant was permitted to testify that he did not know of the labels upon any other stovepipe enamel except upon the one called "Sapolin," that that contained no warning, and that the label on Stoveline was copied very nearly from it. Of other rulings complained of it is sufficient to say that they were manifestly correct.

The defendant has, under section 797 of the General Statutes of 1902, procured the evidence and rulings to be made a part of the record, and in his assignment of errors has requested numerous corrections of the finding. The basis of most of the requests for material changes seems to be that what some witness has testified to, and no witness has contradicted, must be treated as an admitted or an undisputed fact, under the rules of Supreme Court (Practice Book 1908, p. 268, § 10). That this is a mistaken view of the meaning of the rule is apparent from its express language: "That a witness testified to a fact without direct contradiction is not of itself sufficient; the trial court must judge of the credit of a witness." We perceive no error of law upon the part of the trial court in reaching the conclusions stated in its finding, and they sustain the judgment rendered. The requests for corrections are denied.

There is no error. The other Judges concurred.

(81 Conn. 532)

ATWOOD v. JARRETT.

(Supreme Court of Errors of Connecticut. Jan. 7, 1909.)

1. TRIAL (§ 186*)—QUESTIONS OF LAW OR OF FACT—DURESS.

What constitutes duress is a matter of law. Whether or not it enters into a particular transaction is a question of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 320, 321; Dec. Dig. § 136.*]

2. APPEAL AND ERROR (§ 495*)—RECORD—MATTERS TO BE SHOWN BY.

Where the record contains no finding of the subordinate facts, and no statement of the legal principles applied by the trial court in reaching its conclusion that no duress was practiced, the Supreme Court of Errors is left without material for an inquiry into the propriety of the court's action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2287; Dec. Dig. § 495.*]

3. APPEAL AND ERROR (§ 499*)—RECORD—MATTERS TO BE SHOWN BY.

Under Gen. St. 1902, § 802, providing that the Supreme Court of Errors shall not be bound to consider any error unless it appears from the record that the question was raised below and decided adversely to appellant, a question not shown by the record to have been presented to the court below will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2295; Dec. Dig. § 499.*]

Appeal from Superior Court, New Haven County; Milton A. Shumway, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action on notes and collateral agreements by Dwight M. Atwood against William P. Jarrett. Judgment for plaintiff, and defendant appeals. No error.

Ulysses G. Church, for appellant. Francis P. Guilfolle, for appellee.

PRENTICE, J. There are only three assignments of error. The first two complain of the action of the court in not holding, as the answer set up, that there was such duress practiced by the plaintiff upon the defendant that the agreements sued upon would not be enforced. What constitutes duress is a matter of law. Whether or not it enters into a particular transaction is a question of fact. *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. The court has found that the plaintiff practiced no duress. The record contains no finding of the subordinate facts, and no statement of the legal principles applied in reaching its conclusion. We are therefore left without material for an inquiry into the propriety of the court's action in this regard. The record nowhere, either in the pleadings, finding, or elsewhere, discloses that the claim embodied in the remaining assignment of error was either presented to or passed upon by the court below. It is therefore not properly before us for consideration. *Sperry v. Butler*, 75 Conn. 369, 371, 53 Atl. 899; Gen. St. 1902, § 802.

There is no error. The other Judges concur.

(81 Conn. 502)

A. W. BURRITT CO. v. NEGRY et al.

(Supreme Court of Errors of Connecticut. Jan. 6, 1909.)

1. MECHANICS' LIENS (§ 115*)—SUBCONTRACTOR'S LIEN—PAYMENTS TO PRINCIPAL CONTRACTORS—TIME OF FILING LIEN—STATUTES. Gen. St. 1887, §§ 3020, 3021, authorized a mechanic's lien to be filed by a subcontractor 60 days after materials furnished, and allowed to the owner whatever payments he should make to the original contractor in good faith before notice of lien. Gen. St. 1902, § 4137, gave the right to file a lien any time after materials furnished and until 60 days after ceasing to furnish materials, and section 4138 allowed to the owner whatever payments he should make to the original contractor in good faith before notice of lien, and provided that no payment should be made in advance of the time specified in the contract without notice of intention to make such payment being given to persons known to have furnished materials. *Held*, that payments made in advance of the time specified in the contract without notice of intention being given to subcontractors furnishing materials with knowledge of the owner, though made before notice of lien was filed, could not be allowed the owner, as otherwise the last provision of section 4138 would be of no force.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 150-159; Dec. Dig. § 115.*]

2. PAYMENT (§ 17*)—NOTES—EFFECT ON MECHANIC'S LIEN.

An owner of property before notice of lien filed paid a subcontractor his claim against the contractor, partly in cash and the balance by note. The owner received no receipt other than a memorandum showing a credit for the cash paid and the amount of the note, and the account in the subcontractor's book was not closed until after another subcontractor filed a written notice of lien, and brought suit to foreclose. *Held*, that the note was not a payment of the first subcontractor's claim and the owner could not charge it against the contractor so as to destroy the second contractor's lien on that amount.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 70-77; Dec. Dig. § 17.*]

Appeal from Superior Court, Fairfield County; Silas A. Robinson, Judge.

Action by the A. W. Burritt Company against Antonio Negry and others to foreclose a mechanic's lien. From a judgment for plaintiffs, defendant appeals. No error.

The defendant Negry, being the owner of a lot of land in Bridgeport, on the 15th of August, 1905, entered into a written contract with Pillotti & Son, a firm of builders, as original contractors to erect a building thereon. By the terms of the contract they were to be paid \$3,620 therefor in four payments, the first, of \$1,000, to be made when all the outside work was done and roof ready for the tinner; the second, of \$1,000, when the building was ready for the brown mortar, the third, of \$1,000, when the carpenter work was completed and accepted by the owner, and the last, of \$620, within nine months after the job was completed. The carpenter work was completed and accepted by the owner on or about March 15, 1906. The plaintiffs, at the request of the original contractors, began on October 2, 1905, to furnish lumber, timber, doors, sashes, and trim for the building and ceased to furnish such materials on the 10th of March, 1906. Negry knew on December 27, 1905, that they had been and still were furnishing these materials for the building. He made to the original contractors the first two payments of \$1,000 each on the 28th day of October and 29th day of December, when they were due, respectively, under the terms of the contract. He also between December 29, 1905, and January 27, 1906, before any further payment was due under the contract made to the original contractors several additional payments amounting in all to \$910. He gave the plaintiffs no notice of his intention to make these payments, and they had no knowledge that he had made them until they had filed their lien. After these payments had been made, and before the final payment was due under the contract, they gave him an oral warning and a written notice not to pay the original contractors any part of the final payment. On March 16, 1906, another subcontractor who had furnished materials for the build-

ing to the amount of \$337 served a legal notice upon Negry that it intended to claim a lien therefor upon the building. He thereupon at once paid such subcontractor to apply on the bill of the original contractors \$237 in cash and gave it his note for the balance, \$100, payable in two months to the order of the subcontractor. He did not obtain a receipt in full for the amount of the bill owned by Pillotti & Son, but received a memorandum showing a credit of \$237 in cash and \$100 by note. The account of Pillotti & Son on the subcontractor's books was not closed until two months later, when the note was paid by Negry. The plaintiffs gave Negry the statutory notice of their intention to claim a lien on March 30, 1906, and lodged with the town clerk their certificate of lien, to foreclose which this action is brought, on the following day. At this time there was due to the plaintiffs from the original contractor a balance of \$1,538.99 for materials furnished in the construction of the defendant's building. The defendant claimed upon the trial that in determining the amount for which the owner was liable to the lienors the payments amounting to \$910 should be credited to the defendant as having been made in good faith and should be deducted from the amount due to the contractor; also, that the defendant should be credited with the \$100 note in the same manner as though that sum had been paid in cash. The court overruled these claims. The appeal questions the correctness of these rulings.

John C. Chamberlain and Alexander L. De Laney, for appellant. John S. Pullman, for appellees.

THAYER, J. (after stating the facts as above). To preserve their lien the plaintiffs as subcontractors were bound to give the defendant written notice that they had commenced to furnish materials for the construction of his building and intended to claim a lien therefor. They were bound to give this notice "after commencing, and not later than sixty days after ceasing, to furnish materials or render services." Gen. St. 1902, § 4137. The statute gave them the option to serve the notice at once upon commencing to furnish the materials or to delay it to any date not later than sixty days after ceasing to furnish them. They were clearly within their rights therefore in delaying the notice until 20 days after they had ceased to furnish materials. Under section 4138 of the statutes their lien could in no case attach upon the defendant's building to a greater amount than he had agreed to pay the original contractor for its construction; and, if he had reduced the amount due the contractor by payments under the contract made to him in good faith before notice of the lien, the lien could not attach for a greater amount than the balance due to the contractor. The question is whether

the payments amounting to \$910 are to be allowed as made in good faith. The statute last mentioned provides that "in determining the amount to which any lien or liens shall attach upon any land or building, the owner of such land or building shall be allowed whatever payments he shall have made, in good faith, to the original contractor or contractors before receiving notice of such lien or liens. No payments made in advance of the time stipulated in the original contract shall be considered as made in good faith, unless notice of intention to make such payment shall have been given in writing to each person known to have furnished materials or rendered services at least five days before such payment is made." The payments in question were made in advance of the time stipulated in the contract, and when the defendant knew that the plaintiffs had been and were furnishing materials for his building and without giving them any notice of the intended payments. If therefore, the statute is to receive a literal construction these payments are not to be considered as made in good faith, and so cannot be allowed to the defendant in determining the amount to which the plaintiffs' lien attaches.

The defendant insists that to refuse to allow payments thus made before notice of intention to claim a lien had been given, and which, although made in advance of the stipulated time, might have been made at the stipulated time and still in advance of the notice, is to defeat the purpose of the statute, which he claims is solely to secure the subcontractor's "right, if he serve his notice of intention to claim a lien before a payment comes due, to find in the hands of the owner the entire sum." It is apparent that, if this is its sole purpose, the last sentence of the statute is of no force. Under the statute prior to its amendment in 1899 (Pub. Acts 1899, p. 1052, c. 121), this provision did not appear. The lienor was then bound to give his notice "within sixty days from the time when he shall have commenced to furnish materials," etc., and the owner was "allowed whatever payments he shall have made in good faith to the original contractor or contractors before receiving notice of such lien." Gen. St. 1887, §§ 3020, 3021. The amendment of 1899 permitted the subcontractor to delay filing his notice of lien until 60 days after he ceased to furnish materials or services, and the closing language of what is now section 4138 was added at that time. To say that the present statute means only what the defendant claims it does is to say that the added language means nothing in the statute to which it was annexed.

The statute, as it stood before, gave the lienor the right which the defendant claims is the only one given by the present law—the right, if he served his notice before a payment became due, to find in the hands of the owner when the lien matured the entire sum

which was there when notice was served. It is to be presumed that the amendment was not made without a purpose. Sections 4137 and 4138 are for the benefit of persons who furnish labor and material for the construction of the building. It gives them a lien upon the building as against an owner between whom and themselves there is no privity. It gives their lien a preference over that of the original contractor. They are thus given a means of securing through the owner's property a debt due to them from the contractor alone. The tendency to extend the time within which the notice of intention to claim the lien may be served appears in the amendments already referred to. It is not material at present to inquire why the parties do not serve these notices upon beginning to furnish the labor or materials. Possibly such a course is not favored by the original contractor. The longer the delay the greater the opportunity by payments made collusively or in bad faith to defeat the subcontractor's lien and the greater the difficulty in discovering and proving the bad faith. The provision in question, by providing that no payment made in advance of the time stipulated shall be considered as made in good faith unless notice of intention to make it shall have been given to each person known to have furnished materials or rendered services at least five days before such payment is made, is therefore of material benefit to the subcontractor. If, by inadvertence or design, he has delayed giving early notice of his lien, notice of the intended payment will enable him to protect himself against it by at once serving notice of the lien. On the other hand, if such notice of lien is not served within five days after notice of the intended payment has been given, the owner may proceed with the contemplated payment in safety if made in good faith. Under the former law he could make no payment after notice of an intended lien had been served upon him; but, before such notice was served, he could make payments both at, and in advance of, the stipulated time if made in good faith. Under the present law he is, as before, allowed all payments made when due and in good faith before notice, but he is not allowed for payments made when not due, although made before notice of a lien, unless he first gives five days' notice of the intended payment to those persons who he knows have furnished materials and labor. Under the law before amendment notice of the intended lien prevented any payment; under the amended law, knowledge of the furnishing of materials and labor prevents the making of any payment which is not due unless five days' notice of such intended payment is given. There is no injustice in compelling the owner, when he contemplates making a payment before the time provided in his contract, to notify all those, of whom he has knowledge, who, perhaps

with knowledge of the provisions of the contract and relying upon the same, have neglected to file their liens. If he has failed to do this and is thus compelled to pay again, the fault is his own. Under the statute as we interpret it the defendant's advance payment cannot be considered to be made in good faith.

Whether the note for \$100 given to another subcontractor who had given notice that he claimed a lien upon the defendant's building should be allowed the defendant in determining the amount of the plaintiffs' lien depends upon different considerations. The question is, Was the giving of the note under the circumstances detailed in the statement of the case a payment? It was given after the final payment under the contract was due, and, if it is to be considered as a payment to the contractor, it should be allowed to the defendant. But the mere giving of the note in the absence of any agreement that it should be in payment of the contractor's indebtedness to the subcontractor would not extinguish that indebtedness or be a payment of it. *Bill v. Porter*, 9 Conn. 23, 30; *Hopkins v. Forrester*, 39 Conn. 351, 354; *Usher v. Wadlingham*, 62 Conn. 412, 426; *Cummings v. Gleason*, 72 Conn. 587, 589, 45 Atl. 353. No such agreement is found, but it is found that the party receiving the note did not receipt the bill, but merely gave a memorandum of credit by note. The party receiving the note, therefore, had he seen fit, could have filed his certificate of lien as a security for the original debt, and could then have claimed an apportionment of the security between himself and the plaintiffs. The case is quite similar to *Hopkins v. Forrester*, supra, where it is held that notes given by the owner to the lienor were not a payment, and did not discharge the lien. Upon the finding the defendant failed to prove that the note was a payment.

There is no error. The other Judges concurred.

(31 Conn. 492)

IRWIN v. JUDGE.

(Supreme Court of Errors of Connecticut. Jan. 6, 1909.)

1. APPEAL AND ERROR (§ 1005*)—REVIEW—QUESTIONS OF FACT.

It is not a sufficient reason for holding that it was error not to set aside a verdict that the reviewing court is of opinion that the jury ought to have reached a different conclusion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3948-3950; Dec. Dig. § 1005.*]

2. MASTER AND SERVANT (§ 801*)—INJURIES TO THIRD PERSONS—EXISTENCE OF RELATION.

Where, though a chauffeur was in the employ and pay of another person than defendant, he had been intrusted by defendant with the running and management of his car, defendant was liable for his management thereof.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1213; Dec. Dig. § 301.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. PLEADING (§ 428*)—OBJECTIONS—MODE OF MAKING.

The proper way, in an action for injuries to a bicyclist in a collision with an automobile, to have raised the question whether under the rule of pleading (Practice Book 1908, p. 244, § 144) plaintiff should have alleged that the automobile was driven by defendant by his agent would have been to object to proof that it was so driven.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 428.*]

4. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

An instruction, in an action for injuries sustained by a bicyclist in a collision with an automobile, that the statute law made it defendant's duty, when he met plaintiff, to slacken his speed, if necessary, and to seasonably turn to the right so as to give her one-half of the traveled path, if practicable, and a fair and equal opportunity to pass, clearly stated defendant's duty as fixed by Pub. Acts 1906, p. 412, c. 216, and pages 426, 427, c. 230, §§ 10, 11, 14, and was not open to criticism that it placed the entire burden of avoiding the collision upon defendant, where the court had already defined plaintiff's duty, and had instructed that she could not recover if the accident was due to her failure to perform it.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 295.*]

5. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Instructions, in an action for injuries to a bicyclist in a collision with an automobile, that if defendant was on the left-hand side of the street when the collision occurred, he failed to perform a duty which he owed by statute to plaintiff, and should be found negligent, unless he was coming from an intersecting street, and had not had time to get to the right-hand side, and that when a collision occurs, the fact that a person is on the wrong side is *prima facie* evidence of negligence, are not open to the criticism that they stated that one may not lawfully drive upon the left-hand side of the road, where the court had previously instructed that the law did not require a person to drive on his right side, but did require him to turn to his right when meeting another, and since such instructions were expressly confined to the position of defendant at the time of the collision.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 295.*]

6. MUNICIPAL CORPORATIONS (§ 702*)—STREETS—NEGLIGENT USE.

To turn an automobile sharply to the driver's left hand on coming in from an intersecting street is negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 702.*]

7. MUNICIPAL CORPORATIONS (§ 705*)—NEGLIGENT USE—HIGH RATE OF SPEED.

A high rate of speed is an unreasonable one, considering the time and place, and one which prevents the driver from controlling the automobile so as to avoid a collision, though it may be less than the maximum statutory rate.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. § 705.*]

8. MUNICIPAL CORPORATIONS (§ 706*)—STREETS—ACTIONS FOR NEGLIGENT USE—INSTRUCTIONS.

An instruction, in an action for injuries sustained by a bicyclist in a collision with an automobile, that if defendant was driving at a high rate of speed at the time, the jury must find that such act was in itself unlawful, and therefore negligent, must be considered in con-

nection with facts to which it was intended to apply.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

9. MUNICIPAL CORPORATIONS (§ 705*)—STREETS—NEGLIGENT USE—AUTOMOBILES.

The driving of an automobile at a high rate of speed through city streets at times when, and places where, other vehicles are constantly passing, and persons liable to be crossing, or around corners at the intersection of streets, or in passing by street cars from which passengers have just alighted, or may be about to alight, or in other similar places and situations where persons are liable not to observe an approaching automobile, is in itself actionable negligence; and one operating an automobile is bound to take notice of the peculiar dangers of collisions in such places, and cannot secure immunity from liability by merely sounding the automobile horn.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 705.*]

Appeal from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Personal injury action by Annie Irwin against Franklin Judge. There was verdict and judgment for plaintiff for \$500, and a motion to set aside the verdict was denied, and defendant appeals. No error.

J. Belden Hurlbutt, for appellant. James T. Hubbell, for appellee.

HALL, J. The plaintiff, who at the time of the accident by which she was injured was 16 years of age, brings this action by her next friend, alleging in her complaint that, on the 1st day of August, 1906, at about 6 o'clock in the afternoon, when she was going southerly down North Main street on the right-hand side of the street, in the city of South Norwalk, riding a bicycle, at a moderate rate of speed, she was, at a described point, run into by an auto car going northerly on the left-hand side of the road, and driven by the defendant at a high rate of speed, and injured, and that the accident was caused by the defendant's negligence in being on the wrong side of the street, and running his car at so high a rate of speed that it was beyond his control. Main street, in the city of South Norwalk, runs north and south. Washington street, running east and west, crosses it at a central point of the travel and traffic of the city. On the map, made a part of the record, the portions of Main street north and south of the Washington street crossing are designated, respectively, "North" and "South" Main street, and those of Washington street east and west of said crossing "East" and "West" Washington street. There are trolley tracks near the center lines of each of said streets. On the 1st of August, 1906, the defendant, in his automobile, was riding easterly on West Washington street, intending to turn up North Main street. His machine was operated by one Caldwell, who commenced working as a chauffeur about two weeks before that time. The plaintiff was riding

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a bicycle on North Main street, going southerly, and intending to turn down East Washington street. The collision occurred north of the Washington street crossing. There was a conflict of testimony as to the precise point where the collision occurred, and also regarding the exact direction in which the plaintiff was going, and the speed of the automobile and the direction in which it was going. The plaintiff claimed that as going southerly on North Main street, she approached the Washington street crossing, she was riding her wheel on the west side of the street, and just west of the trolley tracks on North Main street, and that the automobile coming from West Washington street turned northerly, and came rapidly up the west side of North Main street, and ran into her wheel, and threw her off, as she was about to cross the trolley track to go over to East Washington street. The defendant claimed that when, going easterly along West Washington street, he reached the Main street crossing, he at a slow rate of speed crossed to the east side of North Main street, and when his automobile had stopped, or nearly stopped, the plaintiff, who had crossed, or was crossing, to the east side of North Main street, ran into the automobile. In his appeal to this court the defendant complains: (1) That the damages awarded are excessive; (2) that the trial court erred in denying defendant's motion to set aside the verdict as against the evidence; and (3) that it erred in refusing certain requests to charge, and in giving certain instructions to the jury. The claim that the damages awarded are excessive is not pursued by the defendant. Regarding the second point, it would be unprofitable to repeat here the evidence which we deem sufficient to support the verdict rendered. It is enough to say of this claim, that an examination of the evidence satisfies us that the trial judge correctly stated, in his memorandum of decision, that "upon the conflicting evidence presented the jury might have found in favor of either party." Those of the alleged errors in refusing to charge as requested which require notice are sufficiently considered in discussing the exceptions to the charge itself.

First, regarding the charge, error is predicated upon the statement of the court to the jury that the defendant was "liable for the management of his car by Caldwell upon the undisputed relations which existed between them." This statement was clearly warranted. Although it appeared that Caldwell was in the employ and pay of another person than the defendant, it was undisputed that at the time of the accident he was, and for some weeks before had been, intrusted by the defendant with the running and management of his car, as chauffeurs ordinarily are by owners of automobiles. He seems to have differed from the ordinary chauffeur only in his inexperience. The defendant testified that Caldwell was taking care of his (the de-

fendant's) car and running it, and that he (the defendant) was teaching him how to run it. Caldwell's testimony was to the same effect. The defendant further testified on cross-examination that he did not claim that he was not responsible for what occurred because he was not running the car. The proper way to have raised the question of whether under the rule of pleading (section 144, p. 244, Practice Book 1908), the plaintiff should have alleged that the automobile was driven by the defendant by his agent Caldwell would have been to object to proof that it was so driven.

Among the other statements made in the charge to which the defendant takes exception in his reasons of appeal are the following:

(2) "The statute law of the state in force at the time of this accident made it the duty of the defendant, when he met the plaintiff, to slacken his speed, if necessary, and to seasonably turn to the right so as to give her one-half of the traveled path, if practicable, and a fair and equal opportunity to pass."

(3) " * * * If you find that he (the defendant) was on the left-hand side of the street when the collision occurred, he failed to perform a duty which he owed, by positive statute, to the plaintiff, and you should find him negligent in that one of the respects alleged in the complaint, unless you find that he was coming into a side street from an intersecting street, and had not had time to get over to the right-hand side of the street. * * *"

(4) "When a collision occurs, the fact that a person is on the wrong side of the road is prima facie evidence of negligence."

(5) "But if you find that he (the defendant) was driving at a high rate of speed at that time, then you must find that such act in itself was unlawful, and was therefore a negligent act."

(6) "No matter how great the rate of speed allowed by law, the operator remains bound to anticipate that he may meet persons or vehicles on a public street, and he must keep his machine under such control as will enable him to avoid a collision."

The statute law thus referred to in the charge, and in force at the time of the accident, provides that when a person driving or operating a vehicle in a highway (and the word "vehicle" by the language of the statute is made to include both automobiles and bicycles) "shall meet another person * * * thus driving or operating a vehicle, if such persons are moving in opposite directions, each shall slacken his pace if necessary and seasonably turn to the right, so as to give half of the traveled road if practicable, and a fair and equal opportunity to pass, to the other * * *"; and that "any such person shall, at the intersection of public highways, keep to the right of the intersection of the centers of such highways when turning to the right, and pass to the right

of such intersection when turning to the left," and that every person who, by neglecting to conform to such rule, "shall cause any injury to the person or property of another or shall negligently collide with another * * * shall pay to the party injured treble damages and costs," and that if the owner of such vehicle shall intrust it to his "agent, servant or employé," to be operated by him upon the highway, and such agent, servant or employé "while in the execution of such owner's business, within the scope of his authority," shall by neglecting to conform to such rule, cause injury to another's property or negligently collide with him, such owner shall pay the injured party his actual damages and costs. The act also imposes a punishment by fine for the violation of certain of its provisions. Pub. Acts 1905, p 412, c. 216.

Sections 10, 11, and 14 of chapter 230, pp. 426, 427, Acts 1905, further provide that no person shall "operate a motor vehicle on the public highways of this state at a rate of speed greater than is reasonable and proper, having regard to the width, traffic and use of the highway, or so as to endanger property or the life or limb of any person, or in any event, within the limits of any city or borough, at a greater rate of speed than one mile in five minutes," and that upon approaching "a crossing of intersecting highways * * * the person operating a motor vehicle shall have the same under control, and shall reduce its speed, * * *" and impose a penalty by fine and imprisonment for the violation of said provisions.

The provisions of the two chapters cited are intended to regulate the conduct of persons moving in the traveled portion of a public highway in passing each other, when going in opposite directions, when going in the same direction, and when approaching the crossings of intersecting highways. The ground of the present action is the alleged failure of the defendant to seasonably turn to the right, when he and the plaintiff approached each other, moving in opposite directions on North Main street, and the driving of his car by the defendant at a high rate of speed at the time of the collision. The complaint contains no reference to any intersection of streets or to any misconduct of the defendant upon approaching a crossing.

The second quoted paragraph of the charge correctly stated the duty of the defendant as fixed by the statute. It is not open to the criticism that it placed the entire burden of avoiding the collision upon the defendant. The court had already defined the duties of the plaintiff, practically as requested by the defendant, and had instructed the jury that she could not recover if the accident was caused by her failure to perform them.

The defendant complains of the language of said paragraphs 3 and 4 of the charge, upon the grounds that it erroneously holds

that one may not lawfully travel upon the left-hand side of the road, and further that the jury were not properly informed what was meant by the wrong side of the road. The trial judge had previously charged the jury, just as the defendant had requested, that the law did not require a person to travel on his right-hand side of the road, but did require him to turn to his right upon meeting a person or team. The remarks of the court in these paragraphs concerning the "left-hand side of the street," and on the "wrong side of the road," were expressly confined to the position of the defendant at the time of the collision. If the collision occurred at the place and in the manner claimed by the defendant, the jury could not, under the instructions given, have found that he was on the wrong side of the road. If it occurred at the point where the plaintiff and some of her witnesses testified it did, the defendant was on his left-hand side—that is, the west side—of the middle line of North Main street, and therefore did not give to the plaintiff that part of the traveled road which the statute required him to give her, if practicable. That it was practicable to give her "half of the traveled road and a fair and equal opportunity to pass" is unquestioned. The court told the jury that it was "agreed that the street was wide enough for both parties to have passed, and that there was no obstruction that made it impracticable for the defendant to give the plaintiff one-half the traveled path." If the defendant turned from West Washington street sharply to the left hand, or west side of North Main street, as the jury evidently found he did, he failed to perform a duty which the law clearly imposed upon him, and he was therefore guilty of negligence. If such violation of duty was one of the causes of the plaintiff's injury, as under the charge of the trial judge we think the jury must have found it was, that negligence was clearly actionable negligence.

As we understand the defendant's objections to paragraphs 5 and 6 of the charge, they are that the trial judge failed to inform the jury what was meant by a high rate of speed, and also erroneously instructed the jury that driving the automobile at a high rate of speed was in itself negligence. In other parts of the charge the trial judge sufficiently defined a high rate of speed by saying, in effect, that it was an unreasonable one, considering the time and place, and one which prevented the defendant from controlling his machine so as to avoid the collision, even though it was less than the maximum statutory rate within the limits of a city. These instructions were correct. In fixing the maximum rate within a city at 12 miles an hour, the statute does not purport to establish a rate of speed which will be lawful under all circumstances. To operate an automobile within the limits of a

city at a greater rate of speed than 1 mile in five minutes was made a criminal offense under the law of 1905. To operate one upon a highway, either within or without the limits of a city, even at a less speed than that, was a violation of the express terms of the act of 1905, and was in itself such negligence as would render one liable civilly for injuries caused by high rate of speed, provided that rate was greater than was "reasonable and proper, having regard to the width, traffic and use of the highway" or was such "as to endanger property or the life or limb of any person." The charge of the trial judge that a rapid rate of speed by the defendant was in itself negligence must be considered in connection with the facts to which it was intended to apply, and which the jury evidently found proven, namely, that the defendant had not, at the time of the collision, passed over, as he claimed he had, to the right hand or east side of North Main street, and that he was not on the left or west side, only because in coming from an intersecting street he had not had sufficient time to pass over to the right or east side of North Main street. As applicable to the evidence before the trial court the instruction given was clearly correct. To persons riding along or crossing our public roads, and especially our city streets, the rapidly moving automobile is a constant source of danger. Their great weight and speed, power and resulting momentum render the consequences of a collision with them much more serious than with ordinary carriages, even moving at a higher rate of speed, and it is much more difficult to avoid, and much more confusing to attempt to avoid, the rapidly moving automobile than the street railway car, which has a fixed and known direction and course

upon its tracks. While owners of automobiles have the right to drive them upon public streets, yet the proper protection of the equal rights of all to use the highways necessarily requires the adoption of different regulations for the different methods of such use; and what may be a safe rate of speed at which to ride a bicycle or drive a horse may be an unreasonably rapid rate at which to drive an automobile in the same place. For the reasons stated, and others which might be given, the driving of an automobile at a high rate of speed through city streets, at times when and places where other vehicles are constantly passing, and men, women, and children are liable to be crossing or around corners at the intersection of streets, or in passing by street cars from which passengers have just alighted or may be about to alight, or in other similar places and situations where people are liable to fail to observe an approaching automobile, is in itself actionable negligence. One operating an automobile under such circumstances is bound to take notice of the peculiar danger of collisions in such places. He cannot secure immunity from liability by merely sounding his automobile horn. He must run his car only at such speed as will enable him to timely stop it to avoid collisions. If he fails to do so, he is responsible for the damage he thereby causes. *Buscher v. N. Y. Transp. Co.*, 106 App. Div. 493, 94 N. Y. Supp. 798; *Thies v. Thomas* (Sup.) 77 N. Y. Supp. 276; *Kathmeyer v. Mehl* (N. J. Sup.) 60 Atl. 40; *McIntyre v. Orner*, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359.

There is no error. The other Judges concurred.

(21 Conn. 479)

WOODBRIDGE ICE CO. v. SEMON ICE CREAM CORPORATION.(Supreme Court of Errors of Connecticut.
Jan. 6, 1909.)**1. SALES (§ 363*)—MODIFICATION—ASSENT OF PARTIES—QUESTION FOR JURY.**

If plaintiff agreed to sell defendant ice for a stated period at a certain price, plaintiff alone could not modify the contract, without defendant's assent thereto, by notifying defendant that a different price would be charged, and the latter's acceptance of the ice and payment of the increased price did not, as a matter of law, operate to modify the contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 363.*]

2. SALES (§ 359*)—MODIFICATION—EVIDENCE.

Where plaintiff, after agreeing to sell defendant ice for a year at a certain price, notified him that an increased price would be there-after charged, defendant's acceptance of the ice and payment of the increased price was strong evidence of a modification of the original contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 359.*]

3. PLEADING (§ 409*)—DEFECTS—WAIVER OF OBJECTION.

In an action for the price of ice sold, where the answer alleged a contract to sell ice for a year at a certain price, but failed to allege that defendant agreed to take the ice for that period, the defect should have been brought to the court's attention by demurrer or objection to evidence of the contract, and not by a requested charge taking from the jury all evidence of the contract.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 409.*]

4. PLEADING (§ 11*)—MATTERS OF EVIDENCE.

Where in an action for the price of ice sold, defendant claimed that the price agreed upon was less than that charged, a general allegation in the answer that plaintiff agreed to sell defendant ice for a year at a certain price was sufficient, without alleging that defendant promised to take ice for a year and pay for it; that being a matter of proof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. § 11.*]

5. APPEAL AND ERROR (§ 884*)—REVIEW—ESTOPPEL TO ALLEGE ERROR.

Where an instruction requested by appellant, assumed that a contract set up in appellee's answer was valid, appellant's contention on appeal that the contract was invalid will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 884.*]

6. SALES (22*)—OFFER TO SELL—ACCEPTANCE.

Where, in an action for the price of ice, defendant claimed that the ice was sold at a price less than that charged by plaintiff, it was error for the court to refuse plaintiff's request for an instruction that if plaintiff offered to sell for a stated price for a year, and defendant did not agree to buy for any stated period, there was no contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 41, 42; Dec. Dig. § 22.*]

7. SALES (§ 864*)—ACTION FOR PRICE—COUNTERCLAIM—INSTRUCTIONS.

Where defendant, in an action for the price of ice, claimed damages for no more than the difference between the value of the ice delivered and that which should have been delivered, an instruction that defendant could show any defects in the ice in mitigation of

plaintiff's demand, and, where more money has been paid than the ice was worth, defendant may recover for overpayment, was erroneous, as it permitted defendant to recoup not only for the defective quality of the ice, but to recover for overpayments not alleged in the answer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1066; Dec. Dig. 364.*]

8. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—PREJUDICIAL EFFECT.

That an instruction, allowing defendant to recover a greater amount than claimed in his answer, was prejudicial, was shown by the fact that the verdict was excessive.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

9. EVIDENCE (§ 271*)—SELF-SERVING DECLARATIONS.

In an action for the price of ice, where defendant claimed that the ice furnished was of inferior quality, testimony that defendant's agent had told witness that plaintiff was robbing him, and he would not pay his bill, was inadmissible as a self-serving declaration made in plaintiff's absence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1087; Dec. Dig. § 271.*]

10. EVIDENCE (§ 271*)—SELF-SERVING DECLARATIONS.

In an action for the price of ice, where defendant claimed that the ice furnished was of poor quality, testimony that defendant had called the attention of various persons, some of whom were not witnesses, to the poor quality of the ice, and that he had called nearly everybody's attention to it, was inadmissible to prove the quality of the ice.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1085; Dec. Dig. § 271.*]

11. SALES (§ 358*)—MODIFICATION OF CONTRACT—EVIDENCE.

In an action for the price of ice, where defendant claimed that the parties had contracted for a lower price than that charged, testimony of defendant's agent that he stated to plaintiff's agent, on being notified of the increased price, that defendant was a poor man, and the increase would ruin him, and that plaintiff had a combination, etc., was not admissible to show that defendant paid the increased price under protest and without waiving the contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 358.*]

12. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Irrelevant testimony in reference to the poverty of the prevailing party is ground for reversal, since it tends to prejudice the jury and improperly arouse its sympathy.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1060.*]

Appeal from Superior Court, New Haven County; Joel H. Reed, Judge.

Action by the Woodbridge Ice Company against the Semon Ice Cream Corporation. From a judgment for defendant on its counterclaim, plaintiff appeals. Reversed, and new trial ordered.

E. P. Arvine, Albert D. Penney, David E. Fitzgerald, and Walter J. Walsh, for appellant. Richard H. Tyner, for appellee.

THAYER, J. This is an action upon the common counts with a bill of particulars

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

showing 464 tons and 1,900 pounds of ice sold and delivered by the plaintiff to the defendant during the months of August, September, and October, 1906; the deliveries during August being charged at \$5 per ton, and those for September and October at \$6 per ton, and the total charge being \$2,526.70. The answer, after alleging that the plaintiff is an ice dealer and the defendant a wholesale and retail dealer in ice cream in New Haven, and that the action is brought to recover a balance of \$2,526.70 claimed to be due contains, the following allegations: "(4) On or about February 1, 1906, the defendant, who for some time prior thereto has been a customer of the plaintiff, and the plaintiff entered into an oral agreement, whereby the plaintiff was to furnish ice to the defendant to be used by it in said ice cream business during the year 1906. (5) The plaintiff did furnish ice to the defendant under said agreement from February 1, 1906, to October 26, 1906, and the total amount of ice furnished during said period was 1,351.88 tons. (6) It was agreed between the defendant and the plaintiff that all ice furnished should be delivered at the defendant's factory at \$2 per ton net, and that all of said ice should be clean and solid, made up of large blocks, and first class in every particular and in every way satisfactory to the defendant. (7) The ice mentioned in the bill of particulars was part of the ice furnished the defendant under said agreement." The answer then alleges that the ice furnished was full of dirt and refuse and was not satisfactory to the defendant, that it could not be handled and used by him except at a much larger expense than if it had been ordinary marketable ice, that it was not worth more than \$1 per ton, and that, if it had been clean, solid, and satisfactory ice, it would have been worth \$2,700. It then alleges that the defendant paid the plaintiff after February 1, 1906, on account of said ice, various sums amounting in all to \$3,386.25, that this was "all and more than all said ice was reasonably worth," and that there was no other agreement, express or implied, under which the ice mentioned in the bill of particulars was furnished, except the one set up in the answer. The answer contains the following by way of counterclaim; paragraphs 11 to 19, inclusive, having been stricken from the answer before the counterclaim was filed: "(1) All the foregoing paragraphs of this answer, except paragraphs 11 to 19, inclusive, are hereby made part of this counterclaim. (2) Said ice was worth at least \$4,503.55 less than the plaintiff claims on account of its deficient character. The defendant claims to recoup said sum of \$4,503.55 for such deficiency, to the extent of the balance claimed by the plaintiff, and asks judgment against the plaintiff for the excess." The reply admits that \$2,526.70 is claimed to be due, that the occupations of the parties are as stated,

and denies all the other allegations of the answer and counterclaim.

Upon the trial it was proven, and not denied by either party, that from January to March, 1906, the plaintiff had been selling ice to the defendant at \$2 per ton, that on March 30th, the plaintiff notified the defendant by letter that until further notice the price of ice delivered to it would be at \$4 per ton, that on August 7th by another letter it was notified that until further notice the price would be \$5, and that on August 31st by another similar letter notice was given it that after September 1st the price would be \$6. It was also undisputed that monthly bills were rendered for ice sold each month at the different prices, that these had all been paid to August 1, 1906, and that these payments amounted to the sum of \$3,386.25 as stated in the defendant's answer. The defendant claimed that these payments were made under protest; the plaintiff that they were made freely and voluntarily. The chief contested question between the parties, apart from the quality of the ice, was whether there was a contract between the parties such as was set up in the answer. The defendant claimed to have established such a contract; the plaintiff claimed that the evidence failed to establish it, and that, if such a contract was made, it was abrogated later.

The court charged the jury that the sending of the letters giving notice of an increase of price, and the acceptance of ice thereafter by the defendant and payment of the price demanded, would not of themselves amount to a waiver or abrogation of the contract claimed by the defendant, if made; but that such facts would be evidence for the jury to consider in determining whether there was such a waiver or abrogation of the contract. The plaintiff claims that there was error in this part of the charge. If there was a contract between the parties made in February as claimed by the defendant, the plaintiff alone could not abrogate it. It required the same meeting of minds to abrogate it which was required to create it. The plaintiff could not, by writing a letter to the defendant, stating that ice thereafter delivered would be charged at a different price, annul the contract or change its terms. The defendant, in accepting the ice after such notice, and in paying the increased price, may have done so, as he claimed was the fact, under protest, and claiming his rights under the contract and that an adjustment in accordance with it should afterwards be made. The two parties might rescind or change the terms of the contract, and, as the jury were told, the acceptance of the ice after the notices and the payment of a double price for it was evidence, and very strong evidence, of the abrogation or waiver of the contract if it ever had existence; but these circumstances did not as matter of law amount to an abrogation or waiver of it, and it was therefore properly left for the jury to draw

their inferences from the facts and say whether such was their effect. The same considerations support the action of the court in refusing to charge, as requested by the plaintiff, that the sending of the letters and the receipt of the ice and payment for it at the advanced price thereafter by the defendant constituted an abrogation or waiver of the contract.

The plaintiff requested the court to charge that: "There is no allegation in the pleadings that the defendant agreed to buy goods of the plaintiff for a year, or any specified time. Under the pleadings there was nothing to prevent the plaintiff from charging the price in April, or any subsequent time." This was in effect asking the court to take from the jury's consideration all of the evidence which had been offered to support the defendant's claim that there was a contract under which the ice was to be furnished for a year at \$2 per ton, for the reason that the answer did not allege such a contract. If the answer is thus defective, advantage could have been better taken of such defect by demurring to the answer or by objecting to all evidence of the contract; but the court charged, and correctly, that there was a sufficient allegation of a contract between the parties and refused to charge as requested. A general allegation, sufficient to give the plaintiff notice of the nature of the contract which would be attempted to be proved, was all that was required. The fourth and sixth paragraphs state that an agreement was entered into between the parties and the nature of the claimed agreement. It was not necessary to allege that the defendant promised to take the ice in a certain quantity for a year and to pay for the same. These matters were to be proven under the allegation that there was such a contract. Under the allegations the defendant might prove a valid contract mutually entered into by the parties of the nature which he claimed to have proven.

The plaintiff claimed that the defendant's evidence failed to establish such a contract because, although the jury should find that the plaintiff agreed to sell to the defendant what ice it should need in its business during the year at \$2 per ton, yet the evidence failed to show any agreement on the part of the defendant to purchase its ice for that year of the plaintiff. Relative to this contention, the plaintiff asked the court to charge the jury as follows: "Where one party agrees to sell goods to another at a stated price for a year or other stated time, and there is no agreement on the part of the other party to purchase for the year, or the stated time, the result is not a contract, but a mere offer on the part of the vendor which may be revoked at any time." The court read this request to the jury and responded to it by saying: "Now I say to you, in response to that, that such might be a mere offer on the part of the vendor, or it might not; but in my

judgment, where there is any agreement by one party to sell ice for the year, and the consideration by the other party is to pay \$2 a ton for that ice, it would be a good contract. That is, it would not be necessary—it would not be absolutely essential—that the other party should agree to take ice for the whole year at that price. But if the offer is made on the part of the plaintiff to furnish the defendant ice for one year, or the season, and in consideration the defendant agrees to pay therefor \$2 a ton for that ice, I think that is a sufficient consideration and a valid contract." As the request to charge assumes, without admitting, that a contract whereby the plaintiff agreed to sell the defendant, and the latter agreed to buy of the plaintiff, all the ice which the defendant should want, or need in its ice cream business, for a stated time at a stated price, would be valid and binding upon both parties, it is unnecessary, to consider the question, argued at some length in the plaintiff's brief, whether such a contract would be invalid because the defendant would not be bound thereby to take any ice at all. However the case may be when the contract is merely to sell what one may want or desire during a given time, there are strong authorities that a contract to sell what one shall need in his business during a stated time is good. *Hickey v. O'Brien*, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227.

The proposition presented by the request is that, if there was no acceptance according to the terms of the offer, there was no contract. The defendant, as the court finds, claimed to have proved the contract by the testimony of one Semon. The substance of this was that, in conversation with two agents of the plaintiff, they said to him that the plaintiff was going to furnish the defendant ice for the year at the old price, and Semon, who was an officer and agent of the defendant, said "Then it is distinctly understood that I get all the ice I want at \$2 a ton," and Wideman, one of the plaintiff's agents, said, "Yes." The plaintiff claimed that the language testified to by Semon did not in law amount to a contract, but was a mere offer, without acceptance, and subject to revocation at any time. The question presented by the request was important therefore, and the plaintiff was entitled to have the jury adequately instructed as to the law bearing upon it. The jury had been instructed in an earlier part of the charge, already alluded to, that, if there was such a contract as claimed by the defendant, the plaintiff was bound by it and could not during the year of its continuance change the price charged for ice. By the part of the charge now under consideration they were told, in substance, that it was not necessary to the validity of the contract that the other party to it should have been bound itself for the same period. Where terms for changing the legal relations between two parties are offer-

ed by one party to another, those terms must be explicitly, fully, and unconditionally accepted to effect such change of relations and constitute a binding contract. The plaintiff was therefore entitled to have its request, or something equivalent thereto, given to the jury, and the charge as given cannot be sustained.

The defendant by its counterclaim asks only to be allowed the difference between the value of the ice delivered and ice such as should have been delivered under the contract claimed. The court instructed the jury that "it was proper for the defendant, if you find that it has proved the allegations of its answer and counterclaim, to show defects in said ice, and, if you find also that there was no abrogation of the contract on its part made afterwards, it is competent for it to show defects in said ice in mitigation of the demand, and, as has been claimed in this case, where more money has been paid than the ice is worth in an action brought to recover a claimed balance, the defendant may set up a counterclaim and recover for overpayment." Under this charge the jury must have understood that upon the counterclaim the defendant could not only recoup for the defective quality of the ice, in mitigation of plaintiff's damages, but could also recover a judgment against the plaintiff for the amount of any overpayment proved. The jury were thus permitted by the instruction to find a verdict against the plaintiff for damages not claimed in the pleadings. That this instruction was harmful to the plaintiff is apparent from the fact that the verdict against it is just equal to the amount of the overpayment claimed by the defendant with interest. The plaintiff complains justly therefore of this part of the charge.

The appeal presents numerous exceptions to the rulings upon evidence. The evidence of Joseph Sternchuss that the defendant's agent, John Semon, told him on one occasion, when he called the witness' attention to the ice, that the plaintiffs were robbing him, and that when they presented their bill some day he would not pay it, was a self-serving declaration, made in the absence of the plaintiff or its agents, and was not proper evidence. The plaintiff asked that it be stricken out, and the motion should have been granted. The testimony of said Semon that he had on different occasions called the attention of various persons (naming them), some of whom were not called as witnesses, to the condition of the ice, and that he "called the attention of everybody he met in New Haven to it," and that "he didn't do anything else apparently," should have been excluded. The quality of the ice could not be proved by such declarations.

The testimony of the same witness as to what was said by him to the plaintiff's agents shortly after he received the letter of March

31st, notifying him of the increase of price, should have been rejected. It consisted of declarations of the witness that he was a poor man, that the increase of price would ruin him, that they had a combination, and had him in their power, and others of like nature, and tended to prejudice the jury against the plaintiff and obtain sympathy for the defendant, while they tended to prove no fact in issue between the parties. They were admitted as a part of the conversation had at the time; but, so far as appears, the entire conversation had no pertinency to the case, although offered to show that the defendant paid the increased price under protest and without waiving the contract; but the conduct and declarations were quite as consistent with the fact that there was no contract to rescind, as that there was one which he was insisting upon being carried out.

The remaining rulings seem to have been correct, and not harmful to the plaintiff, and require no consideration here.

There is error, and a new trial is ordered. The other Judges concur.

(31 Conn. 483)

BEARDSLEY v. IRVING.

(Supreme Court of Errors of Connecticut. Jan. 6, 1900.)

1. TRIAL (§ 202*)—INSTRUCTIONS—DUTY OF COURT.

A trial court should call the attention of the jury to whatever is necessary and proper to guide them to a right decision in the particular case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 474; Dec. Dig. § 202.*]

2. TRIAL (§ 207*)—INSTRUCTIONS—SUBJECT-MATTER—MATTERS AFFECTING CALENDAR.

Where it is important whether the day of the month on which a contract was executed was Sunday, the court should instruct the jury whether or not the date in question was Sunday, and not leave it to them to determine that fact from the evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 207.*]

3. EVIDENCE (§ 1*)—"JUDICIAL NOTICE"—NATURE AND SCOPE.

"Judicial notice" takes the place of proof, and is of equal force, and as a means of establishing facts it is superior to evidence, as it stands for proof, and fulfills the object which evidence is designed to fulfill, and makes evidence unnecessary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 4, p. 3858.]

4. EVIDENCE (§ 17*)—JUDICIAL NOTICE—TIME.

Courts will take judicial notice of what days of the week days of the month occur on, and the hours of sunset and sunrise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 21; Dec. Dig. § 17.*]

5. EVIDENCE (§ 51*)—JUDICIAL NOTICE—MODE OF ASCERTAINING FACTS.

An almanac may be read at a trial to refresh the memory of the court and jury as to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the day of the week on which a day of the month occurs.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 72; Dec. Dig. § 51.*]

Appeal from Court of Common Pleas, New Haven County; William L. Bennett, Judge.

Action by Stanley A. Beardsley against Walter M. Irving. Judgment for plaintiff, and defendant appeals. Reversed.

Robert C. Stoddard, for appellant. E. P. Arvine and Albert D. Penney, for appellee.

RORABACK, J. This is an action brought to recover damages upon an alleged warranty as to the soundness of a horse. The plaintiff obtained a verdict, and the defendant in his appeal to this court has made several assignments of error relating to the charge of the court and its rulings upon evidence.

By his second assignment in error, the defendant claims to have been aggrieved because the court charged as follows: "Now it is necessary that there should be a valid contract, and as you know, and as I charge you, a contract made upon Sunday is not, in this state, a valid contract, and I speak of this in passing. Now, if the 3d of June was Sunday, any agreements made upon that day would not be binding upon the defendant, but, I think, gentlemen, of course, it is for you to say, but I think you will remember that no one in this case has testified that that first agreement was on Sunday, and it is only that you can arrive at the fact that it was Sunday by subtracting three from the tenth that Mr. Irving testified was Sunday. The Beardsleys placed Sunday on the 9th, as I remember—thought Sunday was the 9th. Mr. Irving thinks it is the 10th. Of course, if it is the 10th, and these negotiations for the contract were upon the third, the third would be Sunday. But you have first to determine whether Sunday came upon the 9th or 10th, and you have to find from the evidence—the main thing is to find from the evidence—whether the first negotiations between Mr. Beardsley, Sr., and the defendant, was upon a week day or upon a Sunday, and, as I say, I do not remember any direct evidence from either of them that it was Sunday, and I think there was evidence as to its being a week day, but that, of course, you must bear in mind and consider." In substance, the jury were told that, if they found that there was such a contract, it was for them to say what day of the month it was made, and then determine from the evidence whether such day was Sunday. This was error. The charge delivered by the trial court should call the attention of 12 men unfamiliar with legal distinctions to whatever is necessary and proper to guide them to a right decision in a particular case. *Sturdevant's Appeal from Probate*, 71 Conn. 392, 398, 42 Atl. 70. The coincidence of the day of the month with

the day of the week was a controlling fact in passing upon the validity of the contract upon which the plaintiff's cause of action was predicated. The defendant was entitled to have the jury plainly and clearly instructed whether or not June 3, 1906, came upon Sunday. That this was not done is clearly apparent from the extract from the charge already noticed. The vital fact was not brought clearly to the attention of the jury, and it is obvious that they could not have correctly inferred what the court meant.

The evidence did not furnish any definite information upon the point involved, yet this did not relieve the court from the performance of its duty to furnish the jury with proper instructions. The nature of the subject, the issue involved, and the apparent necessities of the case, required the court to notice judicially which of these days was Sunday. "Judicial notice" takes the place of proof, and is of equal force. As a means of establishing facts, it is therefore superior to evidence. In its appropriate field it displaces evidence, since, as it stands for proof, it fulfills the object which the evidence is designed to fulfill, and makes evidence unnecessary. *Thayer's Cases on Evidence*, 20. Courts take cognizance of the days of the week with the days of the month, of the hours of sunset and sunrise, and an almanac may be read on the trial to refresh the memory of the court and jury. *State v. Morris*, 47 Conn. 179. These instructions may have misled the jury and induced it to render its verdict for the plaintiff upon an erroneous theory that June 3, 1906, was not Sunday. In all other respects except as noticed, the charge is substantially correct and adapted to the issues upon trial. No such error occurs in the rulings upon evidence as would entitle the defendant to a new trial.

An application to rectify the appeal, also an assignment of error, because the court failed to mark the defendant's proposed finding "proven" or "not proven," have been presented. As the points of law which the defendant desired to raise were sufficiently presented in the judge's charge, these questions do not require further discussion.

There is error, and a new trial granted. The other Judges concurred.

(51 Conn. 442)

DOWNEY v. MORIARITY et al.

(Supreme Court of Errors of Connecticut. Dec. 18, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 307*)—DISTRIBUTION—EFFECT.

Where a person as his mother's heir had an interest in five parcels of land left by the mother's intestate father who left three heirs, and two of the parcels were set off to the mother's heirs and the rest to the other heirs of her father, the distribution confirmed his interest in the two parcels set off to his mother's

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

heirs and destroyed his interest in the other three.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 307.*]

2. MORTGAGES (§ 486*)—FORECLOSURE—JUDGMENT.

A mortgagor was one of five heirs of his mother who was one of three heirs of an intestate leaving five parcels of land. After his mother's death, he mortgaged all the interest he then had or ought to have or thereafter might have in the five parcels. Two of the parcels were set off to his mother's heirs and the others to intestate's other heirs. *Held*, that it was not error, as against mortgagor's heirs and administratrix, to grant foreclosure on all five parcels, since as to the three parcels distributed to the other heirs of intestate, if the mortgagor had any interest in them, he conveyed the legal title thereto, and, on failure to fulfill the condition, the equity of redemption was properly foreclosed as against his heirs and estate, and, if he had no interest, the foreclosure could not harm his heirs or estate.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 486.*]

3. LIMITATION OF ACTIONS (§ 167*)—BAR OF DEBT—EFFECT ON SECURITY.

While the fact that no interest had been paid on a mortgage note for about 15 years might defeat an action on the note by limitations, it would not bar foreclosure of the mortgage.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 652; Dec. Dig. § 167.*]

4. PLEADING (§ 182*)—FAILURE TO REPLY—ADMISSION OF ALLEGATIONS IN ANSWER.

Where no reply is filed, the allegations of the answer are admitted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 388; Dec. Dig. § 182.*]

5. EXECUTORS AND ADMINISTRATORS (§ 130*)—POSSESSION—NATURE—PRESUMPTIONS.

As possession of land is presumed prima facie to follow the title, where an intestate had a vested, though defeasible, interest, his administratrix will be presumed to be in possession for the benefit of creditors and heirs under Gen. St. 1902, § 362, relating to the custody of estates of decedents.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 130.*]

6. APPEAL AND ERROR (§ 169*)—ASSIGNMENTS OF ERROR—QUESTIONS NOT RAISED BY PLEADINGS NOR SETTLED BY JUDGMENT.

An assignment of error involving a question not raised by the pleadings nor settled by the judgment cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1018; Dec. Dig. § 169.*]

7. MORTGAGES (§ 486*)—FORECLOSURE—ACTIONS—SCOPE OF ADJUDICATIONS—INTERESTS OF PERSONS NOT PARTIES.

In an action to foreclose a mortgage on the mortgagor's defeasible interest in land as his mother's heir, where pending the action his mother's administratrix conveyed part of the land, whether plaintiff could have a lien either on the parcels sold or their proceeds could not be adjudicated; neither the purchaser nor the administratrix being parties.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 486.*]

Appeal from Superior Court, New Haven County; Milton A. Shumway, Judge.

Foreclosure by Christopher F. Downey against Nellie D. Moriarity and others. Judg-

ment for plaintiff, and defendants appeal. Affirmed.

Finlon E. Phelan and John O'Neill, for appellants. Edward F. Cole, for appellee.

BALDWIN, C. J. Bridget Donahue, wife of Michael Donahue, died intestate January 6, 1892. She was one of three heirs of Patrick Coyle, who had died intestate in 1890, owning five parcels of land in Waterbury. On February 5, 1892, Thomas Donahue, one of her five children and heirs, mortgaged all the right, title, and interest which he then had or ought to have or thereafter might have in or to these lands to the plaintiff to secure his note of that date for \$2,000, payable on demand with interest. It is not found that the deed contained any covenants of title or warranty. During the following month two of these parcels were distributed to the estate of Bridget Donahue,¹ and the others to another of the heirs of Coyle. Michael Donahue thereupon took possession of the two parcels set to his wife's estate, as tenant by the curtesy, and held it until his death on February 5, 1906, a few days after which administration was first taken out on her estate. In July, 1892, Thomas Donahue died, intestate, and one of the defendants was appointed administratrix of his estate. Pending the present action, which was brought in January, 1907, the administratrix of the estate of Bridget Donahue sold the two parcels set to this estate to one Elbin, who thereupon went into and now holds possession. The only defendants are the six children and sole heirs of Thomas Donahue and the administratrix of his estate.

When Thomas Donahue gave the mortgage, he had an interest as an heir of Bridget Donahue, who was an heir of Patrick Coyle, in each of the five parcels which it purported to convey. The distribution of two of them to her estate related back to the date of her decease. *Ward v. Ives*, 75 Conn. 598, 601, 54 Atl. 730. It confirmed his interest as an heir in two of the parcels mortgaged, subject to any disposition of them which might be legally made in the settlement of her estate, should administration thereon be subsequently granted. It also destroyed his interest in the three others. When this action was commenced, administration on Bridget Donahue's estate had been taken out, but nothing had been done in the settlement either of her or of Thomas Donahue's estate to extinguish or change the nature of the interest in any land

¹ The record as certified to this court contained, in the finding of facts, the statement that this distribution was made to Bridget Donahue. The attention of counsel on both sides being called to this, during the argument, they filed in this court a stipulation that it was an inadvertent mistake of the trial judge, and that the finding should be treated as if it read as stated above in the opinion.

covered by the mortgage, to which his heirs succeeded upon his death. The judgment file contains a statement that at its date \$3,940 was due from the defendants on the mortgage debt, and that is the sum which they are required to pay in order to redeem. It is apparent from this that no interest was ever paid on the mortgage note. A little less than 15 years elapsed between its date and the institution of this action. Notwithstanding the fact that this might defeat an action on the note by virtue of the statute of limitation, it could not avail to bar a foreclosure. *Belknap v. Gleason*, 11 Conn. 160, 27 Am. Dec. 721. It follows that, as against the defendants, there was no error in granting such relief to the plaintiff. His mortgage after the distribution of the estate of Bridget Donahue was a conveyance of a proprietary interest in two of the parcels described in it, and it purported to convey such an interest in all five. As to the two a foreclosure properly followed a default. As to the three others, a dilemma may be stated. If the mortgagor had any interest in them, he conveyed the legal title to it, and, on failure to fulfill the condition, it was proper that any equity to redeem it on the part of his heirs or estate should be foreclosed. If, on the other hand, he had no interest in them to convey, the foreclosure granted cannot harm his heirs or estate.

It is insisted that the costs of the action were thrown upon the defendants by the judgment appealed from. This is not so, unless they elect to redeem, and would then be a reasonable condition of permitting the redemption. The finding that \$3,940 is due from the defendants seems unwarranted by the facts stated as leading to that conclusion. There has been, however, no claim by the appellants of error on that account.

The judgment file finds all the allegations in the complaint true. One of these is that the defendants are in possession of the mortgaged premises. No finding was made with respect to certain matters of confession and avoidance set up in the answer. These were the grant of administration in 1906 on Bridget Donahue's estate, and the sale by her administratrix pending the action. No reply having been filed, the truth of these averments was admitted. The judgment is both for a foreclosure, and that, if there be no redemption by the day set, the defendants deliver possession of the mortgaged premises to the plaintiff. It is assigned for error that the facts specially found do not justify the conclusion that the defendants or any of them were in possession.

As respects the two parcels set to Bridget Donahue, Thomas Donahue had a vested, though defeasible, interest at the time of his decease, which upon that event passed to the defendants. Possession is presumed *prima facie* to follow the title. *Noyes v. Stillman*,

24 Conn. 15, 21. There is nothing to rebut this presumption, which under the circumstances of this cause would be that the administratrix of his estate was in possession as a co-tenant for the benefit of creditors and heirs. Gen. St. 1902, § 362. The answer does not state that Elbin ever had possession.

It is assigned for error that under the judgment the plaintiff will have a lien either on the parcels sold to Elbin or on the proceeds of the sale. No issue as to that is raised by the pleadings, or settled by the judgment. Nor could it have been a proper subject of adjudication in an action to which neither Elbin nor his grantor was a party.

There is no error. The other Judges concurred.

(81 Conn. 509)

BISHOP et al. v. BISHOP et al.

(Supreme Court of Errors of Connecticut. Jan. 7, 1909.)

1. WILLS (§ 573*)—CONSTRUCTION—CAPITAL AND INCOME.

A will giving beneficiaries the "life use" of shares in a trust fund, and directing the trustees to pay to one beneficiary "the net amount of the increase, income, profits and interest" of one share, and to another "the net increase, income, profits and interest" of another share, shows that testatrix intended that the beneficiaries should receive income only, where other beneficiaries apparently intended to share on equality were given "income," "income and profits," and "net income, profits and interest," and where the trustees were directed to collect "income, profits, and interest" and "increase, income, profits and interest."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1246-1251; Dec. Dig. § 573.*]

2. WILLS (§ 684*)—CONSTRUCTION—LIFE USE.

Where there is a bequest of the whole or of an aliquot part of the residue of a trust estate to a legatee for life, with remainder over, and no time is fixed by the will for the commencement of the life use, the legatee is entitled to the use or income of the clear residue as it may at last be ascertained, to be computed from testator's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1625, 1627; Dec. Dig. § 684.*]

3. WILLS (§ 684*)—CONSTRUCTION—LIFE USE.

That the executors were directed to divide the estate as soon after testatrix's death as might be conveniently and lawfully done, or that the shares thus ascertained were given to the several trustees, or that it was either the income thereof or sums set out of such income which the trustees were either required or permitted to pay the life beneficiaries, does not show that any time other than testatrix's death was fixed as that from which the life use is to be computed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1625; Dec. Dig. § 684.*]

4. TRUSTS (§ 273*)—CAPITAL AND INCOME—DISTRIBUTIONS—NATURE.

On an issue as to the right of life beneficiaries under a trust to share in a distribution of accumulated profits of a joint-stock company, the company must be treated as if it were a true corporation.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 386; Dec. Dig. § 273.*]

5. TRUSTS (§ 272*)—CAPITAL AND INCOME—RIGHTS OF BENEFICIARIES.

Generally persons entitled to the income of trust funds invested in stocks are entitled only to dividends in the nature of cash dividends, not including those declared in process of liquidation or reduction of capital.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 385; Dec. Dig. § 272.*]

6. TRUSTS (§ 272*)—CAPITAL AND INCOME—STOCK—"CASH DIVIDENDS."

"Cash dividends" within the rule entitling life beneficiaries under testamentary trusts thereto when the trust funds are invested in stocks include all distributions of the surplus assets of a corporation, whether cash or property, made to shareholders pro rata through dividend declarations in such manner that the assets so distributed are separated from the body of the corporate assets to become the shareholders' property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 385; Dec. Dig. § 272.*]

7. CORPORATIONS (§ 155*)—DIVIDENDS—NATURE.

A money dividend by a corporation creates a debt.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 562; Dec. Dig. § 155.*]

8. CORPORATIONS (§ 151*)—CASH DIVIDENDS—OUT OF WHAT DECLARED.

A cash dividend by a corporation is declarable out of surplus assets only, not properly reaching the capital.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 553, 556; Dec. Dig. § 151.*]

9. JOINT-STOCK COMPANIES (§ 9*)—DIVIDENDS—POWER OF MANAGERS.

Under authority of a joint-stock company's managers to declare dividends out of profits, they have no greater right to declare dividends out of all the company's assets than directors of a true corporation would have.

[Ed. Note.—For other cases, see Joint-Stock Companies, Cent. Dig. § 9; Dec. Dig. § 9.*]

10. JOINT-STOCK COMPANIES (§ 9*)—DIVIDENDS—BONDS.

Bonds issued by a joint-stock company in lieu of a distribution of assets with unlimited obligations are a charge upon all the assets of the company, and the holders, if necessary, can exhaust all its property to their satisfaction, leaving the stock valueless, and hence the company's act in issuing the bonds was not a declaration of a cash dividend so as to entitle life beneficiaries under a testamentary trust to them as such.

[Ed. Note.—For other cases, see Joint-Stock Companies, Cent. Dig. § 9; Dec. Dig. § 9.*]

11. WILLS (§ 684*)—TRUST ESTATES—CAPITAL AND INCOME.

On an accounting under a will creating trusts, under which certain beneficiaries are entitled to the income of stocks for life, succession taxes are properly chargeable to the principal account and real estate taxes to the income account.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1621; Dec. Dig. § 684.*]

12. WILLS (§ 684*)—TRUST ESTATES—CAPITAL AND INCOME—PRINCIPAL.

Stock issued by a corporation under a declaration of a stock dividend is principal, and not income, within a testamentary trust giving the income of a trust fund invested in stocks to life beneficiaries.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1618; Dec. Dig. § 684.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5552-5557; vol. 8, p. 7763.]

13. TRUSTS (§ 273*)—CAPITAL AND INCOME—TRANSFER OF BONDS.

A distribution of stocks, bonds, etc., to a trustee to be held for persons entitled to the income of shares of the trust fund for life, "less" specified bonds "held pending decision of the courts as to whether principal or income," transferred the bonds on condition they be not judicially declared to be income, and, that condition failing, the transfer was equitably complete carrying with it the right of the life tenants to enjoy the income thereof accruing since the distribution.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 386; Dec. Dig. § 273.*]

Case Reserved from Superior Court, Fairfield County; Joel H. Reed, Judge.

Action by Nathaniel W. Bishop and others against William D. Bishop and others. Reservation from superior court. Judgment advised.

Julia Ann Bishop died October 9, 1906, leaving a will, five children, and an estate, which included 100 shares of the Adams Express Company and 426 shares of the Westinghouse Air Brake Company. Her will directed the payment of her just debts and funeral expenses by the executors, and then provided as follows: "Article 2. As soon after my decease as may be conveniently and lawfully done, I direct my executors to divide my entire estate into five equal portions." One of these portions she then gave to the executors in trust to expend out of "the net income, profits and interest thereof" such sums at their discretion as they should deem best calculated to insure the suitable maintenance, and support of her son Russell T. during his life, and for the suitable maintenance, support, and education of his son Julian T. for the same period, and with further provisions for the distribution of "net income and profits" and the final disposition of the corpus of the fund, which are without importance in the consideration of the questions presented. Two of the equal portions were given to the Knickerbocker Trust Company of New York in trust, to keep each as a separate fund and pay over in semiannual payments "the net amount of the increase, income, profits and interest" of one of them to her daughter, Mary F., during her life, with remainder over to others at her decease, and "the net increase, income, profit and interest" of the other in semiannual payments to her son William D. during his life, with remainder over to others at his death. The remaining two-fifths were given absolutely to her sons Henry A. and Nathaniel W., one to each. The two sons last named were made executors, and they are now acting in that capacity and as trustees of the one-fifth of which Russell is a life beneficiary. The Connecticut Trust & Safe Deposit Company of Hartford has succeeded to the trust which the Knickerbocker Trust Company originally exercised. All of

the five children now survive, as does the grandchild Julian.

The Adams Express Company is a joint-stock association formed and existing under the laws of New York, and having its principal place of business in New York City. Its shares of stock, of which there are 120,000 outstanding, have no face or par value, but are quoted, bought, and sold in the open market as if they had a face value of \$100 each. Prior to June 14, 1907, neither the company nor its board of managers had ever made any designation or separation of any part of its assets and property as capital, surplus, or reserved fund, but all had been kept and administered as a whole. June 14, 1907, the board of managers voted "that the capital and reserved fund of the association be reduced by transferring and assigning bonds and stocks belonging to the association of the par value of \$24,000,000 to a trustee to hold for the pro rata use and benefit of the shareholders of the association and their assigns, and by issuing and distributing among shareholders distribution bonds to represent their distributive share of said reduction and their respective interests in the stocks and bonds so transferred and assigned." It was further voted that the president, secretary, and trustees, "in order to carry out said reduction and distribution of capital and reserved fund," execute and deliver to the Standard Trust Company of New York a certain deed of trust, and deliver the stocks and bonds thereby transferred and assigned to it, and that the president or vice president and secretary execute "the distribution bonds of the association" to the amount of \$24,000,000 face value in the form prescribed in the trust deed, and issue and deliver to each stockholder of record on the closing of the books of the association at 3 p. m. Thursday, June 27, 1907, \$200 face value of said distribution bonds for each share standing in his name. The directions of this vote were complied with by the execution and delivery to said trust company of a certain deed of trust, the delivery to it of the stocks, bonds, and evidence of indebtedness thereby transferred to it and the issue and distribution as provided of the amount of bonds therein named. These bonds were promises to pay to the bearer or holder the amount specified therein in the ordinary form of such instruments, excepting that they contained the provision that they should not create a personal liability on any shareholder, officer, manager, or trustee of the company as a partner or otherwise, and the further provision that they should be payable solely out of the securities and property assigned and transferred to the trust company under the deed of trust, or, if they should prove insufficient, out of the assets of the Adams Express Company. Reference was therein made to this deed for the statement of the securities and property assigned and transferred to the trustee and the nature

and extent of the security and rights of the holders of the bonds.

By the terms of the deed of trust, which recited the authority of the board of managers, its votes in the premises, and the form of the bond determined upon by it, the express company assigns, transfers, and conveys to the trust company as trustee certain stocks, bonds, and evidences of indebtedness fully described and set out. It is stated that this is done and the instrument executed in order to secure payment of the principal and interest of all outstanding bonds to be issued as provided and the performance and observance of all the covenants and conditions contained in the deed, and to declare the terms and conditions upon which the bonds are issued and received. The trust is declared to be one for the equal and proportionate benefit and security of all holders of the bonds and their coupons, for the enforcement of the payment thereof according to their tenor, and to secure the performance and observance of and compliance with the covenants and conditions of the instrument without preference, priority, or distinction in favor of any bond or bonds over others. Then follow numerous provisions fixing the terms and tenor of the bonds to be issued, the manner of their issue and transfer, and the aggregate amount of the outstanding issue, defining the nature and terms of the trust created, and the rights and powers of the parties in interest and regulating the management of the trust. Of these only those which might be conceived to have significance in relation to the questions here presented need be noticed. By article second of this part of the deed the express company "covenants and agrees that it will duly pay or cause to be paid to every holder of any bond issued hereunder and secured hereby the principal and interest accruing thereon in gold coin of the United States of America of or equal to the present standard of weight and fineness at the dates and rate and in the manner mentioned in said bonds or in the coupons thereto appertaining according to the true intent and meaning thereof."

Articles fourth, fifth, sixth, and seventh embody the following provisions:

"Article Fourth. The trustee shall receive and collect any and all interest, income, dividends, and profits which may accrue or be declared or in any manner become due and payable on said securities and property conveyed and transferred to it as aforesaid, and shall hold and apply the same for the payment of any interest then due or accrued, or accruing up to the next succeeding date upon which the semiannual interest shall be payable on the bonds secured hereby, and any and all excess of such interest, income, dividends and profits so collected after providing for the payment of said interest on all the bonds issued and outstanding hereunder, shall be paid to the company or as it may direct; but if said interest, income,

dividends and profits be insufficient to pay any accrued interest, the company shall forthwith on demand pay the deficiency to the trustee for account of the holders of bonds or coupons. The trustee shall be entitled to do all acts and take all steps and proceedings which in its opinion may be necessary or proper for the purpose of obtaining the payment or collection of said interest, income, dividend and profits, and shall have full power and authority to give all necessary receipts and acquittances therefor; but in case the trustee shall not take such action as is in the opinion of the managers or trustees of the company necessary to obtain or enforce the payment or collection of said interest, income, dividends and profits with all reasonable speed, the company shall be entitled, at its own cost and expense, to take such action in the name of the trustee, provided it shall give to the trustee reasonable indemnity against any liability thereby incurred.

"Article Fifth. The legal title to the securities and property now or hereafter assigned and transferred hereunder shall vest in the trustee for the benefit of the holders of bonds issued hereunder, subject to the following conditions: When the principal of said bonds becomes due and payable, the trustee shall sell and dispose of all and singular the said securities and property, in the manner herein provided, and distribute all the proceeds, including any surplus realized over the amount due for principal and interest of said bonds, as provided in article sixth hereof, after first reimbursing the company any amount paid by it on account of the principal of any said bonds or coupons. The trustee shall invest and reinvest the securities and property or proceeds thereof held hereunder as the trustees of the company shall from time to time direct in writing, and said trustees may at any time require the sale of any securities or property held hereunder and the investment of the proceeds thereof in any other securities or property of the description hereinafter stated in this article as they may from time to time designate. The trustees shall from time to time, on demand of the trustees of the company, release from the lien of this indenture and deliver to them, or upon their order, any of the securities which may at the time be held hereunder, upon the deposit with the trustee, in exchange therefor, of securities, shares, bonds, notes or obligations of any corporation or association, which shall then have a market value, or, in case of the deposit of bonds issued hereunder, a face value, equal to the value of the securities or property so released and delivered, as stated in the schedule of values delivered to the trustee simultaneously with this indenture, or in respect of securities hereafter delivered equal to their market value at the time of such delivery to the trustee, or secured by collateral having such value. The securi-

ties to be deposited with the trustee under this article in exchange for securities theretofore on deposit shall be * * * [here their character is stated]. At the time of depositing with the trustee any securities as provided in this article, other than bonds issued hereunder, the company shall deliver to the trustee, together with such securities, a certificate signed by the trustees of the company stating and certifying the following: (1) The market value of the securities so deposited or of the securities held as collateral for any note or other obligation so deposited. (2) That the association or corporation issuing the shares or liable upon the bonds or other obligations so deposited or held as collateral, or in which the securities deposited or held as collateral represent shares or interests, is in their opinion solvent, and that no default known to them exists in the payment of any principal, interest or dividends of or upon any of such securities. (3) That the trustees of the company have authorized the deposit of such securities with the trustee hereunder and the execution and delivery of such certificate to the trustee. The trustee shall accept such certificates as conclusive evidence of the market value of the securities deposited or held as collateral, for the purpose of this article and of exchange for securities and property theretofore deposited, and that the securities mentioned in the certificates may be properly deposited with the trustee under the provisions of this indenture. No certificate shall be required in connection with the deposit under this article of bonds issued hereunder, except that the trustees of the company have authorized their deposit.

"Article Sixth. In case default shall be made in the payment of any interest on any of the bonds issued hereunder and secured hereby, as and when such interest shall become due and payable, and such default shall continue six months, or in case default shall be made in performing or complying with any covenant or condition herein required to be performed or complied with by the company, and such default shall continue for six months after the trustee shall have made demand in writing upon the company, its successors or assigns, to perform or comply with the same, or, in case default shall be made in the payment of the principal of any of said bonds, when the same shall mature or otherwise become payable, then and in any and every such case, the trustee shall be entitled to sell, and upon the request in writing of the holders of twenty-five per cent. in amount of bonds then outstanding, it shall be the duty of the trustee to sell, the securities and property transferred and conveyed to it hereunder. * * * Upon making any sale under any such default, or in case all or any of the said securities and property shall be sold and the security hereby created for the benefit of the bondholders be en-

forced pursuant to judicial proceedings, then and in such event the principal of all the bonds which shall have been issued and shall then be outstanding, hereunder shall, forthwith, become due and payable, with the interest then accrued and unpaid, anything in the said bonds to the contrary notwithstanding. * * * The proceeds of such sale or sales by the trustee, or pursuant to judicial proceedings, shall be applied, first, to the payment of the costs and expenses of such sale, including a reasonable compensation to the trustee, its agents, attorneys and counsel, and all expenses, liabilities and advances made or incurred by the trustee in managing and maintaining the trust hereby created, and the residue shall be distributed pro rata among the holders of the said bonds then outstanding.

"Article Seventh. In case default shall be made in the payment of any interest on any of said bonds secured hereby, as and when such interest shall become due and payable, and such default shall continue for six months, or in case default shall be made in performing or complying with any covenant or condition herein required to be performed or complied with by the company, and such default shall continue for six months after the trustee shall have made demand in writing upon the company, its successors or assigns, to perform or comply with the same, then, and in any and every such case, the trustee may, by notice in writing served upon the company, its successors or assigns, declare due the principal of all of said bonds, issued under this indenture, and the same shall thereupon become and be immediately due and payable, together with accrued and unpaid interest up to the date of such declaration. In case of any such default continuing for the period of six months, as aforesaid, it shall be the duty of the trustee, upon the request in writing of the holders of a majority in interest of the bonds secured hereby, and at the time outstanding, so to declare the principal of said bonds due and payable, and to give notice thereof, as aforesaid, or to refrain from making such declaration upon such terms and conditions as such holders shall deem proper; and such holders may in like manner annul or reverse any declaration already made by the trustee, anything herein to the contrary notwithstanding, provided, however, that the company, its successors or assigns, shall not on the faith of such declaration have deposited the whole amount due on said bonds with the trustee in trust to pay the same. The action of the trustee, in enforcing and protecting the rights of the bondholders hereunder, shall at all times be subject to the direction and control of the holders of a majority in amount of the bonds hereby secured, and then outstanding; and such holders of a majority in amount of said bonds shall at all times have power, by an instrument in writing, executed and delivered to

the trustee, to direct the trustee to waive any default of the company hereunder (except in the payment of the principal of said bonds or any of them, when due at maturity), and any or all rights resulting therefrom, upon such terms as may be directed by the majority in such writing, shall be binding upon the trustee and all the bondholders. * * *

By the eighth article the trust company is required to give to the express company its power of attorney and proxy irrevocable to vote upon all shares of stock in the trust fund at all corporate meetings and upon all bonds so held at all meetings of bondholders until the security of the instrument should become enforceable or the securities and property held under the trust should have been sold.

By the ninth article it is stipulated that the rights secured to the holders of the bonds and coupons "shall exclude and be in lieu of and exclusive of any and all right to enforce any individual liability as against any present or future shareholder, officer, manager or trustee of the company by reason or in respect of said bonds or coupons or this indenture, or on account of the issue or execution thereof or of any judgment thereon, and that said bonds and coupons shall be payable solely out of the securities and property assigned and transferred to the trustee hereunder, or, if they prove insufficient, out of the assets of the company; and said holders of said bonds and coupons and their transferees, waive and release all claim to any personal liability of the shareholders, officers, managers or trustees of the company, said bonds and coupons being executed and issued on that express condition."

The remaining articles provide for the resignation or removal of the trustee and various matters of procedure in the management of the trust, which possesses no present importance, except the following: "The trustee may be removed at any time by an instrument in writing under the hands of three-fourths in amount of the holders of the bonds hereby secured and then outstanding; but no such removal shall be made before default hereunder without the written consent of the company. * * * Anything in this indenture contained to the contrary notwithstanding, the holders of a majority in amount of the bonds hereby secured and outstanding shall have the right from time to time, if they so elect and manifest such election by an instrument in writing executed and delivered to the trustee, to direct and control the method and place of conducting any and all proceedings for any sale of the securities and property covered hereby or any other action or proceeding hereunder. The trustee shall be entitled to reasonable compensation of all services rendered by it in the execution of the trusts hereby created, which compensation, as well as its reasonable expenses necessarily incurred hereunder, the company agrees to pay and the trustee shall have a

lien therefor upon the securities and property held by it hereunder."

The stocks, bonds, and evidences of indebtedness which passed under this deed were acquired by the express company from time to time from the excess of its receipts over its disbursements and from the income of stocks and bonds owned by it, and constituted assets which had not been set aside or devoted to any particular purpose or fund. Pursuant to the votes and action above outlined, the executors of Mrs. Bishop's will received \$40,000 face value of these bonds. October 14, 1907, they filed an administration account, in which they charged themselves with them in addition to the amount of the original inventory of the estate, and also with the dividends, interest, income, and other receipts of the estate to date. This account, after notice to the children, Russell, Mary, and William, and to the Knickerbocker Trust Company, was heard, approved, and accepted by the court of probate on October 18, 1907. None of the parties in interest who were of legal age, as all of Mrs. Bishop's children were, interposed any objection to the acceptance of this account, which was filed to comply with the laws of the state with regard to the taxes imposed upon the estates of deceased persons, but this absence of objection was upon the understanding and agreement between them that the questions now presented were to be presented to the superior court for determination, and that the rights of the parties were not to be prejudiced by either the acceptance of the account or the failure of the parties to appeal therefrom. About December 1, 1907, the executors received \$800 as six months' interest on the bonds which they now held pending the advice of the superior court. Mrs. Bishop's estate is amply sufficient to pay all debts and expenses of administration without a resort to said bonds or interest. On or about January 28, 1908, the executors, pursuant to the direction of the will, filed in the court of probate a division and distribution, in part, of the assets of the estate, setting out stocks, bonds, and cash in five shares as provided in the will, each share being \$128,480.16 in value, and in this distribution they set out and distributed among other securities certain of the said bonds, \$10,000 in face value, to the Connecticut Trust & Safe Deposit Company as trustee for the defendant William D. Bishop; certain others in equal face amount, to said trust company as trustee for the defendant Mary F. Bishop, and an equal amount to Nathaniel W. Bishop and to Henry A. Bishop. The distributions to the trust company in the case of both the William D. and Mary F. Bishop funds have appended to them the following note. "Less 10 \$1,000 Adams Express Company Collateral Trust 4% distribution gold bonds of 1907; due June 1, 1947; interest June and December; held pending decision of the courts as to whether principal or income, \$8,550.00." These bonds

are now in the hands of the executors. In the share set out to the fund of which Russell is a life beneficiary no bonds of the express company are included. This distribution does not designate any of the property described therein, either as part of the principal of said trusts or as part of the income thereof or of said estate, and the same was received and filed by the court of probate without notice to any of the parties in interest, being marked by said court: "Return of Partial Distribution. Return accepted Jan. 28, 1908."

Prior to the votes of June 14, 1907, the stock of the express company had a market value of from \$275 to \$300 a share. Immediately after June 27, 1907, when the right to share in the bond issue became apart from the stock, the market value of the shares declined to about \$150 a share. In the administration account filed October 14, 1907, as stated, the executors credited themselves with \$1,281.27, being the amount of the succession and transfer tax laid and collected by the state of New York; the same being a tax assessed at 1 per cent. upon the net value of all the property of the estate subject to such tax, to wit, \$128,126.95, and being laid and collected with reference to the interest of all of Mrs. Bishop's children and said grandchild, Julian, as beneficiaries under her will. All of them were in the same class and degree of relationship according to the law of New York, and said tax was laid as a single assessment in the amount named, against all of said property in the aggregate, without division or discrimination, by reason of the fact that the interests of the two first named were in fee simple and of the others for life only. They also credited themselves with the sum of \$1,405.37, a sum paid to the city of Bridgeport as taxes upon the list of 1906 upon real estate of the deceased located therein, and payable April 1, 1907. Upon the recommendation of the board of directors of the Westinghouse Air Brake Company made at a meeting on September 11, 1908, and the approval of its stockholders at a meeting on December 3, 1907, the board of directors on December 11, 1907, declared a stock dividend of 25 per cent., payable in the stock of the company January 31, 1908, to stockholders of record December 31, 1907. Pursuant to this vote, the executors received on or about January 31, 1908, 106 shares of the capital stock of said company, and they have since delivered the same to the distributees of the original 426 shares of that stock in the distribution of January 28, 1908, in proportion to the number of said shares then distributed to each, so that to 4 of the distributees 25 shares each of the new issue were given, and to the fifth, that in which Russell had a life interest, only 6½ shares were given.

William B. Boardman, for William D. and Russell T. Bishop. Arthur M. Marsh, for Natsala W. Bishop and others. William A.

Redden, for Julian T. Bishop. Arthur P. Stone, for Mary F. Bishop.

PRENTICE, J. (after stating the facts as above). Mary F. Bishop, as the life beneficiary of one of the trusts created by her mother's will in a one-fifth share of the latter's estate, claims to be entitled to receive in her own right one-fifth of both the Adams Express Company bonds and the Westinghouse Air Brake Company stock which came into the hands of the executors as original issues, whether or not they are to be regarded as income of the testatrix's estate in that sense which would entitle them as life tenants to share in their division. William D. Bishop, the life beneficiary of the trust similarly created in another one-fifth, asserts a like claim. These two join with the cestuis que trust under the third trust created by the will in asserting that the express company bonds are to be regarded as income of the testatrix's estate in which they are entitled to share pursuant to the trust provisions of the will regulating the appropriation of income.

The first of these two claims rests solely upon the language of the will, which in the case of the two life beneficiaries first mentioned provides that the trustee in the one pay over to the life tenant "the net amount of the increase, income, profits and interest" of the share, and in the other "the net increase, income, profits, and interests." An examination of the will shows that the testatrix in seven different places in it used language descriptive of the interest of life tenants, and that five different forms of expression were employed by her for that purpose. Twice it is simply "income"; twice "net income and profits"; once "net income, profits and interest"; and once each the phrases already recited. In the directions to the executors as trustees, they are directed to collect "the income, profits and interest" of the fund in their hands. In those to the Knickerbocker Trust Company it is directed to collect "the increase, income, profits, and interest." In the case of each of the two trusts in question in respect to which the more extended phraseology is used, the testatrix describes that which is given to the life tenants as "the life use" of the trust fund. The testatrix's general scheme for the bestowment of her bounty evidences a distinct purpose to treat her five children and their children with equality, except so far as she was led to create ordinary trusts with respect to two of them and a spendthrift trust with respect to a third, with the natural incidents of such trusts. *Wolfe v. Hatheway*, 81 Conn. 181, 70 Atl. 645. It is thus evident from the will that the testatrix used the differing forms of expression noticed with no intent to create preferences or to discriminate between the several life beneficiaries, and that whichever of the formulæ she used to express her meaning she thereby intended to comprehend income as

distinguished from principal, and that only. The life tenants place special emphasis upon the use of the word "increase." In *Brinley v. Grou*, 50 Conn. 66, 77, 47 Am. Rep. 618, we said that the phrase "the rents, dividends, increase and income" meant no more in the will in litigation than income. The same is equally true of the language here used.

The second claim resolves itself into two propositions, to wit: (1) That the life beneficiaries under each trust are entitled to the benefit of one-fifth of the net income of the testatrix's estate from the time of her decease; and (2) that the express company distribution partook of the character of what is called a cash dividend, and is therefore to be regarded as income. "It is well settled in this state, as it is in many other jurisdictions, that where there is a bequest of the whole or of an aliquot part of the residue of an estate to a legatee for life, remainder over, and no time is fixed by the will for the commencement of such life use, the legatee is entitled to the use or income of the clear residue so bequeathed, as the same may at last be ascertained, to be computed from the death of the testator." *Webb v. Lines*, 77 Conn. 51, 53, 58 Atl. 227; *Bancroft v. Security Co.*, 74 Conn. 218, 222, 50 Atl. 735; *Lawrence v. Security Co.*, 56 Conn. 423, 439, 15 Atl. 406, 1 L. R. A. 342; *Bartlett v. Slater*, 53 Conn. 102, 106, 22 Atl. 678, 55 Am. Rep. 73. This will contains no express provision upon the subject. If any time other than that of the testatrix's decease is fixed by it as that from which income for the benefit of life beneficiaries is to be computed, it results by implication from the facts that the executors were directed to divide the estate as soon after the testatrix's decease as might be conveniently and lawfully done, that shares thus ascertained were given to the several trustees, and that it was either the income thereof or sums set out of such income which the trustees were either required or permitted to pay to the cestuis que trust. That these matters are not sufficient to raise an implication of a direction contrary to the general rule stated clearly appears from the consideration given to this subject in *Bancroft v. Security Co.*, 74 Conn. 218, 222, 50 Atl. 735. The life beneficiaries are therefore right in this branch of their claim.

Preliminary to the question involved in the second proposition is one as to the character of the express company. It was organized in 1854 under the statute laws of New York as a joint-stock association. It is an association of individuals in the nature of a partnership and possessing the element of personal liability. The courts of New York have apparently had difficulty in defining the exact status and character of associations similarly organized. They have, however, said that almost the full measure of corporate attributes has been bestowed upon them

until the difference, if there be one, is obscure, elusive, and difficult to see and describe. *People v. Coleman*, 133 N. Y. 625, 30 N. E. 1150; *People v. Wemple*, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303. In *Lockwood v. Weston*, 61 Conn. 211, 215, 23 Atl. 9, we said of the shares of stock of similar associations that, for all practical purposes and so far as the question of taxation is concerned, we were of the opinion that they should be considered and treated as if they were shares of stock in private corporations. The same is equally true of the shares held by the stockholders of the Adams Express Company as representing their interests in the assets of the association, and as defining their relation to them and their rights resulting from the incidents of its management in so far as any question here presented is concerned. The association has property devoted to and utilized in the conduct of its business which serves as its capital, and is called its capital, although the precise amount of it may not be easily ascertainable. The managers are authorized to declare dividends out of the profits to such extent as they may from time to time determine. There is no question about the existence of assets which would have justified the division to the shareowners of \$24,000,000 out of accumulated profits, and without encroaching upon anything which could be called its capital fund.

The only question is whether such a division and distribution was made as to entitle life beneficiaries to its fruits. Into its determination there can enter no factor arising from the peculiar character of the company to differentiate the situation in any essential particular from that which would be presented were it a true corporation. *D'Ooge v. Leeds*, 176 Mass. 558, 57 N. E. 1025. The general rule, subject, perhaps, to possible exceptions, is that persons having a right to the income of trust funds invested in stocks are entitled to the enjoyment of those dividends declared by the directors of the respective corporations which partake of the character of cash dividends, not including, however, those which may be so declared in the process of liquidation or reduction of capital, and that their rights are limited to such dividends. *Smith v. Dana*, 77 Conn. 543, 548, 556, 557, 60 Atl. 117, 69 L. R. A. 76, 107 Am. St. Rep. 51; *Boardman v. Mansfield*, 79 Conn. 634, 637, 66 Atl. 169, 12 L. R. A. (N. S.) 793, 118 Am. St. Rep. 178. "Cash dividends," as that term is applied in this connection, include all distributions of the surplus assets of a corporation, whether the same be in the form of cash or property, which are made to shareholders pro rata through the medium of dividend declarations in such manner that the assets so distributed are apportioned from the body of the assets of the corporation to become the property of the shareholders, and thus pass out of the dominion and control of the corporation into

that of the shareowners. *Boardman v. Mansfield*, 79 Conn. 634, 639, 66 Atl. 169, 12 L. R. A. (N. S.) 793, 118 Am. St. Rep. 178; *Green v. Bissell*, 79 Conn. 547, 552, 65 Atl. 1056, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156. In the present case what the stockholders received in hand was the bonds of the corporation—its obligations, therefore, and not its assets. A money dividend declared creates a debt. *Beers v. Bridgeport Spring Co.*, 42 Conn. 17, 25. It is quite possible, therefore, that it would not necessarily militate against the validity of a cash dividend declaration that it provided, as an incident of it, for the issue of evidences of indebtedness, provided that proper conditions and limitations were observed. It is unnecessary, however, for the purposes of this case, to determine this question, or to attempt to formulate the principles applicable to such a situation, since the conditions and limitations which must attend any such transaction in order that its character as a cash dividend declaration may be preserved are here palpably absent. Such a dividend by a corporation can be declared out of surplus assets only. It will not be permitted to reach the capital. *Davenport v. Lines*, 73 Conn. 118, 128, 44 Atl. 17; *Smith v. Dana*, 77 Conn. 543, 553, 60 Atl. 117, 69 L. R. A. 76, 107 Am. St. Rep. 51. The authority of the managers of this company is expressly limited to the declaration of dividends out of profits, and no one would venture to assert that their right to distribute all the assets of the association in the form of dividends declared greater than that of corporation directors to do the same thing. The bonds issued to the stockholders are its unlimited obligations. As such, they are a charge upon all the assets of the company. Their holders are empowered, in case of need, to exhaust its entire property in their satisfaction, leaving the shareholders nothing to give value to their stock. Clearly a distribution of income or profits cannot be made to embody such contingencies, and as clearly, if it could, some adjustment of accepted principles would be necessary to protect the rights of remaindermen against those of life tenants.

But the life tenants contend that the bonds are only one feature of a larger transaction, which must be looked at and judged as a whole. And they say that when the action of the company which involved the issue of the bonds as one of its incidents is examined in its entirety, and with a correct appreciation of the interrelation of the bonds and their collateral, and of the rights of the parties created by the trust indenture, it will be found that it presents all the essential characteristics of a distribution of surplus assets such as satisfies the requirements of a cash dividend. Certain of the provisions of the trust instrument are pointed out in support of this position. The remaindermen, on the other hand, indicate several of its features as affording a

demonstration that no asset of the company has been set out to become the property of shareholders, and so apart from its general assets as to pass out of its dominion and control into that of the shareholders. They insist that under the agreement, there is no item of the company's assets concerning which it can be affirmed that shareholders now have or ever will have any control over it or property in it, or now have or ever will have a right to the proceeds of its sale either directly or indirectly. It requires no very careful examination of the trust deed to appreciate the force of this contention. But there is no occasion to pursue the line of inquiry thus suggested and thus cumulate reasons, since it is clear that there is nothing in the deed which serves to qualify or limit that provision of the bonds already noticed which makes them payable in case of need out of any of the company's assets and thus a contingent charge upon all such assets down to the last penny of them. This condition being present, it cannot be said that the company's action which brought the bonds into the hands of the stockholders was one in the nature of the declaration of a cash dividend.

Counsel for the remaindermen have attempted to fix the character of the transaction. It is suggested that it constituted either a reduction of capital, and a return of a part thereof to the stockholders, or a capitalization of certain of the company's assets by the virtual creation of preferred stock. Another pertinent query would be whether or not it was anything more than it purported to be upon its face, to wit, an issue of the obligations of the company secured by collateral, with certain unusual provisions as to rights in respect to the collateral and its appropriation reserved to the assignor or granted to the trustee or the bondholders. We, however, have no occasion to enter upon any of the lines of inquiry thus indicated. It is immaterial to the claim of these life tenants what the essential character of the transaction was, provided it was not the declaration of a cash dividend.

As the life beneficiaries are entitled to share in the net income of the testatrix's estate from the time of her decease, the administration account filed October 14, 1907, in which there was no separation of principal from income items, is inadequate for all purposes. It seems to disclose the total amount of the estate and income funds in the hands of the executors, but does not reveal what of that total is to be regarded as principal and what net income. A correct adjustment of the rights of the parties requires the ascertainment of these two factors of the total funds in hand, the first for the purposes of

the division and distribution under article two of the will, and the second for the disposition of net income. To this end a separate accounting as to principal and income is necessary. In such an accounting the Connecticut succession tax and New York state tax are properly chargeable to the principal account. The item for taxes paid to the city of Bridgeport is chargeable to the income account.

As to the 106 shares of the air brake company stock form a part of the principal of Mrs. Bishop's estate, it is apparent that the division made of that stock proceeded upon a mistaken theory and resulted unjustly to the Russell Bishop share, and too favorably to the other shares.

The partial distribution of personal estate filed January 28, 1908, is to be interpreted as setting out to the Connecticut Trust & Safe Deposit Company as trustee of the two shares of which Mary F. and William D. were the respective life beneficiaries the items of property enumerated in the schedule of property assigned to each of these shares, including the Adams Express Company bonds, subject only to the condition attached to these bonds that they be not judicially declared to be income. As that condition must fail, the transfer of the title to these bonds is to be regarded as having been equitably complete, carrying with it the right of the life tenants to enjoy the income thereof which has accrued since the date of the distribution.

The superior court is advised to render its judgment of advice that both the 106 shares, new issue, of the capital stock of the Westinghouse Air Brake Company, and the \$40,000 par value of Adams Express Company bonds form a part of the principal of Mrs. Bishop's estate; that the language of the trust provisions of her will whereby income is disposed of in favor of life beneficiaries comprehends the just proportion of the net income of her estate from the date of her decease; that the distribution of January 28, 1908, was effective to set out to the Connecticut Trust & Safe Deposit Company as trustee the Adams Express Company bonds therein allotted to the two shares of which Mary F. Bishop and William D. Bishop are the respective life beneficiaries; that these beneficiaries are entitled to the income which has accrued thereon since said distribution was made; and that the sum of \$1,405.37 paid by the executors to the city of Bridgeport for taxes is to be charged by them against income, while the sums of \$3,722.22 and \$1,281.27 paid to the states of Connecticut and New York, respectively, are to be charged against principal. No costs in this court will be taxed in favor of any party. The other Judges concurred.

LOWE et al. v. MOLTER.

(Supreme Court of Rhode Island. Jan. 13, 1909. On Reargument, Feb. 3, 1909.)

1. VENDOR AND PURCHASER (§ 129*)—REFUSAL OF CONVEYANCE—DEFECTIVE TITLE.

Where, when a deed was to be delivered under a contract of sale, the period within which the land might be sold by the executrix of the vendor's ancestor had not elapsed, and claims had been allowed against the estate, and no inventory filed, such claims being unpaid, the vendee was not required to accept the title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 233; Dec. Dig. § 129.*]

2. SPECIFIC PERFORMANCE (§ 130*)—ANSWER—RELIEF TO DEFENDANT—DEPOSIT—EXPENSES.

Where, in a suit to compel performance of a land contract, vendee showed an unmarketable title, he was entitled to recover his deposit, taxes paid, and expense of searching the title, under Court and Practice Act 1905, § 316, providing that respondent may in an equity suit avail himself of any matter which would be open to him on a cross-bill, by setting up the matter in his answer.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 424, 425; Dec. Dig. § 130.*]

Appeal from Superior Court, Providence and Bristol Counties; William H. Sweetland, Presiding Justice.

Action by Isabel E. Lowe and others against Henry T. Molter. Judgment for plaintiffs, and respondent appeals. Reversed. Decree for defendant.

Page & Page & Cushing, for appellant. John W. Hogan and Philip S. Knauer, for appellees.

PER CURIAM. It is undisputed that on November 15, 1908, the day when the deed to the premises was to be delivered, the period of two years and six months within which the land was liable to be sold by the executrix to satisfy debts of the testator had not elapsed, and that claims of more than \$3,500 in amount had been allowed against the estate, and that no inventory of the estate had been filed in the probate court. It is also conceded that said claims were not paid until after November 15, 1908. We are of the opinion that the record title to the premises in question was such that the respondent was not obliged to accept said deed, and that the relief sought by the complainants should have been denied.

The respondent claims by his answer affirmative relief, under the provisions of Court and Practice Act, § 316, in respect of the sum of \$485, being the amount of the deposit paid by him on the day of sale, and the further sum of \$216.15, being the amount of the tax on the premises for the year 1907, and the cost of searching the title thereto, which is shown by the evidence to have been \$35. We are of the opinion that the respondent is entitled to the repayment of these several sums, with interest thereon.

The respondent's appeal must be sustained, and the decree of the superior court must be reversed. A decree in accordance herewith

may be entered upon proof of the discontinuance of the suit at law now pending for the recovery of the amounts above set forth. The parties will present a draft decree for the consideration of the court.

On Motion for Reargument.

The record shows that claims amounting to more than \$3,500 had been duly allowed against the estate of the testator and remained unpaid at the time named for the delivery of the deed, which was within the period for which the land was liable to be sold therefor, and there was no record evidence that the compromise referred to had been completed. This constituted such a cloud upon the title that the respondent was not bound to complete the purchase.

The motion for reargument is denied.

WASHINGTON REAL ESTATE CO. v. WACHENHEIMER BROS.

(Supreme Court of Rhode Island. Jan. 15, 1909.)

PAYMENT (§ 22*)—PAYMENT BY CHECK.

A tender of a check for a part of a debt, which is not accepted by the creditor, but is not returned to the debtor, and is not cashed, does not constitute a payment of the amount of the check, so as to prevent the creditor from recovering judgment for the entire debt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 87; Dec. Dig. § 22.*]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Action by the Washington Real Estate Company against Wachenheimer Bros. for rent. Defendant tendered a check for part of the rent due, and claimed damages by reason of a leaky roof equal to the balance of the rent. The check was not returned, nor was it ever cashed, and plaintiff brings action for the entire amount of the rent, and defendant asks to have the amount of the check deducted from the amount of the verdict. There was a verdict for the entire amount of the rent, and defendant excepts. Exception overruled, and case remitted for judgment.

J. Jerome Hahn and James C. Collins, Jr., for plaintiff. Waterman, Curran & Hunt, for defendants.

PER CURIAM. There is no merit in the defendants' exception, and the same is overruled. The case is remitted to the superior court for judgment on the verdict.

RILEY v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Jan. 13, 1909.)

APPEAL AND ERROR (§ 1005*)—REVIEW—CONFLICTING EVIDENCE.

Where the evidence is conflicting, and the trial court has overruled the motion for new trial for insufficiency of the evidence, its ruling will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3943-3954; Dec. Dig. § 1005.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Action by Theresa W. Riley against the Rhode Island Company. Verdict for plaintiff. Defendant's motion for a new trial was denied, and he excepts. Exceptions overruled, and cause remitted, with directions to enter judgment on the verdict.

John W. Hogan and Lyman & McDonnell, for plaintiff. Joseph C. Sweeney, for defendant.

PER CURIAM. While the testimony in this case is so conflicting that different minds, considering the same, might fairly arrive at different conclusions, there is nothing in this case that takes it out of the general rule expressed in *Wilcox v. Rhode Island Co.*, 29 R. I. 292, 70 Atl. 913. We cannot say that there is error in the verdict of the jury, and the defendant's exceptions are without merit.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

HANNAN v. CAPRONI (three cases).

(Supreme Court of Rhode Island. Jan. 15, 1909.)

1. APPEAL AND ERROR (§ 1005*)—REVIEW—VERDICTS.

The general rule is that, where a verdict is sustained by the judge presiding at the trial, it must stand.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3948; Dec. Dig. § 1005.*]

2. NEW TRIAL (§ 97*)—GROUNDS—SURPRISE—DILIGENCE IN AVERTING CONSEQUENCES.

A new trial will not be granted to a party because he was obliged to go to trial in the lower court without preparation, where he did not move for a continuance at the trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 195; Dec. Dig. § 97.*]

3. NEW TRIAL (§ 102*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE IN PROCURING.

A new trial will not be granted for newly discovered evidence, where due diligence was not used to procure the same for the trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 210; Dec. Dig. § 102.*]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Action by Michael J. Hannan against John Caproni. From a denial of defendant's motion for a new trial, defendant brings exceptions and petitions for a new trial and for leave to file a motion for new trial in the superior court. Exceptions overruled, and case remitted, with directions to enter judgment on the verdict.

Cooney & Cahill, for plaintiff. Doran & Flanagan and Armstrong & Dorney, for defendant.

PER CURIAM. The defendant's exceptions, based upon the denial of his motion for a new trial, must be overruled. The

verdict of the jury in favor of the plaintiff was sustained by the judge who presided at the trial, and in such circumstances the general rule is that the verdict must stand.

The defendant's petition for a new trial on the ground that he did not have a full, fair, and impartial trial must be denied. The reasons contained in his affidavit and that of his counsel in support of the petition—viz., that he did not know of the assignment of the case for trial and did not know the case was assigned until the evening before the day of trial, that there was no opportunity for preparation, and that the defendant was obliged to go to trial with an unprepared case—would have been grounds upon which to move for a continuance; but no motion for delay was made at the trial. Moreover, the statements are denied in the counter affidavits of the counsel for the plaintiff.

The other petition for leave to file a petition for a new trial in the superior court, on the ground of the discovery of new evidence, does not commend itself to the discretion of this court. While the defendant asserts that he was unable to procure the evidence now offered, it is not clear that he used due diligence in his attempts to obtain the same. Furthermore, there are affidavits in contradiction thereof.

In view of all the circumstances surrounding the case, it does not appear to us that justice requires a revision of the same. The case is remitted to the superior court, with direction to enter judgment on the verdict.

LYNCH v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Dec. 29, 1908.)

APPEAL AND ERROR (§ 1005*)—REVIEW—CONFLICTING EVIDENCE.

Where the evidence is conflicting, and a motion for a new trial for insufficiency of the evidence has been overruled, the ruling will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3949; Dec. Dig. § 1005.*]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Action by Thomas Lynch against the Rhode Island Company. From a verdict for plaintiff, defendant brings exceptions. Exceptions overruled, and cause remitted, with directions.

Cooney & Cahill, for plaintiff. Joseph C. Sweeney, for defendant.

PER CURIAM. There is nothing so peculiar about this case as to take it out of the general rule announced in *Wilcox v. Rhode Island Company*, 29 R. I. 292, 70 Atl. 913. The discrepancies in the testimony of the plaintiff's witnesses, as given by them in the various trials of the case, were called to the attention of court and jury, and were doubt-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

less given proper weight by them. The damages are not so large as to shock the conscience of the superior court, and we cannot say that they are so excessive that the verdict should be set aside for that reason.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

(29 R. I. 380)

GREENOUGH, Atty. Gen., v. TOWN COUNCIL OF TOWN OF NARRAGANSETT.

(Supreme Court of Rhode Island. Jan. 13, 1909.)

1. CENSUS (§ 8*)—STATE CENSUS—APPROVAL BY LEGISLATURE.

Gen. Laws 1896, c. 69, § 3, makes the commissioner of industrial statistics superintendent of the census, and section 4 requires him to superintend the taking of the census and receive the returns, and make a report thereof to the General Assembly. The state census of 1905 was duly reported to the General Assembly, and was printed by the state printers as a part of the "Nineteenth Annual Report of the Commissioner of Industrial Statistics, Made to the General Assembly," and was also printed in a census bulletin for general distribution, wherein it was stated that it was compiled from a correct account of the returns as of June 1, 1905. *Held* that, in the absence of a statute requiring any formal action by the census board or General Assembly, it would be presumed that the board approved the census, and that the General Assembly, by receiving the report and causing it to be published as part of an official report, also approved it so as to make it a legal census.

[Ed. Note.—For other cases, see Census, Dec. Dig. § 8.*]

2. INTOXICATING LIQUORS (§ 45*)—LICENSES—NUMBER ISSUABLE.

Pub. Laws 1908, p. 206, c. 1583, § 2, providing that the number of liquor licenses in towns shall not exceed one for each 500 inhabitants as determined by the last census taken by the United States or the state of Rhode Island, means the last census actually taken, whether by the state or federal government, so that the state census of 1905, and not the federal census of 1900 would determine the number of licenses issuable.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 45.*]

3. INTOXICATING LIQUORS (§ 101*)—LICENSES—EXPIRATION.

A liquor license granted "for the year ending December 1, 1909," became effective December 1, 1908, though the action of the town council was taken November 16, 1908, and Pub. Laws 1908, p. 206, c. 1583, under which it was granted, only became effective on December 1, 1908 and by the direct provisions of the statute it would expire on December 1st next succeeding the granting of the same.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 101.*]

Certiorari by William B. Greenough, Attorney General, against the Town Council of the Town of Narragansett, to review proceedings in granting liquor licenses. Writ issued.

George H. Huddy, Jr., for petitioner. Albert B. Crafts, for respondent.

PARKHURST, J. This is a petition for a writ of certiorari, brought to this court by the virtue of the provisions of chapter 1, § 2, of the Court and Practice Act of 1905, to review certain proceedings of the town council of the town of Narragansett in granting licenses to sell intoxicating liquors, under the provisions of chapter 1583, p. 206, of the Public Laws of 1908, amending chapter 102 of the General Laws of 1896.

The said town council on November 16, 1908, granted three licenses to sell intoxicating liquors at retail, to wit, to Mervin A. Webster, to the Sherry Casino Company, and to William H. Wooley; said licenses being granted "for the year ending December 1, 1909." Section 2, c. 1583, p. 206, of the Public Laws of 1908, giving power to town councils and boards of commissioners to grant licenses, contains the following proviso: "Provided, that the number of licenses granted (not including druggists' liquor licenses) shall not exceed, in the several cities and towns of the state, one for each five hundred inhabitants as determined by the last census taken under the authority of the United States or the state of Rhode Island." At the time of granting of said licenses the last census taken under the authority of the United States was in 1900, and shows the population of the town of Narragansett to have been at that date 1,523. The last census taken under the authority of the state of Rhode Island was taken in 1905, and shows the population of the town of Narragansett to have been at that date 1,469. All three of said licenses were granted at the same meeting of the town council, each by a separate vote, in the order in which they are mentioned above.

The questions raised are: "(1) Does the language of section 2, c. 1583, p. 206, of the Public Laws of 1908, to wit, 'last census taken under the authority of the United States or the state of Rhode Island,' authorize the use by the licensing board of either census at its pleasure? (2) May a town council grant a license to expire at any other time than the 1st day of December next succeeding the granting thereof?"

The respondents contend that there is no evidence that any legal census of Rhode Island was taken in 1905; that there is no record of approval of such census by the "census board," consisting of "the Governor, the Secretary of State, and the Commissioner of Industrial Statistics," or of the proper submission of the census of 1905 to the General Assembly, or of its acceptance and approval thereof; and that, therefore, the respondents were justified in using the last census (1900) taken under the authority of the United States as their basis of computation. We cannot agree with this contention. It appears before us that the state census of 1905, so far as it relates to the population of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

state (with which we are alone concerned), was duly reported to the General Assembly by the Commissioner of Industrial Statistics, who is, by chapter 69, § 3, Gen. Laws 1896, made "superintendent of the census," at the January session, 1906, through Gov. George H. Utter, and was printed by the state printers in 1906 as a part of the "Nineteenth Annual Report of the Commissioner of Industrial Statistics, Made to the General Assembly at its January Session, 1906." It also appears that the same census of population was printed by the Superintendent of the Census, in a census bulletin, for general distribution, under date of November 16, 1905; and it is therein stated that "It is compiled from a correct and final count of the enumerators' returns as of June 1, 1905." In the absence of any provision of law requiring any formal action by the board, or by the assembly, or any action whatever as to approval or acceptance, it is to be presumed that all the members of the census board approved the census as above reported, and that the General Assembly, by its action in receiving the same and causing it to be printed and published as part of an official report, also approved the same. It is to be noted that the only provision as to a report to the General Assembly is contained in section 4, c. 69, Gen. Laws 1896, as follows: "The superintendent of the census shall also superintend the taking of the census and receive the returns when completed. He shall also make up the tables from the returns and prepare and present to the General Assembly a report on the census, showing the information obtained and its application to the promotion of the interests of the state." This duty was performed by the superintendent as above indicated, so far as it related to population, and the information was thereafter available to all persons having occasion to refer to the same.

We have no doubt that it was the plain intent of the act in question to refer to "the last census taken," whether it was taken under the authority of the United States or under the authority of the state of Rhode Island, so as to give as a basis of computation the latest enumeration made, whether under national or state authority. As to the first question raised, therefore, we are of the opinion that it was necessary for the town council of the town of Narragansett to take the census of Rhode Island as of June 1, 1905, as the basis of determining the number of licenses which could be lawfully granted in that town. The population of Narragansett as therein shown appears to be 1,469. As this was the last census taken under the authority referred to in the proviso above quoted, that number must control the action of the town council in issuing licenses under said statute. As the number of licenses granted (not including druggists' liquor li-

censes) shall not exceed one for each 500 inhabitants as determined by the last census, the town council of the town of Narragansett had no authority to grant more than two such licenses for the sale of liquors in said town. It therefore follows that the last of the three licenses by them granted, to wit, that granted to William H. Wooley, was unauthorized and void.

As to the second question raised, although the action of the town council was taken November 16, 1908, granting the licenses in question, it is evident that the licenses were to take effect, and could only take effect, on and after December 1, 1908, because the law (chapter 1583) under which the licenses are granted only went into effect December 1, 1908, and because the express words of the vote granting the licenses are "for the year ending December 1, 1909." We think this action was in legal effect a grant of licenses on December 1, 1908, to expire on the 1st day of December next succeeding the granting of the same, and was in compliance with the language of the statute, viz.: "Whenever any license for the sale of spirituous or intoxicating liquors shall be granted, the same shall be granted to expire on the 1st day of December next succeeding the granting of the same."

The writ of certiorari will accordingly issue to said town council, commanding them to certify the record relative to the proceedings in granting the said license to William H. Wooley, in order that the same may be quashed.

(29 R. I. 384)

DARCEY v. DARCEY.

(Supreme Court of Rhode Island. Jan. 13, 1909.)

1. PLEADING (§ 201*)—DEMURRER—GROUNDS—SUFFICIENCY.

Grounds of demurrer to a bill to specifically perform an agreement, that complainant does not state such a case as would entitle him to the relief sought, that the agreement mentioned in the bill is void and of no effect, and that the promise of the gift of the land in question under the conditions set out in the agreement is such that under the allegations of the bill it cannot be enforced and respondent compelled to make a transfer thereof, are too general to be considered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 476; Dec. Dig. § 201.*]

2. HUSBAND AND WIFE (§ 46*)—CONTRACTS BETWEEN—CAPACITY OF PARTIES.

Under Gen. Laws 1896, c. 194, § 3, as amended by Pub. Laws, c. 335, § 1, passed May 14, 1896, authorizing a married woman to contract with the same rights and liabilities as a single woman, a husband can contract to convey land to his wife on breaking an agreement not to renew adulterous relations, in consideration of the wife agreeing to condone past offenses.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 228; Dec. Dig. § 46.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. HUSBAND AND WIFE (§ 46*)—CONTRACTS—CONSIDERATION—SUFFICIENCY.

A wife's agreement to discontinue a divorce suit was sufficient consideration for the husband's agreement to convey land to her on breaking an agreement not to renew adulterous relations.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 228; Dec. Dig. § 46.*]

4. CONTRACTS (§ 50*)—"VALUABLE CONSIDERATION."

"A 'valuable consideration' is some legal right acquired by the promisor in consideration of his promise, or forbore by the promisee in consideration of such promise."

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 223; Dec. Dig. § 50.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7271-7273.]

5. DAMAGES (§ 78*)—LIQUIDATED DAMAGES OR PENALTY.

Under a contract whereby a wife dismissed a divorce suit and condoned adultery in consideration of the husband conveying a one-half interest in particular property and agreeing to convey the remaining interest if he renewed the adulterous relations, the conveyance of the latter interest is liquidated damages, and not a penalty or forfeiture.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 159; Dec. Dig. § 78.*]

Appeal from Superior Court, Providence and Bristol Counties; William H. Sweetland, Presiding Justice.

Action by Ellen M. Darcey against Patrick L. Darcey. From a decree dismissing the bill, plaintiff appeals. Reversed and remanded, with directions.

Hugh J. Carroll, for appellant. Claude J. Farnsworth and Thomas F. Vance, for appellee.

DUBOIS, J. This is an appeal from the decree of the superior court sustaining the respondent's demurrer and dismissing the complainant's bill in equity.

The bill of complaint was brought by the complainant against the respondent for the purpose of enforcing his specific performance of the following agreement:

"This agreement made and entered into the 27th day of November, A. D. 1906, by and between Patrick L. Darcey, known also as Lawrence P. Darcey, and Ellen M. Darcey, his wife, both of Pawtucket, in the county of Providence, state of Rhode Island, witnesseth:

"Whereas, the parties hereto have been living apart, and said wife has a suit for divorce now pending in the Supreme Court of this state against her said husband; and whereas, they are desirous of settling their differences and become reconciled, it is therefore agreed as follows:

"I. Said P. L. Darcey, husband as aforesaid, agrees to execute and deliver to his said wife a good and sufficient deed of a one-half interest in the real estate owned by said husband on the westerly side of High St., Pawtucket, and land situate and known as the

northeasterly side of Broadway, in said Pawtucket (Nos. 86, 88, and 90 Broadway), one-half of the land on Osborn St., Providence, R. I., with the buildings and improvements thereon, which said land shall hereafter be owned in common by them, each owning one half.

~~"II. Said Ellen M. Darcey shall also have the rents of the estates which she is at present receiving."~~

"III. Said Patrick L. Darcey further agrees that he shall never again consort with, keep the company of, or support or pay any money or other valuables to, a certain woman known by the name of Hughes, or the child she claims belongs to said Patrick L. Darcey. If said Patrick L. Darcey shall break this agreement concerning said woman either in letter or spirit, then this condonation shall be void, and said Patrick L. Darcey shall immediately convey to said Ellen M. Darcey his remaining interest in the above-mentioned land; and, in case of his neglect or refusal so to do on the occurrence of such breach of this agreement by him, the superior court of this county is hereby authorized, on the application of said Ellen M. Darcey, to appoint a commissioner to make such conveyance to said Ellen M. Darcey, and her heirs.

"IV. And the said Ellen M. Darcey hereby agrees to discontinue the said petition for divorce and to condone the matters between herself and her said husband, in consideration of the premises, and to live with said Darcey as his lawful wife, and care for him as such and of their common home and estates.

"In witness whereof, the parties hereto do hereunto set their hands and seals, binding themselves and their several and respective heirs, the day and year above written.

"Paragraph II erased before signing.

"L. P. Darcey. [Seal.]

"Ellen M. Darcey. [Seal.]

"In presence of H. J. Carroll."

The demurrer referred to was based upon the following grounds:

"(1) That said complainant does not state such a case as would entitle him to the relief sought.

"(2) That said agreement mentioned in said bill of complaint is void and of no effect.

"(3) That said agreement mentioned in said bill of complaint was given without any consideration whatsoever.

"(4) That said agreement is a voluntary one and cannot be enforced in a court of equity.

"(5) That the promise of the gift of the land in question under the conditions set out in the agreement is such that under the allegations set out in the bill cannot be enforced and the respondent compelled to make a transfer thereof.

"(6) That said agreement to make said transfer under the conditions set out in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bill was entered into by the respondent without any valuable consideration.

"(7) That said bill does not set out the whole of said agreement, nor make a copy of the same a part of said bill of complaint.

"(8) That by said bill it appears that said complainant has not kept and performed her part of said agreement."

The reasons given by the superior court for sustaining the demurrer and for dismissing the bill were: "The agreement of which the complainant prays specific performance is plainly in the nature of a penalty agreed upon by the parties for the future breach of said agreement by the respondent. Equity will not lend its aid to enforce a penalty or a forfeiture, and the complainant cannot have in this proceeding the relief which she seeks."

The first, second, and fifth grounds of demurrer are too general to be considered; the seventh and eighth specifications are without merit; and the third and fourth grounds add nothing to those contained in the sixth paragraph. Therefore the only questions necessary to be considered are the following: Were the parties capable of entering into the agreement? Second, was the agreement entered into without a valuable consideration? And, third, shall the conveyance promised by the respondent upon breach of his said agreement be regarded as a penalty or forfeiture, or in the nature of liquidated damages?

There can be no question but that the complainant and respondent had the right to enter into the agreement. Under the provisions of Pub. Laws, c. 335, § 1, passed May 14, 1896, Gen. Laws 1896, c. 194, § 3, was amended so as to read as follows: "Sec. 3. A married woman may make any contract whatsoever the same as if she were single and unmarried, and with the same rights and liabilities." The agreement is based upon a valuable consideration. "A valuable consideration is some legal right acquired by the promisor in consideration of his promise, or forbore by the promisee in consideration of such promise." 1 Page, Contracts, § 274, and cases cited. By clause IV of the agreement the said Ellen M. Darcey agrees to discontinue her petition for divorce, and the bill avers and the demurrer admits that she did discontinue the same. This was clearly a forbearance to prosecute a legal right which she had. *Sommer v. Sommer*, 87 App. Div. 434, 84 N. Y. Supp. 446; *Duffy v. White*, 115 Mich. 270, 73 N. W. 363; *Polson v. Stewart*, 167 Mass. 216, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452, and cases cited. See, also, *Adams v. Adams*, 91 N. Y. 384, 43 Am. Rep. 675, in which the remarks of Rapallo, J., are pertinent: "We are unable to perceive on what ground the arrange-

ment can be regarded as against public policy. It tended to restore peace and harmony between husband and wife, and renew their conjugal relations. Agreements to separate have been regarded as against public policy; but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations, after a temporary separation had taken place. While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences or preclude either from forgiving a wrong committed by the other." We regard the conveyance to be made by the respondent upon violation of his agreement, in the light of liquidated damages, and not as a penalty or forfeiture.

The bill alleges and the demurrer admits that the respondent has performed that portion of his contract set out in the first paragraph thereof, and that thereby the complainant has become the owner of an undivided one-half part of the real estate and improvements therein mentioned. It is apparent from the agreement that this was regarded by the parties as compensation to the wife for the injury that she had theretofore sustained by reason of the misconduct of her husband. If one-half of this real estate was deemed by the parties to be the equivalent of adequate damages for past misconduct, why should we question it? No one claims that the agreement was made with intent to delay, hinder, or defraud creditors. The innocent and injured wife and her guilty husband were also fully competent to fix the amount of damages the wife would sustain in case of the husband's future adultery with his former paramour, in which case the home re-established in pursuance of the agreement would be broken up, in violation thereof; and again the wife would be abandoned for the mistress, and made to suffer as much or more than before. In such circumstances can we say that the other half of the real estate is more than adequate compensation to the petitioner? We think not.

The bill alleges and the demurrer admits that the respondent has violated the essential condition of his agreement. We find, therefore, that the agreement is valid and subsisting, that it is founded on a valuable consideration, that the complainant has performed her part of the agreement, and that the respondent has broken the same. The complainant is entitled to the relief sought.

The decree of the superior court is hereby reversed, and the cause is remanded to the superior court, with direction to overrule the respondent's demurrer and for further proceedings in conformity herewith.

(75 N. J. E. 90)

STEPHANY v. MARSDEN et al.

(Court of Chancery of New Jersey. Dec. 18, 1908.)

1. CORPORATIONS (§ 316*)—DIRECTORS—CONTRACTS—VOIDABILITY.

It being contrary to public policy to permit a director of a corporation to freely contract with the corporate body, such contracts are voidable at the option of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1401; Dec. Dig. § 316.*]

2. CORPORATIONS (§ 320*)—CONTRACT WITH DIRECTORS—AVOIDANCE—TIME.

A corporation must exercise its right to avoid a contract with a director within a reasonable time, the length of which is dependent on the circumstances of a given case.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 320.*]

3. CORPORATIONS (§ 320*)—CONTRACT WITH DIRECTOR—AVOIDANCE—STATUS QUO.

Where a corporation elects to avoid a contract with a director, equity will place the parties in statu quo by requiring payment of what the corporation has received.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 320.*]

4. CORPORATIONS (§ 307*)—DIRECTORS—NATURE OF DUTIES.

A director of a corporation occupies a fiduciary relationship to it in the nature of that of a trustee to a cestui que trust.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1350, 1351; Dec. Dig. § 307.*]

5. CORPORATIONS (§ 316*)—STOCKHOLDERS—CONTRACT WITH DIRECTOR—RATIFICATION.

Since the stockholders of a corporation owe no fiduciary relation to it, all of the stockholders by mutual agreement may authorize the corporation to contract with a director, or may ratify such a contract already made which they believe to be beneficial to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1412; Dec. Dig. § 316.*]

6. CORPORATIONS (§ 202*)—STOCK—ISSUANCE TO PROMOTERS—CANCELLATION—ACTION.

While the duty to sue to cancel stock issued to promoters without adequate consideration is primarily in a corporation, a stockholder may sue for such relief, where the control of the corporation is in such interests that it would be futile to expect that it would prosecute the suit with vigor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 777; Dec. Dig. § 202.*]

7. CORPORATIONS (§ 209*)—STOCK—ISSUANCE TO PROMOTER—CANCELLATION—DELAY—LACHES.

A corporation voted certain stock to a promoter in return in part for a mail order system for the sale of the corporation's product. Plaintiff for several years acted as a stockholder, director, and secretary of the corporation, with knowledge of such transaction, and, while the system was probably worth much less than what the corporation paid for it, plaintiff made no objection to the contract until after the system became obsolete, and until it was practically impossible to determine its value at the time the contract was made, nor until after the stock increased greatly in value, because other profitable means of disposing of the corporation's product were devised. *Held*, that plaintiff was barred by laches from maintaining a suit on behalf of the corporation to have the contract set aside.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 209.*]

Action by Albert C. Stephany against John E. Marsden and others. Judgment for defendants.

Joseph H. Gaskill and U. G. Styron, for complainant. Norman Grey, Charles A. Baake, and William B. Linn, for defendants.

LEAMING, V. C. (orally). The law which controls our courts in dealing with transactions of this nature is so well defined, and the facts of the case are so much fresher in my mind at this time than they will be at some later period, that I doubt the advisability of taking the case under advisement.

The Court of Errors and Appeals of this state has held that it is so far contrary to public policy to permit a director of a corporation to freely contract with the corporate body of which he is a director that contracts so made must be deemed voidable at the option of the corporation. I have observed a tendency of recent years, arising largely from the extensive and complex dealings and relations of modern trading corporations, to relax this rule; the tendency being, as I have observed it, to inaugurate the modified doctrine that such contracts should not be deemed voidable at the mere option of the corporation, but that the burden should be imposed upon these seeking to enforce or support such a contract to clearly establish its fairness. I think, however, that the general rule, as I have briefly defined it, as established by our Court of Appeals, cannot be said to have been in any way relaxed by that court since it was there first stated in the case of *Stewart v. Lehigh Valley Railroad Company*, 38 N. J. Law, 505, and it has since been by that court so repeatedly approved and recognized that I must regard it as a fixed part of the jurisprudence of this state. The rule, however, is subject to certain well-recognized and well-defined limitations. One limitation may be said to be that the right of a corporation to avoid at its option a contract in which a director of the corporation is a party must be exercised by the corporation within a reasonable time. What is a reasonable time must be dependent in a large measure upon the particular circumstances of any given case; but it is manifest that in any case the longer delay occurs in the exercise of the privilege upon the part of the corporation, the more likely it is that changing conditions will render it impossible for a court of equity to restore, with any degree of accuracy or completeness, the original conditions, and relief, if granted, must always be granted upon equitable terms and with an object to restore the pre-existing conditions as nearly as possible. A director of a corporation may loan money to his corporation and may be unable to recover the money so loaned by the inherent force of the contract by reason of the fact that the corpora-

tion will be privileged to avoid the contract as such; but in such a case there still exists upon the part of the corporation an obligation which the law imposes upon it to repay the money which it has received, and that obligation a court of equity must protect in any effort upon the part of the corporation to avoid the contract. So, where property has been conveyed to a corporation by a director of the corporation, while the contract under which the conveyance has been made may be avoided by the corporation, it will be the duty of a court of equity to restore to the party who made the conveyance such property or values as he has parted with and as have passed to the corporation, and any considerable efflux of time after such a transaction is liable to render it more or less difficult or, perhaps, impossible for a court to restore original conditions or to adopt substituted conditions with fairness or accuracy. A second limitation which may be said to exist arises from a distinction which must be recognized between the relation of a stockholder to a corporation and the relation of a director to a corporation. A director's duties are trust duties, or, more accurately speaking, are so nearly of the nature of the duties of a trustee to his cestui que trust that a fiduciary relationship with its attendant responsibilities is appropriately said to exist between the director and the corporation; whereas, the position of the stockholder of a corporation is not one of trust, for a stockholder owns that which may be said to represent an integral proportionate part of the corporation as a property right, and it is his privilege to protect that right and to deal with it and to deal with his corporation in accordance with his best judgment, so there is no reason why all of the stockholders of a corporation may not, by mutual agreement, co-operate to enable the corporation which they collectively comprise to make a contract with one of its directors, or to ratify such a contract already made, if the stockholders believe that such a course is beneficial. The limitation to which I refer therefore is that the stockholders may either authorize or approve of a contract between a corporation and one of its directors when they believe such a contract to be beneficial.

In the present case, the right of the corporation to avoid the contract now in question is asserted by an individual stockholder of the corporation; complainant asking as a stockholder that 300 shares (of the par value of \$15,000) of the capital stock of the Liberty Cut Glass Company of New Jersey be canceled. This stock was issued by the corporation named to three parties, who have been called its promoters, and now belongs to one of the three, namely, defendant John E. Marsden. Where rights of this nature of a corporation are to be asserted, it is primarily the duty of the corporation

to assert such rights; but, where the management of the corporation is in hands whose interests will be injuriously affected by the assertion of the rights claimed, it cannot be reasonably expected that the corporation will be active in the matter, and the privilege is accordingly given to an individual stockholder to protect his individual stock interests in a suit of the nature of the present one in behalf of the corporation, and I think the evidence in this case sufficiently shows that the management of the Liberty Cut Glass Company of New Jersey is in such hands that it would have been entirely futile for the complainant to have asked that this suit be prosecuted with vigor by the corporation itself, and this suit may therefore be sustained in its fullness by the individual stockholder, the complainant here, Albert C. Stephany.

The question therefore presented is whether a conveyance made by Mr. Marsden, the defendant, and his two associate promoters, to the Liberty Cut Glass Company at the time of its organization, for which conveyance there was received by the three promoters the \$15,000, par value, of stock of the corporation, shall be set aside and the stock so issued canceled, either in whole or in part. The ground of the relief sought is that the contract of sale was not only a contract between the corporation and three men who were the promoters and directors, but it is also claimed affirmatively upon the part of complainant that the contract of sale was made under false and fraudulent misrepresentations upon the part of defendant Marsden and his two associates, and that values and existing conditions were by them represented to the corporation to exist, which, in fact, did not exist, and that there has been a failure, if not entire, then nearly so, of the consideration for which the stock was issued. I doubt the propriety of going at length into the details of the conditions which existed at the time of the organization of the Liberty Cut Glass Company, and the transfer to it of the property rights which were made the consideration for the stock in question; but perhaps I should briefly summarize the situation at that time by the statement that Mr. Marsden and his two associates were at the time the owners of nearly all the corporate stock of a Delaware corporation operating at Philadelphia, and known as the "Quaker City Cut Glass Company," which corporation was engaged in a business similar to that of the proposed business of the New Jersey corporation then about to be formed. Mr. Marsden and his two associates referred to were also associated as partners in an enterprise which in effect made them sales agents of the Philadelphia corporation.

The enterprise consisted of what they called a "mail order system" of placing cut glass upon the market. That system Mr. Marsden

and his two associates claim to have originated and to have actively prosecuted for a period of 18 months prior to the formation of the new Jersey corporation, and by the testimony of Mr. Marsden it is claimed that a considerable sum of money has been spent in developing the system of its then condition; their expenditures having included a large amount paid for advertising and other incidental expenses. At the time of the proposed formation of the New Jersey corporation in the fall of 1902, the partnership business of the three sales agents referred to, known as the "mail order business," had reached, as Mr. Marsden claims, a considerable magnitude and was prosperous. It was at that time that the plan was originated whereby it was proposed to establish a New Jersey corporation at Egg Harbor under the same name which the three partners had been using up to that time, namely, the Liberty Cut Glass Company, which corporation should take over the name and the trade and whatever tangible business assets there were of the Philadelphia partnership, and should issue to the three partners in payment for such assets the stock now in question. To that end a public meeting was held in Egg Harbor, at which meeting defendant Marsden and his two associates enlightened those present as to the general plan, and at that meeting some stock was subscribed. The idea given out at that meeting appears to have been that Mr. Marsden and his two associates were to supply to the new company, in value at least, dollar for dollar against such money as the Egg Harbor people should put into the concern. To that end subscriptions to stock were taken, with a view of raising \$15,000 by local subscriptions, and \$15,000 in value was to be supplied by Mr. Marsden and his associates by conveying to the corporation the assets already referred to which they possessed. The corporation was formed, and the three incorporators met on October 3, 1902, to hold the organization meeting. At that time there were present a number of the stockholders who had or were about to subscribe for shares which were to be paid for in cash. At that meeting a resolution was passed by the three men named in the charter of the corporation, who were holding the organization meeting, authorizing the board of directors to take over these assets from Mr. Marsden and his associates and to issue full-paid stock to them to the amount of 300 shares, or \$15,000. The Egg Harbor people, who were present at that meeting in considerable number, were invited to participate in the proceedings of the meeting, and did so, and I think the minutes show that those who were present unanimously voted for the resolution authorizing the purchase. A preliminary agreement had already been drawn under date of October 3, 1902, which embodied very fully the general proposition in effect as I have stated it, except that other details to which

I have not yet referred were embodied in the written proposition. After the meeting of the incorporators and the election by them of a board of seven directors, of whom Mr. Marsden and his two associates were three, and of whom Egg Harbor subscribers for stock were four, a directors' meeting was at once held, and the contract in question was made with Mr. Marsden and his two associates, pursuant to a resolution of that meeting, which resolution was in accordance with the vote of the preceding organizers' meeting; and pursuant to that authorization the conveyance now in question was made to the corporation of the rights which Mr. Marsden and his two associates had been up to that time exercising and which they owned, and the stock now in question was issued. While I think the bill of sale which was made by Mr. Marsden and his two associates to the company refers only to the mail order business and its assets, the testimony discloses that what was in fact the consideration for the issuance of the stock to Mr. Marsden and his associates was not only the mail order business, but also the engagement of Mr. Marsden and his associates to cause the Philadelphia company, the Quaker City Glass Company, to enter into a five years' contract with the new Liberty Company, whereby the former company should agree to take of the manufactured products of the new Liberty Company \$25,000 worth of manufactured products a year for five years at a profit above cost to the new Liberty Company of 15 per cent. So the two elements, the mail order business and the guaranteed contract, were the things which formed the consideration for the issuance of this stock. Whether or not both are expressly named in the bill of sale I am not sure, but both are set forth at length in the written preliminary agreement.

I am strongly impressed, as I view the situation in the light of developments which have transpired since this transaction occurred in 1902, that the values conveyed by Mr. Marsden and his associates to the Liberty Cut Glass Company were less, considerably less, than \$15,000 in amount; but the difficulty which necessarily confronts one, after so long a time has elapsed, in ascertaining what the real values were which were conveyed, arises from the fact that it is almost impossible for one to transport himself in effect, to that early date and accurately view conditions from the more limited view points that one would then have had. This mailing contract business, according to Mr. Marsden's testimony, was then of great value and a source of great profit both present and prospective, but soon thereafter became less valuable by reason of a fact which could not then have been discerned, namely, that others soon inaugurated the pursuit of the same system, and the opposition which thus arose destroyed the profits which before that time had been possible through those channels.

In undertaking to assume a view point of the year 1902 we can only appropriately view such things as could then have been seen, and, if it were not within the reasonable contemplation of the parties at that time that new business conditions of the nature referred to would arise, it is improper at this time to base a judgment upon those new conditions which have since developed and become presently apparent. So it is manifestly difficult to determine, in case this stock should at this time be set aside, what values should equitably be restored to Mr. Marsden in lieu of the cancellation of the contract. Such values as should equitably be restored would be the values which then existed of the assets which Mr. Marsden and his associates placed in the hands of the new company; and they included, as already stated, not only the mail order business, but also what then appeared to be, and what I may say now appears to have been, a valuable asset in the nature of a guaranteed contract with the Quaker City Glass Company, under which that corporation was to become obligated to purchase, at a 15 per cent. profit to the new corporation, the amount already stated of the products of the new concern. So I find myself embarrassed, extremely so, in ascertaining a satisfactory method whereby I may, with what I can regard as reasonable accuracy, determine upon a basis for compensation to defendant Marsden in the nature of a restoration of rights in value equal to the rights which were delivered to the new company, should the stock be cancelled pursuant to the prayer of the bill.

It is manifest that rights cannot be restored as they originally existed, because the business which was conveyed has now disappeared entirely, and the difficulties which thus exist arise primarily from the fact that the present suit was instituted at a time so long after the time when the original transaction occurred; the present bill not having been filed until August, 1907. It is apparent that no corporation has the right to speculate upon its privilege to avoid a contract which it has made. Its right of rescission cannot be held in abeyance awaiting the changing conditions of time to the end that the results of the contract may be retained if found desirable or profitable and rejected if found unsatisfactory. The importance and extreme fairness therefore of the principle that a right of this nature, an option of this nature, should be exercised, if at all, promptly, is manifest in almost every aspect in which we approach this or any case. At the organization meeting to which I have referred, Mr. Stephany was present and participated. His name was proposed as a director, but others received more votes than he, and his name was not among those who were declared elected. He was, however, made a director at the annual meeting which was held January 19, 1904, and during the time between the organization meeting in

October, 1902, and the annual meeting in 1904 Mr. Stephany had remained continuously a stockholder. I am unable to agree with the suggestion made by counsel of the defendant to the effect that the participation of the stockholders in the organization meeting would operate as either a ratification or direction upon the part of the stockholders for the purchase of this property and therefore become the individual act of the stockholders or the act of the corporation by virtue of the unanimous or practically unanimous consent of its stockholders given at that time; but it does appear that a meeting of the stockholders was held January 20, 1903—the first succeeding annual meeting—at which meeting there were present 429 shares of stock and were absent 76 shares of stock, the total stock having been 505 shares. At that meeting a new board of directors was elected. The 300 shares of stock in question were voted by Mr. Marsden and his associates, but of the 429 shares present 129, which was more than a majority of the stock exclusive of the stock in question, was represented and voted for those directors. That meeting, as will be seen, was only a short time, three months, after the organization meeting. The next annual meeting after operations had actively begun was on January 19, 1904. At that meeting there were 411 shares present, which, excluding the 800 shares now in question, left 111 shares of stock, or more than half of the stock held by the Egg Harbor people. At that meeting Mr. Stephany was present and was elected a director, and I believe nominated by Mr. Diamond, one of Mr. Marsden's associates, as a director. At that meeting a report was made by the president of the corporation to its stockholders, and in that report it was shown what the amount of sales had been under the Quaker City contract, and also what the amount of sales had been up to that date under the mail order system, so that at that time the practical operative results of the two classes of assets which had been turned over to the Liberty Company were displayed to the assembled stockholders, and if the results which had been obtained during that period of one year and three months by the use of those assets by the Liberty Company indicated a lesser value of these assets than had been represented by the promoters, or indicated a lesser value than the amount which had been paid, then a duty at that time devolved upon the stockholders who were present to exercise any rights they had in the way of avoidance of the obligations of the company which had been given as a consideration for the transfer of the assets.

Stockholders who were not present were privileged to be present and were in a measure chargeable with notice of what occurred. Mr. Stephany is a man of acute intelligence. At that time he well knew what had been paid for the assets which had been turned over to the corporation, and at that time was

informed what the practical results had been in the handling of those assets by the corporation, and as an intelligent man it became his duty and the duty of all stockholders to inquire and ascertain the value of these assets, and to ascertain whether any misrepresentations of value or failure of consideration existed, and to assert such rights as belonged to the corporation, rather than to permit the corporation to continue to utilize the assets for an indefinite period and in effect speculate upon the development of time. No action, however, was taken, looking to the rescission of the contract, and again in January, 1906, there were present at the stockholders' meeting 447 shares, which, excluding the 300 shares in question, left 147 shares, more than a majority of the stock held by the Egg Harbor people, and Mr. Stephany was present and was elected secretary and director. On January 18, 1906, another stockholders' meeting occurred, at which more than a majority of the stock, excluding the 300 shares in question, were present and participated, and Mr. Stephany, I think, at that meeting was again re-elected both as a director and secretary. I think it also appeared at that meeting that the profits of the concern had reached 10 per cent. net for the then current year. At that time the company was still operating under the Quaker City contract, but, as I recall it, the mail order business had at that time practically ceased. On May 15, 1906, the Quaker City contract was canceled. The reason for its cancellation may not be material, but it was canceled by mutual agreement of the Quaker City Company and the Liberty Company. It does appear, and is undoubtedly a fact, that up to that time the Liberty Company had been suffering for want of capital. It had been anticipated at the outset that they would need \$15,000 cash capital, and the subscriptions which were forthcoming only reached about \$10,000, and there had been, in consequence, a shortage of cash capital, and the Quaker City Company had, according to the testimony, gone far in the line of indulgence to the Liberty Company. They had supplied to the Liberty Company a line of credit which, in some measure, had enabled the Liberty Company to conduct its affairs at a profit, and without that line of credit it appears that the Liberty Company would, in all probability, have been embarrassed. At any rate, a friction occurred between the two companies, and that friction seems to have occurred because of a claim upon the part of the Liberty Company, or Mr. Marsden representing the Liberty Company, that the Liberty Company was entitled, under the contract, to a 15 per cent. profit on the cost of

the blanks, which blanks, as I understand it, were articles manufactured by other glass companies in the rough, and which were ground by the Liberty Company. Without undertaking to ascertain whether such a claim was valid or not, I am impressed that any charge upon the part of the Liberty Company, under the contract referred to, of 15 per cent. of the cost of blanks, when those blanks had been supplied by the Quaker City Company to the Liberty Company and had not been paid for, was a severe strain on the spirit of the contract. However, the controversy resulted in a compromise agreement by which the contract was abrogated, and there seems to be no doubt but that that occurred as the deliberate act of both companies. Since that time the Liberty Company has been proceeding with its work at a profit, and at a considerable profit. They have gone into a new system of handling their products, to advantage, as appears by the testimony, so that in the year 1907 they appear to have made, as nearly as I can ascertain, something like 30 per cent. on their capital of \$25,000. The concern is manifestly a flourishing concern at this time. They have been enabled to carry to a surplus account enough profits to give them a better working capital, and are now making profits to the amount I have named. If the \$15,000 stock held by Mr. Marsden is wiped out, the remaining stockholders, at the present rate of earnings, will be receiving something like 80 per cent. profits in the way of dividends and surplus under the present showing. Each year the annual stockholders' meetings have been held, and I think at each annual meeting Mr. Stephany has been present, and such stockholders who have not been present have been privileged to be and have been privileged to acquire an intimate knowledge of the affairs of the concern. They had the opportunity to know what was being done and what had been done, and it was their duty to embrace that opportunity.

If these circumstances and this long delay in the assertion of corporate rights have not amounted to a ratification of the contract by the stockholders, it seems entirely clear that the long delay in the assertion of the claim now asserted has operated to render it impossible for this court to ascertain at this time with reasonable accuracy or certainty the equitable terms on which relief may now be based, and I am fully convinced that the long delay, under the circumstances named, must be regarded as operative to bar the relief now sought.

It is my judgment therefore that the relief which the complainant now seeks must be denied, and I will so advise.

(74 N. J. E. 852)

COLLINS v. LEARY et al.(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)**1. SPECIFIC PERFORMANCE (§ 106*).**

Where a husband orally agreed to convey property to complainant, and, after the husband's death, his wife brought ejectment for the property, which complainant was occupying, the wife was a necessary party to a suit to compel specific performance of the agreement to convey and to enjoin the ejectment suit, at least as far as the injunctive relief was concerned.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 106.*]

2. SPECIFIC PERFORMANCE (§ 106*)—ACTIONS—PARTIES.

Where one agreed with complainant's husband to convey property to complainant merely for convenience, but there was no agreement that she should hold it in trust for her husband's heirs, they were not necessary parties to a suit by complainant for specific performance of the agreement to convey.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 106.*]

**3. EQUITY (§ 148*)—PLEADING—MULTIFARI-
OUSNESS—SEVERAL CAUSES OF ACTION.**

The rule against multifariousness is merely one of convenience, and, if the court can make a decree on a bill which joins independent causes of action, the bill will not be considered multifarious; but, if it is impossible to make a decree so as to do justice to all parties, the court will, of its own motion, treat the bill as multifarious, whether or not the objection is raised by the parties.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.*]

**4. EQUITY (§ 148*)—PLEADING—RELIEF—MULTIFARI-
OUSNESS.**

Complainant's husband made a contract with defendant's husband and a corporation controlled by him, by which the corporation was to have the use of a patent belonging to complainant's husband, for which the corporation agreed to pay a royalty and defendant's husband agreed to convey to complainant a house. *Held*, that the transaction was a single agreement and could be dealt with by one decree against the two sets of defendants and a bill for specific performance of the agreement to convey and an accounting for royalties due, making defendant, her husband's heirs, and the corporation defendants was not multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.*]

5. SPECIFIC PERFORMANCE (§ 127*)—RELIEF—INCIDENTAL RELIEF—ACCOUNTING.

In a suit against a corporation and its manager for specific performance of a contract by which the corporation, in consideration of the use of a patent, owned by complainant, agreed to pay royalties, and the manager agreed to convey certain property to complainant, equity, having jurisdiction to determine the nature of the contract, will decree an accounting as to the royalties.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 127.*]

6. SPECIFIC PERFORMANCE (§ 106*)—PARTIES.

Where defendant's husband agreed to convey to complainant property which complainant and her husband thereafter occupied, but defendant and her husband's heirs brought ejectment therefor after his death, in a suit for specific performance of the agreement to convey and to restrain the ejectment action, the heirs

were proper parties for the purposes of the injunction.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 106.*]

7. SPECIFIC PERFORMANCE (§ 106*)—PARTIES—HEIRS OF PARTY CONTRACTING.

In a suit for specific performance of a contract to convey land, the heirs of the party contracting to convey are necessary parties defendant to the decree.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 347; Dec. Dig. § 106.*]

Appeal from Court of Chancery.

Suit for specific performance and other relief by Sara D. Collins against Mary C. Leary and others. From an order overruling a demurrer to the bill, defendants appeal. *Affirmed*.

The following is the opinion of Howell, V. C., of the court below:

"The argument in this case took place at the October term. The question at issue was decided orally, and an order was entered overruling the demurrer. An appeal having been taken, I am called upon to state the reasons which led to the sustaining of the bill.

"The facts are these: William A. Collins had been for years an employé of the Morris & Cummings Dredging Company, of which company James D. Leary was the controlling influence. Collins died in 1906, leaving the complainant his widow, who became administrator of his estate. Leary died in 1902, leaving a widow and several children, all of whom, together with the Morris & Cummings Dredging Company, are parties defendant. Years ago Collins invented a dredging bucket, for which he obtained letters patent. It seems to have been considered useful in the business of the Morris & Cummings Dredging Company, and an agreement was made in 1906 between Leary on his behalf and on behalf of his company by which the company obtained the right to use the invention, in consideration of which the company and Leary agreed orally to convey to Collins a house and lot in Bloomfield for a home for himself and family, but that as a matter of convenience the title should be taken in the name of his wife, the present complainant. It was also agreed at the same time, and as part of the same consideration, that the Morris & Cummings Dredging Company would pay to Collins a fair royalty for the use of the invention. In pursuance of this agreement Collins and his family at once took possession of the premises. Collins during his lifetime, and the complainant with her family since his death, have been in the continual possession of the premises, and are now in such possession. They have never paid any rent or in any way recognized any right of Leary or his widow and heirs in the property, but have always treated it as their own. A deed of conveyance from Leary to Mrs. Collins was at one time drawn

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and executed, but was never delivered, because the parties had never finally agreed upon the amount of the royalty which should be paid by the Morris & Cummings Dredging Company for the use of the patented bucket. Meantime the dredging company has been using the invention in its business and has paid no royalty whatever therefor. Negotiations concerning the amount of the royalty continued between Collins and Leary until 1902, when Leary died, and after that with the Leary heirs until Collins died, without any definite result. In 1907 Mrs. Leary, the widow of James D. Leary, and the Leary heirs, began an action of ejectment against Mrs. Collins for the recovery of the premises in question, and this suit is brought to obtain decree for the specific performance of the contract, (1) on the part of the Learys by delivery of a deed for the premises in question to Mrs. Collins, and (2) by the Morris & Cummings Dredging Company by accounting for the fair value of the right to use the patent dredging bucket.

"The bill prays, among other things, for a preliminary injunction against the prosecution of the suit at law. The dredging company separately, and the widow and three of the Leary heirs jointly, have demurred. The dredging company assert: (1) Want of equity; (2) that it is not bound by the Leary agreement; (3) that the bill is multifarious; (4) that the Collins heirs are necessary parties; (5) that complainant sues in both her individual and representative capacity; (6) that this court has no jurisdiction; (7) that the complainant has complete remedy at law. Mrs. Leary and the three Leary heirs allege: (1) Want of equity; (2) multifariousness; (3) Leary's widow has no interest and should not be a party; (4) the Collins heirs are necessary parties; (5) the complainant sues in both her individual and representative capacities; (6) the court has no jurisdiction; (7) there is a remedy at law. These objections will be taken up in the order in which they appear in the brief for the demurrant.

"1. The first objection is that the widow of James D. Leary is an improper party. It is quite possible that she is not a necessary party for the final relief which is prayed by the bill. She possibly may not be compelled to surrender her right of dower in the premises, but, even in that event, she is a proper party and may properly be brought in for the protection of her own interests. If it should appear, however, on final hearing, that she had executed the deed which the bill alleges was executed to Mrs. Collins, it might be held that she had waived her dower right. This, however, is a question which is merely suggested and is not at all decided. The conclusive thing about her case is that she is one of the parties plaintiff in the action of ejectment and is undoubtedly a necessary party to the restraint which the bill ultimately prays.

"2. The next objection argued is that the

heirs at law of William A. Collins are necessary parties. The agreement provided that the dredging company and Leary would convey the premises in question to Mrs. Collins as a matter of convenience. It may well be that Mrs. Collins would hold the premises in trust for the heirs of her husband, but there is nothing in the case to show that there is or can be any such trust. Mrs. Collins sued merely for the specific performance of the agreement to convey to her. What happens after such conveyance shall have been effected is of no consequence to the defendants.

"3 and 4. The next objection is that the bill is multifarious because it joins a claim by Mrs. Collins individually with a claim by her in her representative capacity, and because the bill is multifarious, in that it joins separate and distinct causes of action. These two objections I will consider together. The doctrine of multifariousness is dealt with by Vice Chancellor Pitney in *See v. Heppenheimer*, 55 N. J. Eq. 240, 36 Atl. 966, and by Vice Chancellor Emery in *Shutts v. United Boxboard & Paper Company*, 67 N. J. Eq. 225, 58 Atl. 1075; and in the end it may be said that the rule against multifariousness is merely a rule of convenience. If the court can see its way clear to make a decree on a bill which joins what might otherwise be independent causes of action, it will not consider the bill multifarious. If, however, on the other hand, the objection is not taken, by the pleadings or at the hearing, and the court finds it impossible to make a decree which shall do justice to all the parties, then the court will make the objection of its own motion. In this case the allegation is that a contract was made by Mr. Leary and the Morris & Cummings Dredging Company by which the dredging company should have the right to use Collins' patented invention upon payment of a fair royalty, and Leary should convey to Mrs. Collins the Bloomfield property. It is one agreement and is based upon an indivisible consideration. There is no reason, so far as the mere convenience of the court is concerned, why this single contract should not be dealt with by a single decree against the two sets of defendants.

"5. The next objection is that the complainant is not entitled in equity to an account against the dredging company. This needs little or no elucidation. This court has jurisdiction over the question of what the contract is, and, having ascertained what the contract is, an account will be ordered as a matter of course.

"6. That the bill shows no occasion for relief against the Leary heirs: (1) They are proper parties for the purpose of the injunction; (2) they are necessary parties to the decree in case a conveyance is ordered.

"This disposes of all the objections that were made on the argument or in the complainant's brief."

John M. Enright, for appellants. McCarter & English, for respondent.

PER CURIAM. The order under review herein will be affirmed, for the reasons expressed in the opinion of Vice Chancellor Howell.

LEE v. LEE

(Court of Chancery of New Jersey. Dec. 3, 1908.)

DIVORCE (§ 133*)—DESERTION—EFFORT TO INDUCE RETURN—EVIDENCE.

Evidence, in a suit for divorce for desertion, held sufficient to show substantial effort by petitioner to induce defendant to return.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 133.*]

Suit by Joseph M. Lee against Emma Lee. Heard on exceptions of petitioner to the master's report. Exceptions sustained, and decree granted.

Hugh B. Reed, for petitioner.

GARRISON, V. C. This is an uncontested divorce suit, in which the master reported against granting the decree upon the ground that there was not proven any substantial effort on the part of the husband to induce the wife to return to him after she had left him.

From the proofs, I am convinced that a decree should be advised, as I cannot agree with the master that there is not evidence of the character required. The proofs show that the parties were married in 1900 and lived together until February, 1902. They were then living at Nutley, N. J. One of the household was the half-brother of the defendant. His presence was objectionable to the petitioner. He contributed nothing to the household expenses, although he was employed, and his conduct was such that the petitioner did not desire to have him as a member of his family. The husband and wife disagreed about this matter. After a particular instance of disagreement, which occurred in February of 1902, the wife and her mother, who was temporarily staying there, took their household goods and departed during the absence of the husband. They left word with the elder children of the petitioner (who were not his children by this wife, but by a former wife) that they were going away and would not come back. The desertion is, in my view, plainly proven. The husband testifies to several instances when he saw his wife and endeavored to induce her to return to live with him. He is clearly corroborated in respect to one of these instances. His eldest son accompanied him to Brooklyn in the year 1903 or 1904 (neither the father nor the son being able to fix the exact time) and overheard a conversation between the parties in which the defendant stated that she would not come back to live with her husband, his father.

The result is that the exceptions must be sustained, and the decree granted, and I will so advise.

(74 N. J. E. 197)

AMPARO MINING CO. v. FIDELITY TRUST CO.

(Court of Chancery of New Jersey. April 13, 1908.)

1. EQUITY (§ 32*)—JURISDICTION OF SUBJECT-MATTER—NATURE OF ACTION.

An action by a home corporation against a foreign corporation not engaged in business in this state, and without any office, agent, or place of business in the state, to establish title to treasury shares of the capital stock of complainant, which defendant claims to own absolutely, but which complainant alleges were held by defendant's testator in his lifetime as security for the payment of a sum of money, is an action quasi in rem, although complainant asks for a transfer of the shares of stock, and no receiver has been appointed to take possession of the res, and therefore is within the jurisdiction of the Court of Chancery, and defendant, having been duly notified of the suit by the statutory publication of notice, and actual service of notice of the suit, and of the order requiring it to appear and plead on or before a time stated, will be bound by the decree, if it refrains from appearing, so far as the same relates to the status of the stock.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 95; Dec. Dig. § 32.*]

2. EQUITY (§ 32*)—JURISDICTION OF SUBJECT-MATTER—NATURE OF ACTION—"QUASI IN REM."

The essential elements of an action "quasi in rem" are a res located within the territorial limits of the state in such a way that the state can exercise absolute power to control and dispose of it, a course of judicial procedure, the object of which is to subject the res to the power of the state directly by judgment or decree, which is entered as distinguished from a course of procedure which only disposes of the res by compelling a party to control or dispose of the res, and a course of judicial procedure on its face directed sufficiently toward the res so as to disclose this res to the defendant when reasonably notified of the action.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 95; Dec. Dig. § 32.*]

For other definitions, see Words and Phrases, vol. 8, p. 7777.]

3. EQUITY (§ 123*)—PROCESS—NOTICE TO NON-RESIDENTS—SUFFICIENCY.

The notice to nonresident defendants prescribed by Laws 1902, p. 514, §§ 12, 13, directing service on nonresident defendant by notice, the form and scope of which shall be prescribed by the chancellor, and rule 58 of the Chancery Court, stating that the notice shall state "the object of the suit and why the persons to whom it [i. e., the notice] is addressed are made defendants," require that the notice shall apprise the defendant, not only that he is sued, but also of the nature of the suit, and disclosure of the res toward which the suit is directed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 300; Dec. Dig. § 123.*]

4. EQUITY (§ 32*)—JURISDICTION OF SUBJECT-MATTER—NATURE OF ACTION.

The jurisdiction in actions quasi in rem is based on the power of the sovereign state to exercise control over all objects to which that power can be directly applied, and the necessity of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the court to control all property within its territorial limits.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 95; Dec. Dig. § 32.*]

5. CONSTITUTIONAL LAW (§ 309*)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY.

Where an action is brought which involves property within the state, and nonresident defendants are fairly notified of the action, and have ample opportunity to appear and be heard therein, the rights of all parties interested in such property are determined in such action by due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 929; Dec. Dig. § 309.*]

6. EQUITY (§ 31*)—JURISDICTION OF THE PERSON.

An action strictly in personam for the recovery of corporate stock, the situs of which is in the state, may be brought in the Chancery Court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 93; Dec. Dig. § 31.*]

7. EQUITY (§ 32*)—JURISDICTION OF SUBJECT-MATTER—ESTABLISHMENT OF TITLE—EQUITABLE TITLE TO PERSONAL PROPERTY.

Where a holder of an equitable title to chattels takes possession, he thereby acquires a legal title, as the only right in respect to the chattels remaining in the original holder of the legal title is to convey the same to the holder of the equitable title, and this right of the holder of the equitable title is further established by Laws 1902, p. 524 (section 44 of the Revised Chancery Act of 1902) providing that "the decree of the Court of Chancery shall * * * have the force, operation and effect of a judgment at law in the Supreme Court of this state," and Laws of 1902, p. 526, § 46, providing that, when a complainant obtained a decree, the Court of Chancery should have power "to cause by injunction the possession of the effects and estate demanded by the bill, and whereof the possession or a sale is decreed, to be delivered to the complainant or otherwise according to such decree and as the nature of the case may require," and therefore a court of equity may acquire jurisdiction of a suit to establish rights in personal property in the custody of a person in this state, as against a nonresident, as such a suit would be one quasi in rem; a decree in personam not being necessary to transfer the legal title to complainant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 95; Dec. Dig. § 32.*]

8. EQUITY (§ 32*)—JURISDICTION OF SUBJECT-MATTER—ENFORCEMENT OF DECREE.

A contention that jurisdiction cannot attach for the reason that the court cannot enforce its decree cannot be sustained, since the court can enforce the decree by the appointment of a receiver to take possession of the property, and by a decree enjoining the custodian from interfering with the receiver's possession.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 95; Dec. Dig. § 32.*]

9. EQUITY (§ 32*)—JURISDICTION OF SUBJECT-MATTER—ENFORCEMENT OF DECREE.

But such jurisdiction is not dependent on the action of the complainant in moving for, or actually obtaining, the appointment of a receiver, or the issuance of an injunction, but on the existence of the power to seize the property; and a mere possibility that the court's decree may be rendered nugatory by a removal of the property from the state does not destroy the quality of the suit as one quasi in rem.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 95; Dec. Dig. § 32.*]

10. EQUITY (§ 32*)—JURISDICTION OF SUBJECT-MATTER—NATURE OF ACTION.

Nor is the character of such suit as one quasi in rem taken away by the fact that the suit is brought by the custodian of the property, since the same remedies for the enforcement of the decree may be applied at the instance of the defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 95; Dec. Dig. § 32.*]

Suit by Amparo Mining Company against the Fidelity Trust Company, executor, etc., of Edward M. Paxon. Defendant filed a plea to the jurisdiction of the court. Plea overruled.

French & Richards, for complainant. Lindabury, Depue & Folkes, for defendant.

STEVENSON, V. C. The complainant is a New Jersey corporation, and the defendant is a corporation existing under the laws of Pennsylvania, in which state it has its office and conducts its business. The object of the bill is to establish title to 549,504 shares of the capital stock of the complainant, of the par value of \$1 per share, which the defendant claims to own absolutely. The bill alleges that the defendant's testator acquired these shares of stock under such circumstances that his executor and trustee, the defendant, must be deemed to hold the same in trust for the complainant; that the sole interest of the defendant in these shares of stock is the right to hold them as security for the sum of \$40,000 advanced by the defendant's testator in his lifetime, in the business of acquiring the shares as agent or trustee for the complainant. The bill shows that the shares of stock in question are what are commonly called "treasury stock"; i. e., stock once lawfully issued which may be held by or on behalf of the complainant and lawfully transferred at any time. The bill does not set forth a claim that the defendant is holding shares of stock which, upon payment of \$40,000, should be surrendered for cancellation, or that upon such surrender the shares would ipso facto be retired. According to the allegations of the bill the shares will remain definite personal property belonging to the complainant in case its title to them shall be established, in this suit, having the same legal status as if they were shares of stock in some other New Jersey corporation.

The plea to the jurisdiction is substantially the same as that which was sustained in the case of *Wilson v. American Palace Car Co.*, 65 N. J. Eq. 730, 55 Atl. 997. It sets forth, in effect, that the defendant is a Pennsylvania corporation not engaged in business in New Jersey, and without any office, agent, or place of business in New Jersey, and that it has been proceeded against as an absent defendant, under our statute, by publication and actual service of notice of the suit, and of the order requiring the defendant to ap-

gear and plead, answer or demur, to the bill of complaint, on or before a time stated. It is not suggested that ample notice of the existence of the suit and of its precise nature has not been given, and in fact the plea exhibits such an ample notice. The sole bar which the plea attempts to raise to the action is the same which was adjudged effective by the Court of Errors and Appeals in the American Palace Car Company Case above mentioned. In that case the plea was held good because the court found that the action was strictly in personam, and not either an action in rem or an action quasi in rem. It must be conceded that, if this present action is strictly in personam, the plea is good and must be sustained. It is obvious that the present action is not strictly in rem. The question which must determine the validity of this plea is whether or not this action belongs to that class of actions having some of the characteristics of an action strictly in personam, and some of the characteristics of an action strictly in rem, which of late years have been styled actions "quasi in rem." If this is an action quasi in rem, the plea is bad and must be overruled.

The principles which control the decision of the present case are all contained, I think, in the opinion of Vice Chancellor Stevens, in the case of *Andrews v. Guayaquil, etc., Railway Co.*, 69 N. J. Eq. 211, 60 Atl. 568 (1905), in which case I understand the decree was affirmed by the Court of Errors and Appeals upon the Vice Chancellor's opinion. The same principles are again laid down and applied by Vice Chancellor Howell in the case of *Sohege v. Singer Mfg. Co.* (N. J. Ch.) 68 Atl. 64 (1908). It seems to me that these two recent decisions of this court control the present case, and necessarily lead to the conclusion that the defendant's plea to the jurisdiction should be overruled. The essential facts, the controlling facts, in these two cases in my judgment are the same as in the case at bar, so far as those facts fix the character of the actions as actions quasi in rem. Nevertheless, the above-mentioned two cases certainly present facts not found in the present case, and the present case exhibits facts not found in either of those cases. It is argued on behalf of the defendant that, even although this court and the Court of Errors and Appeals have fixed the character of the *Guayaquil, etc., Railway Company Case* as an action quasi in rem, nevertheless the action set forth in the complainant's bill in this case is strictly in personam. It must be conceded that there is no decided case in New Jersey presenting precisely the same set of facts with which we have to deal in this present case, nor has my attention been called to any decision of any court in which the attempt is made to point out and define the essential characteristics of all actions quasi in rem. In endeavoring to determine whether the action disclosed by the bill of

complaint is one strictly in personam or quasi in rem, it may be well to bear in mind the respects wherein that case differs from both the *Guayaquil Railway Company Case* and the *Singer Mfg. Company Case*. In the case at bar we have a sole complainant resident in New Jersey, and a sole defendant resident in Pennsylvania. Unlike the *Guayaquil, etc., Railway Company Case* the defendant has not in any way, directly or through an agent, instituted any action in New Jersey affecting the res which beyond all doubt is located in New Jersey. In the *Guayaquil, etc., Company Case* (and the same was true in the *Singer Mfg. Company Case*) the res was capital stock of a New Jersey corporation, but was not the capital stock of the complainant corporation, as counsel for the defendants have erroneously alleged in their elaborate and learned brief. But, further, in the case at bar no receivership is prayed for, and no party having the custody of the res is brought in as a defendant in order to subject the res to the control of the court. The situation seems to be analogous to one where a complainant in New Jersey, holding the possession of chattels, files a bill in this court to obtain equitable relief against a defendant not resident in New Jersey in respect of such chattels. This case will also, I think, appear on further consideration to be analogous to a suit in this court for divorce brought by a resident of New Jersey against his nonresident spouse.

The authorities which control this court indicate, I think, the following as the essential elements of an action quasi in rem: (1) A res located within the territorial limits of the state in such a way that the state can, if it see fit to do so, exercise absolute power to control and dispose of it; (2) a course of judicial procedure, the object and result of which are to subject the res to the power of the state directly by the judgment or decree which is entered, as distinguished from a course of procedure which only affects or disposes of the res by compelling a party to the action to control or dispose of the res, in accordance with the mandate of the judgment or decree; (3) a course of judicial procedure on its face directed specifically toward the res so as to disclose this res to the defendant when reasonably notified of the action. The failure to recognize this element, it seems to me, vitiates the argument contained in the minority opinion of Mr. Justice Hunt in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1878). A citizen of New Jersey, when notified that an action has been brought against him for the recovery of a money judgment in the state of Colorado, may elect to disregard the notice so received. He may prefer not to appear, and have his case tried under disadvantageous circumstances in a remote court, the result of which would be a judgment binding upon him. He may not know that he has any property situate within the jurisdiction of the

Colorado court. The Colorado action out of which arose the case of *Pennoyer v. Neff* was not specifically directed toward the res, nor was any effort made to notify the defendant, the nonresident owner of the res, that any such res existed, or that the action had any relation to it. The course of procedure prescribed by the Colorado statute and pursued in the case above mentioned, in respect of the matters now under consideration, is analogous to a foreclosure suit brought in New Jersey against an owner of the equity of redemption residing in New York, in which the notice of the suit served or published merely states that an action in the Court of Chancery of New Jersey has been brought against the nonresident defendant, without further informing him that the object of the action, as described in the bill of complaint, is to foreclose a mortgage on land belonging to the defendant and situate in New Jersey. An heir of the mortgagor residing in a foreign state may not have the slightest knowledge of the existence of the res of which he is the owner or part owner.

The notice to nonresident defendants prescribed by our chancery act (Laws 1902, p. 514, §§ 12, 13) is plainly intended to be a notice which shall apprise the defendant, not only that he is sued, but also of the nature of the suit, and such notice necessarily involves a disclosure of the res toward which the suit is directed. The statute (section 13) makes it the duty of the Chancellor to prescribe the exact form and scope of the notice by rule of court, and in the discharge of this duty the Chancellor has ordained that such notice shall state "the object of the suit and why the persons to whom it [i. e., the notice] is addressed are made defendants." Rule 58. If the Colorado statute above referred to had, consistently with the Constitution of the state, prescribed an action in which the plaintiff not only set forth his money claim against the defendant, but also described property of the defendant situate in the state of Colorado and within the jurisdiction of the court, and prayed, not only for the establishment of the money claim against the defendant, but the application of the property described to the payment of such claim, it seems to me that a plain instance would be presented of an action quasi in rem. It is plain that no notice to the defendant of such an action quasi in rem would be reasonable which did not distinctly disclose the res, and its relation to the defendant and to the demand of the plaintiff. The origin of the jurisdiction of our courts in actions quasi in rem is to be found in the power of the sovereign state to exercise control over all objects to which that power can be directly applied. The state must control all property within its territorial limits. Parties interested in that property, and residing within the state, or voluntarily coming into the state, in order to have their rights in respect of the proper-

ty in question enforced or protected, have a right to be heard in the courts of the state, and the utmost that can be demanded on the part of nonresident defendants is that they shall be fairly notified of the action so as to have an ample opportunity to appear and be heard therein. When these conditions exist, the rights of all parties interested in the res are determined by due process of law.

Formerly, when a decree in equity for the specific performance of a contract to convey real estate was enforceable solely by the compulsive power of the court, brought to bear upon the defendant so as to constrain him to make a conveyance in accordance with his contract and the decree of the court, the action in which such a decree was obtained was strictly an action in personam. *Spurr v. Scoville*, 3 Cush. (Mass.) 578. As stated by Mr. Justice Gray, in *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 536, 28 L. Ed. 101: "Upon a bill for the removal of a cloud upon the title as upon a bill for the specific performance of an agreement to convey the decree, unless otherwise expressly provided by statute, is clearly not a judgment in rem establishing a title in land, but operates in personam only by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be canceled, or to execute a release to the plaintiff." When, however, the state through its Legislature imparts a quality to the decree in equity in the classes of cases above mentioned, so as to make such decree operate directly upon the res so as to make the decree establish the rights of the parties litigant in respect of the res, irrespective of any compulsory action by the parties themselves, or any of them, the whole character of the action at once is changed, and what was under the former course of procedure an action strictly in personam, becomes an action quasi in rem. *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918.

In the present case the res is personal property. It does not follow that, because anciently an equity decree affecting real estate operated only in personam, and did not proprio vigore transfer or establish title, such decrees affecting personal property within the jurisdiction of the court were in the same way limited in their practical operation. Assuming that formerly in neither case did the decree establish title, but only the right of the complainant to receive a title, the important distinction still remains that in the case of real estate title did not pass upon delivery of possession, whereas in the case of chattel property it did. Anciently the Court of Chancery would not give to a successful complainant, in a suit for the specific performance of a contract to convey real estate, a writ of assistance to put him in possession, because no legal title would be thereby established. The same difficulty does not exist in the case of chattels.

The argument to sustain the plea in this case seems to assume that a party complainant, who has obtained a final decree in this court establishing his equitable title to chattels in possession of a defendant holding legal title thereto, and who in pursuance of such decree has actually obtained possession, has no legal title, and will have none until the defendant has voluntarily, or under the compulsion of the court, executed a conveyance. The general principle I think is now recognized that a bare legal title to chattels ceases to exist when the holder of a complete equitable title takes possession, for the reason that such possession creates a legal title. *Kronson v. Lipschitz*, 68 N. J. Eq. 367, 60 Atl. 819 (1904). Such certainly must be the effect of the union of a complete equitable title and possession, when the only right or duty in respect of the chattels remaining in the original holder of the legal title is to convey the same to the holder of the equitable title. Possession of a chattel under a complete equitable title in such a case must make a complete legal title.

We are not, however, at the present day, in a case like this, confined to the consideration of those principles of equity jurisprudence and equity procedure and practice which were recognized a hundred years ago. Mr. Paterson's famous Chancery Act of 1799 (*Paterson's Laws*, p. 428) contained a number of provisions which I think bear very directly upon the subject under discussion. Section 47 provided that a decree of the Court of Chancery "for a conveyance, release, or acquittance," after the allotted time for compliance had passed, should be considered "in all courts of law and equity to have the same operation and effect, and be as available as if the conveyance, release or acquittance had been executed conformably to such decree." *Paterson's Laws*, p. 433. There seems to be nothing in this language, especially when considered in the light of the section of the statute next to be cited, which limits the conveyance, etc., to instruments affecting real estate only. This original statute, apparently extending to all classes of property, came down through the Revision of 1846 unaffected. *Rev. St. 1847*, p. 914, tit. 33, c. 1, § 56. In 1852, in a supplement to the Chancery Act of 1799, a provision was inserted making a decree of the Court of Chancery for a conveyance, release, or acquittance "of lands or any interest therein" directly and immediately effective to pass title, notwithstanding the disability of any party to the suit whose estate was so transferred, "arising from infancy, lunacy, coverture or otherwise." *Laws 1852*, p. 257, § 6. Section 47, *Paterson's Law*, however, remained entirely unaffected by this new law, which merely provided for a wider effect of a decree in the case of real estate than the effect of a decree relating to personal property. The revisers who drafted the

Chancery Act of 1874, possibly deeming that they were only expressing what had theretofore been implied, consolidated, to a certain extent, the two laws above mentioned, and left their unified and revised section applicable to real property only. *Revision 1877*, p. 115, § 63. The section as drafted in 1874 is now found in section 45, *Revised Chancery Act of 1902* (*Laws 1902*, p. 525). Conceding that the argument on behalf of the complainant cannot be strengthened by any reference to the existing law defining the effect of a chancery decree directing a "conveyance, release or acquittance," nevertheless there are other provisions in the act of 1799, and an early supplement thereto, which remain to day unrepealed, which I think greatly strengthen the force and effect of a chancery decree relating to personal property, and undertaking to establish title thereto when the situs of the property is within the jurisdiction of the court.

Section 46 provides that the "decree of the Court of Chancery shall * * * have the force, operation and effect of a judgment at law in the Supreme Court of this state." This mandate is now found unchanged in section 44, *Revised Chancery Act 1902* (*Laws 1902*, p. 524). The dictum of Chief Justice Hornblower in deciding the case of *Van Buskirk v. Mulock*, 18 N. J. Law, 184 (1841), which would greatly limit the meaning and effect of this statutory provision, may certainly at the present day be disregarded; the decision itself having been overruled. *Bullock v. Bullock*, 57 N. J. Law, 508, 81 Atl. 1024 (Ct. of E. & A. 1895); *Mutual Life Ins. Co. v. Newton*, 50 N. J. Law, 571, 575, 14 Atl. 756 (1888). In the supplement to Mr. Paterson's Chancery Act, passed Feb. 29, 1820 (*P. L. p. 99*), it was provided that, when the complainant obtained a decree, the Court of Chancery should have power, among other things, "to cause by injunction the possession of the effects and estate demanded by the bill, and whereof the possession or a sale is decreed, to be delivered to the complainant, or otherwise, according to such decree, and as the nature of the case may require. *Laws 1820*, p. 705, § 7. This language is repeated in our present chancery act. *Laws 1902*, p. 526, § 46. Whatever may have been the exact doctrine prior to these statutes, it seems to me that ever since these acts were passed a decree of the Court of Chancery of New Jersey establishing a complete equitable title to personal property, coupled with actual possession by the equitable owner, constitutes a legal title which must be recognized as such in courts of law as well as in courts of equity. It may be admitted that the complete equitable title referred to does not include cases where the holder of the legal title has any interest, or has any duty as trustee, or otherwise, to perform with respect to the property in question other than the duty to convey the same to the equitable owner.

The question now arises whether a decree

of the Court of Chancery of New Jersey, establishing a complete equitable title to personal property, can be enforced by the court in any other way than by compelling action, on the part of the defendant, in the way of delivering up possession, I shall not discuss this question at length because it is no longer an open one in New Jersey while the two recent decisions of this court above cited remain in full force. A careful examination of the ancient rules of equity applicable to the case, with the aid of the statutory provisions above set forth, in my opinion leaves no ground for the proposition that the Court of Chancery of this state, having pronounced a decree establishing title to personal property within its jurisdiction, and in the custody of a party to the suit, can only give possession of the property to the party who is entitled to it under the decree, by compulsive force exerted upon the custodian, constraining him to deliver up possession. The court may appoint a receiver, and such receiver will have a right to possession, and may take possession, and the custodian, after being enjoined from preventing the receiver from taking possession, may be removed as an obstructive force and be placed in jail. But, without pursuing this subject further, it may be pointed out that prior to the chancery act of 1799, the fundamental weakness of a decree of the Court of Chancery, in suits to obtain title to real estate, such as suits for specific performance of a contract to convey real estate, did not arise out of any essential incapacity of the court to obtain possession of the res, or to give possession of the res to the party entitled thereto under the decree. The fundamental weakness of the decree consisted in the fact that possession of the res gave no legal title under the technical rules of law governing the transfer of freehold estates in land. Possession, which was so potent for the transfer of title to personal property, has had no effect to transfer a freehold title to real estate since the days of livery of seisin.

It is undoubtedly true that an action strictly in personam may be brought in the Court of Chancery of New Jersey, for the recovery of corporate stock, the situs of which is in New Jersey. In the Guayaquil, etc., Ry. Co. Case, if the complainant in the cross-bill had commenced an original suit against the resident of the state of New York who claimed to own the stock of the Guayaquil, etc., Ry. Co. in dispute, without making the last-mentioned company a party to the suit, it seems to me that the action would have been strictly in personam. The decree in such case, even if the defendant had appeared in the suit, would have had no direct effect upon the possession of the res, nor do I see that proceedings upon the decree could have been conducted which would have had the effect to give the successful complainant possession of the res. The decree could only have been enforced by compelling the defendant, by stress

of imprisonment, to execute a transfer, or otherwise deliver the shares in dispute to the complainant in conformity with the decree. The New Jersey corporation would have been left free to act in relation to the disputed shares of its stock as it might see fit. It is unnecessary to discuss the effect of the decree in a new suit brought by the complainant against the custodian, the Guayaquil, etc., Ry. Co. The point to be observed is that a decree, in an action against the non-resident stockholder as sole defendant, could not operate directly upon the res, and be made to control and dispose of the res, without regard to any action on the part of the sole defendant which the decree might direct to be taken.

In supporting the proposition that the present suit is strictly a suit in personam the brief for the defendant alleges "that the object of the suit is to obtain relief which could only be decreed in personam," and points out that "the prayer is specifically limited to a decree directing the defendant to transfer the shares of stock in question," and that "the operation of the decree would be purely against the person of the defendant." In support of these views it is alleged that "the case differs from those in which decrees are sought to compel the conveyance of lands," in which cases by statute the "decree if not complied with by the defendant can operate itself as a conveyance," and it is insisted that "no similar provision is made for the transfer of property purely personal," such as the shares of stock in question. This argument seems to rest upon a mistaken view of the nature of the case set forth in the complainant's bill, and of the relief therein prayed for, as well as an inadequate view of the power of the Court of Chancery to enforce its decrees affecting personal property which it can seize and control. The allegations of the bill show that the stock in litigation is charged with a trust for the complainant's benefit, that the complainant is the equitable owner of this stock, and that the defendant, as executor, etc., has no estate or interest therein, excepting so far as the same stands as security for the sum of \$40,000. The prayer of the bill is that the rights under the trust above mentioned may be established by the decree of the court, as well as that the defendant may be decreed to assign and transfer the said shares of stock to the complainant upon payment of the said sum of \$40,000, with the interest thereon. Of course it must be conceded that in any action to recover stock, if the relief prayed for includes the surrender of a certificate, or the execution of an assignment or power of attorney, such relief can only be obtained by compelling the defendant to act, and if such relief is the whole relief prayed for, the action, as we have seen, may be strictly in personam. In the present case, while the bill prays that the defendant may be decreed to assign and transfer the shares or stock in dis-

pute, the main relief prayed for is the establishment of the complainant's equitable title. The jurisdiction of the court is sustained by the existence of a trust, a trust in respect of a res, situate within the jurisdiction of the court and in the custody of a party to the suit. If the complainant shall obtain a decree in this case establishing its rights in respect of the res, and then shall desire to secure the surrender of the outstanding certificates representing the res, it may be obliged to bring a suit in the state of Pennsylvania in order to secure such surrender. A similar situation would exist if the defendant were a natural person resident in New Jersey who had been duly served with process in New Jersey, but who had gone out of the state, carrying with him the certificates representing the stock which was the subject-matter of the litigation. In such a case, however, the decree would be enforceable in personam, whenever the defendant could be seized within the state of New Jersey.

The last matter to be considered is whether it is necessary, where the res is personal property, to have the res actually placed within the custody of the court, through the instrumentality of a receiver, in order to give to the action the quality of an action quasi in rem. I can find no warrant in reason, and none in the authorities, disregarding a few dicta, which make the actual seizure of the res by an officer of the court essential to the status of the action as one quasi in rem. The fundamental essential, of course, must be that the personal property which is the res is so situated within the state that it may be seized. In other words, the res must be within the control of the state. If the state provides for an action affecting the res, but the court in which the action is brought has no power to directly control the res, and can only control the res by compulsory action on the part of the defendant, then we have an instance where the state has full power to provide for an action quasi in rem, but has seen fit not to do so—has seen fit to provide only an action strictly in personam. It is not the actual seizure of the res which is the essential element of an action quasi in rem, but the power to seize the res, and to seize it in the action. If the res is within the jurisdiction of the court, it may be entirely unnecessary to take possession of it through a receiver in order to secure its presence when the decree of the court is to be enforced. An injunction restraining the custodian of the res, who is a party defendant, may be amply sufficient to secure the desired result. Neither a receiver nor an injunction may be necessary to preserve the res within the control of the court. So long as the res is situate within the jurisdiction of the court, and the custodian of the res is made a party to the suit, the requirement of an action quasi in rem under consideration seems to me to be complied

with. The mere fact that the failure of some party to the action to move for an injunction, or for the appointment of a receiver, may in fact result in the disappearance of the res pending the suit, and its absence from the state when the final decree passes, cannot in my judgment affect the essential character of the action at the time when it was commenced, if at that time the res was within the state and within the control of the court. The actual seizure of chattels which constitute the res, and the custody thereof in a receiver appointed by the court, cannot exclude the possibility that the res may be removed from the jurisdiction of the court while the action is pending. It is, however, unnecessary to consider several questions which are suggested in regard to the effect of the removal of the res prior to the final decree, in an action which was plainly, at the time of its institution, an action quasi in rem. In considering the essential nature of an action quasi in rem, both at the time of its institution and at the time of the final decree, there is a plain distinction between the mere possibility that, pending the action, the res may be removed from the jurisdiction of the court and the actual removal of the res.

I think it follows from the principles enunciated in a number of recent federal cases, and in the New Jersey cases above cited, that an action like the present one, brought by the complainant to establish a trust in shares of stock in a New Jersey corporation, is an action quasi in rem, provided the corporation, the stock of which is in litigation, is made a party to the suit, and is lawfully subjected to the jurisdiction of the court in which the suit is brought by service of process within the state, or by voluntary appearance. *Arndt v. Griggs*, supra; *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647; *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520; *Citizens' Savings & Trust Co. v. Illinois Central Railway Co.*, 205 U. S. 46, 27 Sup. Ct. 425, 51 L. Ed. 703. All parties, whether resident in New Jersey or residing in other states, may be lawfully brought into the suit by serving process upon the New Jersey residents, and giving the reasonable notice provided by law to the defendants residing in other states. I discover no basis for the proposition that the whole fabric of the action quasi in rem falls to the ground unless the Court of Chancery through a receiver attempts in some way to take possession of the res, and actually obtains such possession.

The question remains whether, when the custodian of the res, the New Jersey corporation whose stock constitutes the res, comes into court as a party complainant, the case is essentially different from that which is presented where the custodian is made a party defendant. In each case the res is subjected to the power of the court; in the one case by the control over the res, which the

court acquires when the custodian of the res is brought into court by service of process, and in the other by the voluntary action of the complainant in coming into court and presenting to the court for adjudication his claims in respect of the res. No doubt the court at the instance of the defendant may preserve the res to meet the decree of the court by an injunction or by a receiver. If, however, in cases like the Guayaquil, etc., Railway Company Case and the Singer Mfg. Company Case, a prayer for a receiver, or the appointment of a receiver, or the actual placing of the res in the custody of a receiver, is necessary to give the action the status of an action quasi in rem, I do not think that it would necessarily follow that such receivership proceedings would be necessary to constitute the present action one quasi in rem. If the decree in this case is in favor of the complainant, no action on the part of any receiver is necessary. The situation of the res is not disturbed. The complainant stands with its equitable rights to the res established by the decree, and it remains in possession of such res. If, on the other hand, the decree is in favor of the defendant, no action on the part of any receiver can do the defendant any good. Presumably the defendant holds some certificates which have already been issued representing the stock in dispute. The decree will merely adjudge the complainant's claim void and establish the title of the defendant. Assuming that there are certificates representing the res in possession of the defendant in the state of Pennsylvania, it is somewhat difficult to see precisely what a receiver could take into his possession. In the Singer Company Case the stock in litigation was stock of a New Jersey corporation, which was made a party to the suit, and was practically the custodian of the res. This corporation was enjoined from transferring the stock, and receivers were appointed according to the report, "to whose charge and custody" the court "committed the shares in question." What was actually done by the receivers in the way of getting possession of stock in a corporation, the certificates of which had been lawfully issued, and were in the possession of a party beyond the jurisdiction of the court, does not appear.

My conclusion is that the present action has all the essential characteristics of an action quasi in rem, and that the defendant, having been duly notified of the suit so as to give it an ample opportunity to appear and make defense therein, will, if it refrains from appearing, be bound by the decree so far as the same relates to the status of the res, and that in such case the defendant cannot maintain that it is deprived of property without due process of law. This conclusion is not affected by the admission that, if the defendant were a natural person, and should come within the jurisdiction of the court after the

decree had been passed, the court would have no power, by process of contempt or otherwise, to enforce the decree so far as such decree might undertake to constrain the defendant to deliver certificates of stock, execute assignments or powers of attorney, or pursue any other course of conduct relating to the res which the decree might undertake to prescribe.

An order will be advised overruling the plea.

(74 N. J. E. 512)

PARKER v. TRAVERS et al.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1908.)

1. WILLS (§ 616*)—CONSTRUCTION—ESTATES CREATED—LIFE ESTATE—POWER OF DISPOSITION.

When to a life estate, with remainder over of what may be undisposed of, the will adds a power of disposition, the property right of interest of the life tenant is not thereby enlarged, but the devisee takes the life estate only with a power of disposal, to be exercised by her during the continuance of the life estate, and for her benefit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418-1430; Dec. Dig. § 616.*]

2. WILLS (§ 740*)—RIGHTS OF DEVISEES—CONVEYANCES BETWEEN DEVISEES—EFFECT.

Testator devised and bequeathed all his property not disposed of to his widow, with power of disposition, the remainder as to all property not disposed of by the widow to testator's daughter in case she survived the widow, and in the event of the widow marrying again she should have only one-third of the property remaining, the balance to be invested for, and to be paid to, the daughter on her attaining majority. The widow conveyed all the real estate devised by the will to B., to whom she was afterwards married, and he, immediately after the conveyance, conveyed to his son, who reconveyed to the widow. Held that, on the widow's remarriage, the daughter acquired an absolute estate in two-thirds of the land, and that the widow's subsequent deed to the daughter was only effective to transfer an undivided one-third thereof.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 740.*]

3. BANKRUPTCY (§ 186*)—FRAUDULENT CONVEYANCES BY BANKRUPT—ACTION BY BANKRUPT'S TRUSTEE—ESTOPPEL.

Where a suit by a bankrupt's trustee to set aside a conveyance by the bankrupt to her daughter was based entirely on the charge that the conveyance was to hinder and delay E., who was the only real creditor in the bankruptcy proceedings, E., having accepted from defendant the balance due on a loan for which she held the title to the land, and having thereupon conveyed the land to defendant, was estopped to claim that a conveyance of the bankrupt's alleged interest in the land to defendant was fraudulent as to her.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 186.*]

4. BANKRUPTCY (§ 177*)—FRAUDULENT CONVEYANCES—VALIDITY.

Where a bankrupt owned the equitable title to certain land, subject to an indebtedness, which she paid, and then induced the creditor to convey the property to defendant, her daughter, within four months prior to the filing of the bankruptcy petition, such conveyance was,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in effect, a conveyance by the bankrupt, and was voidable at the instance of her trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 177.*]

6. BANKRUPTCY (§ 181*)—VALIDITY—PARTICIPATION BY GRANTEE—CONSIDERATION.

Where defendant participated with her mother, a bankrupt, in procuring transfers to her to hinder and delay the mother's principal and only creditor, the conveyance was voidable, though given in satisfaction of an honest debt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 181.*]

6. BANKRUPTCY (§ 186*)—FRAUDULENT CONVEYANCES—ACTION BY TRUSTEE.

Where a bankrupt only owned an undivided one-third of certain land, which she fraudulently conveyed to defendant, and the bill of the trustee in bankruptcy to set aside such conveyance, and the answer, admitted that defendant received \$6,370 from certain insurance on buildings destroyed by fire, after paying \$4,630 in discharge of mortgage liens, for which the policies had been pledged as collateral, defendant was only chargeable with one-third of such sum, and not one-third of the entire amount of the insurance, and the error was not cured by the fact that the decree only vacated the conveyance subject to all valid mortgages existing at the time it was made, where the mortgage debts had been discharged and were not reinstated by the decree.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 186.*]

7. APPEAL AND ERROR (§ 719*)—ASSIGNMENT OF ERRORS—NECESSITY.

A decree should not be disturbed because it imposed a lien on defendant's land for the amount found due complainant, where no such objection was contained in defendant's reasons for appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 719.*]

8. APPEAL AND ERROR (§ 870*)—REVIEW—SCOPE.

Where complainant, a bankrupt's trustee, did not appeal from the part of a decree which charged against defendant the value of furniture transferred by the bankrupt, complainant's objection that the amount so charged was less than the conceded value of the furniture in defendant's answer would not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8487-8512; Dec. Dig. § 870.*]

9. BANKRUPTCY (§ 473*)—COSTS—ACTION BY BANKRUPT'S TRUSTEE.

Where a bankrupt's trustee was successful in setting aside a fraudulent conveyance made by the bankrupt to defendant, the trustee was entitled to costs.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 473.*]

10. COSTS (§ 234*)—APPEAL AND ERROR.

Where defendant was obliged to appeal to correct a decree against her which was improper, she was entitled to costs on the appeal, including cost of printing, though complainant was successful in the suit.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 892-899; Dec. Dig. § 234.*]

Appeal from Court of Chancery.

Action by Edmund J. Parker, as trustee in bankruptcy of Sophia V. Travers, against Annie E. Travers and others. From a decree for complainant for less than the relief demanded, both parties prosecute cross-appeals. Modified and affirmed.

The following is the opinion of Bergen, V. C., referred to in the opinion:

"James Travers died November 1, 1883, testate, leaving him surviving a daughter, Annie E. Travers, and a widow, Sophia V. Travers, who on August 15, 1889, married William H. O'Brien, now deceased. When he died, James Travers was seised of certain real estate, situate at Point Pleasant, in this state, which may be sufficiently described as lots Nos. 4, 5, 289, and 290, on the map of lands of the Point Pleasant Land Company, and also of an equal undivided half part of lots numbered 17 and 18 on said map. He also left personal property, the amount of which is in dispute, but as it, except the portion used by the widow, and not accounted for, about which the complainant raises no question, was used to improve the real estate, and is devised in the same manner as it is, the question of the amount of the personal estate will only become important should it be necessary to determine whether a reasonable consideration was paid by the daughter to the mother for the conveyance of the real estate which the present proceeding assails. That portion of the will of James Travers pertinent to the issue devises and bequeaths: 'To my wife while she remains my widow, all of my property of every description and character not hereinbefore disposed of, with full power of disposition and alienation provided, however, that in case my daughter survives her, that all the property not disposed of prior to my wife's decease, shall be and become the property of our said daughter, and in the event of my wife contracting another marriage, then it is my will that she shall possess and enjoy as of her own right, only one-third of the property then remaining, and that the other two-thirds shall be invested and held in trust for my daughter Annie, and paid to her upon attaining her majority, and furthermore should my daughter die without leaving child or children, it is my will that any property which she may be entitled to or enjoy under this will, shall go to my two sisters, Mrs. Sidney Wigginia Mitchell, and Mrs. Mary Wynne, their heirs and assigns, share and share alike.' The widow was appointed executrix of the will, which she caused to be probated, and took upon herself the execution thereof, but no inventory was ever made by her of the personal estate, nor has she accounted for the same, either in the orphans' or prerogative court. In 1884 the defendant Sophia V. Travers erected a cottage at a cost of \$6,000 or \$7,000 on lots 289 and 290, manifestly using a portion of the personal estate of her deceased husband for that purpose, as she had no other funds, and on August 13, 1888, she individually, and not as executrix, conveyed all of the real estate devised by the will of her husband to William H. O'Brien, to whom

she was afterwards married, and he, on the day following, conveyed the same lands to his son, Bryan O'Brien, who on August 15, 1888, as admitted in defendant's answer, reconveyed the same to her. In 1892 she caused to be erected a building on lots 4 and 5 to be used as a hotel, at a cost which not only exhausted all of the personal property of the Traverses' estate remaining, admitted by Mrs. O'Brien to have been about \$18,000 or \$20,000, but required the raising of additional funds, which was accomplished by mortgaging the real estate. In 1895 lot 17, was sold by proceedings in chancery, and purchased by Mrs. O'Brien, she thus acquiring the outstanding title which was not vested in her former husband. On February 23, 1905, Sophia V. O'Brien conveyed to the defendant Annie E. Travers all of her interest in the foregoing lands, as well as in another tract, to be hereinafter referred to. At the time this conveyance was made Mrs. O'Brien was indebted to one Elizabeth O'Brien, a sister of Mr. O'Brien, and judgments had, on February 10, 1905, been entered against her therefor in the court of common pleas, in the county of Philadelphia, in the state of Pennsylvania, for over \$6,000. The judgments were assigned to a Mr. Roney residing in Camden, N. J., who on February 15, 1905, commenced an action in the Supreme Court of this state to recover the amount due thereon, which action was defended, and, as stated by counsel on the argument, yet remains undetermined. Having transferred all of the property to her daughter, Mrs. O'Brien, on September 8, 1905, filed her petition in bankruptcy in the United States District Court for the District of New Jersey, from which it appears that the only debts then owing by her, outside of a few traders' accounts, amounting to \$165, and an alleged claim of the daughter, was the debt due on the O'Brien judgments. The judgment indebtedness and the claim of the daughter being presented, proved, and allowed in the bankruptcy proceedings, the complainant, as trustee in bankruptcy, filed his bill of complaint in this cause, charging that the conveyance heretofore referred to was contrived and carried out for the purpose of hindering and delaying creditors, and therefore void, upon which a prayer is rested to have the conveyance declared fraudulent and void, and the land decreed to be the property of the debtor, and made subject to the payment of her debts. As to the property now under consideration, the first question to be determined is what was the state of the title which was conveyed to the daughter in 1905, she claiming that on the marriage of her mother two-thirds of the property passed to her, and that she paid full value to her mother for the other one-third. The insistence of the complainant is that, by virtue of the conveyance from Mrs. Travers and the reconveyance to her, the absolute title vested in her, and that any right which the daughter took

under the will of her father, in the event of remarriage, was defeated thereby, because that act was a disposition of the property, and under the terms of the will vested an absolute estate in the mother, so that nothing remained of the estate to go to the daughter, when she, the mother remarried.

"The rule is well established in this state that, when to a life estate, with a remainder over of what may be undisposed of, there is added a power of disposition, the property right or interest of the life tenant is not thereby enlarged, but the devisee takes a life estate only, with a power of disposal to be exercised by the devisee during the continuance of the estate, for his benefit. *Robeson v. Shotwell*, 55 N. J. Eq. 318, 36 Atl. 780. The interest in the real and personal property of James Travers, which his widow acquired under the devise to her above set out, was a life estate, determinable upon her remarriage, with the power of disposal and alienation during the continuance of the estate, subject to a gift over of what remained undisposed of at her death should she remain unmarried, and also subject to the condition that, in the event of her remarriage, she should take in her own right one-third of the property then remaining, and invest the residue for the benefit of her daughter, to be paid to her when she became of age. It is admitted by the complainant that two-thirds of the personal estate remaining in the hands of the widow when she married immediately became a trust fund for the benefit of the daughter, but he insists that, as to the real estate, the widow, having exercised her power of disposal, thereby became entitled to an absolute estate and title in the lands, thus defeating the gift over to the daughter which was to become effective at the termination of the life estate. I find myself unable to accept this result; for, assuming that the contention of the complainant that the conveyance was executed for the purpose of defeating the gift over is correct, it could not be supported as a bona fide exercise of the power conferred, which must always be executed in good faith, looking to the carrying out of the expressed intention of the party creating the power. By the gift over of what remained undisposed of at the death of the life tenant, and the substituted disposition on the remarriage of the widow of what then remained, the testator plainly indicated that it was his intention that his widow should exercise the power of disposal and alienation to such extent as might be required for the beneficial enjoyment of the property during her tenancy, but clearly a transference of title which did not alter the identity of property or owner, for the purpose of defrauding the remainderman, was not such an exercise of the power of disposal granted as to change a life estate to a fee simple, nor do I think it would have made any difference in this case if there had been an actual sale and the property con-

verted into money; for the proceeds thereof which remained in her hands undisposed of when the tenancy ended would have been a part of the estate 'that remains,' and be subject to the alternative bequest. The purpose for which the conveyances were made does not appear in the deeds; and, although the intention of the grantor must, if possible, be gathered from the writing, parol evidence is admissible to show the object for which the power was exercised, where the deed does not disclose it, and on this subject the life tenant, Mrs. O'Brien, testified that, before her second marriage, Mr. O'Brien, her intended husband, who was a lawyer living in Philadelphia, advised her to alienate the property, before her marriage, 'otherwise, if I kept the ground just as it was, in my name, that I would not be able to sell until Annie became of age, and that the property might depreciate.' She also testified that she was advised that the transfer would not affect Annie's interest, for by her father's will she would be entitled to two-thirds of the property as soon as she (the mother) married. This evidence negatives the claim of the complainant that the conveyance was intended to be, and was, an exercise of the power of disposal for the purpose of conversion, but, on the contrary, shows that it was an alienation of the property for other purposes, and was not intended to change the character of the estate then held by the life tenant. I am satisfied that in 1905, when the conveyance was made to the daughter, she was entitled to have two-thirds of the property of which her father died seised, which is described as lots 4, 5, 289, and 290, conveyed to her without consideration, and that her mother was then seised, in her own right, of the one-third part of the same land.

"In addition to the foregoing, other lands, being lots 2 and 3 on said map, were conveyed by the same deed to Annie E. Travers, the status of which will now be considered. In 1891 these lots were conveyed by a Mr. Lomas to William H. O'Brien, and the consideration was paid with \$3,000 borrowed by O'Brien from Elizabeth, his sister, as appears from a paper writing, in the nature of a declaration of trust or equitable mortgage, by the terms of which he and his wife, Sophia, agreed to convey said lots to Elizabeth upon default in payment of the sum so loaned. William E. O'Brien held the legal title to this land when he died, and by his last will devised it to his sister, Elizabeth. It is claimed by the answer of both defendants that the property belonged, in equity, to Sophia, subject to the payment of the loan; that of this she had paid \$2,000, although the legal title was vested in Elizabeth, who, on May 22, 1905, conveyed the lots to the daughter. As the equity of the present proceeding is based entirely upon the charge that this conveyance was contrived for the purpose of hindering and delaying Elizabeth,

who is the only real creditor in the bankruptcy proceedings, in the collection of debts which were then in existence, I am of opinion that, as she accepted from the daughter the balance that was due on her loan, and conveyed to that daughter this particular land with full knowledge of all the conditions, she is estopped by her deed, and cannot justly complain that a conveyance, which she made with full knowledge of the situation, is a fraud perpetrated by the defendants against her, and shall advise that the bill be dismissed as to lots 2 and 3. As to lots 17 and 18, of which the testator died seised, it appears from the pleadings that they were sold in partition proceedings, and lot 17 was purchased by the mother, and by her conveyed to one Van Note in order that he might make a sale of it, but substantially, as I construe the evidence, for the purpose of securing to him, out of the proceeds of such sale, a debt of \$200. This debt the daughter paid, and he conveyed the lot to her August 3, 1905. It is not denied that the property then belonged equitably to Mrs. O'Brien, and the conveyance by Van Note was, in effect, a conveyance by Mrs. O'Brien; and, as the transfer to the defendant Annie E. Travers was made within four months of the filing of the bankruptcy petition, it is clearly void as against the trustee in bankruptcy, under the bankruptcy act, and if this conveyance is a hindrance to the application of the property to the payment of the bankrupt's debts, it should only be allowed to stand as a mortgage to secure the amount paid by the daughter, viz., \$200. As to lot 18 it is impossible to ascertain, from the pleadings or evidence, what became of it. It was sold in partition proceedings at the same time lot 17 was sold, but who became the purchaser, or where the title is now vested, I am unable to discover, and certainly in the present state of the proceedings, no decree can be made regarding it. There yet remains to be considered a tract of land described in the pleadings as lot No. 1. This lot was purchased November 16, 1895, by the defendant Sophia O'Brien, and on January 21, 1905, she conveyed it to her daughter, without any consideration other than an alleged indebtedness from the mother to the daughter on account of her interest in the estate of her deceased father. It also appears by the pleadings that, when the conveyance of the real estate was made, the mother also transferred to the daughter a considerable quantity of furniture, which the daughter admits was of the value of \$1,500. The bill charges that it was of much greater value, but no evidence was produced upon which I can base any reliable estimate of its value, and I have concluded to accept the figure admitted by the defendant. It, therefore, appears that at the time of this conveyance the mother was possessed of an equal undivided one-third interest in lots 4, 5, 289, and 290 and the whole of lot No. 1,

and furniture to the value of \$1,500, all of which was conveyed to the daughter in satisfaction of what they estimated to be her interest in her father's estate.

"I shall not undertake to analyze the evidence for the purpose of ascertaining what would have been due to the daughter on a strict accounting, because in my judgment the transfer of the mother's interest in the real estate last referred to, and also in the furniture, was contrived and carried out for the purpose of hindering and delaying Elizabeth O'Brien, the creditor of the mother, in the collection of her debt. The grantee has been above the age of 21 years for a long time; and, although she now testifies that she made repeated demands upon her mother to account, she never took any steps looking to that end until the mother was being pressed for the collection of a debt, whereupon the mother conveyed, and the daughter accepted, all of the property which the mother possessed, without, so far as this case shows, any accounting between them, and the only consideration which the daughter now sets up was an unadjusted claim, which, it was estimated, was more than the value of the property, and although since that time the state of the alleged account has been reduced to figures, there was no proof that previous to, or at the time of, the conveyance there was any attempt to ascertain the true condition of their respective relations to the estate of the testator. But even if the amount due had been correctly ascertained, and the transfer made in consideration thereof, the fact that the daughter participated with the mother in procuring the transfers for the express purpose of hindering and delaying the principal and only creditor of the mother in the collection of her debt is sufficient to avoid the conveyance, even if given in satisfaction of an honest debt. That such was the purpose of the daughter is conclusively shown by a letter which the daughter wrote but a short time before the transfer to her attorney, Mr. Peterson, of which the following is important: 'I had suggested mother putting her property in my name, and then having herself declared bankrupt. In that case, if she were forced to pay the notes, she would be exempt, would she not? I wish you would advise me of the wisdom of this.' This letter plainly disclosed that the daughter had suggested to her mother the putting of the title of her property in the daughter's name to avoid the payment of the notes held by Elizabeth O'Brien. There was no pretense that the property was to be conveyed in satisfaction of any debt. On the contrary it plainly disclosed a scheme by which the property was to be put beyond the reach of the creditor and of bankruptcy proceedings, and could have had no object other than preventing the creditor, then pressing her claim, from obtaining satisfaction out of the property which the mother had held in her own name for a great many years, upon the strength of

which she had undoubtedly obtained credit. It was a bald declaration of a fraudulent purpose, which was subsequently carried out, and the parties should not be permitted to enjoy its benefits.

"I will advise a decree, declaring void the transfer so far as the mother's interest in the property is concerned, subject to the mortgages on the lands when transferred, and also requiring the defendant Annie E. Travers to account for \$1,500, the admitted value of the furniture. It appeared during the trial that one of the buildings had been destroyed by fire since the conveyance, and that the defendant Annie E. Travers has collected the insurance. Of this sum she will be decreed to pay one-third to the complainant as representing her mother's interest therein."

Wilson, Carr & Stackhouse, for complainant. Frank Durand and John H. Backes, for defendants.

SWAYZE, J. There are cross-appeals in this case. As far as concerns the questions presented by the petitions of appeal, we agree with the views expressed by the Vice Chancellor. Through inadvertence, the decree fails to follow the opinion in some respects, and in others seems to require explanation.

1. It decrees that the deed conveying lots 4, 5, 289, and 290 be set aside, annulled, and made void. The opinion makes it clear that it is only void as to the equal undivided one-third of Sophia V. O'Brien. The deed is not printed in the record, but it seems to have conveyed only the undivided interest of Sophia V. O'Brien. Although she had on the face of the earlier deeds a paper title to the whole, it is clear that in equity she was a trustee as to two-thirds for Annie E. Travers, even if the conveyances by which the title was conveyed to her in 1888 were efficacious to pass the legal title. If they were not efficacious for that purpose, Mrs. O'Brien had a legal title to one-third only. We regard the deed of January 24, 1905, as conveying only one-third, and with this explanation, the decree in this respect is affirmed.

2. The decree adjudges that the complainant is entitled to one-third of \$11,000, moneys collected by Miss Travers for insurance on the buildings that were destroyed by fire, and fixes the amount, with interest, at \$3,710. The bill charges, and the answer admits, that she received (after paying mortgage liens amounting to \$4,630, for which a part of the insurance policies had been pledged as collateral security) the sum of \$6,370. She should be charged only with one-third of this amount. The mistake in the decree is not cured by the fact that the deed is set aside, subject to the lien of all valid mortgages existing at the time of the conveyance. The mortgage in question seems to have been satisfied, and the decree does not attempt to reinstate it, but in so many words adjudges a money liability against Miss Travers for

an amount which makes no allowance for what was paid on the mortgage. This mistake requires a reversal of the decree upon the appeal of Annie E. Travers.

3. The decree adjudges that the complainant have a lien, for the amount found due upon the interest of Annie E. Travers in the land. Her counsel argues that such a lien is not authorized, but in the reasons for reversal stated at the conclusion of her petition of appeal, no such reason is assigned. We think, therefore, that we should not disturb the decree in this respect.

4. The complainant urges that the amount charged against Miss Travers for the value of the furniture is less than its value as conceded in the answer. We think it unnecessary to consider this question, since the complainant does not appeal from this part of the decree.

Sophia V. O'Brien's rights do not seem to be affected by the decree, except as to the costs. The controversy was between the complainant and the defendant Travers. Since the complainant prevailed in setting aside the conveyance made by Mrs. O'Brien, he was entitled to costs. The decree, so far as it is involved in her appeal, should be affirmed. The same result follows so far as the complainant's appeal is concerned.

Miss Travers has been obliged to come to this court to correct the decree, and she should have costs on the appeal, including the costs of printing. The complainant is entitled to costs in the Court of Chancery as the decree adjudged.

MONOGHAN v. COLLINS et al.

(Court of Chancery of New Jersey. Dec. 7, 1908.)

1. HUSBAND AND WIFE (§ 49½*)—GIFTS—EVIDENCE.

Where a husband purchased premises in the joint names of himself and wife out of the proceeds of a sale of his own property, such transaction negatives a claim by the wife that her husband had made a gift of the entire proceeds of the sale of his property to her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 254; Dec. Dig. § 49½.*]

2. HUSBAND AND WIFE (§ 49½*)—GIFTS—VALIDITY.

A gift by a husband to his wife of the proceeds of a sale of his property will be set aside, unless it is shown that he had independent and competent advice as to the nature and effect of the gift, where he was a man of some years and his mind, though not dethroned, was susceptible of domination, and he was in a position of dependency upon his wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 252; Dec. Dig. § 49½.*]

3. HUSBAND AND WIFE (§ 49½*)—GIFTS—EVIDENCE.

A direction by a husband to his wife to take the proceeds of a sale of his property herself and put it in the bank to her account, that she had worked hard for it, was not a declaration that he gave her the money as and for her

sole property, but was entirely consistent with a desire on his part that she should be the custodian thereof.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 251; Dec. Dig. § 49½.*]

4. HUSBAND AND WIFE (§ 49½*)—GIFTS—EVIDENCE.

A direction by a husband to his wife to take the proceeds of a sale of his property and put it in her own name, for she had earned it, to put it in her own name and nobody could touch it, if, when standing alone, sufficient evidence of a gift, cannot be held to evidence a gift, where the husband made other statements, with which it must be read, showing no gift, but rather an intention to retain the control over his money.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 254; Dec. Dig. § 49½.*]

5. EXECUTORS AND ADMINISTRATORS (§ 133*)—INCUMBRANCES ON LAND—DUTY TO PAY—REPRESENTATIVES.

A mortgage assumed by a grantee is not to be paid by his executor in favor of the heir or devisee, unless grantee shall have assumed the debt in such manner as to show an intention to charge his personal estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 548; Dec. Dig. § 133.*]

6. EQUITY (§ 196*)—AFFIRMATIVE RELIEF—CROSS-BILL.

Affirmative relief can only be afforded upon a cross-bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 450; Dec. Dig. § 196.*]

Bill by Michael Monaghan, executor of the will of Patrick Collins, deceased, against Margaret A. Collins and others. Decree for complainant.

William M. Jamieson, for complainant.
Martin P. Devlin, for defendant Margaret A. Collins.

WALKER, V. C. The complainant's testator, Patrick Collins, departed this life June 28, 1907. His will was proved July 16, 1907. In it, after directing his executor to pay all his just debts and funeral expenses, he gave, bequeathed, and devised all his real and personal property absolutely to his wife, her heirs and assigns, forever, provided she remains a widow for the rest of her life, and should she remarry, then he gave, bequeathed, and devised all his estate absolutely to his three sons (by a former wife), their heirs and assigns, forever. He appointed the complainant sole executor of his will, which was dated November 25, 1905. At the time of the publication of this will the testator, who was a saloon keeper, owned a property at the corner of Union and Steamboat streets in the city of Trenton, where he conducted the retail liquor business. This property he sold to David Fineberg in June, 1907. The proceeds of this sale came to the possession of his wife, the defendant, who claims the same as a gift from her husband, and the executor's suit is to compel her to deliver those proceeds to him as the representative of her husband's estate. Long before the sale of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the property Mr. Collins had suffered a paralytic stroke, and remained an invalid thereafter to the time of his death.

David Fineberg, who purchased the property, testifies that he went to Collins' with the idea of making the purchase, and talked with Mrs. Collins and asked for Mr. Collins, and Mrs. Collins took him into the back room, where her husband was lying on a couch; that he, the witness, tried to have conversation with him, but he was a weak man and referred him to Mrs. Collins, saying he would be satisfied with what she did; he said Mr. Collins was on his feet part of the time, but could not walk. He had to walk alongside of the wall with one hand and with a cane in the other. The price of the property was \$6,000. On June 7, 1907, Fineberg made his check to the order of Collins for \$1,000, and delivered it to Mrs. Collins. On June 19, 1907, another check for \$3,763.25 was made by Lawrence Barden, Fineberg's broker, to the order of the defendant's solicitor. This check the solicitor indorsed and handed to Mrs. Collins. The check for \$1,000 is indorsed by Mr. Collins and by Mrs. Collins. The check for \$3,763.25 is indorsed by the solicitor and Mrs. Collins, but not by Mr. Collins. Both checks were deposited to Mrs. Collins' credit with the Trenton Saving Fund Society in a bank-book of hers. At the time Fineberg paid the \$1,000 he went to the saloon and asked for possession (which he did not get until he paid the balance), and he said he heard Mrs. Collins ask Mr. Collins what she would do with the money, and he told her to take it and put it in the bank to her own account—she had worked hard for it.

Charles A. Comp, a real estate agent, went to see Mr. and Mrs. Collins about selling a property on Centre street. This was May 24, 1907, and as a result of a conversation with Mrs. Collins which he says he presumes Mr. Collins heard for he was in an adjoining room where he and his wife had talked together in the hearing of Mr. Comp, he delivered to Mr. Collins a receipt, reading that he had received of Margaret Collins and Patrick Collins \$10 as a deposit for the purchase of the brick house No. 631 Centre street, for the sum of \$4,000, to be free and clear of all incumbrances. On June 7, 1907, a further payment of \$100 was made to Mr. Comp, for which he gave a receipt in the names of Patrick and Margaret Collins, in which receipt it was stated that a mortgage on the property of \$2,600 was to be assumed, and the balance of the \$4,000 was to be paid in cash. Mr. Comp was unable to remember any conversation at all with Patrick Collins.

Julia Donlon, a daughter of Patrick Collins and of the defendant, his second wife, testified that her father started the saloon business about 1899 or 1900 and ran it a year or so, but gave too much credit and became involved in about \$500 of debt; after that

the business was taken in charge by her mother, and she and her mother together kept the books; that in August, 1901, her father was taken sick, "had a stroke," as she put it, and that his illness lasted until his death. She did say that, while the paralysis affected him from the waist down, above the waist his condition was perfect. She further testified that after the will was made her father told her mother and her of its contents, and named the executor he had appointed, and her mother asked him if he could not get some one else (she apparently disliking Mr. Monaghan), and he said it could be changed, that he was not going to die right away, and, being asked how he intended to change it, he said that he intended to sell the place and when he sold it he would give her the money, and then her mother seemed satisfied. At the time Mr. Comp was at the place about the Centre street property she, the witness, said she heard Mr. Comp ask whose name was to go in the receipt, and her father said both names; and, when Mr. Comp asked how the property was to be paid for, her mother said by cash, her father being within hearing, and his hearing being perfectly good. When her father indorsed the check for \$1,000, he, according to the witness, handed it to her mother, and said: "take this check, and when you get the rest clear the Centre street property, put the rest of the money in bank in your own name, and you will always have a home; we don't know what time the children are going back on us, and it won't be hard for us to live if our house is clear." On another occasion she says she heard her father say to her mother: "Take the money and put it in your own name, for you earned it; put it in your own name and nobody can touch it." On one occasion, when her father and mother were discussing the purchase of the Centre street property and the sale of the saloon property, she heard her father say to her mother: "Take that money and clear it off, and when we have a shelter it won't be hard for us to get a bite to eat; and put the rest of the money in your own name in bank, because you can't say when the children will go back on us." She also said she heard her father say, when he sold the Union street property, that that would leave Mr. Monaghan nothing to do as executor.

This, as I understand it, is the testimony upon which the defendant relies to establish a gift from her husband to her in his lifetime of the proceeds of the sale of the saloon property. It should be mentioned that the license was in the name of Mr. Collins, and that the bills were contracted in his name. It is true that Mrs. Collins actually ran the business, hiring the help, paying the bills, and working herself, including bartending. This did not make the business hers. It was started by her husband and conducted by him, at least for some time. Mrs. Collins simply did what every faithful

and dutiful wife would do, if she were able; that is, ran her husband's business after he became incapacitated by disease.

On June 7, 1907, a formal agreement for the purchase of the Centre street property was entered into, and although it was, as is usual, written to be executed by both parties, it was signed only by the owners. It was in the names of Margaret and Patrick Collins. Their attorney, before its delivery, changed the provision for the payment of the balance of the \$4,000 in cash upon the delivery of the deed to an undertaking on the part of the grantees to assume the payment of a mortgage for \$2,600 on the premises, the difference to be paid in cash. The reason for this was that David Fineberg had been unable to raise the balance of the purchase-money required to be paid by him upon the purchase of the saloon property. The deed for the Centre street property to Margaret and Patrick Collins, although dated on the day of the agreement June 7, 1907, was not delivered for some time afterward, as it had to be sent to Minnesota to procure an acknowledgment. It was offered in evidence, and contains an assumption of the \$2,600 mortgage just mentioned. The difference between that amount and the purchase price of \$4,000, namely, \$1,400, was paid in cash. It is perfectly apparent that Patrick Collins intended to purchase, and did purchase (in the joint names of himself and wife), the Centre street property out of the proceeds of the sale of his saloon property. His intention was to spend \$4,000 out of those proceeds in that way. Assuming that the placing of the title to the Centre street property in the joint names of his wife and himself was his own volitional act—and I must assume it was, for the contrary is not proved—the transaction of itself is an absolute refutation of the idea that he made a gift of the proceeds of the sale of the saloon property to his wife. She does not claim a gift of the balance between the price of the Centre street property, incumbered or unincumbered, but a gift of the entire proceeds of the sale of the saloon.

But, irrespective of the force and effect of the purchase of the Centre street property as negating any gift of the proceeds of sale of the saloon property to the wife, the facts relied upon by her to show such gift, in my judgment, entirely fail to substantiate her claim. In *Haydock v. Haydock*, 34 N. J. Eq. 570, 38 Am. Rep. 385, Mr. Justice Reed, speaking for the Court of Errors and Appeals, said, at page 574 of 34 N. J. Eq. (38 Am. Rep. 385), that if it be admitted that the donor was a person who possessed sufficient mental power to make a gift, yet it was upon the recipient of the gift to show the fairness of the transaction; all the evidence showed that the wife was the one upon whom he naturally leaned, and he submitted himself to the control of her who naturally and necessarily became the head of the house; while

they so lived together, and while none but the wife and her brothers were about him, without the advice of disinterested counselors, the old man made the gifts of which she was the recipient. How entirely parallel the case at bar is to that of *Haydock v. Haydock*. Collins was a man of some years and feeble in body, and his mind, though not dethroned, was undoubtedly susceptible of domination. His wife was the one upon whom he naturally leaned, and he certainly submitted himself to her control, and while living in the house with her and their daughter, and without the advice of disinterested counsel, he is said to have made the gift which stripped him of all his worldly possessions, without the power of recall.

Where parties are in a position in which one is more or less dependent upon the other, courts of equity hold that the weaker party must be protected, and they set aside his gifts if he had not proper advice independently of the other. *Haydock v. Haydock*, 34 N. J. Eq. 570, 575, 38 Am. Rep. 385. The case of *Slack v. Rees*, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393, absolutely controls this case in this regard. In that case it was held that the rule that a deed of gift containing no power of revocation will be set aside where a relation of trust and confidence exists between donor and donee, and the donor has no independent advice as to the effect of the deed upon his own interest in the subject-matter of the gift, applies to an irrevocable conveyance made by an aged and infirm father, without independent and competent advice, to a daughter with whom he lives and upon whose care his well-being depends. Now, in the case under consideration, if Patrick Collins had sought to bestow the saloon property upon his wife by a solemn conveyance of the title under the forms of law, it would certainly be set aside by this court, unless it could be shown that he had independent and competent advice as to the nature and effect of the gift he was to make. Surely the gift of the proceeds of the sale of that property in the most informal manner, namely, by mere word of mouth, must be set aside for the same reason, in the face of his decrepitude and position of dependency upon his wife, which is so apparent. Furthermore, the language relied upon as establishing the gift from husband to wife in this case does not in my judgment bear the interpretation put upon it by counsel for the defendant. There is no clear-cut, unambiguous, and unequivocal declaration of a gift, but statements made which are equally, if not more, susceptible of an intention to retain the property than to give it away. True it is that Fineberg said that the deceased, in answer to a question by his wife as to what she should do with the money, said: "Take it yourself and put it in the bank to your own account; you worked hard for it." This was no declaration that he gave the money

to his wife as and for her sole and individual property. The language is entirely consistent with a desire on his part that she should be the custodian of his money. And it is true, doubtless, that she worked for it, helped earn it, by running his business through her devotion to him. How she helped earn it, however, does not appear. It may be that through her management his business prospered and he was thereby enabled to pay off some mortgage or discharge indebtedness otherwise incurred, or perhaps it was that her efforts prevented a failure in business and consequent loss of the property through that sort of misfortune. She was, of course, interested in the fund, and they both reasonably expected that she as well as he would get a living from it, at least in part. This assertion is not mere speculation, for the daughter testifies that her father said to her mother: "Take that money and clear it off (meaning, doubtless, the mortgage on the Centre street property), and when we have a shelter it won't be hard for us to get a bite to eat; and put the rest of the money in your own name in bank, because you can't say when the children will go back on us." In one only of the statements which the daughter says she heard her father make did he not include himself in the mention of the money. The statement was this: "Take the money and put it in your own name, for you earned it; put it in your own name, and nobody can touch it." Now, if nobody could touch it, certainly the wife could not touch it for the purpose of consuming it as her own. Even if this statement, standing alone, would be sufficient evidence of the gift said to have been made, it cannot be so used, because it must be read in connection with other statements made by the deceased to the same witness, and which other statements, as seen, disclose no gift, but rather an intention to retain control over his money. *Smith v. Burnet*, 35 N. J. Eq. 314, was a case in which an executor claimed certain shares of stock by way of gift from his deceased testator; the proof adduced to support the claim was the testimony of a witness who had heard the deceased say that he had given the stock to the executor. Mr. Justice Reed, speaking for the Court of Errors and Appeals, said, at page 324 of 35 N. J. Eq., that the word "give" is often used with other meaning than as evincing an intent to confer the title in the thing delivered (giving instances in which the word may be otherwise used); and he well says that this view, together with the difficulty of recalling or stating with accuracy all that was said, and how it was said, should cause such a declaration to be closely scrutinized before a title is passed solely upon such evidence. The defendant did not discharge the burden which the law casts upon

her of showing the fairness of the gift in question, nor did she show that the donor had competent and independent advice in the making of it. For these reasons the gift fails.

There was another question presented on the argument by counsel for the defendant, and that is whether, if the gift failed, the executor should not be charged with the duty of paying the mortgage upon the Centre street property which was assumed in the deed of conveyance. The rule, as I understand it, is that land incumbered by a mortgage, the payment of which is assumed by the grantee in the deed of conveyance therefor, is not to be paid by the executor of the grantee in favor of the heir or devisee, unless the decedent shall have assumed the debt in such manner as to show an intention to charge his personal estate. *Mount v. Van Ness*, 33 N. J. Eq. 262; *McLenahan v. McLenahan*, 18 N. J. Eq. 101; *Campbell v. Campbell*, 30 N. J. Eq. 415; *De Grauw v. Mechan*, 48 N. J. Eq. 219, 223, 21 Atl. 193; *Hetzel v. Hetzel* (Ch., October term, 1908, not yet reported), 71 Atl. 755.

If the defendant is entitled to have this mortgage paid by the executor in exoneration of the land, so that she can enjoy the premises which are now hers (by virtue of her survivorship of the tenancy by the entirety which was in her and her husband during his lifetime), the relief can only be afforded upon a cross-bill, and there is no such pleading in the case. I will hear counsel for the defendant upon notice to the complainant, on an application for leave to file a cross-bill, raising this question, if he so desires. In the present posture of the pleadings it is impossible to grant the defendant any affirmative relief.

There must be a decree for the complainant adjudging her to hold the balance of the purchase money received upon the sale of the saloon property as trustee for the complainant as executor of the will of her husband, and requiring her to turn over those moneys to him, and requiring the defendant the Trenton Saving Fund Society to honor the check of the defendant to be made in pursuance of the decree.

(75 N. J. E. 20)

MAYOR, ETC., OF CITY OF NEWARK v.
ERIE R. CO. et al.

(Court of Chancery of New Jersey. Dec. 4, 1908.)

1. EQUITY (§ 44*)—EXCLUSIVE JURISDICTION
—CONFLICTING EASEMENTS.

A case involving the rights of the parties in case of conflicting easements is one of equitable, and not of legal, cognizance, and appertains to the exclusive, and not auxiliary or concurrent, jurisdiction of chancery.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 141-145; Dec. Dig. § 44.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. EASEMENTS (§ 61*)—JURISDICTION OF EQUITY—SCOPE OF REMEDY.

The case of the rights of two tenants in common of an easement is one of equitable cognizance, and equity may use any remedy appropriate to the circumstances, either preventive or mandatory, adequate to promote and secure the joint user in such a way as the law requires in view of the particular situation.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 131, 134-137; Dec. Dig. § 61.*]

3. EASEMENTS (§ 61*)—RIGHTS OF TENANTS IN COMMON—TEST OF EQUITY JURISDICTION.

The test of equity jurisdiction in a case affecting the rights of tenants in common of an easement is the existence of actual conflict; and, if there is no conflict, there is no jurisdiction.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 131, 134-137; Dec. Dig. § 61.*]

4. CORPORATIONS (§ 393*)—COMPELLING PERFORMANCE OF CORPORATE DUTY—REMEDY AT LAW.

The Court of Chancery does not ordinarily compel a corporation to do its duty, the performance of which, neglected or contested, is enforced by the Supreme Court by mandamus.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1575; Dec. Dig. § 393.*]

5. RAILROADS (§ 99*)—GRADE CROSSINGS—COMPELLING ELEVATION OF TRACKS—JURISDICTION OF EQUITY.

The Court of Chancery has power to compel railroad elevation over highways, if that is the only way in which joint user can be properly secured and enjoyed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 299; Dec. Dig. § 99.*]

6. RAILROADS (§ 99*)—GRADE CROSSINGS—COMPELLING ELEVATION OF TRACKS.

In view of the legislation of this state recognizing that railroads may cross streets at grade, it cannot be held that grade crossings are per se illegal structures even in cities, or that streets are not safe, in the legislative sense of that word, merely because they are crossed at grade by a railroad crossing, but the situation must be such that nothing but track elevation will protect the public.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 293; Dec. Dig. § 99.*]

7. RAILROADS (§ 99*)—GRADE CROSSINGS—MORE THAN ONE TRACK OVER STREETS.

It cannot be maintained that streets become unsafe and inconvenient when more than one track is laid across them.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 293; Dec. Dig. § 99.*]

8. RAILROADS (§ 99*)—GRADE CROSSINGS—RESTRAINING EXCESSIVE USE.

If a street is so incumbered with railroad tracks that the public is practically shut out from using it, the appropriate remedy in such a case is an injunction restraining their excessive use; neither party being at liberty to destroy the right of the other.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 293, 299; Dec. Dig. § 99.*]

9. RAILROADS (§ 99*)—GRADE CROSSINGS—ELEVATION OF TRACKS.

If the number of tracks crossing a street be not excessive, the question whether trains run over them with such frequency and such speed, and at such an angle or with such curves, that the joint user of the crossing would be practically gone, and so necessitate elevation of the tracks, is one of fact, to be determined according to the circumstances of the case.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 293; Dec. Dig. § 99.*]

10. RAILROADS (§ 98*)—RIGHTS AT GRADE CROSSINGS—LIMITATIONS.

Tracks cannot be built over a street, or used thereon for the convenience of factory or yard or station purposes, and thus injuriously affect the public traffic over the highway.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 260, 264; Dec. Dig. § 93.*]

11. RAILROADS (§ 98*)—RIGHTS AT GRADE CROSSINGS—LIMITATIONS.

The right of a railroad over a highway is a right of passage, with its reasonable incidents, and nothing more.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 264; Dec. Dig. § 93.*]

12. RAILROADS (§ 99*)—GRADE CROSSINGS—NECESSITY OF ELEVATING TRACKS—EVIDENCE.

Evidence held not to show that a railroad elevation over a street was the only way in which joint user could be properly secured and enjoyed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 300; Dec. Dig. § 99.*]

13. RAILROADS (§ 99*)—GRADE CROSSINGS—UNLAWFUL OBSTRUCTIONS—RELIEF IN EQUITY.

A bill praying, not only for the depression or elevation of railway tracks at a street crossing, but also for general relief, is broad enough to warrant an injunction against the use in the highway of certain tracks illegally obstructing the way, and the unlawful use of another track for an unauthorized purpose.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 299, 300, 302; Dec. Dig. § 99.*]

Bill by the Mayor and Common Council of the City of Newark against the Erie Railroad Company and others. Findings for complainant.

Joseph Coult, for complainant. Cortlandt Parker and Charles Corbin, for defendants.

STEVENS, V. C. This is a bill to compel the defendant companies to elevate their tracts where they cross Summer avenue, in the city of Newark. The bill was demurred to, and the demurrer was overruled. *Newark v. Erie R. R.* (N. J. Ch.) 68 Atl. 413. In overruling it Chancellor Magie reaffirmed the rule laid down by Beasley, C. J., in *State v. Central Railroad Co.*, 32 N. J. Law, 220, to the effect that the duty imposed upon railroads whose charter provisions are similar to those of the Central Railroad is to "keep at all times and under all circumstances the public highways, at the point where they cross the railroad, in a condition fit for safe and convenient use." Both the Supreme Court and this court have approved the rule in the numerous cases cited by the Chancellor. If there was any doubt about its correctness, that doubt has been set at rest by the recent decision of the Court of Errors in *Borough of Metuchen v. Penn. R. R. Co.* (N. J.) 69 Atl. 465.

The act of 1893 (Laws 1893, p. 110, c. 66) does not confer upon this court the power to abolish grade crossings. It merely authorizes it to make reasonable provision for their protection. The act, in terms, limited to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cases where the public road or highway "is crossed by a railroad track at the same grade or level." The effect of the act was considered in *Palmyra v. Penn. R. R.*, 62 N. J. Eq. 611, 50 Atl. 369, Id., 63 N. J. Eq. 799, 52 Atl. 1132, and in *Eckert v. Perth Amboy & Woodbridge R. R. Co.*, 68 N. J. Eq. 437, 57 Atl. 438. Section 29 of the general railroad act (Laws 1903, p. 860) is, however, held by Chancellor Magle, in his opinion overruling the demurrer (68 Atl. 415), to authorize the court to decree track elevation. The section reads as follows: "When any company shall not properly construct and maintain the bridges or other crossings of highways by its railroad tracks as required by law, it shall be lawful for the governing body of the township or municipality wherein such crossings are located, within a reasonable time, after notice to the company, to construct or repair such bridges or other crossings and the cost thereof may be collected from the company whose duty it is to make such construction or repair by action in any court of competent jurisdiction; or in lieu of such construction or repair, the township or municipality may proceed by a suit in equity to compel the specific performance of the duties imposed by law upon such company with respect to the construction, maintenance and repair of such bridges and crossings and the court shall prescribe the crossing to be constructed or the repairs to be made and in order to enforce obedience to its decree or mandate, the court may restrain the exercise of any of the franchises of the company or adopt such other remedies as may be in accordance with the practice of the court." Referring to this section the Chancellor says: "The claim that no statutory jurisdiction has been conferred on this court to prescribe the crossing to be constructed, if any railroad company shall not properly construct bridges or other crossings of highways as required by law, may be for the present passed by, with the observation that, by section 29, Revised Railroad Act 1903, the Legislature has undertaken to confer, and has conferred, by language which is incapable of any other construction, precisely the jurisdiction in question. It is contended, however, that in so doing, the Legislature exceeded its constitutional powers. This contention will hereafter be considered. That the twenty-ninth section of the act above cited does, by its terms, confer such jurisdiction has been settled in this court. *Penn. R. R. Co. v. Metuchen* (N. J. Ch.) 64 Atl. 484." The case referred to was one in which a bill had been filed, by the borough of Metuchen against the company, to compel it to widen a bridge over a highway, its tracks being laid upon this bridge. It appeared that the railroad had originally crossed the highway at grade, but that the company had elevated its tracks, and in so doing had narrowed the highway by placing abutments therein and otherwise contracting it. It was held by Pitney, V. C., in

this court, that section 29 gave this court jurisdiction to make an order directing the company to so reconstruct and lengthen its bridge that the public might have the use of the highway to its full width. The Court of Errors (69 Atl. 465) sustained the Vice Chancellor in his view of the jurisdiction conferred, but differed with him on the question of fact.

Section 29 contains two clauses. The first authorizes the governing body of the township or municipality to construct and repair "bridges and other crossings" if the company shall not properly construct and maintain them. I think it may be doubted whether this clause would be held to confer upon municipalities the right, after notice, to interfere with the company's rails, and with the structure supporting those rails, or to give it the right to change the grade of the railroad. The words, taken according to their natural import, would seem to authorize municipalities to build bridges over cuts, to plank between the rails, and to do such other acts as would interfere little, if at all, with the exclusive control exercised by the company over its roadbed. The second clause of section 29—the part that was construed by this court and the Court of Errors—gives the township, in lieu of such construction and repair, the right to proceed by a suit in equity to compel the specific performance of the duties imposed by law upon the railroad company "with respect to the construction, maintenance and repair of such bridges and crossings"; i. e., such bridges and crossings as the company did not properly "construct and maintain." As the same words "construct" and "maintain" and "repair" are found in both clauses, it might be argued with some plausibility that the second clause was intended to apply to the same classes of cases that the first clause was. But this view appears to have been rejected, not only here, but in the Court of Errors, unless we take the view that power is given to the municipality to interfere with the grade and structure of the roadbed. Gummere, C. J., says: "The grounds which led the learned Vice Chancellor to the conclusion that the matters involved in the litigation were cognizable in the Court of Chancery are fully set out in his opinion, and we concur in the views expressed by him upon this point and in his conclusion." The Vice Chancellor in his opinion had said: "The power of the court to compel by mandatory proceedings the railroad corporation to do its duty in this respect (i. e., to widen its bridges and remove a part of its embankment) rests, so far as I am aware, wholly upon the statute of 1903." Had it not been for this expression of opinion, I should have thought that the power might have been referred to the jurisdiction exercisable in the case of conflicting easements. *Del. Lack. & West. R. R. Co. v. Erie R. R. Co.*, 21 N. J. Eq. 302; *Nat. Dock R. R. v. Cent. R. R.*, 32 N. J. Eq.

755, 767; *Nat. Docks v. United Co's.*, 53 N. J. Law, 218-224, 21 Atl. 570. A case of that sort is one of equitable, and not of legal, cognizance. It appertains to the exclusive, and not to the auxiliary or concurrent, jurisdiction of chancery. Says Beasley, C. J., in the leading case (*D. L. & W. R. R. v. Erie R. R.*, supra): "They [the two companies] are tenants in common of an easement, and if this court cannot protect the one against the injustice of the other, the party whose rights are invaded is clearly without any adequate remedy." But if the case is one of equitable cognizance, it would seem to follow that equity may use any remedy appropriate to the circumstances. Not only a remedy merely preventive, but also one that is mandatory—any remedy whatsoever, out of its store of remedies adequate to promote and secure the joint user in such a way as the law requires in view of the particular situation.

The test of jurisdiction would seem to be the existence of actual conflict. If there is no conflict, there is no jurisdiction. This court does not ordinarily compel a corporation to do its duty. Performance of a duty, neglected or contested, is enforced by the Supreme Court by mandamus. It would seem to have been this aspect of the matter that presented itself to the judges in *N. Y. & Greenwood Lake R. R. v. Montclair*, 47 N. J. Eq. 591, 21 Atl. 493. The case was one of demurrer to a bill, and, as will be seen by a reference to the facts stated in the preface to the opinion of the Chancellor (*Montclair v. New York & G. L. Ry. Co.*, 45 N. J. Eq. 436, 18 Atl. 242), it appeared that the predecessor of the defendant company had constructed a bridge over a cut, the bed of which had been graded, but on which no rails had been laid. This bridge had been suffered to decay, and the question was whether the defendant company, as the successor of the original company, was under an obligation to rebuild it. The question was apparently one of legal duty, not of conflicting easements. It was in view of such a situation that Mr. Justice Reed said: "The doctrine that a court of equity will not act in any instance where the common-law courts possess adequate power to afford the relief asked for is fundamental. The power of the common-law courts to compel the performance of duties of the kind under consideration . . . is complete." Be this as it may, I must hold that, from whatever source derived, the power to compel railroad elevation over a highway, if that is the only way in which the joint user can be properly secured and enjoyed, exists in this court. Chancellor Magie was, as it seems to me, strictly logical when he held that, inasmuch as it had been decided that the second clause of section 29 was broad enough to confer the power to order the company to reconstruct its railroad bridge over a highway by lengthening it and removing part of the railroad

embankment, it was also broad enough to authorize this court to order the defendant company to reconstruct its tracks across the highway by elevating or depressing them. If the generality of the language of the clause included the one, it necessarily included the other. But an affirmation of the jurisdiction of this court does not solve the question as now presented. The allegations of the bill are so general that they present little more than the abstract question whether, under any circumstances, this court would compel a railroad company to elevate or depress its tracks. The decision was that in a proper case it would. Whether it would or not was held to depend upon the special facts. To these I now address myself.

Summer avenue is a residence street. The houses fronting upon it extend northward as far as the railroad. Further north there are still many vacant lots, both on the avenue itself and to the east and west of it, but the town is growing in that direction. There are six tracks laid across the avenue at grade. The general lay of the land in the immediate vicinity is level, and the tracks, if unobstructed by cars, moving or standing still, may be seen eastward and westward, by a person standing from 20 to 30 feet away, for about a quarter of a mile. From 1,000 to 1,200 people, and over 100 vehicles, cross daily between 6 o'clock a. m. and 6 o'clock p. m., and about a third as many at night. From 22 to 28 passenger trains each way pass over the crossing every 24 hours. The number of freight trains running through is small, but in the operations of the local yard, and in the making or breaking up of trains, freight cars frequently cross and recross the avenue. The yard and freight station are between Summer avenue and Washington avenue. The obstruction to travel seems to be mainly due to the freight cars. The gates are frequently lowered, and the delay amounts, at times, to several minutes. According to complainant's count, in the 24 hours between 6 a. m. of August 2 and August 3, 1907, the gates were down 30 times for 3 minutes or more. The report shows that the delay to travel thus occasioned resulted chiefly from the handling of freight cars. As the freight house and water tank, as well as the yard, are in the vicinity, the side tracks are seldom unoccupied, and the cars standing on them are a serious obstruction to the view up and down the tracks. The street crosses the railroad at right angles. It occupies the site of an old highway that was laid out many years before the advent of the railroad. This I think gives a general view of the situation. The question is whether such a situation calls for an elevation of the road at the point in question, under the rule laid down in the *Central Railroad Case*. It is admitted that it cannot be depressed; and, if elevated, the grade at Mount Prospect avenue, further to the westward, will have to be changed.

The first thing that strikes one is that it has not yet become the policy of the state, as evinced by its legislation, to require crossings generally to be otherwise than at grade, although there has been some advance in that direction. In the beginning of railroad construction the practice of laying the tracks at the grade of the highways, unless unadvisable from an engineering standpoint, was universal. The cities were then small, the trains slow and infrequent, and the tracks few. As the cities grew and the trains and tracks became more numerous, the state began to take precautions for the public safety. In 1839 it was enacted that a bell should be placed on the engine and rung at least 300 yards from the highway. It was also provided that a board with the inscription "Look out for the Locomotive" should be erected and maintained (Laws 1838-39, p. 170). By act March 26, 1852 (P. L. p. 532), the company was allowed to blow a steam whistle as a substitute for a bell. These have been the only precautions that were generally deemed indispensable by the Legislature where trains crossed highways at grade. But the courts went further. They held that under circumstances of special danger—for example, where there was a railroad curve within a short distance of the highway, or where the company itself had erected buildings close to the tracks so as to obstruct the view—a duty to take special precautions arose; that the company must provide gates or a flagman. *Penn. R. R. Co. v. Matthews*, 36 N. J. Law, 531. But in a long series of cases the courts have decided that, if the element of special danger be wanting, then neither the court nor the jury can require more than the Legislature has seen fit to prescribe, viz., the ringing of a bell or the blowing of a whistle and the erection of sign posts. *N. Y. R. R. Co. v. Leaman*, 54 N. J. Law, 202, 23 Atl. 691, 15 L. R. A. 426. This is the law to-day.

What the Legislature has done toward further protecting the highways is this: It has authorized cities and other municipalities to require by ordinance flagmen or gates to be placed at designated crossings. *Del. Lack. & West. R. R. Co. v. East Orange*, 41 N. J. Law, 127; *M. & E. R. R. Co. v. Orange*, 63 N. J. Law, 252, 43 Atl. 730, 47 Atl. 363. This, of course, is a legislative recognition that railroads may cross streets at grade. It has authorized the governing body of any township or municipality to petition this court to order gates to be erected, or a flagman stationed at any grade crossing, or that some other reasonable provision be made for protecting the crossing. Laws 1903, p. 664, § 36; *Palmyra v. Penn. R. R. Co.*, 62 N. J. Eq. 601, 50 Atl. 369; *Eckert v. Penn. R. R.*, 66 N. J. Eq. 438, 57 Atl. 438. This is also a legislative recognition that railroads may cross at grade. And it has also declared (section 27 of same act) that any railroad thereafter to be constructed (*Newark v. Cent. R.*

R. [N. J. Ch.] 67 Atl. 1009) shall cross streets either above or below grade, unless the governing body thereof shall permit crossing at grade. This is a further recognition of the lawfulness of grade crossings in cities, if the cities agree thereto. With a view to the gradual abolition of grade crossings by mutual consent it has provided that any municipality or township, or in the case of a county road the board of chosen freeholders, may enter into contracts with railroad companies to abolish grade crossings. Laws 1874, p. 45; Laws 1901, p. 116; Laws 1902, p. 402; Laws 1903, p. 661, §§ 30, 31. The Legislature has gone a step further. It has enacted that on the initiative, either of a city of the first class, or of a railroad company, application may be made to the Supreme Court for an order compelling the abolition of grade crossings. If that court finds that the change is feasible, and that it may be made without unreasonable cost, the matter is referred to commissioners to prepare a plan, and if the plan be approved, the court apportions the cost of the work. This act, it will be seen, differs from the acts of 1901 and 1903 in that its provisions may be put into operation by either party without the consent of the other. Laws 1896, p. 139. In view of this legislation it is quite impossible to hold that grade crossings are, per se, illegal structures, even in cities, or that streets are not safe, in the legislative sense of that word, merely because they are crossed at grade by railroad tracks. There must be something in the situation so peculiar as to compel the court to say that gates will not adequately protect the public; that flagmen will not; that nothing but track elevation will. And it cannot be maintained that the streets become unsafe and inconvenient when more than one track is laid across them. In *Allen v. Jersey City*, 53 N. J. Law, 522, 22 Atl. 257; it was held by the Supreme Court that the Erie Railroad could, against the consent and protest of Jersey City, lay another track across Jersey street, one of its main thoroughfares.

The question, then, must be, as I have said, whether gates and flagmen and other expedients are, in the given case, so inefficacious that nothing but track elevation will give to the public, in fact as well as in name, the joint use of the highway. It is obvious that a street may be so incumbered with tracks that the public is practically shut out from using it. As neither party is at liberty to destroy the right of the other, the appropriate remedy in such a case would appear to be an injunction restraining the excessive use. *Newark v. Central R. R. Co. (N. J. Ch.) 67 Atl. 1009*; *Newark v. D. L. & W. R. R. Co.*, 42 N. J. Eq. 196, 7 Atl. 123. If, on the other hand, the number of tracks be not excessive, it is still conceivable that the trains might run over them with such frequency and speed, and at such an angle or with such curves, that the joint user of the crossing

would be practically gone. The question is, then, one of fact, to be determined according to the circumstances of the case. In considering the question it must, however, be remembered, that it is no light thing to order a change in the grade of a steam railway. In the language of Church, C. J., in *People v. N. Y. C. & H. R. R. Co.*, 74 N. Y. 302, "the grade necessarily embraces considerations of convenience, expense, and facility of construction and operation, and is fixed at a particular point with reference to grades at other points." The Legislature has therefore necessarily vested the company with a considerable discretion in determining what and where it shall be.

Coming to the evidence, it appears that there has as yet been no accident, although the situation, as it exists, seems to be such that one might easily occur, especially as the crossing is used daily by a considerable number of school children on their way to and from the public school. The only safeguard hitherto provided has been gates, raised and lowered by an operator in a tower, several hundred feet distant. But there is a complication in the case. The company has, without the consent of the city, placed on the crossing no less than six tracks. One of these is conceded to be merely for the convenience of a near-by factory (as to which, see *Montgomery v. Trenton*, 36 N. J. Law, 279); another for the convenience of another factory, but occasionally used for general freight delivery. Still another—the north siding—is used in connection with the defendant's yard, of which it seems to be an adjunct. Mr. English, in his evidence, calls it a "passing siding." He admits, however, that it has a dead end, and that it is used most of the day for the storage of coal and other cars. These three tracks, so far as they are laid upon the highway, seem to me to be unlawful structures. The right of the railroad over the highway is a right of passage, with the reasonable incidents of passage, nothing more.

In the case of *Penn. R. R. Co. v. Angel*, 41 N. J. Eq. 328, 7 Atl. 433, 56 Am. Rep. 1, Justice Dixon portrayed a situation similar to that I am now dealing with. He said: "In our judgment they [the legislative provisions] indicate that those rights are such as pertain to the use of the avenue for the purposes of a way, not the purposes of a station yard. The primary privilege given is that of passage. This and its reasonable incidents cover the whole scope of the grant. The right of storing engines and cars, either for a longer or a shorter period, the right of making up or breaking up trains, are not embraced in such a concession. These are strictly terminal and station purposes, and by providing for station yards the Legislature has indicated its intention that business of that nature should be transacted there. * * * Having a right of passage, it [i. e., the Pennsylvania Railroad Company] used

its tracks as though they were within its terminal yards, and so used them constantly in its everyday concerns." Accordingly, an injunction was given against the use of the tracks for purposes other than of passage. The case of *State v. Morris & Essex R. R. Co.*, 25 N. J. Law, 437, is very much in point. There the railroad had been indicted for obstructing the highway, at or near the village of Rockaway, by placing its cars upon the streets and allowing them to remain there and obstruct its use. Green, C. J., said: "It is admitted that the freight could not be received and discharged at the Rockaway depot in its present location without, to some extent, impeding the public travel, and that the defendants have not willfully caused any obstruction beyond what their business at this depot required. The necessity of obstructing the highway results, not from the exercise of their corporate rights, but from the improper location of their depot. A station house and freight depot may be necessary to the operations of the company. It may be necessary that the cars should stand for half an hour, or an hour, to receive and discharge freight. But there is no necessity that the depot should be so located as to cause an obstruction of the highway by the cars. The company cannot, by its own imprudence, create a necessity for the obstruction, and then justify the nuisance on the ground of the necessity which they have created. Because a depot is necessary to the operations of the company they are not therefore justified in building it upon the highway, or so near it that their trains must injuriously affect public travel. The fallacy of the argument on the part of the defendants consists in assuming that placing the depot in its present location was a matter of necessity." In these two decisions is indicated the solution of the present question. The company in the case in hand has been doing just what the Court of Errors and the Supreme Court said, in the cases above quoted, from, it could not do. For its own convenience it has placed its switches, its sidings, its yards, its freight depot, and its water tank in such close proximity to the highway that it now finds it necessary to use it otherwise than as a way. Of the three remaining tracks, two are undoubtedly used for passage. The third, as I gather from the evidence, is used both for passage and for yard or station purposes. It cannot be lawfully used for the latter where it crosses the avenue. If the three tracks first spoken of, where they cross the highway, be eliminated, and the unlawful use of the other enjoined, I do not think that the crossing, properly guarded, will be more dangerous, in an absolute sense, than most of the other grade crossings in the cities and many of the other municipalities of the state.

To sum up: The Legislature has not seen fit to abolish grade crossings except to the

extent heretofore indicated. It still authorizes them, with the proviso, however, that where, in the future, any railroad shall cross any street in any city; it shall cross above or below grade, unless the governing body of the city grant permission to cross at grade. In this state of the legislation upon the subject I think the court can go no further, in a case situated as this is, than to enjoin the use in the highway of the three tracks above referred to, and the unlawful use of the fourth. On the evidence it would seem that a flagman should be stationed at the crossing, but I doubt whether an order to that effect could be made in this proceeding. It would hardly come within the scope of the bill.

The two cases relied upon by counsel for the city (*State v. St. Paul, etc., R. R. Co.*, 98 Minn. 380, 108 N. W. 261, and *State v. Duluth*, 98 Minn. 429, 108 N. W. 269) are not in point. There the necessity of a bridge, which had in fact existed over the locus in quo for some time, was conceded. The question was who should bear the expense of maintaining it. Here the necessity of the overhead crossing is the very point in controversy.

The question whether the tracks that have been found to have been illegally laid over the street should be actually taken up has not been argued. I presume that, if they cannot be used for any purpose, they would naturally be removed. They would seem to be illegal obstructions, and, if allowed to remain, would be calculated to distract the attention of persons about to cross, who would not know on which of them to look for approaching trains. If, however, counsel desire to be heard on this subject, I will hear them.

The bill, although primarily designed to enforce track elevation, is broad enough in its statements to warrant the giving of the relief indicated. There is a prayer, not only for depression or elevation of the tracks, but also for general relief.

(75 N. H. 150)

INTERNATIONAL PAPER CO. v. MILES et al.

(Supreme Court of New Hampshire. Coos.
Dec. 1, 1908.)

LOGS AND LOGGING (§ 8*)—CONTRACTS—CONSTRUCTION.

A contract to cut timber during several years bound the owner to loan money to the contractor to make improvements on the land, and bound the contractor to give his note for the loans and to assign all improvements and leases as collateral for the payment of the notes, which improvements and leases on default in the payment of the notes, or any of them, "or of any other of" his "agreements herein," should become the absolute property of the owner. The owner made no loans to the contractor. Held, that the contract did not bind the contractor to transfer the improvements and leases, except as

security for a loan, and the improvements and leases were not security for the contractor's performance of his agreement, but stood primarily as security for the payment of the notes, evidencing the loans, and, until a loan was made, no transfer could be insisted on by the owner.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 8.*]

Young, J., dissenting.

Transferred from Superior Court, Coos County; Plummer, Judge.

Bill in equity by the International Paper Company against Herman E. Miles, administrator of Willis Tucker, deceased, and others. A demurrer to the bill was overruled subject to exceptions, and the cause was transferred from the superior court. Case discharged.

The bill alleges the following facts: The plaintiff is the successor in interest of the Glen Manufacturing Company. November 24, 1894, the Glen Company made a contract with Willis Tucker and Wilfred A. Hodgdon, by which the last-named parties agreed to cut a large quantity of timber in certain townships in Coos county; the operations to extend over several years. Section 5 of the contract is as follows: "The company agrees to loan to said Tucker and Hodgdon, for the purpose of making improvements upon said lands or any of them, such sums, not exceeding in the aggregate ten thousand dollars (\$10,000), as said Tucker and Hodgdon shall request, said Tucker and Hodgdon to give their joint and several promissory notes for the amounts so loaned, payable in four or six months from their respective dates, the company agreeing to renew said notes from time to time at the request of said Tucker and Hodgdon; provided that the maturity of the last extension therefor, or of any of them, shall not be beyond four years from the date of this agreement; and provided, further, that said Tucker and Hodgdon pay interest thereon promptly as hereinafter provided and keep their other agreements herein. All said notes and the renewals thereof shall bear interest at the rate of six per cent. per annum payable semiannually. Said Tucker and Hodgdon shall assign and transfer all improvements made or which may be made by them upon said lands or any of them, and also all leases of other lands used in connection with this business, to the company as collateral security for the payment of said notes and any renewals thereof, which improvements and leases upon the default by said Tucker and Hodgdon in the payment of said notes or any of them, according to the terms hereof, or of any other of their agreements herein, shall after ninety days' notice in writing by the company to said Tucker and Hodgdon of any such default become and be the absolute property of the company, but said Tucker and Hodgdon shall not be thereby relieved from liability upon said notes or any of them." The

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

interests of Tucker and Hodgdon finally became the property of Willis Tucker, now deceased, of whose estate the defendant Miles is the administrator. In carrying on lumbering operations the contractors have made certain improvements on the lands of the plaintiff, which the reasonable prosecution of the work rendered necessary and convenient. They also secured certain leases of lands and rights from third parties, which were used in carrying on the work. It is alleged that neither the contractors nor their successors have performed the conditions of the contract, but in 1903 abandoned the contract, and that in consequence thereof all the improvements made by them upon the lands and all leasehold rights acquired by them became the property of the plaintiff, upon the giving of a written notice to that effect to the defendants, which notice was given. In October, 1903, Tucker gave a personal mortgage of the improvements to the Tucker Lumber Company, one of the defendants, to secure the sum of \$25,000. Miles has already removed some of the improvements, and threatens to sell or remove others. The prayer is that the improvements be decreed to be the property of the plaintiff, that an assignment of the leases from Miles as administrator to the plaintiff be ordered, and that Miles be restrained from removing or interfering with the property. By an amendment to the bill, the plaintiff seeks to recover damages for the nonfulfillment of the contract.

Drew, Jordan, Shurtleff & Morris, for plaintiff. Herbert I. Goss and Sullivan & Daley, for defendants.

WALKER, J. The principal contention involves a construction of section 5 of the agreement. The plaintiff claims, in effect, that that section contains two distinct contracts or undertakings, viz.: (1) That the contractors should transfer and assign to the Glen Company all improvements made by them under the other provisions of the contract and all leases secured by them in the prosecution of the work, whenever they obtained a loan of money from the company, which property should be held as collateral security for such loan, and in case the loan was not paid when due the title to the property should at once pass to the company; and (2) that the property should at all times be deemed to be security for the contractors' performance of their agreements contained in the other sections of the contract, and in case of a breach thereof it should become the absolute property of the company, upon notice from it. There is no claim by the plaintiff that the contemplated loan was made, or that there was any transfer of the property; but it is insisted that, upon the failure of the contractors to perform their agreements relating to the lumbering operations, the property, meaning the improvements and

leases, was forfeited to the company and became its property, by virtue of the terms of section 5, without a formal transfer. In accordance with this theory, the plaintiff asks for a decree establishing its right to the property, ordering a transfer of the leases, and restraining the defendants from interfering with the property. But the language of section 5, upon a reasonable construction, does not support the plaintiff's contention. The principal purpose of the parties therein was to provide for a loan of money if the contractors should desire it, in order that they might carry on the work more conveniently and expeditiously. In an undertaking of this magnitude, large expenditures of money were required, and it was the purpose of the parties to make arrangements for that necessity at the request of the contractors. The company for its protection required a pledge or transfer of certain property, termed the "improvements and leases," to hold as collateral security if it made the contemplated loan. The collateral thus transferred was to stand primarily as security for the payment of the notes evidencing the loan, and it may be it was intended as security for the performance of the contractors' agreements generally; but, if it had this effect, until a loan was made no transfer of property could be insisted upon by the company, and, in the absence of a transfer to secure payment of the contractors' notes, the property could not be held as security for their other agreements. So long as the contractors did not ask for the loan of money to carry on their operations, the inference is that the company did not desire to insist upon specific security for the general performance of the agreements of the contractors. At least, it seems clear that the parties did not understand they were making two distinct and independent contracts of indemnity; one relating to the notes, and the other to other promises on the part of the contractors. If the intention was that the improvements and leases should be deemed to constitute a general security, without regard to whether a loan of money was made or not, it would be natural to expect some definite expression of that intention. A matter of that importance would not ordinarily be inserted incidentally and parenthetically in a paragraph dealing with an entirely different matter. It would not be left to be discovered by an involved inference which neither the language nor the subject-matter renders necessary. As it is not alleged that a loan was made, or that the property was transferred, it is not perceived how section 5 became effective, or how under it the plaintiff became entitled to the improvements and leases.

This result renders it unnecessary to consider the rights of the mortgagees of the property, as against the plaintiff, upon the allegations in the bill. Whether some of the property is of such a character that it can-

not be removed from the land, whether some of it is a part of the real estate and is so annexed to the realty as to belong to the owner of the fee and to be governed by the law relating to real property, and, if so, what part of it has that character, are questions which are not decided upon the present state of the pleadings. Nor is it deemed advisable to determine whether the plaintiff may proceed upon this bill in equity to try the questions of a breach of the contract by the contractors and the resulting damages, until the defendants definitely raise that issue and seek its adjudication.

Case discharged.

YOUNG, J., dissents. The others concur.

(75 N. H. 553)

PALMER v. BLANCHARD.

(Supreme Court of New Hampshire. Strafford. Dec. 1, 1908.)

APPEAL AND ERROR (§ 207*) — REMARKS OF COUNSEL—OBJECTIONS.

An exception to the remarks of defendant's counsel will be overruled, where plaintiff did not ask the court to instruct the jury to disregard them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1500; Dec. Dig. § 207.*]

Exceptions from Superior Court, Strafford County; Stone, Judge.

Action by Osmer Palmer against Roscoe G. Blanchard. Verdict for defendant, and plaintiff excepts. Exception overruled.

The defendant is a physician, and treated the plaintiff's daughter for spasmodic croup. The plaintiff's evidence tended to prove that she died of membranous croup. Dr. Morgan, who was called to the child about two hours before her death, was a witness for the defendant, and admitted on cross-examination that the plaintiff and his attorney, Scott, called on him at his office, but denied that he told them death resulted from membranous croup. The redirect examination took up the occurrences at his office and then proceeded as follows: "Q. Did you see Col. Scott later? A. Saw him on the street one day; that is all. Q. What talk did you have with Col. Scott about it on the street?" The plaintiff's counsel objecting, the court said: "That is not evidence. Defendant's Counsel: It was put in before, your honor. I don't think it is quite fair. I don't wish to criticize the court. The Court: Any talk this man had with Col. Scott on the street is not evidence. Defendant's Counsel: They put it in before. I didn't know but they wanted to now." To this the plaintiff excepted. The court found that these remarks were addressed to the court in explanation of the defendant's contention as to the competency of the question put to Dr. Morgan, and that counsel acted in

good faith in his endeavor to address the court.

Walter W. Scott and Samuel W. Emery, for plaintiff. William F. Nason and Edwin G. Eastman, for defendant.

YOUNG, J. Counsel had a right to urge his views on the court, if he honestly believed the question was competent. If the plaintiff thought the controversy was likely to prejudice him, he should have asked the court to instruct the jury to disregard it. *Batchelder v. Railway*, 72 N. H. 329, 56 Atl. 752, is not in point. In this case the court has found that the remarks excepted to were made to the court while the defendant's counsel was urging the competency of his question. In the case cited the question excepted to was asked after its competency had been considered and it had been finally excluded.

Exception overruled. All concurred.

(75 N. H. 146)

LEVASSEUR v. CITY OF BERLIN.

(Supreme Court of New Hampshire. Coos. Dec. 1, 1908.)

1. TRIAL (§ 368*)—TRIAL BY COURT—VERDICT ON AGREED FACTS.

Where the facts were agreed in an action for negligence, but the fact of negligence which was the foundation of the action was not agreed, the verdict of the trial court upon the agreed facts cannot be sustained as a conclusion of law from the facts stated.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 368.*]

2. MUNICIPAL CORPORATIONS (§ 834*)—TORTS—OBSTRUCTIONS IN WATER COURSES.

Where plaintiff, without the knowledge of the city, connected his cellar by drain with a city water course which was not maintained as a sewer, his act was a wrongful interference with the city's property, and the city was not liable to him for a flooding of his cellar from an obstruction in the water course which forced water through his drain.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 834.*]

3. MUNICIPAL CORPORATIONS (§ 845*)—OBSTRUCTION IN WATER COURSE—ACTION—VERDICT—SPECIAL FINDING INCONSISTENT WITH GENERAL VERDICT.

A conclusion involved in a general verdict, that plaintiff was damaged by defendant city's negligent management or construction of a common sewer with which plaintiff's premises were rightfully connected, is inconsistent with a special finding that the stream in question was not maintained as a sewer, and the general verdict should therefore be set aside.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 845.*]

Transferred from Superior Court, Coos County; Plummer, Judge.

Action by Peter Levasseur against the City of Berlin. Facts agreed, and case transferred from the superior court. Case discharged.

In March, 1906, the plaintiff purchased a house and lot on Park Street in Berlin. At that time a stream of water flowed across

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the rear of the lot in a covered stone culvert, which connected with a tile drain on the southerly side of the premises. About ten years before, the city in building a street diverted the stream so as to cross this lot. About three years later the culvert was built by the city, and afterward it was continued by the tile drain. At the upper end of the culvert an iron grate was placed to screen the water passing through. The city did not maintain the water course as a sewer and had no knowledge that it was so used. The plaintiff enlarged and deepened the cellar under his house, and laid a drain from it connecting with the culvert in such a manner that the water of the stream might flow back. The drain was used to carry the sewage of the house until the summer of 1907, when the city constructed a sanitary sewer on Park street, and the plaintiff connected his premises therewith for sewerage purposes, leaving the drain to carry off water which accumulated in the cellar. During freshets in March, 1907, and in February, 1908, the water backed through the plaintiff's drain into his cellar, causing the damage sued for. In March, 1908, the city uncovered the culvert at the lower end, and it was found that the upper end of the tile pipe was much obstructed by an accumulation of tin cans, bottles, and other débris. The tile pipe and culvert are large enough to carry all the water of the stream, but the pipe is smaller than the culvert, and the construction at this point is such that articles like those found might naturally accumulate there. Upon the foregoing facts a verdict was given to the plaintiff.

Herbert I. Goss, for plaintiff. Matthew J. Ryan, for defendant.

PARSONS, C. J. The case does not disclose any question of law reserved in the superior court. So far as appears, all questions there raised were settled without exception. Strictly therefore there is nothing before this court upon the record. The parties, however, have argued the validity of the verdict upon the agreed facts, and it is probable that the defendants' exception to the verdict was accidentally omitted when the record was made up for the transfer. With that understanding the case has been considered. The record also fails to state whether the verdict "given to the plaintiff" was understood to be so given because as matter of law the facts which had been agreed upon required such a verdict, or whether from the evidence furnished by these facts the court, performing the function of a jury, found the verdict.

As the fact of negligence on the part of the defendants, which is the foundation of the plaintiff's action, is not agreed, the verdict cannot be sustained as a conclusion of law from the facts stated. Neither can the

verdict stand as a finding of fact, for although in such case it must be assumed that all facts necessary to support the verdict, which could be found by inference from the facts agreed, were found by the court in reaching a conclusion in favor of the plaintiff, and although there is evidence from which lack of care in the construction of the water course at the point of connection between the culvert and tile pipe could be found, there is no evidence that the water course was constructed or maintained as a common sewer, as alleged in the declaration. Such a conclusion is directly negatived. The parties have agreed that the stream flowing through the culvert was not maintained by the city as a sewer, and that the city had no knowledge it was so used. Hence the act of the plaintiff in attempting to so use the culvert constructed by the city to carry this stream of water was a wrongful interference by him with the property of the city, and, as it does not appear the plaintiff would have been damaged except for the drain by which he connected his cellar with the culvert, he cannot claim damages from the city for an injury which would not have happened to him except for such interference. The verdict should be set aside because the special fact found is inconsistent with the general verdict. *Concord Coal Co. v. Ferrin*, 71 N. H. 331, 335, 51 Atl. 283, 93 Am. St. Rep. 496. The conclusion involved in a general verdict that the plaintiff was damaged by the defendants' negligent management or construction of a common sewer with which the plaintiff's premises were rightfully connected is negatived by the special finding that the stream was not maintained as a sewer.

The legal right of the city to maintain the culvert over the plaintiff's land is not in question. The plaintiff did not object, but assented to its existence, and was injured by his unauthorized use of it.

Case discharged. All concur.

(75 N. H. 102)

LANE v. MANCHESTER MILLS.

(Supreme Court of New Hampshire. Hillsborough. Nov. 4, 1908.)

1. MASTER AND SERVANT (§ 280*)—INJURY TO SERVANT—ASSUMPTION OF RISK—EVIDENCE.

In an action for the death of an employé while working as a patter-boy in a mill, in consequence of being struck by cloth while running through different machines in one continuous piece, evidence held to warrant a finding that the employé did not appreciate the danger, and therefore did not assume the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 983; Dec. Dig. § 280.*]

2. MASTER AND SERVANT (§ 280*)—INJURY TO SERVANT—ASSUMPTION OF RISK—EVIDENCE.

In an action for the death of an employé 14½ years old, while working as a patter-boy in a mill, in consequence of being struck by cloth while running through different machines in one continuous piece, the fact that a boy

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

14 or 15 years of age, though of average intelligence, is less likely to be apprehensive for his own safety, when laboring about machinery in operation, than an ordinary man would be, due to the immaturity of his judgment because of lack of experience and observation, is some evidence on the issue whether he intelligently assumed the risk of being hit by the moving cloth with sufficient force to cause the accident resulting in his death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 981; Dec. Dig. § 280.*]

3. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

In an action for the death of an employé 14½ years old, while working as a patter-boy in a mill, in consequence of being struck by cloth while running through different machines in a continuous piece, evidence held to warrant a finding that the employer failed to furnish the employé a safe place in which to work, in view of his youthfulness and want of experience.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 958-968; Dec. Dig. § 278.*]

4. TRIAL (§ 419*)—DENIAL OF MOTION FOR NONSUIT—EXCEPTIONS—WAIVER.

Where, after a motion for nonsuit is erroneously denied, defendant introduces evidence supplying the deficiency in the evidence of plaintiff, the exception is waived.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 982; Dec. Dig. § 419.*]

5. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE—FAILURE TO WARN—EVIDENCE.

In an action for the death of an employé 14½ years old, while working as a patter-boy in a mill, evidence offered by the employer that the place in which decedent worked was not dangerous for a boy like him, and that he fully understood his situation, so that no instruction or warning was necessary, was evidence that the employer did not warn decedent of the danger of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 972; Dec. Dig. § 278.*]

6. APPEAL AND ERROR (§ 207*)—PRESENTING QUESTION IN LOWER COURT—IMPROPER REMARKS IN ARGUMENT—INSTRUCTIONS BY COURT.

Where, in an action for the death of an employé in a mill, the jury, with the assent of defendant, viewed the premises and saw the machinery, and noticed that the use of the particular method of operation in vogue at the time of the accident had been discontinued, the erroneous argument to the jury by plaintiff's counsel to the effect that defendant discontinued its dangerous method of work after the injury, and that defendant thereby admitted that the method was dangerous, was not ground for reversal, since a request for proper instructions as to the relevancy of the evidence obtained by the view would protect defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1500; Dec. Dig. § 207.*]

7. APPEAL AND ERROR (§ 928*)—PRESENTATION OF QUESTIONS BELOW—INSTRUCTIONS—PRESUMPTIONS.

In the absence of a request for proper instructions as to the relevancy of evidence, it will be presumed that the court's charge was proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8749; Dec. Dig. § 928.*]

Exceptions from Superior Court, Hillsborough County; Plummer, Judge.

Action by David Lane, administrator of David W. Lane, deceased, against the Manchester Mills for the negligent death of plaintiff's intestate. There was a verdict for plaintiff, and the cause was transferred from the superior court on exceptions. Exceptions overruled, and judgment on the verdict.

David W. Lane, the plaintiff's intestate, was 14½ years old at the time of his death, and had worked in the defendants' finishing room as a patter-boy for about 7 months. Cloth about to be finished is brought into the north end of this room and run toward the south end of it in one continuous piece through six different machines. Between each of these machines and the one next south of it is a set of eight boxes in two rows of four boxes each. The boxes are 4½ feet high, and are used to hold the cloth as it comes from the machines. When the cloth comes through a machine it is carried over a reel located directly over the boxes and dropped into them. It is the duty of the patter-boys to direct the cloth as it falls into the boxes, so that it will be evenly folded. They move about on top of the boxes when they are doing this work, and sit or stand as suits their convenience, usually changing their position several times an hour. Lane worked on the set of boxes just north of the finishing machine—the last machine through which the cloth is run in the process of finishing—and had charge of the easterly four boxes of this set. The finishing machine is a washing machine. If one washing does not thoroughly cleanse the cloth, it is washed a second time. When Lane first worked in this room the rewashing was done in another part of it, but for a month or more before the accident it had been done by the machine just south of where he worked. The cloth to be rewashed was brought into the finishing room on trucks. As it could not be left directly in front of the machine because of the boxes, a pole was lashed to an iron post just north and east of the boxes, and an eye was fastened to a pipe over the west end of the finishing machine. The pole was 4½ feet and the eye 6 feet above the top of the boxes. The end of the cloth was carried up over the pole, through the eye, and down to the rolls which drew it into the machine. It was the duty of the boy who ran this machine to stand between the pole and the truck and let the cloth be drawn through his hands in such a way that it would be fed into the machine with as even a tension as possible. The path of the cloth as it ran from the pole to the eye was diagonally across this set of boxes, and the distance between those points was 11 feet. The cloth sagged more or less between those points, the amount of sag depending on the way the boy held it; but, when it was running in the ordinary way, there was sometimes so much sag that,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

if Lane, who, was 4 feet tall, was near the middle of the boxes, there was not room for him to walk under the cloth without stooping. The evidence was conflicting as to how much of the time the machine was used in this way. There was evidence that for a month or more before the accident it had been so used for a third of the time, and also that it had been so used only a very few times. On the day of the accident Lane was sitting on the west end of one of the middle boxes, attending to his work. He got up, started east on the rail of the box, stooped when close to the moving cloth, and passed under it, and resumed his work. A minute or two later the cloth sagged and struck the side of his face, and either threw him from the box, or caused him to lose his balance and fall from the box to the floor. The injury thus received resulted in his death the following day. The plaintiff's counsel in argument asked the jury to find from what they saw at the view that the defendants never used the contrivance for rewashing cloth after the accident. The defendants excepted to this argument, and to the denial of their motions for a nonsuit and the direction of a verdict in their favor.

Branch & Branch and Michael F. Shea, for plaintiff. Taggart, Tuttle, Burroughs & Wyman, for defendants.

WALKER, J. If the cloth had not become slack, the boy would not have been within its plane, and would not have been struck by it. The circumstance, then, that rendered the place unsafe and dangerous, as claimed by the plaintiff, was the liability of the cloth to sag so that the boy could not pass under it without stooping. This was not a concealed defect of which the boy was ignorant, for just before his injury he attempted to pass under it by stooping. It may also be assumed that he must have known that the cloth was liable to be drawn up suddenly by the operation of the machinery, and that it might strike his head with some force if he was standing sufficiently near it. But it cannot be said that he realized or appreciated the fact that the blow might cause him to lose his balance and fall to the floor. While it is more than probable that he knew he might come in contact with the cloth as it was drawn up to a taut condition, it cannot be held that reasonable men might not find that he did not appreciate the force of the blow, or realize the effect it was liable to have upon him in the peculiar position his duties required him to occupy; that is, he might not have appreciated that his situation was a dangerous one. *Demars v. Company*, 67 N. H. 404, 40 Atl. 902; *Goodale v. York*, 74 N. H. 454, 69 Atl. 525. But it is urged that the evidence is insufficient to support such a finding and that it is as probable that he did, as that he did not, appreciate the danger. If it is conceded, as claimed by the defendant,

that the burden of proving nonassumption of risk was upon the plaintiff, it cannot be said that no evidence was submitted in support of it. It is common knowledge that a boy 14 or 15 years of age, though of average intelligence, is less likely to be cautious and apprehensive for his own safety, when laboring about machinery in operation, than the ordinary man would be. The immaturity of his judgment, due to lack of experience and observation, often suggests to his mind a course of conduct which an adult would at once see was attended with danger. This fact is some evidence bearing on the question whether the deceased intelligently assumed the risk of being hit by the moving cloth with sufficient force to cause him to lose his balance and fall to the floor. *Disalets v. Company*, 74 N. H. 440, 69 Atl. 283. It also appears that at the time he was injured he was engaged in the performance of his duties, moving about upon the boxes, and it might be inferred that such a boy, under such circumstances, would not consider the danger of his position. The evidence was somewhat contradictory as to the number of times dry cloth had been carried to the boxes in this way during the time the boy worked there. The jury might have found that such an occurrence was very infrequent, and that running cloth in that way was an abnormal and unusual method of performing the work. Although there was much evidence that this was not an unusual method of work, it cannot be held that reasonable men could not find otherwise. It might therefore be found that the boy was suddenly brought face to face with a practically new situation while attending to his duties, the danger of which was not apparent to his understanding. Hence a finding that he did not appreciate the risk he incurred would seem to be amply supported by the plaintiff's evidence. The evidence was also sufficient to support the finding that the defendant provided an unreasonably dangerous place for the deceased to work in. No reason is suggested why a safe method of conveying the dry cloth to the boxes was impracticable, or why an unsafe method was necessary. The jury, having had a view of the place and observed the machinery in operation, were warranted in finding from all the evidence that the defendant failed to perform its master's duty to the deceased in requiring him to work in a place which was not safe, in view of his youthfulness and want of experience in similar situations, and that its negligence in this respect was the proximate cause of his injuries. These findings were matters of legitimate inference for the jury to draw.

But it is claimed by the defendant that the burden was upon the plaintiff to prove, not only that the defendant was negligent in failing to provide a reasonably safe place for the deceased, but in not warning him of the danger and risk of his employment, and that there was no evidence to support the latter

ground of liability. If, however, it was incumbent on the plaintiff to prove that the master did not warn the decedent of the danger he encountered (*Bennett v. Company*, 74 N. H. 400, 68 Atl. 460), a point upon which no opinion is expressed, it cannot be said that the jury were not warranted in finding that he received no warning or instruction from the master upon this subject. Indeed it may be conceded that, from the plaintiff's evidence alone, that fact could not be found; but, if the alleged defect in the plaintiff's proof was afterwards supplied by the defendant's evidence, the denial of the motion for a nonsuit for that cause cannot be reversed. "Where, after a motion for a nonsuit is erroneously denied, the defendant, instead of risking his case upon the exception, goes on with the trial and introduces evidence, the exception is waived if the deficiency in evidence is supplied by one side or the other before the case goes to the jury." *Burnham v. Railroad*, 69 N. H. 280, 282, 45 Atl. 563, 564. The theory of the defense was that the place was not dangerous for a boy like the deceased to work in, and that he fully understood his situation, and hence that no instruction or warning was necessary. If no instruction was necessary, the inference that none was given would not be an illogical or violent one. It is a reasonable deduction from the defendant's theory of defense, and its evidence in support thereof. The silence of the defendant's testimony upon this subject, in view of the defense insisted upon, was an evidentiary fact in favor of the plaintiff, which supplied the defect, if any, in the plaintiff's evidence. It follows that, if the motion for a nonsuit should have been granted when made, the exception to the denial of the motion was subsequently waived or abandoned by the defendant.

The defendant's final exception relates to the argument to the jury by the plaintiff's counsel. If it is susceptible of the construction that the defendant discontinued its dangerous method of work after the injury to the deceased, and that this was an admission that it was dangerous, the prejudicial character of the argument consisted, not in the statement of a material fact not in evidence, but in the assertion of an erroneous rule of law in its application to the facts. *Aldrich v. Railroad*, 67 N. H. 250, 29 Atl. 408. From the view which the jury took of the premises, presumably with the assent of the defendant, they saw the condition of the machinery, and noticed that the use of the particular method of operation in question had apparently been discontinued. What they saw, without objection, became evidence for their consideration under instructions from the court. The plaintiff's counsel did not attempt to state facts of which there was no evidence. At most he was merely stating his view of the effect of the evidence. But its

legal bearing or want of relevancy upon the question of the defendant's negligence was a question of law for the court. If in argument counsel took an erroneous view of the law applicable to such evidence, a request for proper instructions as to its relevancy would have protected the defendant. *Leavitt v. Company*, 72 N. H. 290, 56 Atl. 462; *Seeton v. Dunbarton*, 73 N. H. 184, 187, 59 Atl. 944. In the absence of such a request, it is presumed the court's charge was proper upon the point suggested.

Exceptions overruled; judgment on the verdict.

(76 N. H. 125)

CUMMINGS v. FARNHAM.

(Supreme Court of New Hampshire. Carroll. Dec. 1, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 233*)—CLAIMS—FAILURE TO PRESENT—RELIEF.

The relief afforded by Pub. St. 1901, c. 191, § 27, to a decedent's creditors who have not prosecuted their claims within the time prescribed by law is based on justice and equity, and want of culpable negligence on claimant's part.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 831; Dec. Dig. § 233.*]

2. EXECUTORS AND ADMINISTRATORS (§ 437*)—ACTIONS—LIMITATIONS—EFFECT OF STATUTE—"SUSPENSION."

A mere failure to apply for administration is not a "suspension" within Pub. St. 1901, c. 191, §§ 2, 4, prohibiting suits against an administrator unless the demand is exhibited to, and suit is brought against, him within a specified time after grant of administration, excluding the time administration may have been suspended; the suspension contemplated being one caused by the death, resignation, removal, etc., of an original administrator upon a deceased debtor's estate within the period prescribed for presentation of claims or suing, and having no reference to a suspension of administration upon a deceased creditor's estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1749; Dec. Dig. § 437.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6833-6835.]

3. EXECUTORS AND ADMINISTRATORS (§ 431*)—ACTIONS—CONDITIONS PRECEDENT—PRESENTATION OF CLAIM.

In the absence of fraud or its equivalent, and apart from the relief afforded by Pub. St. 1901, c. 191, § 27, to a decedent's creditor who has not prosecuted his claim within the time prescribed by law, proof of presentation of a claim within one year after grant of administration, etc., as required by section 2, is essential to a suit against a deceased debtor's executor or administrator, under section 4, authorizing such suit to be brought within two years from the grant of administration.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1679; Dec. Dig. § 431.*]

4. EXECUTORS AND ADMINISTRATORS (§ 431*)—ACTIONS—CONDITIONS PRECEDENT—PRESENTATION OF CLAIM.

It is essential to an action against an administrator, under Pub. St. 1901, c. 191, § 6, providing that, if a right of action existed in favor of or against decedent when he died, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

survives, suit may be brought by or against the administrator within two years after the grant of administration, that section 2, requiring demands to be exhibited within one year after grant of administration, be complied with.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1679; Dec. Dig. § 431.*]

5. EXECUTORS AND ADMINISTRATORS (§ 437*)—ACTIONS—LIMITATIONS—EFFECT OF STATUTES.

Under Pub. St. 1901, c. 191, § 4, requiring suits against administrators, to be brought within two years after grant of administration, excluding the time administration may have suspended, and under section 6, providing that, if a right of action existed in favor of or against decedent when he died, and survives, an action may be brought by or against the administrator within two years of the grant of administration, the only privileges conferred by section 6 over those conferred by section 4, where suit is brought against an executor or administrator, are that, if plaintiff is an executor or administrator, he may sue within two years after administration is taken out on the creditor's, instead of the debtor's, estate, if advantageous to do so, and the consequent extension of time within which payment may be demanded before suit.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1730, 1735; Dec. Dig. § 437.*]

6. EXECUTORS AND ADMINISTRATORS (§ 437*)—ACTIONS—LIMITATIONS.

Under Pub. St. 1901, c. 191, § 2, requiring demands to be exhibited to administrators within one year after the grant of administration, and under section 6, providing that, if the right of action existed in favor of decedent when he died and survived, his administrator may sue within two years after grant of administration, plaintiff as one interested in testatrix's estate could, before her appointment as executrix, exhibit a claim against decedent's administrator on behalf of testatrix's estate, within one year from the taking out of administration by him, and, after taking out administration on testatrix's estate, could demand payment and sue within two years from that time.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1729, 1730; Dec. Dig. § 437.*]

Exceptions from Superior Court, Carroll County; Chamberlain, Judge.

Action by Anna M. Cummings, executrix, against J. Frank Farnham, executor. Transferred from the superior court on defendant's exceptions. Exceptions overruled.

Jacob H. Cook died November 28, 1904, and the defendant was appointed executor of his estate January 3, 1905. Lilla M. Cook died May 29, 1905, and a special administrator of her estate was appointed in Massachusetts March 5, 1906. The plaintiff was appointed executrix of her estate in Massachusetts March 11, 1907, and in New Hampshire May 21, 1907. This suit was brought July 1, 1907. The notes in suit were presented to the defendant, and payment was demanded before the action was begun, but there was no evidence that the notes were exhibited to the defendant by the plaintiff or her testatrix within a year after administration was taken out by the defendant up-

on his testator's estate. Other material facts appear in the opinion.

Arthur O. Fuller, for plaintiff. Kivel & Hughes, for defendant.

BINGHAM, J. This is an action of assumpsit upon two promissory notes given by the defendant's testator to the plaintiff's testatrix. In the superior court it was agreed by the parties that, if upon a transfer of the case the ruling of the court denying the defendant's motions for a nonsuit and a verdict should be sustained, the plaintiff should have judgment for the amount of the notes (\$318.42) and costs; but that, if it should be set aside, the defendant should have judgment with costs. Both motions were based upon the same ground, namely, that the plaintiff had failed to prove that the notes were presented to the defendant within one year from the granting of administration upon his testator's estate. As this is a proceeding at law, and the case was transferred upon the agreement of the parties that, if the plaintiff could not maintain her action upon the proof submitted, there should be judgment for the defendant, it is clear that the question whether the plaintiff might have relief in equity under the provisions of section 27, c. 191, Pub. St. 1901, notwithstanding her failure to prove that the notes were duly presented, is not now before us. The relief afforded under that statute to creditors of a deceased person's estate who have not prosecuted their claims within the time prescribed by law is based upon grounds of justice and equity, and want of culpable negligence on the part of the claimant; and a proceeding under it calls for the determination of questions of fact not material to this action, and not here presented. *Webster v. Webster*, 58 N. H. 247; *Page v. Whidden*, 59 N. H. 507, 510; *Libby v. Hutchinson*, 72 N. H. 190, 55 Atl. 547. The question, therefore, which we are called upon to consider is whether, apart from the relief that might be afforded under section 27, and without proof that the notes were seasonably exhibited, the plaintiff can maintain this suit against the defendant.

In chapter 191, Pub. St. 1901, it is provided that no action shall be sustained against an administrator if begun within one year after the original grant of administration, nor unless the demand has been exhibited to the administrator and payment has been demanded (section 1), nor unless the demand was exhibited to the administrator within one year after the original grant of administration, exclusive of the time such administration may have been suspended (section 2), nor unless the action is begun within two years next after the original grant of administration, exclusive of the time such administration may have been suspended (section 4); and, if the right of action existed in fa-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vor of or against the deceased at the time of his death, and survives, an action may be brought by or against the administrator at any time within two years after the original grant of administration (section 6). In this case the plaintiff has neither proved that her claim was exhibited to the defendant within the year after original administration was granted upon the estate represented by the defendant, nor that original administration upon that estate has ever been suspended. A mere failure to apply for administration is not a suspension within the meaning of sections 2 and 4 of chapter 191; for, until administration is granted, the time within which the claim must be presented or the suit begun does not commence to run. The suspension contemplated by these sections is one occasioned by the death, resignation, removal, and the like of an original administrator upon a deceased debtor's estate, within the period prescribed for the presentation of claims or the bringing of suits, and has no reference to a suspension of administration upon the estate of a deceased creditor. Where there has been no suspension of administration, it has been repeatedly held that an action cannot be maintained against an administrator under section 4, unless the claim upon which the suit is based was exhibited within the year after administration was taken out on the debtor's estate. *Mathes v. Jackson*, 6 N. H. 105; *Kittredge v. Folsom*, 8 N. H. 98; *Walker v. Cheever*, 39 N. H. 420, 426; *Clough v. McDaniel*, 58 N. H. 201. And this rule has been held to apply to contingent demands, and to demands not falling due within the statutory period. *Cutter v. Emery*, 37 N. H. 567; *Walker v. Cheever*, 39 N. H. 420; *Libby v. Hutchinson*, 72 N. H. 190, 194, 55 Atl. 547. The only situation in which an action has been maintained against an executor or administrator under section 4, the provisions of section 2 not having been complied with, is where "the omission to present a demand in due time has been caused by the fraudulent act of the executor or administrator, or * * * [some] person with whom he is in privity." *Sugar River Bank v. Fairbank*, 49 N. H. 131, 143; *Walker v. Cheever*, 39 N. H. 420, 426, 427. Therefore, in the absence of fraud or its equivalent, and apart from the relief afforded by section 27, proof of the presentation of a claim, as prescribed in section 2, is essential to the maintenance of an action against an executor or administrator of a deceased debtor's estate under section 4.

It is also essential to the maintenance of an action against an executor or administrator, under section 6, that section 2 should be complied with; for, notwithstanding a right of action may have existed in favor of the creditor of his executor against the debtor at the time of his decease, section 2 provides

that a suit cannot be maintained against the debtor's executor or administrator unless the claim is exhibited to him within the year after he has qualified as executor or administrator. In other words, the legal construction of section 2 is that no action can be maintained against the executor or administrator of a deceased debtor's estate if the requirements of that section have not been met, even though a right of action may have existed against the debtor at the time of his decease and survived him. *Libby v. Hutchinson*, 72 N. H. 190, 194, 55 Atl. 547; *Clough v. McDaniel*, 58 N. H. 201. The only privileges conferred by section 6, in addition to those conferred by section 4, where suit is brought against an executor or administrator, are that, if the plaintiff is an executor or administrator, he may begin his suit within two years after original administration is taken out on the creditor's, instead of the debtor's, estate, if it will be of advantage for him to do so, and the consequent extension of time within which payment may be demanded before suit is brought. *Brewster v. Brewster*, 52 N. H. 52; *Clough v. McDaniel*, 58 N. H. 201.

According to the facts in this case, the plaintiff's testatrix in her lifetime could have presented her claim to the defendant and demanded payment; and, if the plaintiff, before she took out administration in New Hampshire, could not have made a proper demand of payment (Pub. St. 1901, c. 191, § 18; *Cutter v. Emery*, 37 N. H. 567, 568, 573; *Merrill v. Woodbury*, 61 N. H. 504; *Judge of Probate v. Rannels*, 66 N. H. 271, 21 Atl. 1020; *Strafford Savings Bank v. Church*, 69 N. H. 552, 44 Atl. 105), a question not decided, nevertheless, as a person interested in the estate, and before taking out administration, she could have exhibited the claim in behalf of the estate to the defendant at any time within one year from the time administration was taken out by him (*Ayer v. Chadwick*, 66 N. H. 385, 23 Atl. 423); and, after taking out administration upon the testatrix's estate, she could have demanded payment, and brought her action within two years from that time. *Brewster v. Brewster*, 52 N. H. 52.

Defendant's exceptions overruled. All concurred.

(75 N. H. 127)

ROCKINGHAM COUNTY v. CHASE et al.
(Supreme Court of New Hampshire. Rockingham. Dec. 1, 1903.)

1. FINES (§ 20*)—FORFEITURES (§ 10*)—DISPOSITION—"OFFENSES AGAINST THE POLICE OF TOWNS."

The phrase "offenses against the police of towns," as used in Pub. St. 1901, c. 256, § 2, providing that, unless otherwise specially provided, all fines and forfeitures imposed by a justice of the peace for offenses against the police of towns shall be for the use of the town in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which the offense was committed, refers to the offenses enumerated under that title in Pub. St. 1901, c. 264, on crimes and offenses.

[Ed. Note.—For other cases, see Fines, Dec. Dig. § 20;* Forfeitures, Dec. Dig. § 10.*]

2. STATUTES (§ 161*)—REPEAL—LATER STATUTE COMPLETE IN ITSELF.

A later statute complete in itself, and in its practical operation independent of a former statute covering the same subject, is not ordinarily deemed to have merely a cumulative effect, but to operate as a repealing statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 230; Dec. Dig. § 161.*]

3. STATUTES (§ 161*)—CONSTRUCTION.

Pub. St. 1901, c. 264, § 18, entitled "Offenses against the police of towns," providing that no person shall ride through a street in the compact part of a town at a swifter pace than five miles an hour, applies to one riding in an automobile, making the driving of an automobile at a greater speed than five miles an hour an offense against the police of towns. Laws 1905, p. 498, c. 86, is entitled "An act to provide for the registering, numbering and regulating the speed of automobiles, etc., and for licensing the operator," and section 8 provides that no automobile shall be driven at a greater speed than eight miles an hour in compactly built sections of a city. Various other regulations are stated, and section 10 provides a penalty for violation of any provisions of the act. There is no reference to chapter 264. *Held*, that the act of 1905, not only limiting the speed of automobiles, and providing a penalty for exceeding it, but providing a complete system for their regulation and operation, was not intended to be cumulative to chapter 264, but repealed section 18 so far as it applied to automobiles, so that driving an automobile at an unlawful speed was no longer an offense against the police of towns.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 230; Dec. Dig. § 161.*]

4. FINES (§ 20*)—DISPOSITION OF PROCEEDS—STATUTORY PROCEEDINGS.

Driving an automobile at a prohibited rate not being an offense against the police of towns, fines imposed by a justice of the peace for violations of the speed limit, in the absence of special provision to the contrary, belong to the county under Pub. St. 1901, c. 256, § 2, providing that, unless otherwise specially provided, all fines and forfeitures imposed by a justice of the peace for "offenses against the police of towns," and violations of by-laws of towns, and fines and forfeitures imposed by a police court, shall be for the use of the town, and all other fines and forfeitures shall be for the use of the county.

[Ed. Note.—For other cases, see Fines, Cent. Dig. § 23; Dec. Dig. § 20.*]

5. BAIL (§ 96*)—FORFEITURE—DISPOSITION OF PROCEEDS—STATUTORY PROVISIONS.

Under the same provision, cash bail forfeited in such prosecutions belongs to the county, in the absence of special provision to the contrary.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 424; Dec. Dig. § 96.*]

6. BAIL (§ 96*)—CRIMINAL PROSECUTION—DISPOSITION—SET-OFF OF COSTS.

In prosecutions before justices of the peace for driving automobiles at a prohibited rate, the costs cannot be set off against forfeited recognizances, which belong to the county, in the absence of statute permitting it, especially as costs in criminal prosecutions are payable by the complainant, except when the prosecutions are directed or approved in writing by counsel of the

state or the county commissioners under Pub. St. 1901, c. 256, § 9.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 96.*]

Transferred from Superior Court, Rockingham County; Chamberlin, Judge.

Action by Rockingham County against Jeremiah Chase and others. Facts agreed, and case transferred from the superior court. Judgment for plaintiff.

Assumpsit, to recover money received by the defendant Chase and paid over to the defendant town of Seabrook under the following circumstances: Chase is a justice of the peace, residing in Seabrook, before whom certain persons have been arraigned for operating automobiles upon public highways in that town at a speed greater than is permitted by section 8, c. 86, p. 501, Laws 1905. As such justice, Chase received the fines imposed by him on convictions for such offenses, and also cash bail in other similar cases, which bail has been forfeited. Believing that the fines and forfeitures belonged to the town, Chase turned the fines over to the town treasurer, and also the forfeitures, after deducting therefrom the costs and fees of the officers, constables, and himself. If the county is entitled to the fines and bail forfeitures, the amount is to be ascertained by the superior court, and judgment rendered against the defendants for the amount due; otherwise, the defendants are to have judgment for their costs.

Charles H. Batchelder, for plaintiff. Page & Bartlett, for defendants.

WALKER, J. "Unless otherwise specially provided, all fines and forfeitures imposed by a justice of the peace for offenses against the police of towns, and violations of by-laws of towns, shall be for the use of the town in which the offense was committed; all fines and forfeitures imposed by a police court shall be for the use of the town in which the court is established; and all other fines and forfeitures shall be for the use of the county within which the offense was committed." Pub. St. 1901, c. 256, § 2. It is plain that a fine imposed by a justice of the peace for an offense "against the police of towns" is for the use of the town where the offense was committed, and that fines imposed by justices of the peace in all other cases, in the absence of a special provision to the contrary, belong to the county. As "offenses against the police of towns" is not a technical, common-law expression descriptive of a class of crimes, little doubt can be entertained that in the statute quoted the Legislature referred to the offenses enumerated under that title in chapter 264, Pub. St. 1901. Before the passage of the statute regulating the use of automobiles in the public highways (Laws 1905, p. 498, c. 86), the driving of such a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vehicle therein at a greater rate of speed than five miles an hour might have been deemed an offense against the police of towns; for it is provided in section 18, c. 264, Pub. St. 1901, that "no person shall ride through a street or lane, in the compact part of a town, at a swifter pace than at the rate of five miles an hour." In *Bly v. Railway*, 67 N. H. 474, 32 Atl. 764, 30 L. R. A. 303, 68 Am. St. Rep. 681, it was held that this section of the statute was applicable to the operation of street railways, upon the ground that "the mode of conveyance was a mere incident of the mischief" which the statute was intended to prevent. The use of electricity as a motive power to propel carriages along the highway was not prohibited by this statute, but merely their propulsion at a rate of speed deemed dangerous to other travelers using the same thoroughfare. For the same reason, an automobile speeding at the rate of 25 or 30 miles an hour over a course devoted to the public use of locomotion creates a more evident danger from its excessive speed than the driving of racing horses or street cars.

As riding in an automobile undoubtedly falls within the general purview of section 18, c. 264, Pub. St. 1901, the question arises whether it is removed therefrom by chapter 86, p. 498, Laws 1905, entitled "An act to provide for registering, numbering and regulating the speed of automobiles and motor vehicles and for licensing the operator thereof." Section 8 provides that "no automobile or motor cycle shall be operated upon any public highway outside the business district or compactly built sections of a city or town at a speed greater than twenty miles an hour, or within the business districts or compactly built sections of a city or town at a greater speed than eight miles an hour. * * * Upon traversing a crossing of intersecting ways, in going around a corner or curve which cuts off a free view of the road to be traversed, or in traversing a highway bordering a steep descent or passing over a bridge, every person operating such a vehicle shall run it at a rate of speed less than that heretofore specified, and at no time and in no place greater than is reasonable and proper, having regard to traffic, the use of the way, and the safety of the public." The act contains various other regulations relating to the management of automobiles, and section 10 provides for the penalty to be imposed for the violation of "any provisions of this act." There is no reference in the act to chapter 264, Pub. St. 1901; and if it repealed section 18 of that chapter, and also was in effect intended to be a substitute for that section of the former statute, so far as the speeding of automobiles is concerned, that result can only be arrived at by implication.

That the Legislature of 1905 intended to establish a different speed limit for automobiles than then existed for other vehicles, and to provide a different penalty for a viola-

tion of the newly established speed limit, cannot be controverted; and in this respect it repealed the old law. The inconsistency between the two statutes when applied to the use of automobiles is so apparent as to show conclusively that a repeal was intended, unless the new act can be construed to be an amendment of or an addition to the old one. But such a construction has little in its support. A later statute which is complete in itself, and in its practical operation independent of a former statute covering the same subject, is not ordinarily deemed to have merely a cumulative effect, but to operate as a repealing statute (*Leighton v. Walker*, 9 N. H. 59; *Hillsborough County v. Manchester*, 49 N. H. 57, 60; *End. Stat. § 195*; 1 *Lewis, Suth. Stat. §§ 251, 252*); that is, the former law becomes ineffective, and the latter one operates as a distinct and independent expression of the legislative will. The only evidence that the statute of 1905 was intended to be an amendment of the former statute on the subject of fast driving, and to be included in the list of "offenses against the police of towns," is that before 1905 the original statute applied to the speed of automobiles, and that the subject-matter of the new statute falls appropriately within the purview of the old one. But the facts that the legislation of 1905 covers many subjects relating to the ownership, operation, and control of automobiles, and is not confined merely to limiting their speed upon the highways, that a different limit and a different penalty are provided than is found in the Public Statutes, that no reference is made to the former statute, and no repealing or amendatory clause was inserted, furnish abundant evidence that this legislation was not intended to be cumulative to the chapter on "offenses against the police of towns," but to be substantially new and distinct from existing legislation. That it might have been given a cumulative effect, or that the speeding of automobiles might have been designated as a local police offense, is not very cogent evidence that the Legislature had that intention, which they left to be discovered from doubtful implication rather than from plain expression of statutory language. The result is that the fines and forfeitures received by the defendants for violations of the automobile law belong to the county.

The remaining question is whether the justice of the peace was entitled to recoup from the money he received upon the proceedings before him for a forfeiture of the recognizances the costs incurred in those prosecutions, which of course were not paid by the respondents. No statute allowing such a set-off has been called to our attention; and as costs in criminal prosecutions are payable by the complainant, except when such prosecutions are "directed or approved in writing by the counsel of the state, or the county commissioners" (Pub. St. 1901, c. 256, § 9), the sums forfeited in these cases, which cannot

belong to the county, cannot be decreased by the costs incurred.

Judgment for the plaintiff. All concur.

(75 N. H. 133)

MCGILL v. YOUNG et al.

(Supreme Court of New Hampshire. Strafford. Dec. 1, 1908.)

WILLS (§ 684*)—CONSTRUCTION—LIFE ESTATES—SUPPORT OF BENEFICIARY—POWER OF TRUSTEE.

Where a will, in providing for the support of the testator's son out of the net income of the estate, also declared in the same connection that the trustee should pay to him, during his natural life, all the moneys actually necessary for his comfort and support, at such times and places as may be expedient, and to look after him with diligence, the trustee is entitled to use so much of the principal as is necessary for that purpose, if the net income will not suffice.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614-1628; Dec. Dig. § 684*]

Transferred from Superior Court, Strafford County; Stone, Judge.

Bill by Laurence V. McGill, trustee of the will of Emerson Furber, deceased, against John Young and another, for construction of the will. Case discharged.

See 72 N. H. 202, 55 Atl. 1047.

Kivel & Hughes and George E. Cochrane, for plaintiff. Arthur G. Whittemore, for defendant Leighton.

YOUNG, J. It was held in *Demeritt v. Young*, 72 N. H. 202, 55 Atl. 1047, that the testator intended to provide for the comfortable support of his son by giving the estate to the trustee to hold for that purpose, and that what was left at the son's death should be divided among those more remotely related to the testator. The question now before the court is whether the testator intended to limit the money available for the support of the son to the net income of the estate.

Although the testator says, in the clause of his will in which the provision for the support of his son appears, that the trustee shall support him out of the net income of the estate, it is highly improbable it was intended to limit the trustee to that fund, and to forbid him to use the principal if at any time the income should be insufficient for the purpose; for the will says, in the same connection, that the trustees shall "pay * * * to my son, Frank Furber, during his natural life, all the money that may be actually necessary for his comfort and support in sickness or health, at such times and such places as may be expedient under all circumstances, relative to justice; look after said Frank with a diligent exercise of your best powers relative to good care and no abuse." When the testator directed that his trustee should use what money was actually necessary to take good care of the son, it is probable that

he meant it. Consequently that is the trustee's duty; and, since the net income will not suffice, he must use so much of the principal as is necessary for that purpose.

Case discharged. All concur.

(75 N. H. 139)

MANAGLE v. PARKER.

(Supreme Court of New Hampshire. Hillsborough. Dec. 1, 1908.)

1. WILLS (§ 297*)—EVIDENCE OF REVOCATION—DECLARATIONS OF TESTATOR.

On an issue as to the revocation of a will, evidence as to testator's declarations is admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 696; Dec. Dig. § 297*]

2. WILLS (§ 171*)—REVOCATION BY DESTRUCTION.

To revoke a will by destruction, there must be not only a physical destruction of the instrument, but also an intention to thereby revoke it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 451; Dec. Dig. § 171*]

3. WILLS (§ 220*)—DESTRUCTION OF DUPLICATE—PRESUMPTIONS AS TO REVOCATION.

Where a will is executed in duplicate, the presumption of intent to revoke the same, arising from testator's act of destroying the copy in his custody, is not an irrebuttable conclusion, but is a mere inference of fact.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 603; Dec. Dig. § 290*]

4. WILLS (§ 175*)—REVOCATION.

A will executed in duplicate is not revoked by the mere destruction of the copy in his possession, if testator understood that the other copy was left in force.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 454; Dec. Dig. § 175*]

5. TRIAL (§ 105*)—RECEPTION OF EVIDENCE—FAILURE TO OBJECT—WAIVER.

Where the court cautioned counsel on objection to evidence to state the grounds of his objections specifically, objections other than those then stated will be considered as waived.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 261; Dec. Dig. § 105*]

6. WILLS (§ 324*)—REVOCATION—QUESTION FOR JURY.

On the contest of a will executed in duplicate, where there is evidence to rebut the presumption of revocation by the destruction of the copy in testator's possession, the question of revocation is one of fact for the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 770; Dec. Dig. § 324*]

7. WILLS (§ 306*)—REVOCATION—SUFFICIENCY OF EVIDENCE.

Evidence on the contest of a will held to warrant a finding that testatrix executed her will in duplicate, and that she did not intend to cancel the copy held by another by the destruction of the copy in her own possession.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 732; Dec. Dig. § 306*]

Exceptions from Superior Court, Hillsborough County; Plummer, Judge.

Application by Minnie A. Managle, administratrix, for the probate of the will of Hannah Stevens, deceased. From an order admitting the will to probate after verdict of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the jury on the issue of revocation, Hattie L. Parker appeals. Transferred from the superior court on exceptions. Exceptions overruled.

See, also, 74 N. H. 422, 68 Atl. 538.

The evidence tended to show that the paper offered for probate was executed as a will by Hannah Stevens September 14, 1899. Before it was signed and witnessed, a line was crossed out. Shortly thereafter a second draft identical with the first draft except for the erasure, was executed before the same witnesses at the request of the attorney who drew the will, because he did not wish a paper prepared by him to go to probate in the condition of the first draft. When the second draft was signed, Miss Stevens gave the first to one of the witnesses, Mrs. Noyes, "to keep in case anything happened" to the second, which the testatrix retained in her possession. Mrs. Noyes kept the first draft until about three weeks before Miss Stevens died, when it was delivered to an attorney, who retained it until it was offered for probate. Miss Stevens kept the second draft in her own possession, and within two years voluntarily destroyed it by tearing. At that time she declared that she did not like it and would not have it. She died August 12, 1906. Subject to the defendant's exception, Mrs. Noyes testified that about two years after the will was made the testatrix asked her if she still had the paper which had been given her, and said that the one she had kept had been destroyed because some of her relatives had made a fuss, that the testatrix said she had earned the money herself, had a right to dispose of it as she saw fit, and would like to see the faces of her relatives when the will was read. Subject to the same exception, Dr. Danforth testified that about two weeks before her death Miss Stevens said that she was very fond of Minnie (the residuary legatee) and did not know how she could get along without her, that she was going to take care of or provide for Minnie if it lay in her power, and that "that was fixed." The defendant's request that the jury answer the question whether the second draft was intended as a substitute for the first was denied, and she excepted. Subject to the defendant's exception, the only issue left to the jury was that of revocation. At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant moved for the dismissal of the petition and the direction of a verdict in her favor on the issue submitted. The motions were denied, and she excepted.

John O'Neill and Burnham, Brown, Jones & Warren, for the plaintiff. David W. Perkins and Taggart, Tuttle, Burroughs & Wyman, for the defendant.

PEASLEE, J. Evidence of the testatrix's declarations was properly admitted. The issue of revocation involved two distinct facts:

The physical act of destruction, and the intent with which the act was done. "All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two." *Cheese v. Lovejoy*, L. R. 2 P. D. 251. The question in the present case is whether the declarations are evidence of intent. That they are not evidence by which the physical act of destruction might be proved (*Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916) may be conceded. "If the will was executed in duplicate, and the testator destroys one part, the inference generally is that he intended to revoke the will; but the strength of the presumption will depend much on the circumstances. Thus, if he destroys the only copy in his possession, an intent to revoke is very strongly to be presumed; but if he was possessed of both copies and destroys but one, it is weaker; and if he alters one and then destroys it, retaining the other entire, the presumption has been said still to hold, though more faintly; but the contrary also has been asserted." 2 Gr. Ev. § 682. "This class of presumptions embraces all the connections and relations between the facts proved and the hypothesis stated and defended, whether they are mechanical and physical, or of a purely moral nature. It is that which prevails in the ordinary affairs of life, namely, the process of ascertaining one fact from the existence of another, without the aid of any rule of law; and therefore it falls within the exclusive province of the jury, who are bound to find according to the truth. * * * They are usually aided in their labors by the advice and instructions of the judge, more or less strongly urged at his discretion; but the whole matter is free before them, unembarrassed by any considerations of policy or convenience, and unlimited by any boundaries but those of truth, to be decided by themselves, according to the convictions of their own understandings." 1 Gr. Ev. § 48. When it is said that a presumption of intent to revoke arises from the testator's act of destroying that copy of a will executed in duplicate which is within his reach, it is not to be inferred that a presumption *juris et de jure* is meant. The presumption referred to is not an irrebuttable conclusion of law. It is a mere inference of fact. That a man intends the usual and ordinary consequences of his acts is a fact so well known that such intent is inferred from the common knowledge of the ordinary way in which desire compels accomplishment, but the rule is not universal. Notwithstanding its existence, other facts may appear which outweigh this fact so commonly known. Neither by statute nor by common law has this presumption of intent been made a preferred class of evidence to be received to the exclusion of other evidence on the same issue. As has been said of the presumption in favor of a will executed according to the forms of law, "it is a presumption of fact, and not

of law." *Edgerly v. Edgerly*, 73 N. H. 407, 62 Atl. 716.

From the facts surrounding the execution of the two documents by the deceased, it could be found that she intended them for duplicate wills, and that she understood that the copy left with her neighbor would continue to be her will, no matter what was done with the copy she herself retained. There is no evidence (other than by way of presumption) that the testatrix ever had a different understanding. It is true that there was evidence that at the time she destroyed the copy of the will in her possession she said she did not like it and would not have it. Undoubtedly, this was sufficient evidence to support a finding that she intended to revoke her will, but it was not a preferred class of evidence of intent. Taken in connection with the evidence of her understanding as to the force and effect of the other copy, and considering the fact that she allowed that copy to continue in the custody of her near neighbor and friend for five years after the destruction of the copy she herself had, the evidence of intent to revoke the existing copy is of a dubious sort; that is, there are facts in evidence from which different inferences may be drawn. "He does not revoke it if he does not treat it as being valid at the time when he sets about to destroy it." *Giles v. Warren*, L. R. 2 P. D. 401. The same principle is involved here. She did not revoke the will if she understood that the destruction of the copy in her possession left the other copy in force. "The mere physical act of destruction is itself equivocal, and may be deprived of all revoking efficacy by explanatory evidence, indicating the animus revocandi to be wanting." 1 Jar. Wills, *130. Her intent being an essential part of a valid revocation, and the act of cancellation and the accompanying words not being a preferred class of evidence on the question of intent, the question is: How far her then present purpose or state of mind may be shown by her subsequent declarations upon the same subject?

Two theories for the admission of the testator's declarations touching his will have been advanced. The first is that they constitute an exception to the hearsay rule. This theory has been applied in a limited way in this state. *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591. The second theory is that the declarations show present state of mind, that on the doctrine of continuity the past state of mind can be inferred from the present one, and that the past act may be inferred from the state of mind at the time the act was done. 3 Wig. Ev. § 1736. The latter theory is contrary to the recent decision of this court. *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916. Outside this state the question has been considered in many jurisdictions, and radically different results have been reached. *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed.

663. The considerations influencing the courts have seemed to be largely those of policy, and few of the results can be justified in their entirety upon any scientific theory of what is admissible evidence. Thus, in our own case of *Lane v. Hill*, supra, the excepted hearsay as far as it relates to the formal acts of execution or revocation is said to be admissible, but only in corroboration of "direct evidence" bearing on the fact in issue. How much direct evidence there must be to furnish a support for this testimony, whether the direct evidence may be contradicted and overborne by this excepted hearsay, or whether this class of evidence is to be used only by the producer of "direct evidence" tending to support his contention, are questions not answered nor considered in that case. Nor is it necessary to consider them here, for the issue is as to intent only, and "the formalities prescribed by law" are not involved. There is here no attempt to substitute the testator's understanding for the acts which the statute demands, as there was in *Holt v. Holt*, 63 N. H. 475, 3 Atl. 604, 56 Am. Rep. 530, and *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916. That the formal act essential to a revocation was performed is admitted. The issue is as to the intent with which the act was done. The illustration used in *Lane v. Hill*, supra, goes far beyond what is required to make this evidence admissible. "If the issue were whether a will duly executed were a forged or genuine will, and the evidence were evenly balanced, would not evidence that the supposed will remained in the testator's possession, that he was seen to examine it, that he spoke of it as his will, be of the highest moral convincing force in favor of the will? No logical reason appears why such should not be legal evidence." So far as the present case differs from the foregoing illustration, it is stronger for the admission of the evidence. There "an inference was required from the subsequent state of mind to the prior act, while here the inference is merely from the subsequent to the prior state of mind." 3 Wig. Ev. § 1737; *Curtice v. Dixon*, 74 N. H. 386, 397, 68 Atl. 587.

While the limitations put upon the use of this class of evidence may not be wholly satisfactory or entirely definite, they have been sufficiently established to sustain the ruling of the superior court. The declarations were admitted solely for the purpose of showing the intent of the testatrix when she destroyed the copy of the will in her possession. "The state of mind of a testatrix before and after cancellation of a will being relevant in inferring the intent at the time of cancellation, the testator's declarations before and after revocation are evidence of his state of mind at those times." 3 Wig. Ev. § 1737, note 3; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322. Much that has been said in argument and in the cases relied upon by counsel, as to the policy of the

law requiring certain formalities to guard against frauds in the matter of wills of deceased persons, is wide of the mark. It is true that the execution of a will is surrounded by statutory formalities, and so is a written revocation of a will. Pub. St. 1901, c. 186, § 14. But there are other methods of revocation, recognized by the Legislature as valid, proof of which is still left to be made under the ordinary rules of evidence. For example, in the present case proof that one copy of the will was destroyed by the testatrix, and that the act was accompanied by words indicating a revocatory intent, rested entirely upon the uncorroborated oral testimony of one person. If the controversy related to some other subject, the evidence now objected to would plainly be admissible under the law of this state. *Keefe v. Railroad*, 75 N. H. —, 71 Atl. 379. The original statute of frauds (29 Car. II, c. 3, § 6), from which our statute (Pub. St. 1901, c. 186, § 14) is copied, "has not been construed so strictly as to exclude all evidence tending to show *quo animo* the act was done, which is a conclusion to be drawn by a court or jury from all the circumstances." 1 Jar. Wills, *180.

It is urged that the case for the administratrix rests upon fraud—that she seeks to show that the testatrix attempted to deceive her heirs at law. The point of view from which this argument is advanced is one not unfrequently assumed by prospective heirs who regard the estate of an aged relative as already their lawful property. Much stress is laid upon the utterance of the court in *Meeker v. Boylan*, 28 N. J. Law, 274, 276, 283; but an examination of the argument there advanced shows that it makes against as well as for the position of the contestants. The deviser "may, to secure his own peace and comfort during life, * * * conceal the nature of his testamentary dispositions, and make statements calculated and intended to deceive those with whom he is conversing. He is neither under the sanctity of an oath nor the strong bond of self-interest to secure his adherence to the truth." So here, the testatrix may well have intended to dispose of the entreaties of importunate heirs by a pretended destruction of her will. The declarations which were excepted to have a different trend. The conversation with Mrs. Noyes "has all the evidences of sincerity and reality about it, which might be looked for where the object was not merely to parry or evade a disagreeable subject or baffle impertinent curiosity. * * * Here is that fullness of detail, and reference to persons and events, and also speculations of the probable conduct

of those opposed to the will, as gives it all the appearance of reality and attests its genuineness and sincerity." *McBeth v. McBeth*, 11 Ala. 596, 602; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336. But these considerations seem logically to go only to the weight of the evidence. As was said in *Collagan v. Burns*, 57 Me. 449: "The declarations of the testator may have been false and uttered to deceive, or, being true, they may have been misunderstood, in whole or in part, from inattention. They may have been misrecalled from forgetfulness, or misreported from design; but all this affects the degree of credit to be given the testimony, not its admissibility. It shows that caution should be used in weighing it, not that it should be excluded. The exclusion of evidence, relevant and material, from the fear that it may not receive its just degree of credence, is the rude resort of barbarism. Civilization hears, weighs, examines, compares, and then decides."

The objection now made to the testimony of Dr. Danforth, on the ground that the declaration testified to does not relate to the will, comes too late. When this evidence was introduced, the presiding justice cautioned counsel that the ground of objection should be stated specifically. Not only was there a failure to then state this ground, but counsel said that he had no ground other than those already stated. The objection was waived.

There was no error in refusing to direct a verdict for the contestant upon the issue of revocation. "Whenever facts that would sustain the will are put in evidence, together with other facts from which an inference unfavorable to its validity may be drawn, the question of whether the unfavorable inference should be drawn, and, if so, whether it has been rebutted, are both questions of fact." *Edgerly v. Edgerly*, 73 N. H. 407, 408, 62 Atl. 716. The evidence warranted a finding that the testatrix executed duplicate wills, and that she did not intend to cancel the copy held by Mrs. Noyes by the destruction of the copy in her own possession.

The refusal to submit to the jury the special question whether the second draft of the will was intended as a substitute for the first raises no question of law. The issue framed and tried was whether the testatrix had revoked her will. Whether certain facts which might be material on that issue should or should not be specially found by verdict of the jury was for the presiding justice to determine.

Exceptions overruled. All concur.

BARBER v. BARBER et al.†

(Supreme Court of Rhode Island. Jan. 25, 1909.)

1. TRUSTS (§ 234*)—MANAGEMENT OF TRUST PROPERTY—LOSS OF PROPERTY.

Where trust property is lost or accidentally destroyed, without gross fraud or neglect of the trustee, he is only liable for the loss.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 340; Dec. Dig. § 234.*]

2. TRUSTS (§ 182*)—MANAGEMENT OF TRUST PROPERTY—USE OF PROPERTY.

Where a trustee took personal property as a necessary part of the trust estate, consisting of a farm, and used the same in the management of the farm, and there was no evidence that he made any profit from the use of the property, or that he neglected to accept any opportunity for its profitable use, or that he neglected to keep it in as good condition as when he received it, the restoration of the property and the payment of the legal rate of interest for its use was a sufficient fulfillment of his duty as trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 236; Dec. Dig. § 182.*]

3. APPEAL AND ERROR (§ 1022*)—REVIEW—QUESTIONS OF FACT.

A master's finding on conflicting testimony, approved by the trial court, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. § 1022.*]

Appeal from Superior Court, Washington County; Charles C. Mumford, Judge.

Action by William E. Barber against Walter D. Barber and another. From a decree for plaintiff, defendants appeal. Modified.

Lyman & McDonnell, for appellant Walter D. Barber. Frederick C. Olney, for appellee.

PER CURIAM. We are of the opinion that the principle upon which the item of \$1,426 was allowed by the superior court for use of a pair of horses, team, wagon, and harnesses for 4 years 9 months and 13 days, on the basis of a letting and hiring at the rate of \$1 per day for 1,336 days, and at the rate of 50 cents per day for the remainder of the time, is not warranted by the evidence. It was not a letting and hiring in the ordinary sense of the terms. Walter D. Barber, the defendant, took this property, together with all the other farm property, as a necessary part of the same for use in the management of the farm. It is not in evidence that he did in fact make any such profit from the use of this pair of horses, team, wagon, and harnesses as would justify such a charge, or that he had, and neglected to accept, any opportunity for such profitable use. In the absence of any such evidence, and in view of the fact that he fed and kept up the horses, etc., in fair condition, so that he returned them to the complainant in substantially as good condition as when he received them, barring inevitable depreciation from increased age, and inasmuch as the value at the time of their transfer to him in 1904

was placed by the complainant at \$500, we think it would be more reasonable to charge him for the use of them at the rate of 6 per centum per annum on the capital sum of \$500 for the whole period during which he had possession, to wit, from January 8, 1904, to October 21, 1908—4 years 9 months and 13 days—amounting to \$144.

There is no sufficient evidence to show that the defendant was guilty of any waste or neglect in the care of this property. Even if he had totally lost the same, or it had been accidentally destroyed without gross fraud or neglect, he would only have been required as a trustee to make good the loss. We think that the restoration of the property and the payment of the legal rate of interest for its use is a sufficient fulfillment of his duty as a trustee.

As to the price charged the defendant for the various kinds and quantities of the wood cut upon the premises, there was much variation and conflict in the testimony of the numerous witnesses. The matter has been before the superior court twice, and that court has twice refused to disturb the master's findings. We do not regard those findings as so clearly against the evidence that we should disturb them. We are further of the opinion that the distribution of costs between the parties, by the decree appealed from, was a reasonable and fair distribution, and we decline to amend the decree in that respect.

We therefore find that the defendant Walter D. Barber should not have been charged with the sums of \$1,336 and \$90, amounting to the sum of \$1,426, as found by the superior court, but that he should be charged with the sum of \$144. This leaves a balance in favor of this defendant on those two items of \$1,282. As the "second" paragraph of the decree finds this defendant liable to the complainant in the sum of \$858.30, the final balance found in favor of this defendant against the complainant amounts to \$423.70.

The parties may prepare and present a draft of a decree, modifying the decree appealed from so as to accord with the foregoing.

(29 R. I. 358)

PROBATE COURT OF CUMBERLAND v. FITZ-SIMON et al.

(Supreme Court of Rhode Island. Dec. 29, 1908. On Rehearing, Jan. 13, 1909.)

1. PLEADING (§ 173*)—REPLICATION—FORM—CONCLUSION.

A declaration in an action on the bond of an executor alleged that the executor had been found guilty of unfaithful administration. The plea alleged that plaintiff, as creditor, had not procured a final decree of the probate court adjudging the executor guilty of unfaithful administration. The replication alleged that plaintiff had procured a final decree of the superior court

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

adjudging the executor guilty of unfaithful administration, that a certified copy of the decree had been transmitted to the probate court, and that the decree was still in force. *Held*, that the replication contained new matter and stated, by way of new assignment, that though plaintiff had not procured a final decree of the probate court against the executor for unfaithful administration, he had procured such a decree in the superior court, and properly concluded with a verification.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 340; Dec. Dig. § 173.*]

2. PLEADING (§ 173*)—REPLICATION—FORM—CONCLUSION—MATTERS OF RECORD.

Since matters of record are not to be tried by a jury, a replication relating thereto should not conclude to the country.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 340; Dec. Dig. § 173.*]

3. JUDGMENT (§ 487*)—COLLATERAL ATTACK—CAUSE OF ACTION.

Where the creditor of an estate, suing on the bond of an executor for unfaithful administration, complied with Court and Practice Act 1905, § 1027, and showed that his claim had been filed, that the claim had been disallowed by the executor, and that the decree of unfaithful administration had been entered, because the executor had not disallowed the claim within the statutory time and had not paid it within a reasonable time, the executor and the sureties could not attack the decree by attempting to show a disallowance of the claim on newly discovered evidence, for the executor, if aggrieved and entitled to a revision of the decree on the ground of newly discovered evidence, was required to proceed by petition, pursuant to section 473.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 921; Dec. Dig. § 487.*]

4. JUDGMENT (§ 199*)—NON OBSTANTE VEREDICTO—IMMATERIAL ISSUE.

Where parties are compelled to proceed to trial on immaterial issues, judgment must be rendered for plaintiff notwithstanding any verdict that may be rendered by the jury on such issues.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 368; Dec. Dig. § 199.*]

5. APPEAL AND ERROR (§ 78*)—ORDERS REVIEWABLE.

Where the ruling of the superior court on demurrers to the pleadings was such that, if complied with, it would result in submitting to the jury an immaterial issue, the ruling was decisive and reviewable, before proceeding further in the suit, on bill of exceptions raising the question of law by referring to the pleadings involved in the exception to the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 464-468; Dec. Dig. § 78.*]

On Motion for Reargument.

6. EXECUTORS AND ADMINISTRATORS (§ 537*)—MANAGEMENT OF ESTATE—UNFAITHFUL ADMINISTRATION—STATUTES.

Where a decree of unfaithful administration for nondisallowance and nonpayment of a claim against the estate has been entered against the executor, the time within which the executor may disallow a claim on the ground of newly discovered evidence, before payment, under Court and Practice Act 1905, § 886, when no such decree has been entered against him, is immaterial in an action on the executor's bond.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 537.*]

Exceptions from Superior Court, Providence and Bristol Counties; William H. Sweetland, Presiding Justice.

Action by the Probate Court of Cumberland, for the benefit of Margaret Fitz-Simon, against Vincent Fitz-Simon and others. The superior court overruled and sustained certain demurrers, and plaintiff brings exceptions. Exceptions sustained, and cause remitted to the superior court for further proceedings. See, also, 28 R. I. 555, 68 Atl. 431.

James Harris and Frederic A. Greene, for plaintiff. Bassett & Raymond (Russell W. Richmond, of counsel), for defendants.

DUBOIS, J. This is a bill of exceptions to the decision of the presiding justice of the superior court overruling the plaintiff's demurrer to the defendants' rejoinder to the replications of the plaintiff to the defendants' first and second pleas, and sustaining the defendants' demurrer to the plaintiff's replication to the defendants' third plea. The defendants have filed their motion to dismiss said bill of exceptions upon the following grounds: "(1) Because the exception is not to any ruling, decision, or finding of the court in an action heard on its merits wherein and whereby the plaintiff was aggrieved. (2) Because the bill of exceptions is prematurely brought. (3) Because the bill of exceptions does not state separately and clearly any finding of the court upon any issue of fact or upon any issue of law by which the plaintiff deems himself aggrieved."

It appears that James A. Fitz-Simon died in Cumberland, R. I., on the 26th day of September, A. D. 1905, leaving a will in which the defendant Vincent A. Fitz-Simon is named as executor. Said will was duly probated by the court of probate of the town of Cumberland, and said Vincent A. Fitz-Simon qualified as executor, and gave notice of his appointment as such on the 17th and 24th days of November and on the 1st day of December, 1905. Within one year from the date of the first publication of the notice of the appointment of said executor, the above-named Margaret Fitz-Simon filed her claim against the estate of said James A. Fitz-Simon in the office of the clerk of the probate court of said town of Cumberland, and said executor failed to disallow or pay said claim within 30 days from the expiration of said one year from said first publication. Thereupon said Margaret Fitz-Simon filed in said court of probate her petition praying that said executor be adjudged guilty of unfaithful administration, which was, after hearing in said court of probate, denied and dismissed, and from said decision of said court of probate the said Margaret Fitz-Simon appealed to the superior court, and upon hearing in said superior court said executor was adjudged guilty of unfaithful administration as executor of the will of said James A. Fitz-Simon. To the decision of said superior court said Vincent A. Fitz-Simon claimed exceptions, which said excep-

tions were overruled by this court (see 28 R. I. 555, 68 Atl. 431), and said cause was remitted to the superior court, with directions to enter a decree in accordance with its decision. A decree was entered, adjudging said Vincent A. Fitz-Simon guilty of unfaithful administration, and a copy of the same was transmitted to the court of probate of the town of Cumberland, and said decree is still in full force and has never been reversed or annulled.

After the entry of the decree of unfaithful administration, the present action was brought upon the bond of said executor, and to the declaration the defendants pleaded: (1) That the executor had fully administered. (2) That the executor had disallowed the claim of said Margaret Fitz-Simon before payment upon evidence discovered after 30 days after the expiration of six months from the first publication by the executor of the notice of his appointment. (3) That the plaintiff had not procured a final decree of the probate court adjudging the defendant Vincent A. Fitz-Simon guilty of unfaithful administration. To the first two of these pleas the plaintiff replied that a final decree of the superior court had been entered declaring the defendant Vincent A. Fitz-Simon guilty of unfaithful administration, and that a copy of this decree had been sent to the probate court according to law and duly recorded, and that said decree is still in full force. To the third plea the plaintiff replied that the final decree of the superior court had been obtained and transmitted to the probate court of Cumberland according to law, and had never been reversed, annulled, or set aside. To the replications to the first and second pleas the defendant filed a rejoinder, setting up that since the filing of the plaintiff's petition, and the decree thereon adjudging Vincent A. Fitz-Simon guilty of unfaithful administration, said Fitz-Simon had discovered new evidence which warranted, and still warrants, him in disallowing said claim. The plaintiff demurred to this rejoinder on the ground that said rejoinder and the matters therein contained were not sufficient in law to preclude the plaintiff from having and maintaining her aforesaid action. The defendants demurred to the plaintiff's replication to the defendants' third plea on the grounds (1) that said replication contains no new matter and concludes with a verification; (2) that said replication ought to conclude to the country, instead of with a verification; (3) that it does not appear in and by said replication that said final decree of the probate court of Pawtucket was entered before the commencement of this action.

The allegation in the plaintiff's declaration, to which the defendants' third plea relates, reads as follows: "And the plaintiff further avers that the said Vincent A. Fitz-Simon has been found to be guilty of unfaithful administration as executor of the last will and testament of the said James A. Fitz-

Simon." The defendants' third plea reads as follows: "And the defendants, Vincent A. Fitz-Simon and William McCusker, by their attorneys, Bassett & Raymond and Claude J. Farnsworth, come and defend the wrong and injury, when, etc., and crave oyer of said supposed writing obligatory in said plaintiff's declaration set forth, and it is read to them. They also crave oyer of the condition of said writing obligatory, and it is read to them. And they say that they ought not to be charged with said debt by virtue of said writing obligatory, because they say that said Margaret Fitz-Simon, as a creditor of the estate of James A. Fitz-Simon, has not, as provided by law, procured a final decree of the probate court of the town of Cumberland, declaring that said Vincent A. Fitz-Simon is guilty of unfaithful administration of the estate of James A. Fitz-Simon. And this the defendants are ready to verify." And the plaintiff's replication thereto is of the tenor following: "And the said plaintiff, as to the said plea of the said defendants by them thirdly above pleaded, saith that she, the plaintiff, by reason of anything by the said defendants in that plea alleged, ought not to be barred from having and maintaining her aforesaid action thereof against the said defendants, because she says that she, the plaintiff, has procured a final decree of the superior court of the state of Rhode Island declaring that said Vincent A. Fitz-Simon is guilty of unfaithful administration of the estate of James A. Fitz-Simon, and that a certified copy of said final decree of said superior court has been sent and transmitted to said probate court of the town of Cumberland as by law provided, and has been duly recorded by said probate court as therein directed. And the plaintiff avers that said decree is still in full force and has never been reversed, annulled, or set aside. And this the plaintiff is ready to verify. Wherefore she prays judgment and her damages by her sustained on occasion of the nonperformance of said writing obligatory in her declaration mentioned, to be adjudged to her."

The defendants' demurrer should have been overruled. The plaintiff's replication does contain new matter, and states in effect, by way of new assignment that although she has not procured a final decree of the probate court of Cumberland against said Vincent A. Fitz-Simon for unfaithful administration, as in said plea alleged, she has procured such a final decree of the superior court of the state of Rhode Island, a certified copy of which decree has been duly recorded in said probate court according to law, and that said decree remains in full force, and this properly concludes with a verification. The second ground of demurrer is untenable, because matters of record are not to be tried by a jury, and therefore the pleadings relating to the same should not conclude to the country; and the third ground of demurrer should have been overruled, because the pro-

bate court of Pawtucket has nothing to do with the case.

The plaintiff's demurrer to the defendants' rejoinder should have been sustained, because the rejoinder tenders an immaterial issue, to wit, whether the defendant Fitz-Simon had discovered new evidence warranting the disallowance of the very claim for the nondisallowance and nonpayment of which he had been adjudged guilty of unfaithful administration. The matter is *res judicata*, and while said decree exists he cannot be allowed to attack it or override it collaterally. If the parties are compelled to proceed to trial upon such immaterial issue, judgment must be rendered for the plaintiff, irrespective of or notwithstanding any verdict that may be rendered by the jury. Under Court and Practice Act 1905, § 1027, all that the plaintiff need show is "(1) That his claim has been duly filed; (2) that his claim has not been disallowed by the executor or administrator, or has been established by commissioners or by judgment; (3) that a decree of unfaithful administration has been entered as provided in the next following section, and if the estate be insolvent, he shall also produce a copy of the order of distribution." The plaintiff has complied with the requirements of the statute, but the defendants seek to avoid the effect of the same by attempting to show a disallowance made in the face of the decree. This the defendants cannot be permitted to do. If the defendant Fitz-Simon is aggrieved by the decree of the superior court, and claims that he is entitled to a revision thereof by reason of evidence newly discovered since the entry thereof, for lack of which evidence the decision which culminated in said decree was unfavorable to him, he must proceed by petition filed within one year after the entry of such decree, under the provisions of Court and Practice Act 1905, § 473.

It thus appears that the ruling of the superior court was such that, if complied with, it would result in submitting to the jury an immaterial and useless issue, the trial of which would involve an unnecessary and useless expenditure of time and money. Such action on the part of the superior court, changing the issue to one not included in the statutory requirements hereinbefore quoted, is not preliminary, but decisive, as it causes a radical change in the suit itself, and an exception to such ruling ought to be heard and determined before further proceedings are had in the original suit. The bill of exceptions plainly raises the question of law, because it refers to the pleadings which are involved in the exception taken.

The motion to dismiss the bill of exceptions upon this ground is therefore denied, the plaintiff's exceptions to the rulings of the superior court in overruling her demurrer and in sustaining the defendants' demurrer

are sustained, and the case is remitted to the superior court for further proceedings in accordance herewith.

On Reargument.

PER CURIAM. It is not necessary in this case to consider within what period an executor may disallow a claim, on the ground of newly discovered evidence, before payment, under the provisions of Court and Practice Act 1905, § 886, when no decree of unfaithful administration for nondisallowance and nonpayment of such claim has been entered against him. Such is not this case, but exactly the reverse.

The defendants' motion for reargument must be denied.

(29 R. I. 335)

RHODE ISLAND HOSPITAL TRUST CO. v. TOWN COUNCIL OF WAR- WICK et al.

(Supreme Court of Rhode Island. Jan. 25, 1909.)

1. PERPETUITIES (§ 3*)—REMOVEDNESS OF GIFTS TO CHARITIES—GIFT FOR IMPROVEMENT OF BURIAL LOT.

A legacy to a town council to be held by them and their successors in office in perpetual trust for ornamenting and keeping in repair the testator's burying ground, though creating a private, as distinguished from a charitable, trust, is saved from the rule against perpetuities by Gen. Laws 1896, c. 40, § 35, authorizing town councils to receive and hold funds conveyed to them for ornamenting or keeping in repair burial lots, and to execute such trusts; and the fact that successive town councils have declined to act does not invalidate the trust.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. TRUSTS (§ 38*)—ACCEPTANCE BY TRUSTEE.

Though a legacy to a town council in perpetual trust for the repair of the testator's burial lot is authorized by Gen. Laws 1896, c. 40, § 35, the court has no power to compel the council to accept the trust, nor to bind a new trustee to act in their place.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 54; Dec. Dig. § 38.*]

3. EXECUTORS AND ADMINISTRATORS (§ 303*)—DISTRIBUTION OF ESTATE—MODE OF PAYMENT—PAYMENT INTO COURT.

On the refusal of successive town councils to accept a legacy to them, to be held in perpetual trust for keeping in repair the testator's burial lot, the executor will be permitted to pay the fund into the registry of the court, in order that he may settle his account and that opportunity may be afforded to the town council within a reasonable time to accept the legacy.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1242; Dec. Dig. § 303.*]

Case Certified from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Bill by the Rhode Island Hospital Trust Company, as executor, against the Town Council of Warwick, and others. Case certified from the Superior Court. Decree ordered.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Tillinghast & Tillinghast, for complainant.

PER CURIAM. This is a bill in equity by the trust company, as executor of the will of Henry W. Greene, late of Warwick, for instructions. The portions of the bill material to this inquiry read as follows:

"Your orator, the Rhode Island Hospital Trust Company, a corporation created by the General Assembly of this state of Rhode Island and located and transacting business in the city of Providence therein, comes and shows to the court:

"(1) That Henry Whitman Greene, late of the town of Warwick, in the county of Kent, died there on the 20th day of January, 1897, leaving a last will and testament, which has been duly admitted to probate and remains of record in the court of probate of said town of Warwick, and of which will your orator is the duly appointed and qualified executor, and a full copy of which will is hereto annexed and hereby referred to as a part of this bill of complaint as if fully embodied herein.

"(2) That in and by paragraph II of said will the said testator made the following bequest, to wit: 'II. I give and bequeath to the Town Council of said Warwick the sum of Five Hundred (500) dollars to be held by the said Town Council and their successors in office in perpetual trust, to apply the income of said sum to the ornamenting and keeping in repair of my said burying-ground forever.' But said town council, after repeated offers from your orator to pay the said legacy to it, and repeated requests from your orator to it to receive and accept the said legacy, has declined and still does decline to accept the same.

"(3) That the widow of said testator has deceased, and your orator, as executor of said will, has paid all of said testator's debts, and all of the other legacies of his said will, except the legacy aforesaid to said town council, and is ready and anxious to render and settle with the court of probate its final account, but is unable to do so without the advice and instruction of this court as to what disposition to make of said legacy so bequeathed to said town council or of the fund remaining in its possession representing the same."

After the entry of a decree that the complainant's bill be taken as confessed against each of the defendants, the cause, being ready for hearing for final decree, was certified to this court under the provisions of Court and Practice Act 1905, § 338.

As argued by counsel for complainant: "This legacy is plainly a private, as distinguished from a public or charitable, trust, and but for Gen. Laws 1896, c. 40, § 35, which reads as follows: 'Such town councils may take and hold to them and their successors in office, all such lands within their

respective towns, as shall be conveyed to them in trust for burial purposes, and, in like manner, may receive and hold all funds that shall be conveyed to them for the purpose of ornamenting or keeping in repair such burial lots or any other burial lots within their respective towns, and execute said trusts in accordance with the terms contained in the instruments of conveyance'—would be clearly void for perpetuity, and would fall into the residue and go to the residuary legatees, or be distributed as intestate to the next of kin; and in this case it matters not which, as these are here the same parties defendant. *Kelly v. Nichols*, 17 R. I. 306, 21 Atl. 906; *Sherman v. Baker*, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717. And the question therefore is: Does the statute save it, so that the court can, by the appointment of a new trustee, or in any other way, provide for its administration; the town council having persistently declined it, and there being, we assume, no power short of the General Assembly that can compel its acceptance, however, obligatory would seem to be its duty, both towards the state and towards its town, to do so."

We are of the opinion that the statute does save it. But in the present condition of the law we have neither power to compel the town council to accept said trust nor to appoint a new trustee to act in their place. As the statute has made provision for such a perpetual trust, a testator has a right to avail himself of such provision by means of a legacy to a town council for such uses in his last will. A valid trust having been created by the will, the fact that the trustee named has hitherto declined to act does not invalidate the trust. Furthermore, the fact that several successive town councils of the town of Warwick have heretofore declined to accept the said legacy does not preclude the possibility that the present or some future town council may accept said legacy and enter upon the performance of said trust.

Considering this possibility, and the inability of the complainant to settle its account, we are of the opinion that the prayer of the complainant, viz., "that your orator may be permitted to bring and pay the said sum of money, with such interest, if any, as the court shall adjudge to be rightfully payable thereon or in respect thereof, into the registry of the court," should be granted, in order that the complainant may be permitted to settle its account and be relieved from further responsibility in respect to this fund, and that opportunity may be afforded to the town council of the town of Warwick within a reasonable period of time to accept said legacy as trustee aforesaid.

The cause will be remanded to the superior court for entry of a decree in accordance with this opinion. A draft decree may be presented for approval.

McELROY v. McCARVILLE.

(Supreme Court of Rhode Island. Jan. 20, 1909.)

1. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—PREJUDICIAL EFFECT—FINDING.

A finding that respondent's answer admitted complainant's ownership of the north part of a gangway and his easement in the south half, even if the admission was not conclusively binding, would not affect the judgment for complainant, where the evidence supported complainant's claim thereto.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1071.*]

2. EQUITY (§ 186*)—PLEADING—ANSWER—ADMISSIONS.

In a suit to determine the rights of adjoining owners to a gangway between the lots, an admission in the answer that complainant owned a part of the gangway in fee and had an easement in another part was binding on respondent.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 426; Dec. Dig. § 186.*]

3. APPEAL AND ERROR (§ 878*)—PARTIES ENTITLED TO ALLEGE ERROR—APPELLEE—INADEQUACY OF DAMAGES.

Where complainant did not appeal from the decree, the insufficiency of the damages awarded him will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 877; Dec. Dig. § 878.*]

Appeal from Superior Court, Providence and Bristol Counties; William H. Sweetland, Presiding Justice.

Suit by Ellen McElroy against Michael McCarville. From a decree in part for complainant, respondent appealed. Affirmed.

See, also, 71 Atl. 183.

The suit was to determine the rights of the parties in a certain gangway between adjoining lots, and respondent's answer admitted complainant's title to the north half thereof and his easement in the south half thereof; but respondent afterward introduced evidence to deny such title and easement therein.

Charles E. Gorman, Dennis H. Sheahan, and James M. Gillrain, for appellant. Harry C. Curtis, Walter J. Ladd, and Edward G. Carr, for appellee.

PER CURIAM. A full and careful reading and consideration of the pleadings and of the evidence before the master, the master's report, the opinion of the superior court, and the briefs and arguments of counsel in this cause, convinces us that there was no error in the decree of the superior court, and that the same is fully supported, both as to law and fact, by the case as made.

The suggestion by the respondent's counsel that he should not be bound by his admissions in his answer relative to the title of the complainant as to her ownership in fee simple of the northerly half of the gangway and as to her easement in the southerly half of the gangway, although such admission was regarded by the master and by the superior

court as conclusive, does not in any way affect the conclusion arrived at by this court, inasmuch as we find, from the evidence and from the deeds and plats before us, that the complainant's claims as to her title and easement were correctly stated in the bill and supported by the evidence; so that we do not rely upon the respondent's admission as to complainant's title, although we find that such admission was correct as a matter of law.

The complainant contends before us that the award of damages by the superior court under the evidence should have been much larger. We cannot yield to this contention: First, because the complainant has not appealed from the decree, and therefore we are not called upon to pass upon the question of the increase of the damages awarded; second, because, even if we were, we are satisfied that the superior court was justified in limiting the amount of damages as it did in its opinion. The reasons therein set forth fully justified such limitation.

Upon the whole case, we are satisfied that the decree does justice between the parties, and the same is therefore affirmed.

SMITH v. RIVERS.

(Supreme Court of Rhode Island. Jan. 25, 1909.)

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge. Action by Joseph Smith against James M. Rivers, alias, etc. There was a judgment for plaintiff, and defendant excepts. Exception sustained.

Bliss & Walsh, for plaintiff. John C. Quinn, for defendant.

PER CURIAM. A careful consideration of the testimony discloses the fact that there is a strong preponderance of the evidence against the verdict.

The defendant's exception upon that ground is therefore sustained, and the case is remitted to the superior court for a new trial.

SIMONE v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Jan. 7, 1909.)

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Ella Simone against the Rhode Island Company. Verdict for defendant, and plaintiff brings exceptions. Overruled.

Dennis H. Sheahan and Gardner, Pirce & Thornley (William W. Moss, of counsel), for plaintiff. Joseph C. Sweeney, for defendant.

PER CURIAM. In the absence of special findings, it is impossible to ascertain upon what grounds the jury based their finding for the defendant. We cannot say that the verdict is upon the sole ground that the company was not negligent. It is possible that the jury found that the plaintiff was not injured to any appreciable extent and was not entitled to any dam-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ages. The case was properly left to a jury, and we cannot say that the jury erred in its verdict. The plaintiff's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

CHAMPLIN v. TAYLOR.

(Supreme Court of Rhode Island. Jan. 15, 1909. On Reargument, Jan. 28, 1909.)

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Action by George B. Champlin against Olin P. Taylor. From a judgment for plaintiff, defendant brings exceptions. Exceptions overruled, and case remitted, with directions to enter judgment on decision.

Lyman & McDonnell, for plaintiff. William J. Brown, for defendant.

PER CURIAM. We are unable to discover any error either of law or fact on the part of the justice of the superior court who tried the case without a jury, and the damages awarded by him are not excessive.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the decision.

On Reargument.

PER CURIAM. A careful consideration of the defendant's motion for reargument convinces us of the correctness of our former decision.

The defendant's motion for reargument is denied and dismissed.

(104 Me. 135)

YOUNG v. RANDALL.

(Supreme Judicial Court of Maine. April 21, 1908.)

1. MASTER AND SERVANT (§ 219*)—NEGLIGENCE—ASSUMPTION OF RISK.

When one enters into the service of another, by virtue of the employment he assumes the risk of all obvious and apparent dangers which are incident to the business, and of all which, by the exercise of reasonable care, one of his age, care, and experience ought to know and appreciate. He also assumes the risks of all dangers of which he knows and which he should appreciate, whether obvious and visibly apparent or not.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 610; Dec. Dig. § 219.*]

2. MASTER AND SERVANT (§ 280*)—INJURY TO SERVANT—EVIDENCE.

The plaintiff while operating a swinging circular saw in the defendant's employ sustained personal injuries resulting in the loss of the second and third fingers of the left hand, and the mutilation of the fourth finger so as to render it useless, and caused by the alleged negligence of the defendant. The plaintiff thereupon brought an action against the defendant and recovered a verdict for \$1,000. Assuming all the facts to be as claimed by the plaintiff, *held*, that the action cannot be maintained, and the verdict is so clearly wrong that the same must be set aside.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 981-986; Dec. Dig. § 280.*]

(Official.)

On Motion from Supreme Judicial Court, Kennebec County.

Action by Frank O. Young against Ira H. Randall. Verdict for plaintiff. Motion to have verdict set aside granted.

Action on the case to recover damages for personal injuries sustained by the plaintiff while operating a swinging circular saw in the defendant's employ, resulting in the loss of the second and third fingers of the left hand and the mutilation of the fourth finger so as to render it useless, and caused by the alleged negligence of the defendant, in that the "saw table was not provided with any standards or upright pieces sufficiently near the path of the saw, so that a log or bolt could rest against the same and be held steadily in place and prevented from swinging in and upon said saw, and thereby said plaintiff's employment was made unnecessarily dangerous."

Plea, the general issue. Verdict for plaintiff for \$1,000. The defendant then filed a general motion to have the verdict set aside.

Argued before EMERY, C. J., and SAVAGE, STROUT, SPEAR, and CORNISH, JJ.

Williamson & Burleigh, for plaintiff. A. M. Goddard, for defendant.

CORNISH, J. Tort for personal injuries while operating a swinging circular saw in defendant's employ. The defendant is a manufacturer of lumber and manager of the Augusta Lumber Company, which operates a large mill at Augusta. In the spring of 1905 he purchased a lot of standing timber in the neighboring town of Belgrade, and sent a crew there to cut and manufacture the same. Among them was the plaintiff, who was the owner of a team of four horses and of a portable sawing machine driven by a gasoline engine. After working with his team five or six weeks yarding logs, the plaintiff started his sawing machine, and with the assistance of Mr. Weston, the foreman, attempted to saw a small lot of ash logs into shovel handle bolts about 44 inches long. This proved impracticable, as the logs, varying in length from 25 to 30 feet, were too heavy to be handled and sawn easily with his machine, which was constructed in the ordinary way for sawing cord wood, with a stationary circular saw and a push or sliding table.

The foreman then suggested the necessity of a swinging saw with a stationary table, and sent word to Mr. Randall through the plaintiff where a secondhand machine of that sort could be obtained. Mr. Randall thereupon procured the saw, and sent it, with necessary shafting and pulleys purchased elsewhere, to Belgrade, and with it went Mr. Dixon, his millwright, who was to have charge of setting it up.

The temporary machine was then hastily constructed. A table or platform about 18 inches wide and 2 feet high was built of

planks resting on blocking. The left end of this table, viewed from the operator who stood in front of it, was connected with a run provided with rolls over which the logs were pushed by hand lengthwise from the ground upon and along the table. Against the side of the table opposite the operator stood three heavy logs or posts set firmly in the ground, and extending above the table six or eight feet, carrying on their tops the bearings or boxes which held the main shaft. One of these posts stood within a few inches of the right end of the table, another toward the left end and eight feet from the first and between the two a third, the exact location of which is in controversy. At the right of this middle post and 1 foot from it, according to the plaintiff, or $2\frac{1}{2}$ inches from it, according to the defendant, the saw frame or ladder was suspended from the main shaft in such a manner that the circular saw attached to the lower end could be swung forward and backward in the slot extending part way across the table by means of an oxbow bolted to the ladder, and extending forward toward the operator. The distance from the saw to the right end of the table was the exact length of a bolt, 44 inches. Four men were employed in working the machine, two at the left with cant dogs to push the logs upon the table and hold them in place, one to operate the saw, and one at the right to keep the end of the log flush with the end of the table, and to remove the bolt. In operation the logs were pushed upon the table, the larger end ahead, the scarf was first sawn off, then the various bolts, and, if the smaller end was less than six inches in diameter, that portion was used for cordwood.

As the saw was hung somewhat higher than the table, it had a natural tendency in cutting, to draw the logs toward and under it, a tendency which was stronger in the smaller logs, and which could be resisted only by having proper guards and supports on the back of the table. The failure of duty alleged by the plaintiff in his writ is that "the saw table was not provided with any standards or upright pieces sufficiently near the path of said saw, so that a log or bolt could rest against the same and be held steadily in place and prevented from swinging in upon said saw." The plaintiff admits the existence of the three posts before described, but says they were insufficient for the purpose, as there was a space of 44 inches at the right of the saw, and of one foot at the left without any support or guard whatever, so that, in sawing a stick of such a length that it reached from the right end of the table to a point between the saw and the post on the left, it had no support whatever except at the extreme right end, and the action of the saw tended to pull it in toward itself, taking with it the hand of the operator resting upon the stick. The defendant met this issue by offering evidence tending

to show that the distance from the saw to the post on the left was only two or three inches, that four or five inches at the right of the saw was an additional post firmly set in the ground and extending above the table, placed there to serve this very purpose, and also that guides or guards were attached to the back of the table, the one at the left of the saw extending from post to post, being a timber four inches square, and the one at the right from post to post a plank two by six set on edge.

Here was a sharp issue of fact, the plaintiff admitting that, if the fourth post and the guards were there at the time of the accident, the table was reasonably safe, and the defendant admitting that, if they were not there, it was negligently constructed.

The jury found for the plaintiff upon this as upon all other issues, and their verdict the defendant asks to be set aside. It is unnecessary to consider the question of the defendant's care or want of care in the construction of the machine. The plaintiff is in this dilemma. If the defendant was not guilty of negligence in this respect, the plaintiff admittedly cannot recover. If the defendant was guilty of negligence, the plaintiff is precluded from recovering because of his own knowledge of the careless construction and his assumption of the attendant risks. This is a fatal point in the plaintiff's case.

The particular danger on which he bases his right to recover was the lack of protection against the tendency of the saw to draw the logs to itself. But this was no concealed or hidden danger. It was obvious as soon as he began to operate. He felt the tendency to draw. He admits it. He saw the lack of protection; and with his experience he must or at least should have known the risk attendant upon the sawing of a stick resting against only one support. The plaintiff was not an inexperienced boy, but a man 30 years of age, of intelligence, and of some experience with circular saws. He was the owner of a portable sawmill, and had himself operated it six weeks or more during the previous winter, and in that time must have learned its traits. While that worked on a somewhat different plan from this, yet the difference and its effects must have been obvious to him. He had asked for no instructions before beginning work nor during its progress. Though Mr. Weston, the foreman, stood near by, he apparently needed none. The foreman could have told him nothing that he himself could not see and appreciate. In his writ he does not complain because no instructions were given him. He began and continued the work without protest or objection, confident of his own knowledge and experience. There is evidence that he even showed impatience when cautioned more than once by the foreman not to jump the saw and not to keep his left hand upon the log. His method of opera-

tion was to pull the swinging saw by the oxbow with his right hand, while he steadied himself by placing his left hand upon the log at the right and within five or six inches of the saw itself. He worked but little the Wednesday afternoon that the machine was completed, as the saw needed setting and filing, but began on Thursday morning, and worked during the forenoon. He says that he noticed the tendency of the saw to pull the logs toward it as it cut, especially the smaller and more crooked ones, and during the forenoon "there was one log that the cant of it was kind of up and kind of crooked, and it turned down as a stick naturally would. The saw pinched in the wood a mite, and the log rolled toward the saw, and went out through." The accident of the afternoon was practically a repetition of this. In the afternoon the plaintiff had worked but half an hour before he was injured. His own description of the accident is clear. "Well, we had a log come up and I sawed off this scarf, and it came on and I sawed it again. I should say three or four cuts into three or four of these sticks that we used for bolts, and then there came a piece here that was just a little longer than it ought to be, about six inches longer, and I thought it was smaller than six inches, so I threw it off, but Weston wanted it sawed—so I took it up and held it on the saw like that [illustrating], and the saw bit on to it and took my hand in. * * * I took hold of this saw, and brought it to me, and, as I did, it kind of rolled this way a little, and, when I put the saw on, she bit here, and then caught and went right over like that [illustrating]. I think both pieces went out under the saw that way. I know they got out of my way." On the plaintiff's own statement nothing unusual happened, nothing that the plaintiff might not himself have anticipated if the conditions were favorable. He nowhere stated that he did not see and appreciate the precise risk in question. He simply denies having worked on this particular kind of a machine prior to the day of the accident. The doctrine of assumption of risk has been so often and so fully expounded that its mere statement is sufficient.

"When one enters into the service of another, by virtue of the employment he assumes the risk of all obvious and apparent dangers which are incident to the business, and of all which, by the exercise of reasonable care, one of his age, care, and experience ought to know and appreciate. He also assumes the risks of all dangers of which he knows, and which he should appreciate whether obvious and visibly apparent or not."

Babb v. Paper Co., 99 Me. 298, 59 Atl. 290. See, also, *Mundle v. Mfg. Co.*, 86 Me. 400, 80 Atl. 16. The application of this firmly established principle to the case at bar pre-

cludes recovery. The accident arouses our sympathy, but, assuming all the facts to be as the plaintiff claims, this action cannot be maintained. *Demers v. Deering*, 93 Me. 272, 44 Atl. 922; *Wilson v. Steel Edge Stamping Co.*, 163 Mass. 315, 39 N. E. 1039; *Tenanty v. Boston Mfg. Co.*, 170 Mass. 323, 49 N. E. 654; *St. Jean v. Tolles*, 72 N. H. 587, 58 Atl. 506.

The jury did not give proper consideration to the plaintiff's assumption of the risk. Whether they were unduly affected by sympathy or by the unmaintainable position so persistently contended for by the defendant's counsel as to the ownership of the machine or by both it is impossible to determine.

But, whatever the cause, the verdict is so clearly wrong that the entry must be:

Motion sustained.

Verdict set aside.

(104 Me. 177)

GOLDEN v. ELLIS et al.

(Supreme Judicial Court of Maine. May 11, 1908.)

1. MASTER AND SERVANT (§ 209*)—RISKS ASSUMED—ORDINARY APPLIANCES AND METHODS.

A servant assumes the risks of injuries from simple and ordinary appliances and methods, the nature of which he understands.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 552; Dec. Dig. § 209.*]

2. MASTER AND SERVANT (§ 124*)—MASTER'S DUTY OF INSPECTION—COMMON TOOLS.

The duty of inspection by an employer of the appliances used by his employes does not extend to the small and common tools in everyday use, of the fitness of which the employes using them may reasonably be supposed to be competent to judge.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

3. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK—KNOWLEDGE OF UNSUITABLE APPLIANCE.

If a servant continues in the services of his employer after he has knowledge of any unsuitable appliances in connection with which he is required to labor, and it appears that he fully comprehends and appreciates the nature and extent of the danger to which he is thereby exposed, he will be deemed to have waived the performance of the employer's obligation to furnish suitable appliances, and to have voluntarily assumed all risks incident to the service under such circumstances. Such assumption of the risks of an employment by a servant will bar recovery independently of the principle of contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

4. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK.

Although a hammer is made of suitable material and properly tempered, yet it is a matter of common knowledge that, when it is used with great force upon other steel implements, small chips or scales of steel are liable

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to break off, and fly from one implement or the other.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 217.*]

5. TRIAL (§ 159*)—NONSUIT.

When the evidence presented by a plaintiff with all the inferences which a jury would be justified in drawing from the same is insufficient to support a verdict in his favor, so that it would be the duty of the court to set aside such a verdict, if rendered, the presiding justice is not bound to submit the case to the jury, but may properly order a nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 359-367; Dec. Dig. § 159.*]

6. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK.

The plaintiff and a fellow servant were engaged in squaring up a certain stone from which a corner had been broken. The plaintiff was holding a bull-set, a steel implement, along one of the lines marked on the stone. His fellow servant then struck the bull-set with a steel striking hammer, and a small piece of steel chipped off one corner of the face of the hammer and flew into the plaintiff's left eye, resulting eventually in the loss of both eyes. The plaintiff was employed by the defendants primarily as a blacksmith to sharpen tools, and, when not engaged in that capacity, he was to work "elsewhere as an all-round" man. His experience as a tool sharpener comprised a period of 15 years, and he had learned from his experience that steel implements were rendered brittle by overheating and overhardening in the process of manufacture or sharpening, and that, in the use of such tools, pieces of steel were liable to be broken off and fly from a hammer as well as from other tools. Prior to the accident, he had noticed numerous fire cracks or checks on the face of the hammer used by his fellow servant, and knew that it had been burned and was brittle, and that it was liable to break and chip whenever used, but he never made any complaint in regard to the defective condition of the hammer, and never made any request or suggestion that it should not be used in connection with any work that he was required to perform. He had never received from the defendants any request to continue in their service until another and suitable hammer should be supplied or any assurance that any other or different hammers would be used in connection with his work. He was not placed in a position where he was exposed by the nature of his duties to any undisclosed or unknown dangers. The precise condition of the defective hammer was not concealed from him nor the danger of using it unknown to him. *Held* (1) that, as the plaintiff fully understood and appreciated all the dangers to which he would ordinarily be exposed arising from the use of the overhardened hammer in connection with any branch of his work, he must be deemed to have voluntarily assumed the risks incident to his employment after full knowledge of the defective condition of the hammer used in connection with the service which he was required to perform; (2) that a nonsuit was properly ordered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

(Official.)

Exceptions from Supreme Judicial Court, York County, at Law.

Action on the case for personal injuries by John H. Golden against Jacob M. Ellis and others. A nonsuit was ordered, and plaintiff excepts. Exceptions overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendants, and caused by the alleged negligence of the defendants, and which injuries resulted in the loss of both of the plaintiff's eyes. Plea the general issue.

Argued before EMERY, C. J., and WHITEHOUSE, STROUT, PEABODY, CORNISH, and KING, JJ.

Fred A. Hobbs and Geo. F. & Leroy Haley, for plaintiff. Verrill, Hale & Booth and Cleaves, Waterhouse & Emery, for defendants.

WHITEHOUSE, J. This case comes to the law court on exceptions to the ruling of the presiding justice ordering a nonsuit on the plaintiff's testimony.

In the fall of 1905 the defendants were engaged in building a stone bridge across the Mousam river, at Kennebunk, in pursuance of a contract with the Boston & Maine Railroad. The plaintiff was employed to work for the defendants primarily as a blacksmith to sharpen tools, and, when not engaged in that capacity, he was to work "elsewhere as an all-round man." On the morning of October 2d, among the "all-around" duties imposed upon him, he was directed by the foreman to "square up" a certain stone from which a corner had been broken. After lining off the face of the stone with a "redwood and square," the plaintiff undertook to break off and cut the edges of the stone up to the lines marked upon it by means of a bull-set and a large striking hammer. The bull-set is a steel implement five or six inches long. One end of it, corresponding to the peen of a mason's hammer, is three-fourths of an inch thick, and suitably shaped and tempered for breaking stone. The other end, the head of the set, is left with the steel as manufactured without hardening. When duly equipped with a wooden handle, this bull-set bears a general resemblance to a hammer. The large striking hammer was a piece of steel with a head about two inches square; the corners being chamfered so as to give it an octagonal shape. The face of it was flat, and showed the fine checks or fire cracks caused by overheating in the process of manufacture. There was only one other large striking hammer used on the job.

The plaintiff was holding the bull-set along one of the lines marked on the stone, and a fellow servant called for that purpose undertook to wield the striking hammer. A light blow was first struck on the head of the bull-set for the purpose of gauging the distance, and, when the second blow was struck, a small piece of steel chipped off of one corner of the face of the hammer, and flew into the plaintiff's left eye, resulting eventually in the loss of the sight of both eyes.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is alleged that the striking hammer used on that occasion was defective and unsafe; and this action was brought by the plaintiff to recover damages for the injury suffered by him on account of the alleged failure of duty on the part of the defendants in not providing suitable tools to be used in connection with the service required of him.

The plaintiff was 46 years of age. He had worked as a stone mason for 25 years, and his experience as a tool sharpener comprised a period of 15 years. He had learned from his experience as a blacksmith that steel implements were rendered brittle by overheating and overhardening in the process of manufacture or sharpening, and that, in the use of such tools, pieces of steel were liable to be broken off and fly from the hammer as well as from other tools. A week or 10 days before the accident he put a new handle into this defective hammer, and he states in his testimony that he noticed the fire cracks or checks on the face of it, and knew it had been burned and was brittle, and that it was liable to break and chip whenever it was used. The plaintiff knew that the other striking hammer in use had a round face, while this one it has been seen had a square face; the corners being slightly chamfered. When the fellow servant came up to do the striking, the plaintiff admits that he neither inquired nor looked to see whether the hammer in his hands was the round-faced one, or the square-faced one with the fire cracks on it. He knew that it must be one or the other, but even when the striker gently laid it upon the head of the bull-set, held by the plaintiff, for the purpose of "getting the distance," the plaintiff did not look to see which one it was. He states in his testimony, it is true, that he supposed it was the good hammer that the striker was using, but he gives no reason for this assumption. For aught that appears, it was as likely to be the defective hammer as the good one. He testifies that after that piece of steel had gone into his eye, at a time when he must have been suffering severe pain, he "noticed that it was the flat-faced hammer with the cracks on it." But he admits that he afterward said to some one at the hospital that he "couldn't tell until he saw it" whether the piece of steel that flew into his eye came from the hammer or the bull-set.

With respect to the defendants' knowledge of the defective condition of the hammer, the plaintiff testifies that on one occasion, when the workmen "were all sitting around eating their dinner, somebody spoke about this hammer being in bad condition, the face of it being cracked, and the foreman said it was a new hammer when they started the job." There is no evidence that the plaintiff himself ever gave the defendants or their representative in charge of the work any information or made any complaint in regard to the defective condition of the hammer, or that he ever made any request or suggestion

that it should not be used in connection with any work that he was required to perform. It does not appear that he ever received from them any request to continue in this service until another and a suitable hammer should be supplied in place of the one alleged to be defective, nor any assurance whatever that any other or different hammers would be used in connection with the service required of him. According to the testimony, the plaintiff himself appears to have had more precise and definite knowledge in regard to the alleged defects in the hammer in question than any representative of the defendants. He states that he could plainly see "somewhere in the neighborhood of a hundred" fire checks or cracks on the face of this hammer. He was a man of mature years and a workman of large experience, both as a stone mason and as a blacksmith in sharpening tools. He knew that such fire cracks indicated overhardening and brittleness, and that, when a heavy blow is struck with such a hammer upon other steel implements, chips of steel are liable to fly from it. Even if a hammer is made of suitable material and properly tempered, it is a matter of common knowledge that, when it is used with great force upon other steel implements, small chips or scales of steel are liable to break off and fly from one implement or the other. In *Hopkinson Bridge Co. v. Burnett*, 85 Tex. 18, 19 S. W. 886, cited in 4 *Thompson on Negligence*, 4613, the "flying" or "chipping" of these scales or splinters of steel from hammers sufficiently hardened to be used in striking against steel was held to be one of the ordinary risks incident to the employment.

But, in considering the exceptions to the ordering of a nonsuit, full probative force must be given to all of the plaintiff's testimony. It is accordingly assumed that the plaintiff's grievous injury was caused by a small piece of steel which was splintered off from a defective hammer used in a proper manner by a fellow servant.

It has been seen that the plaintiff was not placed in a position where he was exposed by the nature of his duties to any undisclosed or unknown dangers. The precise condition of the defective hammer was not concealed from him, nor the danger of using it unknown to him. The implement had been in his own hands within 10 days prior to the accident, while he was fitting a new handle to it, and he admits that he then discovered those fire checks upon the face of it, which to his experienced eye were an infallible indication that the steel had been rendered brittle by overheating in the process of manufacture. The conclusion is therefore irresistible that he fully understood and appreciated all the dangers to which he would ordinarily be exposed arising from the use of an overhardened hammer in connection with any branch of his work. Under the circumstances of this case, upon a well-settled and familiar principle of law, he must,

therefore, be deemed to have voluntarily assumed the risks incident to his employment after full knowledge of the defective condition of the implement used in connection with the service which he was required to perform.

This rule of law has been forcibly illustrated and fully considered in many of the recent decisions of this court. In *Conley v. Express Co.*, 87 Me. 352, 32 Atl. 965, it is said in the opinion, on page 356 of 87 Me., on page 966 of 32 Atl.: "It is now settled law in this state that if a servant continues in the service of his employer after he has knowledge of any unsuitable appliances, in connection with which he is required to labor, and it appears that he fully comprehends and appreciates the nature and extent of the danger to which he is thereby exposed, he will be deemed to have waived the performance of the employer's obligation to furnish suitable appliances, and to have voluntarily assumed all risks incident to the service under these circumstances. Such an assumption of the risks of an employment by a servant will bar recovery independently of the principle of contributory negligence." See, also, *Cunningham v. Iron Works*, 92 Me. 501, 43 Atl. 106; *Mundie v. Hill Mfg. Co.*, 86 Me. 400, 30 Atl. 16; *Welch v. Bath Iron Works*, 98 Me. 361, 57 Atl. 88.

In 4 *Thompson on Negligence*, §§ 4707, 4708, the author says: "It is a part of this doctrine that the servant assumes the risks of known defects in machinery, tools, appliances, etc., or of improper appliances furnished for the performance of a particular task, or where no proper appliance is furnished, although the defect or danger results from the negligence of the master.

"A servant assumes the risks of injuries from simple and ordinary appliances and methods, the nature of which he understands, or which is easily understood. It is a part of this doctrine that the duty of inspection by an employer of the appliances used by his employes does not extend to the small and common tools in everyday use, of the fitness of which the employes using them may reasonably be supposed to be competent judges."

It is accordingly the opinion of the court that the nonsuit was properly ordered. The evidence presented by the plaintiff with all the inferences which the jury could justifiably have drawn from it was insufficient to support a verdict in his favor, so that it would have been the duty of the court to set aside such a verdict if it had been rendered. Under such circumstances, it is the established rule of procedure in this state that the court is not bound to submit the case to a jury, but may properly order a nonsuit. This rule of practice is too well settled to require the citation of authorities in support of it.

Exceptions overruled.

(104 Me. 184)

YOUNG v. CHANDLER.

(Supreme Judicial Court of Maine. June 3, 1908.)

1. APPEAL AND ERROR (§ 999*) — REVIEW — VERDICT.

When, on a motion to have a verdict set aside, it appears that the issues were peculiarly within the province of the jury, and the evidence shows no sufficient basis for interfering with the conclusions of the jury, the verdict will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3912; Dec. Dig. § 999.*]

2. APPEAL AND ERROR (§ 1215*)—REVERSAL—NEW TRIAL—DIRECTING VERDICT.

When, by a former decision under the evidence then presented, it has been determined that the title to certain property is in the defendant, and not in the plaintiff, then in a second trial of the same action, involving in part such property, if there is nothing in the evidence at the second trial to change the legal aspect of such title, it is proper for the presiding justice to instruct the jury to leave such property entirely out of consideration.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1215.*]

3. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

When, in an action of tort, it is apparent that the jury were not misled by the instructions of the presiding justice in reaching the conclusion that certain articles of personal property belonging to the plaintiff were intentionally abandoned by the plaintiff, and that the defendant was not chargeable with any violent act of dominion over them, exceptions to the instructions will be overruled.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1064.*]

4. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

When a verdict is for the defendant, it must be assumed that the jury were not influenced by any instruction given by the presiding justice relating to the measure of damages.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4228; Dec. Dig. § 1068.*]

(Official.)

Action in trespass by Albert A. Young against James E. Chandler. Verdict for defendant. Motion and exceptions by plaintiff overruled.

This case was formerly tried at the February term, 1906, of said superior court, and at the conclusion of the plaintiff's testimony the presiding justice ordered a verdict for the defendant, and the plaintiff excepted. The law court sustained the exceptions, set the verdict aside, and ordered a new trial. 66 Atl. 539. The case is reported in 102 Me. 251, 66 Atl. 539. The case was again tried at the April term, 1907, of said superior court. Plea, the general issue as in the former trial. Verdict for defendant. The plaintiff then filed a general motion to have the verdict set aside, and also during the trial excepted to certain instructions given to the jury by the presiding justice. Certain of the exceptions were not considered by the law court.

Argued before WHITEHOUSE, PEA-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

BODY, STROUT, SPEAR, CORNISH, and KING, JJ.

Dennis Meaher, for plaintiff. L. L. Hight and H. P. Sweetser, for defendant.

PEABODY, J. This was an action of trespass with a count also in trover; the writ being the same as in *Young v. Chandler*, 102 Me. 251, 68 Atl. 539.

Upon trial of the cause before a jury the verdict was for the defendant.

The case is before the court on motion by the plaintiff for a new trial, and on exceptions to the charge of the presiding justice.

The motion for a new trial would seem to have no sufficient basis, since the issues were peculiarly within the province of the jury.

In the decision of the court above referred to it was held that the greenhouse has become a part of the mortgage security, and by foreclosure the defendant became the owner by accession, as there was no evidence of his consent that the greenhouse should remain personal property after annexation. There being nothing in the evidence at the second trial to change the legal aspect of this title, the presiding justice properly charged the jury that, in view of this decision, they were to leave the greenhouse entirely out of consideration. The plaintiff's first exception was to that portion of the charge, and cannot be sustained.

It only remains to ascertain whether the plaintiff presents by his other exceptions any error in the charge of the presiding justice which may have prejudicially influenced the jury in their verdict.

The second exception is to that part of the charge which relates to the abandonment of certain of the property described in the writ. The evidence tended to show that, while the plaintiff was removing portions of the greenhouse from the defendant's premises, the defendant ordered him to desist, making some reference to an official badge which he wore at the time, but with no attempt to use actual force. There is some doubt whether the act of the defendant had particular reference to the day, which was Sunday, or to the particular property which the plaintiff was removing at the time, or whether it was a general prohibition against removing any of the property to which the plaintiff claimed title, but it appears that the plaintiff actually made no further attempt to remove either the remaining portions of the greenhouse or any of the compost, plants, etc., specified in the writ.

The presiding justice instructed the jury that "the law requires men to use a reasonable amount of diligence and firmness in asserting rights to their property. They cannot on the simple say-so of some one else relinquish their personal property and allow that property to go to waste and ruin. * * *

Unless his action at that time was that of an ordinarily and reasonably prudent man, a man of ordinary courage and spirit in the assertion of property rights, he could not abandon his property under those circumstances and the property be allowed to go to decay and then recover the value of it."

The presiding justice further said:

"Of course, if the circumstances were such that he foresaw that a personal collision, a personal encounter, would result, he would then be justified in abandoning the property because no man is required to break the law in order to enforce the law."

It is apparent, therefore, that the jury were not misled by these instructions in reaching the conclusion that the compost and a few of the plants and other chattels which clearly belonged to the plaintiff were intentionally abandoned by him, and that the defendant was not chargeable with any violent act of dominion over them. This applies to a very small part of the property upon which the plaintiff founds his action, since it has been already determined that the greenhouse belonged to the defendant, and uncontradicted evidence in the case tended to show that the greater part of the plants remaining on the premises had been given to the defendant's wife by the prior owner, and so were not included in the property sold by him to the plaintiff.

In an action of trespass as well as an action of trover, the wrongful act of the defendant constitutes the gist of the action. A verdict for the defendant, therefore, determines that he did not commit the acts complained of, and it must be assumed that the jury were not influenced by any instruction relating to the measure of damages.

The third, fourth, fifth, and sixth exceptions relate to damages, and need not, therefore, be considered, since the jury did not reach that question.

Motion overruled.

Exceptions overruled.

(104 Me. 156)

SMITH v. PRESTON.

(Supreme Judicial Court of Maine. April 22, 1903.)

1. NUISANCE (§ 72*) — COMMON NUISANCE — SPECIAL DAMAGES.

One who suffers special injury from a common nuisance may recover damages in an action at law from the person creating it.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. § 164; Dec. Dig. § 72.*]

2. MUNICIPAL CORPORATIONS (§ 776*) — OBSTRUCTION IN PUBLIC WAY—"NUISANCE."

An obstruction placed within the limits of a public way is a nuisance at common law as well as by statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1630; Dec. Dig. § 776.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4855-4864; vol. 8, p. 7734.]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. MUNICIPAL CORPORATIONS (§ 808*)—PROPERTY ADJOINING HIGHWAY.

One cannot use his property adjoining a public way to the injury of his neighbor's person, while rightfully traveling upon such way.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1684-1687; Dec. Dig. § 808.*]

4. MUNICIPAL CORPORATIONS (§ 809*) — OBSTRUCTING PUBLIC WAY—LIABILITY.

One who creates an obstruction in a public way is not relieved from liability for damages resulting therefrom to travelers while lawfully traveling along such way, notwithstanding that some other person has neglected his duty to remove the obstruction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1688-1694; Dec. Dig. § 809.*]

5. MUNICIPAL CORPORATIONS (§ 808*) — STREETS—DISCHARGE OF WATER.

The proprietor of land may maintain a structure thereon up to the line of a public way; but, if by that structure he intercepts and artificially collects the snow and rain which would have been harmless if allowed to reach the ground as it fell from the clouds, it is his duty to control the water so collected, and not discharge it or allow it to escape upon the public way, thereby obstructing such way.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1686; Dec. Dig. § 808.*]

6. MUNICIPAL CORPORATIONS (§ 808*) — STREETS — ICE — LIABILITY OF ABUTTING OWNER.

When a public sidewalk is obstructed by an accumulation of ice resulting from water artificially collected and discharged upon it by a defective gutter on a building, and the owner of such building has control over it as to its physical condition and repair, and a person while rightfully using the sidewalk as a traveler, and in the exercise of due care, is injured by that obstruction, such owner is liable in damages to the person so injured.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1686; Dec. Dig. § 808.*]

7. MUNICIPAL CORPORATIONS (§ 703*) — STREETS—OBSTRUCTION FOR BUSINESS PURPOSES.

The right of travelers to use public ways may be temporarily interrupted, and the traveler must submit to some inconveniences occasioned by the use of adjoining property for business purposes. Such necessary interruptions and unavoidable inconveniences are not unlawful obstructions; but, when a public sidewalk is unlawfully obstructed as the result of the neglect of the owner of a building, over which he has control, to keep his building in safe condition, such owner is liable in damages to any person injured by such obstruction.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 703.*]

8. LANDLORD AND TENANT (§ 167*)—FAILURE TO REPAIR—INJURIES TO THIRD PERSONS—LIABILITY OF LANDLORD.

Whenever an owner is bound to repair his building, and has control of it sufficient for that purpose, he, and not the tenants, is liable to a third person for damages arising from a neglect to repair. Such liability rests upon the elementary principle that the party whose neglect of duty causes the damages is responsible therefor.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 670; Dec. Dig. § 167.*]

9. LANDLORD AND TENANT (§ 167*)—ICE UPON SIDEWALK—LIABILITY OF LANDLORD.

In the case at bar, *held*, that the defendant's liability arose from the fact that he caused the obstruction, and not because an obstruction, which he did not cause, was suffered to exist on the sidewalk adjoining his property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 672, 674; Dec. Dig. § 167.*]

10. TRIAL § 252*) — INSTRUCTIONS — MATTERS NOT SUPPORTED BY EVIDENCE.

Also in the case at bar the defendant landlord requested the presiding justice to instruct the jury "that if there was any understanding that the landlord should make repairs for the tenant, if there were any defects, he would not be liable until he got notice from the tenant." The presiding justice declined to give this instruction except as previously explained. *Held*, that the case did not show that there was any understanding that the tenants were to have any care over the exterior of the building, or even to report to the defendant any defect which they might observe therein, and that the requested instruction was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

(Official.)

Exceptions from Supreme Judicial Court, Cumberland County.

Action on the case for personal injuries by Catherine Smith against John C. Preston. Verdict for plaintiff, and defendant excepts, and moves for a new trial. Motion and exceptions overruled, and judgment on the verdict.

Action on the case to recover damages for personal injuries sustained by the plaintiff February 1, 1907, and caused by the alleged negligence of the defendant. The defendant was the owner of a certain two-story building on Washington avenue, Portland, and the plaintiff claimed that a certain gutter on the outside of the defendant's building was defective and leaky, so that the water accumulated by it was wrongfully discharged upon the public sidewalk, where it froze and rendered the sidewalk dangerous, and that the accumulation of ice caused thereby was an obstruction of the sidewalk, and constituted a nuisance both at common law and by statute. The plaintiff, a woman over 80 years of age, while lawfully walking on this part of the sidewalk, slipped and fell on the ice, and fractured her left hip, and also received other bodily injuries. The plaintiff's writ contained two counts—one at common law and the other under the statute. See Rev. St. c. 22, §§ 5, 13. Plea, the general issue. Tried at the October term, 1907, Supreme Judicial Court, Cumberland county. Verdict for plaintiff for \$507.47. The defendant then filed a general motion for a new trial, and also excepted to the refusal of the presiding justice to give to the jury a certain requested instruction.

The case appears in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

Connellan & Connellan and Wm. R. Robinson, for plaintiff. D. A. Meaher, for defendant.

KING, J. On the 1st day of February, 1907, between 9 and 12 o'clock in the forenoon, the plaintiff, a lady past 80 years of age, while walking on the sidewalk on the southerly side of Washington avenue in Portland, fell and received bodily injuries. She claims that the cause of her fall was a spot of ice which had formed there by the freezing of water wrongfully conducted by the defendant from his building upon the sidewalk, and which rendered the walk dangerous. In this action for damages she has obtained a verdict, and the case is here on defendant's motion to have the verdict set aside as being against the law and evidence and upon exceptions.

The defendant's building is two stories high, gable roof, standing in the corner formed by Cumberland avenue on the west and Washington avenue on the north, with its end facing the latter avenue, and is so located that its northeast corner adjoins the sidewalk, but its northwest corner is back eight or ten feet therefrom. The building has wooden gutters, the one on the easterly side, at its street end, joining the projecting finish of the gable roof, so that this joint of intersection slightly overhangs the sidewalk.

Attached to the east side of this building, on Washington avenue, is a one-story building of the defendant, adjoining the line of the sidewalk, with its roof sloping back from the street. Both buildings were occupied by tenants, and all repairs were to be made by the defendant.

The plaintiff claimed, and introduced evidence tending to show, that the gutter on the easterly side of the two-story building was defective and leaky, and that at its northerly end over the sidewalk, there was an opening in the joint through which the water it accumulated was wrongfully discharged upon the walk where it froze, forming a dangerous accumulation of ice, that was an obstruction of the walk, and caused her injuries without fault on her part.

The defendant denied this claim, and testified that the gutter was not defective, that water was not discharged from it upon the walk, and that on the morning of the day of the accident he passed over this sidewalk, and saw there no accumulation of ice as the plaintiff alleged.

There can be little or no doubt, however, from all the evidence that there was at the time of the plaintiff's accident, and had been for some time prior thereto, a defect in the gutter through which water was unnaturally discharged upon the sidewalk, causing ice

to form thereon abreast the junction of the two buildings.

No one saw the plaintiff fall, and the defendant claims that she failed to prove due care on her part. She was found, with her hip fractured, at the place where the ice was. She says she slipped and fell on the ice. There is nothing in the case suggesting that she had any infirmity on account of which she should have refrained from using the public streets. On the other hand, it appears affirmatively that she was accustomed to travel upon the streets, and was active and spry for one of her age.

Her statement as to her conduct at the time was: "I was walking along the sidewalk as I usually do, paying attention to my business." The jury had a right to understand from that statement that she was "paying attention" to where and how she was walking. That is evidence of due care. Whether or not she did, in fact, exercise due care, was an issue for the jury. That issue they must have decided for the plaintiff, and their decision should control.

It will serve no useful purpose to incorporate here any extended review of the evidence, which is somewhat conflicting. From an examination of the whole case, we are of opinion that a jury would be warranted in finding that the sidewalk was obstructed by an accumulation of ice resulting from water artificially collected and discharged upon it by a defective gutter of the defendant's building, over which he had control as to its physical condition and repair, and that while rightfully using the sidewalk as a traveler, and in the exercise of due care, the plaintiff was injured by that obstruction.

If upon these facts and conditions the action is maintainable, then the defendant's motion for a new trial must be denied.

But, notwithstanding those facts, the defendant contends that he did not create the obstruction by any wrongful act, or cause its existence by the neglect of any duty owing by him to the plaintiff; and, furthermore, that he was a mere landlord, and not the occupant of the building, and that those in occupation as tenants are liable, if any one is liable, for the alleged obstruction.

We have already observed that the jury were warranted in finding as a fact that the building, at least that part of it including the defective gutter, was under the general care of the defendant, and that he had such control of the premises as was necessary to keep them in proper and safe condition. His own testimony established that fact. In answer to the question: "What arrangement, if any, had you made for the repairs of the two-story building?" he said: "Well, I made all repairs. When I was informed anything was needed, or if I discovered anything was out of repair, I had it fixed." He not only retained the right to make repairs, but the liability to keep the building in proper and safe

condition continued to rest upon him notwithstanding the letting.

Whenever an owner is bound to repair his building, and has control of it sufficient for that purpose, he, and not the tenants, is liable to a third person for damages arising from a neglect to repair. Such liability rests upon the elementary principle that the party whose neglect of duty causes the damages is responsible therefor. *Kirby v. Boylston Market Association*, 14 Gray (Mass.) 249, 74 Am. Dec. 682; *Shipley v. Fifty Associates*, 101 Mass. 231, 234, 3 Am. Rep. 346; *Id.*, 106 Mass. 194, 200, 8 Am. Rep. 318; *Larue v. Farren Hotel Co.*, 116 Mass. 67.

The same principle governs in actions between tenant and landlord for damages arising from defects and want of repair of the premises. See *Toole v. Beckett*, 67 Me. 544, 24 Am. Rep. 54; *Simonton v. Loring*, 68 Me. 164, 28 Am. Rep. 29; *McCarthy v. York County Savings Bank*, 74 Me. 315, 43 Am. Rep. 591; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279. In all the cases the criterion of liability is the obligation to maintain and repair with the right of control for that purpose.

As bearing upon the defendant's liability, it is also to be noticed that the duty here neglected was to repair the gutter and maintain it in a reasonably suitable condition to keep the water it collected from the sidewalk, and not merely to keep the gutter free from such obstructions of ice or snow as would be likely to occur from storms and sudden climatic changes in the winter season. The latter duty may rest upon the occupant, although the owner is bound to maintain and repair. But that is not this case. Here the neglect to repair allowed the water to fall upon the walk unnaturally. It was the defendant's neglect, because the duty to repair rested on him.

Was the defendant's failure to repair the gutter, so that the water it collected should not be discharged unnaturally upon the public way, the neglect of a duty he owed to the plaintiff?

The proprietor of land may maintain a structure thereon up to the line of a public way, but he cannot thereby unreasonably obstruct such way with impunity.

The defendant by his building intercepted and artificially collected the snow and rain which would have been harmless if allowed to reach the ground as it fell from the clouds. It was his duty to control the water so collected, and not discharge it or allow it to escape to the injury of others.

It is too well settled to need the citation of authorities that no one may artificially collect water on his own land by means of a building or otherwise, and discharge it unlawfully upon his neighbor's property upon which it would not have naturally fallen. If he does so, he is liable for the resulting damages. Neither has he the right to discharge water

so collected upon the public way where it would not have naturally fallen, if in so doing he obstructs such way. No one would contend that an abutter upon a public way would have the right to obstruct such way by discharging water thereon from his cistern. Wherein is the distinction between such case and the one before us? The same duty to refrain from obstructing the public way arises in the one case as in the other. In either case the water would be discharged upon the way unnaturally in consequence of the use made of adjoining property.

The reason why the defendant owed a duty to the plaintiff not to cause her injury by turning the water from his building upon the public way is very aptly stated in *Shipley v. Fifty Associates*, 106 Mass. 197, 8 Am. Rep. 318, in these words: "The plaintiff at the time of the accident was where she had a right to be, and was not guilty of any want of due and reasonable care. For the purpose for which she was using the sidewalk, her rights were exactly the same as if she owned the soil in fee simple. The case in our judgment depends upon the same rules, and is to be decided on the same principles, as if it raised a question between adjoining proprietors, in which the lands or buildings of one were injured by the manner in which the other had seen fit to occupy or use his own land and buildings. In contemplation of law the person is at least as much entitled to protection as the estate."

If one may not use his property to the injury of his neighbor's land, he certainly may not use it to the injury of his neighbor's person while rightfully traveling upon the public way.

The right of travelers to use the public way may be temporarily interrupted, and the traveler must submit to some inconveniences occasioned by the use of adjoining property for business purposes. Such necessary interruptions and unavoidable inconveniences are not unlawful obstructions. But in this case the jury have found that the sidewalk was unlawfully obstructed as the result of the defendant's neglect to keep his building in safe condition.

From both reason and authority the defendant must be held liable for the obstruction which caused the plaintiff's injury.

An obstruction placed within the limits of a public way is a nuisance at common law as well as by statute. *Rev. St. c. 22, § 5*; *Corthell v. Holmes*, 88 Me. 376, 34 Atl. 173. One who suffers special injury from a common nuisance may recover damages in an action at law from the person creating it. *Rev. St. c. 22, § 18*; *Holmes v. Corthell*, 89 Me. 31, 12 Atl. 730; *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482; *Dudley v. Kennedy*, 63 Me. 465; *Staples v. Dickson*, 88 Me. 362, 34 Atl. 168.

But the defendant further contends that he is not liable because it was the duty of

the occupants of the building to remove the snow and ice from the sidewalk adjoining the building. Assuming that such duty did devolve upon the occupants, we think the neglect of that duty did not discharge the defendant from his liability in this action. He who creates an obstruction in the public way is not relieved from liability for damages to travelers resulting therefrom, notwithstanding that some other person has neglected his duty to remove the obstruction. The defendant's liability here arises from the fact that he caused the obstruction, and not because an obstruction, which he did not cause, was suffered to exist on the walk adjoining his property. The motion must be denied.

The Exceptions. At the conclusion of the charge, counsel for the defendant requested the court to instruct the jury:

"That if there was an understanding that the landlord should make repairs for the tenant, if there were any defects, he would not be liable until he got notice from the tenant." To which the court replied: "I shall decline to give that, except as I have already explained."

The question whether the liability to repair was upon the defendant or his tenants under the letting was clearly presented to the jury as an issue of fact, and, as to the defendant's knowledge of the particular defect, the court said: "He would not be liable for anything which he was absolutely ignorant of, either as understanding how this gutter was originally made, or having his attention by observation called to its condition, if it seemed to be absolutely perfect as he observed it from day to day. But if he did, by his constant observation of his building, being a practical man, observe what the condition of this gutter was, having an opportunity as he passed by to see whether it was leaking or not, or whether there was ice being formed underneath it, the jury would determine whether as a matter of fact he knew of its condition, or would, by reasonable diligence, have been bound to know. So if you find that he had the control of the roof and was bound to make the repairs upon it, and that the tenants were not, then he would be liable, provided there was such a public nuisance caused by him as obstructed the sidewalk and made it dangerous at the time."

The case does not show that there was any understanding that the tenants were to have any care over the exterior of the building or even to report to the defendant any defect which they might observe therein. We think the requested instruction was properly refused. The instructions given upon the matter of notice to the defendant were as favorable as he could claim. The exceptions must be overruled. The entry is to be:

Motion and exceptions overruled.
Judgment on the verdict.

(104 Me. 126)

LITTLEFIELD et al. v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine. April 1, 1908.)

1. PLEADING (§ 189*)—MOTION TO DISMISS— DEMURRER.

At common law a motion to dismiss and a demurrer are not interchangeable.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 189.*]

2. DISMISSAL AND NONSUIT (§ 55*)—MOTION TO DISMISS—GROUNDS.

At common law a motion to dismiss can be used to abate the action only when it is apparent from the record that the court has no jurisdiction; and, when an order of dismissal is made, the action ends.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 116; Dec. Dig. § 55.*]

3. PLEADING (§ 225*)—DEMURRER—OPERATION AND EFFECT.

At common law a demurrer admits the jurisdiction, but attacks the pleadings; and, if the demurrer be sustained, the action is not thereby dismissed, but there may still be opportunity for amendment, and, until further steps are taken, the action remains on the docket.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 576; Dec. Dig. § 225.*]

4. DISMISSAL AND NONSUIT (§ 58*)—MOTIONS TO DISMISS—DEFECTS IN PLEADING.

An action at common law is not to be dismissed for mere defects in pleading that are amendable, or which may be cured by verdict, if it appears that the court has jurisdiction and the plaintiff has stated a good cause of action. The defendant should demur, if he wishes to raise objections to such defects.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 134, 136, 137; Dec. Dig. § 58.*]

5. DISMISSAL AND NONSUIT (§ 55*)—MOTION TO DISMISS—STATUTORY PROCEEDINGS.

In statutory proceedings, where the jurisdiction of the court rests upon allegation and proof of statutory requirements, a motion to dismiss may serve the purpose of a demurrer, and the motion will lie where it appears, assuming the allegations to be true, that the court has no jurisdiction.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 115; Dec. Dig. § 55.*]

6. DISMISSAL AND NONSUIT (§ 53*)—MOTIONS TO DISMISS—PROOF DEHORS THE WRIT.

A motion to dismiss does not lie when to support it or resist it proof is necessary dehors the writ.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 107; Dec. Dig. § 53.*]

7. REPLEVIN (§ 85*)—DECLARATION—MOTION TO DISMISS—GROUNDS.

In a common-law action of replevin, a motion to dismiss does not lie when the alleged reasons for dismissal are: (1) Insufficient description of the property taken; (2) want of allegation of ownership or right of possession in the plaintiff; (3) want of allegation of demand before suit; (4) want of allegation of value, but such objections should be raised by demurrer, if raised at all, as they are mere defects in pleading which can be cured by amendment or verdict, and do not go to the jurisdiction of the court.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 85.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. REPLEVIN (§ 85*)—MOTION TO DISMISS—SUFFICIENCY OF BOND.

In a common-law action of replevin, a motion to dismiss the action for the alleged reason that the bond is not signed by sufficient sureties will not be sustained, although the objection comes within the scope of the motion, when it appears that on its face the bond is in due form and sufficient.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 329; Dec. Dig. § 85.*]

9. REPLEVIN (§ 58*)—ALLEGATION OF OWNERSHIP—SUFFICIENCY.

In an action of replevin, an allegation that the goods "belonged to the plaintiff" is a sufficient averment of ownership.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 211; Dec. Dig. § 58.*]

10. REPLEVIN (§ 61*)—ALLEGATION OF DEMAND—NECESSITY.

In an action of replevin, demand is a matter of proof, and not of pleading.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 223; Dec. Dig. § 61.*]

11. REPLEVIN (§ 59*)—ALLEGATION OF VALUE—NECESSITY.

In an action of replevin, the allegation of value is unnecessary; and, even if required, an averment in the proviso that the plaintiff gave bond in a sum certain, "being twice the value of said goods and chattels," is sufficient.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 215-218; Dec. Dig. § 59.*]

12. REPLEVIN (§ 57*)—DECLARATION—SUFFICIENCY.

In the case at bar, *held*, that the declaration follows exactly the form of replevin writ established by St. 1821, p. 312, c. 63, § 9, and in general use in this state for more than 80 years.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 57.*]

13. REPLEVIN (§ 20*)—TIME TO SUE—PREMATURE ACTION.

When a replevin writ is made provisionally to be used only in case of the refusal of the defendant to surrender the property after demand, and is not served until after demand and refusal, the action is not prematurely brought.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 20.*]

14. RECEIVERS (§ 173*)—AUTHORITY—REPLEVIN.

When receivers of a street railway company have been duly appointed, with express authority "to prosecute and maintain any suits at law or in equity for the recovery, preservation, or protection" of the property of the railway company, no special decree is needed in order to authorize such receivers to prosecute and maintain an action of replevin for the recovery of personal property of the railway company, alleged to be unlawfully taken and detained by a defendant.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 173.*]

(Official.)

Exceptions from Supreme Judicial Court, Knox County.

Replevin by A. S. Littlefield and others, as receivers of the Rockland, South Thomaston & Owls Head Street Railway against the Maine Central Railroad Company. Defendant's motion to dismiss was overruled, and it excepts. The case was also brought before the Supreme Judicial Court on a report of

the evidence. Exceptions overruled. Judgment for plaintiffs.

Action of replevin brought by the plaintiffs as receivers of the Rockland, South Thomaston & Owls Head Street Railway for one reel of copper trolley wire alleged to have been taken and detained by the defendant. The plaintiffs' writ and declaration were as follows:

"State of Maine, Knox—ss.

"To the Sheriff of Our County of Knox, or His Deputy—Greeting:

"We commend you that you replevy the goods and chattels following, viz.: One reel 4-O grooved copper trolley wire belonging to A. S. Littlefield, S. T. Kimball, both of Rockland, and J. E. Moore, of Thomaston, Knox county, Me., as receivers of the Rockland, South Thomaston & Owls Head Railway, now taken and detained by Maine Central Railroad Company in Rockland aforesaid, and them deliver unto the said Littlefield, Kimball, and Moore, receivers, provided the same are not taken and detained upon mesne process, warrant of distress, or upon execution as the property of said Littlefield, Kimball, and Moore, receivers, and summon the said Maine Central Railroad Company that it may appear before our justices of our Supreme Judicial Court, next to be holden at Rockland, within and for the county of Knox, on the 1st Tuesday of April next, to answer unto the said Littlefield, Kimball, and Moore, receivers, in a plea of replevin, for that the said Maine Central Railroad Company, on the 1st day of March at said Rockland unlawfully, and without any justifiable cause, took the goods and chattels of the said Littlefield, Kimball, and Moore, receivers, as aforesaid, and them unlawfully detained to this day, to the damage of the said Littlefield, Kimball, and Moore, receivers, as they say, the sum of \$500; provided, they the said Littlefield, Kimball, and Moore as receivers shall give bond to the said Maine Central Railroad Company with sufficient surety, or sureties, in the sum of \$1,000, being twice the value of the said goods and chattels, to prosecute the said replevin to final judgment, and to pay such damages and costs as the said Maine Central Railroad Company shall recover against them, and also to return and restore the same goods and chattels, in like good order and condition as when taken, in case such shall be the final judgment; and have you there this writ with your doings therein, together with the bond you shall take.

"Witness, Lucillius A. Emery, Chief Justice of our Supreme Judicial Court at Rockland, the 1st day of March, A. D. 1907.

"Gilford B. Butler, Clerk."

A bond to the defendant, as required by the writ, for the sum of \$1,000, "being twice the value of said goods and chattels," was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

duly executed by the plaintiffs as principals, and by the National Surety Company, "a corporation duly organized by law and having an office at said Rockland," as surety. See Rev. St. c. 49, § 119.

The writ was duly entered at the April term, 1907, Supreme Judicial Court, Knox county, at which time the defendant filed a motion to dismiss the action for the following reasons:

"First. Because the goods and chattels mentioned, and which the officer was commanded to take, are not definitely or sufficiently described.

"Second. Because the plaintiffs are not named as owners, or that they have or had a right of possession to the articles named.

"Third. Because there is no averment in the writ of a demand having been made upon the defendant before this action was commenced, or that said article was tortiously or unjustly taken or detained.

"Fourth. Because there is no averment or statement in the writ of the value of the article alleged to have been taken and detained.

"Fifth. Because the bond is not signed with sufficient sureties.

"Wherefore the defendant prays judgment of said writ, and for a return of the goods and chattels therein named."

This motion was overruled, and the defendant excepted. The action was then continued to the September term, 1907, of said court, at which time it came on for trial. The defendant pleaded the general issue with brief statement as follows:

"And said defendant, by brief statement of its further defense, says that the goods and chattels, viz., the coil of wire mentioned in plaintiffs' writ, were not, at the time of the issuing of said writ, owned or possessed by the plaintiffs, nor were said goods and chattels ever owned or possessed by the plaintiffs, and neither were they then or now entitled to the possession thereof as receivers or otherwise.

"And the defendant further says that, at the time of the issuing and service of said writ, C. Gardner Chalmers, of Bangor, was the owner thereof, but before that time said Chalmers had deposited with and intrusted to the defendant said coil of wire for shipment, whereby, and by reason whereof, the defendant became the owner thereof pro hoc vice, and the same was then and there rightfully in its possession, and was then and there wrongfully and illegally taken therefrom, and are in law entitled to a judgment for a return thereof to it."

At the conclusion of the evidence it was agreed that the case should be reported to the law court for decision "upon so much of the evidence as is legally admissible; the law court to render such judgment as the law and the legal evidence require." It was also agreed that the defendant's exceptions to the overruling of the motion to dismiss

should be carried to the law court as a part of the case.

It was admitted that the Rockland, South Thomaston & Owls Head Railway was duly organized as a railroad company.

Clause 3 of the original decree appointing receivers of the aforesaid Owls Head Railway reads as follows:

"Said receivers are hereby authorized and directed to take possession of all the real and personal property of said Rockland, South Thomaston & Owls Head Railway, including its line of railway, its equipment, franchise rights, and including all deeds, books, vouchers, accounts, contracts, papers and documents. Said receivers shall preserve, manage and care for said property, may employ all necessary servants, agents and employes, shall collect and receive all money due or that may hereafter become due to said company from whatever source and shall pay all wages and caring for said property. Said receivers are authorized to prosecute and maintain any suits at law or in equity for the recovery, preservation or protection of said property."

All the material facts appear in the opinion, and in *Chalmers v. Littlefield et al.*, 103 Me. 271, 69 Atl. 100.

Argued before WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

J. E. Moore, A. S. Littlefield, and S. T. Kimball, for plaintiff. D. N. Mortland, for defendants.

CORNISH, J. This is an action of replevin for one reel of copper trolley wire, a part of a quantity purchased by the Rockland, South Thomaston & Owls Head Railway, for use in the construction of a street railway from the Rockland Line to Crescent Beach and Owls Head.

The plaintiffs claim title as receivers of said railway. The defendant denies the title of the plaintiffs, and sets up right of possession in itself as bailee of C. Gordon Chalmers, who claims ownership by virtue of an attachment, in an action of assumpsit brought by him against the corporation July 12, 1904, and an execution sale thereon made June 14, 1906. The case is before this court on defendant's exceptions to the overruling of its motion to dismiss, and also on a report of the evidence.

1. Motion to dismiss.

The defendant alleges five grounds for dismissal, four of which should have been raised, if at all, by demurrer to the declaration, and not by a motion to dismiss. These are: Insufficient description of property taken; want of allegation of ownership, or right of possession in the plaintiffs; want of allegation of demand before suit; and want of allegation of value. It is familiar law that a motion to dismiss will lie only when it is apparent on the record that the court has no jurisdiction, as in case of want of indorser to

an original writ (*Clapp v. Balch*, 3 Me. 216; *Pressey v. Snow*, 81 Me. 288, 17 Atl. 71), or of writ running without warrant against the body of the defendant (*Cook v. Lothrop*, 18 Me. 200), or of want of service (*Searles v. Hardy*, 75 Me. 461), and analogous cases. But an action at law is not to be dismissed, if it appears that the court has jurisdiction, and the plaintiff has stated a good cause of action, for mere defects in pleading that are amendable or may be cured by verdict. The defendant should demur if he wishes to raise objections to such defects. A motion to dismiss and a demurrer are not interchangeable. The former can be used to abate an action only when it is apparent from the record that the court has no jurisdiction. The latter admits the jurisdiction, but attacks the pleadings. An order of dismissal is a finality. The action ends. Not so with the sustaining of a demurrer. There may still be opportunity for amendment, and until further steps are taken, the action remains on the docket.

In statutory proceedings, where the jurisdiction of the court rests upon allegations and proof of statutory requirements, a motion to dismiss may serve the purpose of a demurrer, and the motion will lie where it appears that, assuming the allegations to be true, the court has no jurisdiction, as in *Rines v. Portland*, 93 Me. 227, 44 Atl. 925; *Hayford, Aplt., v. Bangor*, 103 Me. 434, 69 Atl. 688. But the case at bar is the common-law action of replevin, and not one of the four reasons for dismissal under discussion goes to the jurisdiction of the court.

"A defendant cannot move for a dismissal or nonsuit for the mere insufficiency or uncertainty of the declaration or complaint, where the defects may be obviated by amendment or by giving leave to plead over, or by allowing a continuance, or where the defect may be cured by verdict" (as in *Stimpson v. Gilchrist*, 1 Me. 202, *Hutchins, Adm'r., v. Adams*, 3 Me. 174, and *Elliot v. Stuart*, 15 Me. 100). "The underlying principle, as shown by the cases is: That if trial may be had on the merits of the case, and the defects in the pleading may be amended or cured by subsequent pleas or proceedings, the action should not be dismissed." Cyc. vol. 14, pp. 440, 441.

In *Barlow v. Leavitt*, 12 Cush. (Mass.) 483, the defendant attempted to take advantage of a misjoinder of different causes of action by a motion to dismiss, and the court, in overruling the motion, said: "There is no ground for the motion to dismiss this action. The court below had jurisdiction, both of the subject-matter and of the parties. The defect, if any existed, was in the misjoinder of two separate and distinct causes of action, for each of which the law prescribes different remedies. At common law the only proper mode of taking advantage of such a defect was by a demurrer or motion in arrest of judgment. 1 Chit. Plead. 236. Under the practice act, it can be done only by demur-

rer." The Supreme Court of Vermont, in *Alexander v. School District*, 62 Vt. 273, 19 Atl. 995, noted the distinction in these words: "The motion to dismiss is sought to be maintained on the ground that the plaintiff cannot recover, as bearer, on the order set out in the specifications or bill of particulars, because it is not negotiable. This ground is entirely untenable, and wholly misconceives the nature and scope of a motion to dismiss. Such a motion is in the nature of a plea in abatement, and is not used for testing the right of recovery on the merits, but only for impeaching the correctness of the proceedings for the purpose of abating the action. Defects apparent on the face of the declaration, independent of any reference to the writ or its service, are not pleadable in abatement, nor the subject of a motion to dismiss. The proper way of taking advantage of such defects is by demurrer or motion in arrest of judgment."

As to the first four objections to the declaration, the remedy by a motion to dismiss was clearly inappropriate, and exceptions to the overruling of the motion in those particulars cannot be sustained.

We might add; however, that the objections would not be tenable even if raised on demurrer. The description is ample, within the rule laid down in *Musgrave v. Farren*, 92 Me. 198, 42 Atl. 355. The allegation that the goods "belonged to" the plaintiffs is sufficient averment of ownership. Demand is a matter of proof, and not of pleading. *Seaver v. Dingley*, 4 Me. 306; *Lewis v. Smart*, 67 Me. 206. The allegation of value is unnecessary (*Blake v. Darling*, 116 Mass. 300; *Litchman v. Potter*, 116 Mass. 371); and, if required, there is a sufficient averment in the proviso that the plaintiffs gave bond "in the sum of \$1,000, being twice the value of said goods and chattels." In fact the declaration follows exactly the form of replevin writ established by section 9, c. 63, p. 312, Laws 1821, and in general use in this state for more than 80 years.

The fifth cause of dismissal is that the bond is not signed with sufficient sureties. This objection comes within the scope of a motion to dismiss. *Wilson v. Nichols*, 29 Me. 566. But the bond is signed by the National Surety Company as surety, as authorized by Rev. St. c. 49, § 119, and the company is described as being duly organized by law and having an office at said Rockland. On its face the bond is in due form and sufficient, and a motion to dismiss does not lie, when to support it or resist it proof is necessary dehors the writ. *Chamberlain v. Lake*, 36 Me. 388; *Badger v. Towle*, 48 Me. 20; *Hunter v. Heath*, 76 Me. 219.

This ground therefore falls.

2. The case on its merits.

The rights of the parties in this action have been substantially established in the case of *Chalmers v. Littlefield et al.*, 108 Me. 271, 69 Atl. 100, where the material facts

connected with this litigation are set forth with such fullness that it is unnecessary to repeat them here. The parties in the two suits are reversed, but the issues are practically the same. In that case Mr. Chalmers attempted to hold the defendants liable in trover for the conversion of certain steel rails, which had come into their possession as receivers of the railway company, and which he claimed to own by virtue of an execution sale made after the receivers were appointed. The wire in the case at bar was sold under the same execution, and at the same time, as the rails, so that Mr. Chalmers' source of title is the same in both cases, as is also that of the receivers.

In the former case this court held that the title to this personal property passed into the custody of the receivers, who had been appointed by the court to take possession of all the property of the corporation, and to manage it for the interest of the bondholders and creditors as their rights might be made to appear; that the entire property was in custodia legis when Mr. Chalmers, without leave of court, presumed to seize and sell a part of it on the execution issued on a judgment, which was also taken after the receivers were appointed, and this the law did not permit them to do. The title of the receivers was therefore held valid, and that of Mr. Chalmers invalid, and that decision as to title is conclusive in the case at bar.

It is further contended by the defendant that the plaintiffs have not been authorized by any special decree of court to bring this suit. The answer is that no special decree was needed. The original decree of appointment was comprehensive in its terms, and among other powers conferred on the receivers was the express authority "to prosecute and maintain any suits at law or in equity for the recovery, preservation, or protection of said property." This action is in conformity with that authority. Finally the counsel claims that the defendant came lawfully into possession of this property as a common carrier, and that the action could not be maintained until there had been a proper demand and refusal, which demand should have been made at least the day previous to the service of the writ. The evidence shows that one of the plaintiffs made the writ on the morning of March 2, 1907, and, accompanied by the sheriff, went at once to the station agent and demanded the wire, which was refused, and he then directed the sheriff to serve the writ and take the property, which was done. The refusal gave the plaintiffs the right to proceed forthwith. To require a longer time to intervene might wholly defeat the plaintiffs' rights, as it would permit the property to be put beyond their reach. Where a replevin writ is made provisionally to be used only in case of the refusal of the defendant to surrender

the property, the action is not prematurely brought. *O'Neill v. Bailey*, 68 Me. 429; *Grimes v. Briggs*, 110 Mass. 446.

"A writ may be considered as purchased at any moment of the day of its date which will most accord with the truth and justice of the case." *Bank v. Mosher*, 79 Me. 242, 9 Atl. 614.

Exceptions overruled. Judgment for plaintiffs for \$1 damages and costs. Plaintiffs to keep property replevied.

(104 Me. 164)

HAZELTON v. LOCKE.

(Supreme Judicial Court of Maine. April 23, 1908.)

1. TROVER AND CONVERSION (§ 17*)—ACTIONS—PERSONS ENTITLED TO SUE.

When the manager of a life assurance society appoints an agent to canvass for applications and collect premiums on all policies obtained by him, which premiums so collected are to be paid by the agent to the manager or the society, then as between the manager and the agent the manager has a special property in the premiums collected by the agent and is entitled to receive them, and this right gives him a remedy against the agent upon his refusal to pay over the same as directed.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 17.*]

2. TROVER AND CONVERSION (§ 32*)—DECLARATION—SUFFICIENCY—DESCRIPTION OF MONEY.

In a declaration in an action of trover for the alleged conversion of money, only the same certainty is required as in indictments, and it is not necessary to set out the money verbatim; the description in a general manner being sufficient.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 194; Dec. Dig. § 32.*]

3. TROVER AND CONVERSION (§ 2*)—PROPERTY SUBJECT OF CONVERSION—CURRENCY.

Legal currency may be the subject of an action of trover, as there is nothing in the nature of money making it an improper subject of this form of action so long as it is capable of being identified, as when delivered at one time, by one act and in one mass, or when the deposit is special and the identical money is to be kept for the party making the deposit, or when wrongful possession of such property is obtained.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 2.*]

4. TROVER AND CONVERSION (§ 13*)—ACTIONS.

Where the relation of a plaintiff and defendant is that of principal and agent, it is necessary, in determining whether trover or assumpsit is the proper remedy for money collected by the agent but not turned over, to consider the distinctive quality of money as differing from other kinds of property, and the character and conduct of the agent in receiving and retaining the money collected by him.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 13.*]

5. TROVER AND CONVERSION (§ 9*)—LIABILITY OF AGENT—MONEY OF PRINCIPAL.

From its nature, the title to money passes by delivery, and its identity is lost by being changed into other money or its equivalent in the methods ordinarily used in business for its safe keeping and transmission, and an agent, unless restricted by his contract, would violate

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

no duty assumed by him by adopting these methods in dealing with the money of his principal. Mere failure to deliver such property in specie on demand would not be technical conversion, nor would the refusal to pay over its equivalent be conclusive evidence of conversion in the sense of the law of trover, but might be the ground for an action of assumpsit.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 9.*]

6. TROVER AND CONVERSION (§ 13*)—ACTIONS.

When the defendant is the agent of the plaintiff for the collection and paying over not of a single premium of insurance, but such as are payable for all policies effected by him, and he is entitled to receive as commission a certain percentage of such premiums when paid over, an action of trover by the principal might be unjust to the agent by depriving him of his right of set-off and other legal defenses.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 18.*]

7. TROVER NOT MAINTAINABLE.

In the case at bar the relation of principal and agent existed between the plaintiff and the defendant, and the principal brought an action of trover against the agent for money alleged to have been collected by the agent and converted to his own use. *Held* that, under all the circumstances of the case, the action could not be maintained.

(Official.)

Exceptions from Superior Court, Cumberland County.

Trover by Franklin H. Hazelton against Sperry H. Locke. A nonsuit was ordered, and plaintiff excepts. Exceptions overruled.

Action of trover for the alleged conversion of \$51.13 "in lawful current money of the United States," brought in the superior court, Cumberland county. For pleadings the defendant filed the general issue, together with a "special plea," interposing his discharge in bankruptcy as a defense. The case was heard before the justice of said superior court without the intervention of a jury. At the conclusion of the plaintiff's evidence, the justice ordered a nonsuit, and the plaintiff excepted. The specific defense presented by the "special plea" was that considered by the law court, but the case was decided on the questions raised by the general issue.

The case appears in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, STROUT, PEABODY, CORNISH, and KING, JJ.

Harvey D. Eaton, for plaintiff.

Llewellyn F. Hobbs, for defendant.

PEABODY, J. This was an action of trover for the conversion of \$51.13 in the money of the United States. The writ was dated July 8, 1905.

The defendant's plea was the general issue and a brief statement setting out his discharge in bankruptcy under the bankruptcy act of 1898, and that the claim, demand, debt, or action declared on was provable against his estate from which he is discharged, not being excepted by said act.

The case was tried before the justice of the

superior court for Cumberland county without the intervention of a jury.

At the conclusion of the plaintiff's evidence, upon motion of the defendant's attorney, the presiding justice ordered a nonsuit, to which ruling and action the plaintiff excepts, and the case is before this court upon the exceptions.

The following is a summary of the facts upon which the nonsuit was ordered:

The plaintiff and defendant entered into a written contract dated February 2, 1904, for transacting the business of canvassing for applications for life insurance in the Equitable Life Assurance Society of the United States, of which the plaintiff was manager for the state of Maine, upon certain specific terms, and conditions among which that the defendant was to receive commissions on the premiums under various forms of policies which were to accrue only as the premiums were paid to the plaintiff or the society in cash.

On January 10, 1905, the defendant received of George C. Fuller \$51.13 in currency, consisting of bills and silver which was for the premium on a policy of insurance issued on the life of his wife by the Equitable Life Assurance Society on the 1st day of April, 1905. The attorney for the plaintiff called on the defendant and asked him for this sum of \$51.13, also on two other occasions prior to the commencement of the action, and he declined and refused to deliver the same.

As we view the case, it is not necessary to consider the specific defense presented by the brief statement. The general issue raises the following questions:

1. The Nature of the Property as a Proper Subject of This Form of Action and the Sufficiency of its Description. As specified in the writ, the property was money in the currency of the United States, and the evidence is that it consisted of bills and silver amounting to \$51.13. Legal currency may be the subject of an action of trover. There is nothing in the nature of money making it an improper subject of this form of action so long as it is capable of being identified, as when delivered at one time, by one act and in one mass (*Burns v. Morris*, 47 Tryw. R. 485; *Royce, Allen & Co. v. Oakes*, 20 R. I. 252, 38 Atl. 371; *Walter v. Bennett*, 16 N. Y. 220; *Farrelly v. Hubbard*, 148 N. Y. 592, 43 N. E. 65; *Conaughty v. Nichols*, 42 N. Y. 83; *Vandelle v. Rohan*, 36 Misc. Rep. 239, 73 N. Y. Supp. 285; *Reeside's Executor v. Reeside*, 49 Pa. 322, 88 Am. Dec. 503; *Ringo v. Field*, 6 Ark. 43; *Wood v. Blaney*, 107 Cal. 291, 40 Pac. 428; *Michigan Carbon Works v. Schad*, 49 Hun, 605, 1 N. Y. Supp. 490; *Wallace v. Castle*, 14 Hun [N. Y.] 106; *Duguid v. Edwards*, 50 Barb. [N. Y.] 288; *G. T. R. Company v. Edwards*, 56 Barb. [N. Y.] 408; *Graves v. Dudley*, 20 N. Y. 76), or when the deposit is special and the identical money

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is to be kept for the party making the deposit, or when wrongful possession of such property is obtained (*Murphey v. Virgin*, 47 Neb. 692, 66 N. W. 652; *Donohue v. Henry*, 4 E. D. Smith [N. Y.] 162; *Coffin v. Anderson*, 4 Blackf. [Ind.] 395). In *Moody v. Keener*, 7 Port. (Ala.) 218, it was held that in actions of tort only the same certainty is required as in indictments that it was not necessary to set out the money verbatim that the description in a general manner is sufficient, and is in accordance with the decisions of this state. *Stinchfield v. Twaddle*, 81 Me. 273, 17 Atl. 66; *Manufacturing Company v. Lumber Company*, 96 Me. 537, 53 Atl. 40.

2. The Title of the Plaintiff. It is contended that the evidence shows that the money belonged to the Equitable Life Assurance Society of the United States. It appears from the evidence that the plaintiff was the manager of this society in the state of Maine, and that the money in question was a premium due to it on one of its life insurance policies. By the contract the defendant was appointed by the plaintiff to canvass for applications and to collect the premiums on all policies obtained by him, and to pay over forthwith to the plaintiff or to the assurance society. As between the parties, the plaintiff, having a special property in the premiums collected, was entitled to receive them. This right gave him a remedy against the defendant upon his refusal to pay over the same as directed. *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291.

3. In determining from the circumstances and relation of the parties whether trover or assumpsit is the proper remedy, it is necessary to consider the distinctive quality of money as differing from other kinds of property, and the character and conduct of the defendant in receiving and retaining the money in question. From its nature the title thereto passes by delivery, and its identity is lost by being changed into other money or its equivalent in the methods ordinarily used in business for its safe-keeping and transmission. An agent, unless restricted by the terms of his contract, would violate no duty assumed by him by adopting these methods in dealing with the money of his principal. Mere failure to deliver such property in specie on demand would not be technical conversion, nor would the refusal to pay over its equivalent be conclusive evidence of conversion in the sense of the law of trover, but might be the ground for an action of assumpsit. *Orton v. Butler*, 4 Eng. C. L. 224; *Hennequin v. Clews*, 111 U. S. 678, 4 Sup. Ct. 576, 28 L. Ed. 585; 1 Fed. St. Ann. 578-581 (U. S. Comp. St. 1901, p. 8428).

The defendant was the agent of the plaintiff for the collection and paying over not of a single premium of insurance, but such as were payable for all policies effected by him in his business of canvassing, and he was en-

titled to receive as commission a certain percentage of these premiums when paid over. An action of trover by the principal might, under these circumstances, be unjust to the agent by depriving him of his right of set-off and other legal defenses. *Orton v. Butler*, supra.

Exceptions overruled.

(76 N. J. L. 684)

MINSHULL v. NEW JERSEY TERMINAL R. CO.

(Court of Errors and Appeals of New Jersey. Nov. 16, 1908.)

CORPORATIONS (§ 407*)—CONTRACTS OF PRESIDENT—VALIDITY—WORK AND LABOR (§ 14*)—RESCISSION OF EXPRESS CONTRACT.

The plaintiff, who was employed by the defendant at a stated salary, testified that he was induced to decline a higher salary offered by another railroad, and to remain in the service of the defendant by a promise made by its president that, if he remained until the road was sold, he should have 2 per cent. of its bonds and \$25,000 worth of its stock. The defendant owned no stock or bonds at the time. This promise never received the assent of the executive committee nor of the board of directors, but, instead, a modified proposition was made to the plaintiff by some of the directors, which he refused to accept. The road was thereafter sold, and thereby the plaintiff's services ended. His salary under his old contract was paid. In an action against the railroad company for breach of a contract to deliver the bonds and stock, *held*, first, that the president had no authority as such to make the alleged promise, and, in the absence of any ratification of it by the directors, it did not bind the defending company; *held*, secondly, that there could be no recovery quantum meruit because the old contract remained in force, not having been rescinded by a subsequent agreement.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1616; Dec. Dig. § 407; **Work and Labor*, Cent. Dig. § 29; Dec. Dig. § 14.*]

(Syllabus by the Court.)

Error to Supreme Court.

Action by George B. Minshull against the New Jersey Terminal Railroad Company. From a judgment of nonsuit, plaintiff brings error. Affirmed.

C. Frank Kircker and John B. Humphreys, for plaintiff in error. Gilbert Collins, for defendant in error.

REED, J. This writ of error brings up a judgment of nonsuit. It appears that Mr. Minshull, the plaintiff, had been employed by the New Jersey Terminal Railroad Company at a salary of \$175 a month. In July, 1905, he received an offer from the Lehigh Valley Railroad Company to enter its services at a salary of \$200 a month. He spoke to Mr. Savage, the president of the defending company, about this offer, and told him that he (Minshull) would refuse the offer of the Lehigh Valley Railroad Company, and remain in the service of the defendant until the latter sold its road, if the defendant, in addition to his then salary, would

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

give him 2 per cent. of its bonds and \$25,000 par value of its stock. Mr. Minshull testified that Mr. Savage told him that he would let him know in a day or two, and that Mr. Savage afterward told him that his offer was accepted, and that when the Messrs. Corbin, who were then away on their vacation, returned, the necessary bonds and stock would be provided for. It is to be observed that all the stock of the defending company was already issued and owned by 10 persons, and all the bonds had also been issued. After the conversation with Mr. Savage, the plaintiff remained in the service of the defendant until July, 1905, when the control of the New Jersey Terminal Company was sold to the Central Railroad of New Jersey. This sale terminated the services of the plaintiff. His salary of \$175 a month has been paid. The 2 per cent. of the bonds, and the \$25,000 worth of stock has never been delivered to the plaintiff. This action was brought for the breach of the alleged contract to deliver to plaintiff the stock and bonds just mentioned.

That the plaintiff cannot stand upon his conversation with Mr. Savage, the president of the defending company, to establish a contract with the company, seems manifest. The president was invested with no authority to bargain that the company should go into the market and buy stocks and bonds for the purpose of paying an increased compensation to one of the company's servants. Indeed, the plaintiff does not put his case upon the existence of any such authority in the president. His point is that the executive committee, or the directors of the New Jersey Terminal Company, acquiesced in the bargain entered into by the president, and in this manner bound the corporation to its fulfillment. The executive committee consisted of Mr. Savage, Mr. William H., and Mr. Charles L. Corbin. Mr. Minshull admits that he never had any conversation concerning this bargain with Mr. Charles L. Corbin. Respecting his connection with Mr. W. H. Corbin, it appears conclusively that the latter was never informed by Minshull of the terms upon which, as he claims, Savage promised to retain him; and, if Mr. W. H. Corbin learned of these terms from any other source, it conclusively appears that he never assented to them.

It does appear that on August 8, 1904, Mr. Savage wrote to Mr. W. H. Corbin concerning the offer made to Minshull, and said: "I think Minshull would be willing to stay at the same salary, with at least 2 per cent. of the bonds, and such proportion of the stock as we may agree upon. I rather imagine he wants \$25,000.00." To this letter Mr. Corbin replied, fixing a meeting at Jersey City for the next Friday. The first meeting between Mr. W. H. Corbin and Minshull was at Jersey City. Mr. Minshull says that Mr. Corbin said to him at that meeting that he "thought they would be able to do as

well by him as the L. V. R. R. Co., or any one else." Minshull says: "I told them that was something that had already been settled between the president and myself, and that the offer of the L. V. R. R. Co. had been declined." He says, "Mr. Corbin assured me that in his judgment I had made no mistake in staying with the Terminal Company, and handed me a draft of an agreement, and requested that I look it over, and if it was entirely satisfactory, to hand it to Mr. Savage." This paper was the draft of a contract between Minshull on the one hand, and Mr. Savage and four others on the other hand. It purported to bind Minshull to remain in the service of the company for five years. In addition to the salary then paid by the terminal company, it was to deposit with a trust company \$5,000 in bonds at par and \$20,000 in par value of stock. Each year of the five-year period the trust company was to deliver to Minshull one \$1,000 bond and certificates of shares of stock of par value of \$4,000. This was the only agreement to which Mr. Corbin had thus far indicated his willingness to give his approval. This paper was not satisfactory to Mr. Minshull, and thereafter the terms of this writing were slightly modified by a second writing, which was also unsatisfactory to the plaintiff; so, when the road was sold out in July, 1905, there had been no contract entered into between Minshull and the executive committee, because, so far as concerned the Messrs. Corbin, no terms had been agreed upon, and they constituted a majority of the committee.

What is true of Minshull's relations with the executive committee is also true of his relations with the board of directors. This board consisted of the members of the executive committee and four others. Two of these four knew of the negotiations with Minshull, and one of them, Mr. Houston, signed the second paper which was drafted, but, as already stated, was never accepted by Mr. Minshull. The other two of the four directors, so far as appears, had no knowledge of the negotiations. From these facts it appears that no right of action for a breach or of any specific contract exists in favor of the plaintiff. Nor is it perceived upon what ground he can sustain his alleged right to recover on a quantum meruit. The contract existing between Mr. Minshull and the defendant in July, 1904, was that he was to receive \$175 a month for his services. There was not a moment from this date until Mr. Minshull left the company's employ in July, 1905, that he was not entitled to recover this amount. The railroad company could not claim that he was bound to receive less than \$175 a month, although a jury might find that his services were worth less. This situation exists because the contract under which Minshull had been serving previous to July, 1904, was in no way rescinded. The rights of both parties were

measured by its terms until that contract ceased to exist. It continued to exist unless a substituted contract took its place and thus ended it. But the promise of Mr. Savage, if made, being beyond his authority to bind the defendants, and being never ratified by them, the negotiations between the parties never became a new contract, and so the old contract remains in force until the end of the plaintiff's services.

There was no error in directing a nonsuit.

(77 N. J. L. 188).

EGGERS et al. v. MAYOR, ETC., OF CITY OF NEWARK et al.

(Supreme Court of New Jersey. Dec. 30, 1908.)

1. ACTION (§ 7*)—INTERESTED PARTY—MOTIVES.

If a party to a cause is asserting a legal right in a lawful manner, his motives and the underlying reasons for his action are immaterial in law.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 8; Dec. Dig. § 7.*]

2. MUNICIPAL CORPORATIONS (§ 106*)—ORDINANCES—SUSPENSION OF BY-LAW—ADVERTISING.

The by-law adopted by the board of street and water commissioners of the city of Newark, pursuant to legislative authority, which by-law requires advertisement between first and second reading of ordinances not based on "notice of intention," could not, at the time of action by the said board on the ordinance brought up in this case, be suspended so as to render advertisement unnecessary and permit the introduction and passage of the ordinance at the same meeting.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 226; Dec. Dig. § 106.*]

(Syllabus by the Court.)

Certiorari by Augustus F. Eggers and R. Arthur Heller against the Mayor and Common Council of the City of Newark and others to review an ordinance of the board of street and water commissioners. Ordinance set aside.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

Chandler W. Riker and Francis Child, for prosecutors. Frank Bergen and R. V. Lindabury, for North Jersey St. Ry. Co. and Consolidated Traction Co. Malcolm MacLear, for other defendants.

PARKER, J. This writ brings up for review an ordinance of the board of street and water commissioners of the city of Newark, entitled, "An ordinance validating and confirming a certain contract or agreement made on the seventeenth day of January, 1905, by the mayor of the city of Newark and the city counsel of the said city, on behalf of the said city and the Consolidated Traction Company and the North Jersey Street Railway Company, lessee, providing for and defining the terms and conditions upon which the lines

of street railways owned or operated by the said street railway companies in any territory heretofore or hereafter annexed to the said city of Newark shall be operated; and further providing and defining the manner in which certain gross receipts provided for in a certain ordinance passed July 13, 1893, entitled, 'An ordinance to authorize and empower the Consolidated Traction Company, a corporation incorporated under the laws of the state of New Jersey, to locate, construct, operate and maintain street railways and appurtenances over and through certain streets, avenues and highways in the city of Newark,' shall be computed and determined," passed by the board of street and water commissioners on the 19th day of January, A. D. 1905, and approved by the mayor of said city on the 20th day of January, A. D. 1905. The contract recited in this somewhat lengthy title is dependent on the ordinance for its validity. For an understanding of the scope and effect of the contract and ordinance, a short outline of the matters leading up to the contract may as well be presented here. As far back as 1890, in the early days of electric street railways, the city of Newark required of the railway company, asking permission to operate such railway in the streets, a payment, in addition to general taxes and existing license fees, of "five per cent. of the gross earnings received from passenger traffic within the city limits from lines on which electricity is used as a motive power." Similar action by ordinance was taken afterward from time to time with respect to other lines, especially in 1892, in the case of the Newark & South Orange Railway Company, when the same language as quoted was used; and in 1893, in the case of the Consolidated Traction Company, when the 5 per cent. provisions of the ordinance of 1892 were expressly made applicable by citation and reference. But difficulties soon arose, due to the facts that many car lines already extended beyond the city limits, and others from time to time were so extended, and the parties disagreed as to the interpretation of the clause in question. In addition to this, new territory was added from time to time, by absorption of other municipalities which themselves had agreements with the car lines; and finally the street railroads themselves were all merged into or acquired by the North Jersey Street Railway. Settlements were made from time to time by agreement between the city and the companies as to amounts then due, but no basis was fixed for ascertaining these amounts in the future. To accomplish this, the contract and ordinance of 1905 were drafted by joint action of counsel for the city and the railway company, and after informal conferences the contract was executed by the North Jersey Street Railway Company and its counsel, and signed by the mayor of Newark and the city counsel, and the ordi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

nance was presented to the board of street and water commissioners at a meeting on January 18, 1905, and put through three readings and final passage at the one meeting. It is this action which prosecutors attack.

It is objected at the outset that prosecutors have no legitimate standing. It appears by the proof that prosecutor Eggers was president of the board of street and water commissioners at the time the ordinance in question was passed, was present at the meeting and voted for it, and the claim is made that this estops him from attacking it. It also appears that on December 29, 1905, the common council directed the institution of proceedings and the employment of special counsel to set aside the agreement and ordinance in question, such proceedings to be brought "in the name of the city or otherwise," and that the other prosecutor, Heller, appeared as such at the suggestion of such special counsel, assumed no financial responsibility, and employed no counsel in his own behalf. We find nothing in the attack on Mr. Heller's status that bars him from prosecuting. As a party, he is responsible to the defendants for costs, if defeated; and as he appears voluntarily, and thereby assumes that responsibility, neither his motive, nor the reason for his action, nor the question how his counsel are to be paid, is a material inquiry, if he is asserting a legal right in a lawful manner. *Davis v. Flagg*, 35 N. J. Eq. 491; *Hodge v. U. S. Steel Corporation*, 64 N. J. Eq. 111, 53 Atl. 601. If this be the case as to Heller, the status of Eggers becomes an academic question.

But it is further objected that a mere taxpayer as such is not entitled to question the ordinance brought up by this writ, because it does not appear that he suffers any special injury from the proceedings under review. Counsel rely on the case of *Jersey City v. Traphagen*, 53 N. J. Law, 434, 22 Atl. 190, as controlling in this case; but, if it can be said that the present complaint falls within the lines of the *Traphagen* Case, the question is settled by the later cases of *Oliver v. Jersey City*, 63 N. J. Law, 96, 42 Atl. 782, in which the opinion of the Supreme Court on this point was expressly approved by the Court of Errors and Appeals in 63 N. J. Law, 634, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228, on error; and *Rehill v. East Newark*, 73 N. J. Law, 220, 222, 63 Atl. 81. For reasons appearing more fully elsewhere in this opinion, the ordinance directly affects the revenues of the city, and, while there may perhaps be room for dispute as to whether its net results in the future will be financially injurious or beneficial to the city, there can be no question that by it important and valuable rights of the city, both present and prospective, are surrendered. We are clearly of opinion therefore that the municipal action is of the character that entitles a taxpayer to intervene and question its regu-

larity. And on this branch of the case the first reason advanced by prosecutors seems decisive, viz., that the ordinance was not legally passed, and for the reason that its attempted passage by the board of street and water commissioners was in violation of a by-law of that body, which reads as follows: "Every ordinance shall be read by the clerk when presented, and shall be ordered to a second reading; but no ordinance shall have a second reading at the meeting at which it was presented or reported to the board, without the assent of two-thirds of the members present. Nor shall any ordinance have a third reading at the meeting at which it is presented without the assent of two-thirds of the members present. All ordinances except those which are based on a published notice of intention shall, between their first and second readings, be published at least five times in at least two of the approved newspapers designated by the Board." The ordinance fell within the last clause, but no publication was had, as required in that clause. On the contrary, the ordinance was read three times, put on its final passage, and passed, all at the one meeting. The defendant companies undertake to meet this criticism in two ways. They say, first, that the proceeding was validated by a "suspension of the rules." The minutes show that Commissioner Ballard asked unanimous consent for the introduction of the ordinance, which was given, and the ordinance introduced and "read for the first time, and on motion the rules were suspended, and the ordinance was taken up and read for a second time, and there being no amendments passed second reading and was ordered to a third and final reading by a unanimous vote. * * * Commissioner Ballard moved that we suspend section 2 of chapter 15 of the by-laws for the purpose of giving this ordinance a third and final reading, which motion was unanimously passed. The ordinance was taken up and read for a third time and passed a third and final reading by a unanimous vote."

There is some confusion in the case on the question whether section 2 of chapter 15 is the section quoted, or whether it is section 2 of chapter 16. The matter is explained by the allegation of counsel for the defendant companies that a new edition of the by-laws, revised in March, 1905, after the meeting in question, was introduced in evidence by prosecutors as the by-laws in force at the time, instead of the previous edition; and a printed book, not put in evidence but purporting to be the by-laws of 1903 and in force in January, 1905, was submitted by defendants' counsel on the argument. A comparison of the two compilations show that they are identical with the exception of an additional chapter interpolated in the revision of 1905 so that chapters 14 and 15 of the old by-laws became chapters 15 and 16 respectively of the new ones. The edition of 1905 was tes-

tified to without objection or challenge, as that in force in January, 1905. If this be so, then section 2 of chapter 15 of that edition, relating to inspection of public works, had no bearing at all on the passage of an ordinance, and its suspension, if effective, was useless. If, on the other hand, we accept the assertion of defendants' counsel that section 2 of chapter 15 of the old edition (16 of new edition) was referred to in the motion, we find it as above quoted, and the question before us is whether there was a valid suspension of its provisions. We think not. By the first section of the act constituting the board (P. L. 1891, p. 249; Gen. St. 1895, pp. 465-467, incl.), it was enacted that they "may make, establish, alter, modify or repeal such by-laws, rules and regulations, and pass such resolutions for the government of the proceedings of such board * * * and the transaction of its business, as such board may deem advisable." Pursuant to this provision, the by-laws already referred to were adopted, and constituted the working regulations governing its action so far as not regulated by the higher authority of the statute; and, as the powers given by that statute do not include the power to suspend the by-laws, but only to alter, modify, or repeal them, it may well be doubted whether it would be competent to provide in the by-laws themselves for their temporary suspension, and still less to suspend them, in the absence of such provision. But on examination of the by-laws themselves we find no authority for suspending the provisions relating to passage of ordinances. By the last chapter, they may be amended at any regular meeting by affirmative vote of three members, on written notice given at the previous regular meeting. Chapter 16 of the 1903 edition (17 of that of 1905) is entitled "Rules of Order" and embodies regulations as to the order of business and conduct of meetings customary in such cases. Rule 23 of this chapter reads as follows: "No departure from the regular order of business nor suspension of any rule, shall be allowed, except by the acquiescence of a majority of the whole number of commissioners of the board." This rule is invoked by defendants as authorizing the suspension of section 2 of chapter 15 (16), requiring publication of ordinances between first and second readings; but in our view it refers only to the "Rules of Order" of which it is one, and not to the other by-laws. If this were not so, it would be practicable by a vote of three at any meeting, without notice, to nullify the fundamental provisions relating to the permanent officers and their duties, management of finances, giving out of contracts for public improvements, and payments for same, bonds of officials and employes, and so on. All these matters, as also the provisions relating to the passage of ordinances, are the subject of separate chapters, and properly so, as they bear on the interests of the public and not merely on the con-

venience of handling the business of a meeting; and it is evident that, if they can be rendered nugatory by the suspension of a mere rule of order, the by-laws are little more than a suggestion, instead of being, as they should be, a set of regulations for the transaction of public business by a public body, on which regulations the public itself has a right to rely. The more radical proposition is also advanced that, as the vote was unanimous to suspend the by-law and pass the ordinance, no one can be heard to complain; but this likewise loses sight of the right of the public to expect that ordinances, involving as they do the interests of the public, shall be enacted in due form as provided by law, and that part of that law is the regulations adopted and promulgated by the legislating body. The ordinance in question was one in which the public were vitally interested. It involved the privileges in the streets of a vast system of street car lines, the terms and method of their payment for such privileges, the applicability of those terms to future lines within the existing city limits, and present and future lines in territory which might be subsequently annexed, and the perpetuation of certain limited franchises; thus tying the hands of future boards in their dealings with the street railroads and surrendering claims previously asserted as valid. It is said, and may be true, that valuable concessions were made in return by the railroads to the city; but this in no way disproves the facts that the transaction was one of very great importance to the city and its people, and that its revenues and the right to use of its streets were involved, for both present and future. Public rights may not be dealt with in such offhand fashion. It is doubtless true, as claimed, that very careful consideration was given to this ordinance and the contract it purports to ratify, both before and at the meeting, by the commissioners themselves and other city officials; but this again does not answer the proposition that the public have a right to rely on the pursuit of the orderly course of procedure as to passage of ordinances, as laid down in the by-laws of the board. In *Hicks v. Long Branch Commission*, 69 N. J. Law, 300, 54 Atl. 568, 55 Atl. 250, the Court of Errors and Appeals, reversing the Supreme Court, held that a resolution involving the expenditure of money should be set aside for mere failure to comply with a rule requiring the yeas and nays to be recorded, basing the decision on the right of the public to know the votes of individual members and to hold them accountable therefor. So in this case, if the ordinance had been advertised as required by the by-laws, and the public thereby apprised of what was contemplated, material benefit to the city might have resulted. In any event, by nonpublication the citizens and taxpayers were deprived of their right to know what was being done and to express their views thereon to their legislative agents.

Our conclusion therefore is that the by-law requiring advertisement of this ordinance between first and second readings was disregarded, and was not and could not be suspended by the action that was taken, and that the ordinance was in consequence not legally passed, and for that reason must be set aside.

This conclusion renders it unnecessary to discuss the other reasons advanced.

(75 N. J. E. 197)

In re DEGNAN.

(Prerogative Court of New Jersey. Dec. 7, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 17*)—GRANT OF LETTERS—PERSONS ENTITLED.

The husband of a married woman dying intestate is entitled to administration upon her estate, but if he be dead, or does not apply, then the grant of letters must be to her next of kin, unless there be some personally disqualifying objection to the applicant, and the probate court has no discretion in the matter, and cannot ignore the claims of the persons mentioned; their right to administer in the respective cases being paramount.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 44, 45; Dec. Dig. § 17.*]

2. DESCENT AND DISTRIBUTION (§ 52*)—CHOSES IN ACTION—RIGHT OF ADMINISTRATION.

Choses in action, left by a wife dying intestate, pass to her administrator, who may be her husband, but, if another shall administer, such administrator will hold her choses in action, as well as her personality in specie, after the payment of her debts, in trust for the benefit of her husband if he be living, or for his representative if he be dead; the rule being that the right of the husband to the personal property left by the wife upon her death intestate does not depend upon his conversion or reduction of the same to his own use or possession after her death.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 135-171; Dec. Dig. § 52.*]

(Syllabus by the Court.)

Appeal from Orphans' Court, Hudson County.

Application of Patrick Degnan for letters of administration on the estate of Nellie Moran, deceased. From an order granting letters, and ordering certain assets paid to the administrator, Patrick Degnan appeals. Reversed.

Edward Kenny, for appellant. Joseph M. Branegan, for respondent.

WALKER, Vice Ordinary. This is an appeal from an order of the Hudson county orphans' court, made on June 12, 1908, in which it was decreed that the title and interest in certain shares of a building and loan association are part of the assets of the estate of John Moran, deceased, and that the association shall pay, or cause to be paid, or credit the sum due upon them, to the executors of the estate of the late John Moran.

The facts of the case are these: On January 13, 1908, Patrick Degnan presented a verified petition to the surrogate of the county of Hudson, in which he showed that he was a brother of Nellie Moran, who departed this life intestate September 19, 1907; that she left her surviving her husband, John Moran, and the petitioner, and no other relatives; that John Moran died December 22, 1907; that he never took out letters of administration on the estate of his wife, and never reduced her property into his possession; that the only property of which she died possessed was five shares of the capital stock of the People's Building & Loan Association of the town of Harrison, which were of the value of \$800 as nearly as he could ascertain, and therefore he applied for administration of her estate. On January 29, 1908, the Rev. Thomas A. Conroy presented a verified petition to the surrogate of the county of Hudson, in which he showed that Nellie Moran departed this life intestate, as set forth in her brother's petition, and left her surviving John Moran, her husband, who died December 22, 1907, and that he, the petitioner, was the executor of the last will and testament of John Moran, appointed as such on January 8, 1908; that the intestate (Nellie Moran) was possessed of personal property to the value of \$800 as nearly as he could ascertain, and therefore he applied for letters of administration of her estate. On February 5, 1908, a citation was issued out of the Hudson county orphans' court, directed to the Rev. Thomas A. Conroy and Patrick Degnan, commanding them to appear before that court on February 21st, then instant, to answer unto the applications for letters of administration on the estate of Nellie Moran, deceased. This process was not in proper form. It required each applicant to answer to his own, as well as his rival claimant's, petition for administration. It should have recited that, a dispute having arisen as to the right of administration upon the estate of Nellie Moran, deceased, the parties were cited and warned to appear before the Hudson county orphans' court on the date named, at which time and place the court would hear and determine the matter in controversy. See Kocher's Orph. Ct. Pr. p. 451, form 183. However, this is merely formal, and no objection was made on this score in the court below, nor is it urged here, nor could it very well be made the subject of objection. On April 24, 1908, a memorandum was filed in the Hudson county orphans' court by Judge Blair as follows: "Administration will be given to the next of kin of Nellie Moran. Patrick Degnan." On June 12, 1908, the order appealed from was entered. It entirely ignores (while setting aside) the memorandum of April 24, 1908. The order is in the following words and figures: "Application being made

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for letters of administration on the estate of Nellie Moran, deceased, and it appearing that Nellie Moran died September 18, 1907, leaving her surviving her husband, John Moran, who died December 25, 1907, leaving a will, which was admitted to probate by the Hudson county surrogate on the 8th day of January, 1908, and it appearing that Ellen Moran was the holder of passbook No. 6660 in the People's Building & Loan Association of Harrison, and that after her death, until the death of John Moran, he had paid the premiums on the said shares, and then [thus] indicated a determination to reduce same to his possession. It is on this 12th day of June, 1908, ordered and decreed that the said right, title, and interest in the building and loan shares, as evidenced by passbook No. 6660 is part of the assets of the estate of John Moran, deceased, and that the building and loan association upon the presentation of a certified copy of this order shall pay or cause to be paid or credit with the sum now due to the executor of the estate of John Moran." Returned with the transcript from the orphans' court in this matter is an agreed state of facts which reads as follows: "Nellie Degnan Moran was married to John Moran September 18, 1887, died on September 19, 1907. She had in her own name five shares of the People's Building & Loan Association of Harrison, N. J., which were issued to her September 19, 1889. Those shares are now worth the sum of \$616.40, of which \$500 is the amount paid for them, and the balance is the accrued interest, viz., \$116.40. Her husband, John, died December 22, 1907. He never applied for, nor took out, letters of administration on the estate of his wife. He never reduced her chose in action to possession. She left her surviving at the time of her death no children, no father nor mother, no brother nor sister, except her brother Patrick Degnan, of East Newark, N. J., and she left surviving her no child of any deceased brother or sister. There were no children born of her marriage with John Moran. During the time of her marriage she worked at dress-making, and earned considerable money in that occupation." The day after the making of the order above recited by the Hudson county orphans' court, Patrick Degnan, the brother and next of kin of Nellie Moran, deceased, appealed therefrom to this court, and prayed that the order of the orphans' court might be set aside, and that letters of administration upon the estate of the decedent might be ordered to be granted to him, and for further or other relief.

The order appealed from is erroneous in two particulars: First, because it makes no grant of administration upon the estate of Nellie Moran, deceased; and, second, because the orphans' court was without power to adjudicate as to the ownership of the building and loan shares and order paid or credited to the executor of the estate of John

Moran, the amount or value of those shares. It is to be observed that each of the parties before the orphans' court of the county of Hudson prayed for a grant of administration upon the estate of Nellie Moran, deceased. The orphans' court act, Revision of 1898 (P. L. p. 724, § 27), provides that, if any person die intestate, administration of the goods, chattels, and credits of such intestate shall be admitted or granted to the widow or the next of kin of such intestate, or to some one of them, if they, or any of them, will accept the same; and, if none of them will accept thereof, then to such other proper person, or persons, as will accept the same. In *Donnington v. Mitchell*, 2 N. J. Eq. 243, 247, it was held that the husband is entitled to administration because he is entitled to the wife's estate, not as her next of kin, for he is not, strictly speaking, of kin to his wife at all. See, also, *Dick. Pro. Ct. Pr.* pp. 38, 39. *Kocher's Orph. Ct. Pr.* p. 61. This was so under the probate practice of England, and is expressly recognized by our orphans' court act. P. L. 1898, p. 780, § 170. In *Fleider v. Hanger*, 3 Hagg. Ecc. Rep. 770, the Prerogative Court of Canterbury granted administration *de bonis non* of a feme covert to the representative of the husband, who had taken out administration, and died without fully administering, and remarked that the same grant would have been made if the husband had not taken out administration, unless it could be shown that he had not the interest, but that the property belonged to the wife's next of kin. This practice appears never to have obtained with us, although the rule that a residuary legatee will be appointed in preference to the next of kin has so obtained, notwithstanding the statute. In *re Will of Kirkpatrick*, 22 N. J. Eq. 463, 466; *Booraem's Case*, 55 N. J. Eq. 759, 37 Atl. 727.

The right of the husband to administration of his wife's estate first arose under the statute of 31 Edw. III, c. 11, "as the next and most lawful friend" of the deceased, which right, as well as the right to the property, the husband has under the statute of 29 Car. II, c. 3, s. 25, notwithstanding the statute of distributions, 22 & 23 Car. II, c. 10. This whole subject is ably and interestingly reviewed in 2 Hagg. Ecc. Rep., Appendix p. 170, in a note by the reporter, but a discussion of the English practice is here unnecessary, because our statute is entirely controlling.

As already remarked, our orphans' court act gives the husband the right to administer, and in the absence of a surviving husband, administration must be granted to the next of kin whose right is paramount unless there be some personally disqualifying objection to the applicant. *Donahay v. Hall*, 45 N. J. Eq. 720, 722, 18 Atl. 163; *Cramer v. Sharp*, 49 N. J. Eq. 558, 24 Atl. 962. Where there is no husband nor widow, administration must be granted to the next of

kin, if any of them are fit and competent and will accept. *Sayre v. Sayre*, 48 N. J. Eq. 267, 22 Atl. 198. Upon application to the surrogate of Hudson county for administration upon the estate of Nellie Moran, which was the question before the Hudson county orphans' court, the only order which could have been properly made was one granting administration to the next of kin of Nellie Moran, namely, her brother, Patrick Deghan, the appellant, and that should have been the order of the court. The administrator, however, when appointed will be considered in equity with the respect to the residue of the estate, after payment of debts, as trustee, for the husband's representative. This was expressly decided in *Donnington v. Mitchell*, ubi supra, upon the authority of several cases cited in 2 N. J. Eq. at page 247, and the same doctrine has been held to in this state ever since. In *Nelson v. Nelson*, 57 N. J. Eq. 118, 36 Atl. 280, the wife devised and bequeathed all of her real and personal estate to her husband, and, after his death, with remainder in certain realty to certain persons, and she, therefore, died intestate as to the remainder of her personalty. In a contest over the same between the next of kin of both husband and wife, Vice Chancellor Emery held, at page 122 of 57 N. J. Eq., at page 281 of 36 Atl. that the right of the husband to the wife's personal property undisposed of by her will does not depend upon his actual conversion of her estate after her death to his own use; and, so far as the same has not been administered or converted by him, the administrator de bonis non of the wife's estate will hold the estate in trust to pay over to the husband's administrator after paying the debts of the wife's estate.

It is to be observed that the Hudson orphans' court in the order appealed from adjudged that the deceased husband had done certain acts which indicated a determination to reduce to his possession the choses in action (for such they were) which were left by his deceased wife. It was not necessary for John Moran to have reduced these choses into possession to entitle his estate to the beneficial interest in them, nor does such beneficial interest give his personal representative the right to administer upon the estate of Nellie Moran as against her next of kin, much less does it afford the orphans' court any power to make an order that the People's Building & Loan Association of Harrison should pay, or cause to be paid, to John Moran's executor the sum due upon the shares of which Nellie Moran died possessed. The building association was not before the orphans' court, and the decree as to it was clearly coram non judice. Besides, I cannot understand how the Hudson county orphans' court could have found that the husband had reduced the choses into possession before he died, which is practically what was decided in that regard, in the face of the

agreed state of facts, which says that he did not do so. In *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689, Chancellor McGill, as ordinary, said in the Prerogative Court, at page 580 of 43 N. J. Eq., at page 600 of 12 Atl. (speaking to the question of the validity of a will), that if the will shall not be established, the husband will be entitled jure mariti to the wife's entire personal estate, citing *Donnington v. Mitchell*, 2 N. J. Eq. 243. This case was affirmed in *Stoutenburgh v. Hopkins*, 45 N. J. Eq. 890, 19 Atl. 622, on the opinion of the ordinary in the Prerogative Court. In *Folwell's Case* in the Prerogative Court, 67 N. J. Eq. 570, 59 Atl. 467, Chancellor Magie, as ordinary, at page 572 of 67 N. J. Eq., at page 468 of 59 Atl. remarked that, if Mrs. Folwell had died intestate, her husband would have been entitled to all her personal property, the jus mariti in this respect having been recognized and preserved by section 170, Orphans' Court Act (P. L. 1898, p. 780). This case was reversed (see *Folwell's Case*, 67 N. J. Eq. 728, 63 Atl. 1118), but upon the sole question whether or not the last will and testament of Mrs. Folwell bequeathed her personal estate to her daughter absolutely, and it remains an authority for the view which I take, to the full extent. In *Wright v. Leupp*, 70 N. J. Eq. 130, 62 Atl. 464, Vice Chancellor Pitney remarked, at page 133 of 70 N. J. Eq., at page 465 of 62 Atl., that by the common law which prevails in New Jersey the husband is not only entitled to administration of his wife's estate lying in this state, but, whoever may administer it, he is entitled to her whole net personalty. Hence any fund which might come to the hands of the complainant's administrator must, after paying her debts, go to the husband.

Counsel for the appellant contends that, because Mr. Moran did not reduce his wife's choses in action into possession during his lifetime, the beneficial interest in those choses has passed to the next of kin of his deceased wife; but this position, as already shown, is not tenable. Counsel relies upon *Bacon v. Devinney*, 55 N. J. Eq. 449, 37 Atl. 144, in which it was held that, when a husband and wife both make payments to meet the dues of building association stock standing in the name of the wife, the presumption is that his payments were gifts to her. Even so, there is nothing in this view which militates against the husband's right to have his wife's personal property after her death, and in fact in that case Vice Chancellor Grey held, at page 454 of 55 N. J. Eq., at page 146 of 37 Atl., that the husband had a right to the ownership of the stock, subject to the pledge made of it for the debt of the wife created in her lifetime. This is but a reaffirmance of the doctrine that the wife's personal property is subject to her debts, and her surviving husband takes only the net surplusage of her personalty, and this, too, in effect, is decided in *Bacon v. Devinney*, 55

N. J. Eq., at page 456, 37 Atl., at page 146. On behalf of the appellant reliance is also placed upon *Vreeland v. Ryno*, 26 N. J. Eq. 160, in which Chancellor Runyon said, at page 162 of 26 N. J. Eq., referring to the common law, that the husband had an interest in the choses in action of the wife, which he could reduce to possession, and when so reduced, they became his absolutely, and on his death went to his representatives, but that such of them as had not been reduced to possession by him at his death still remained hers, and at her death went to her representatives, and not to his. But this case is in entire harmony with the cases in this state which hold that the beneficial interest in the deceased wife's property pass to the husband's representative after his death. In that case, and in *Compton v. Pierson*, 28 N. J. Eq. 229, 232, Chancellor Runyon simply adverted to the common-law rule that the choses in action of the wife, not reduced into possession by the husband in his lifetime, went to her representatives at her death, and not to his, and this where the wife survived the husband, and in both cases he referred to the fact that, after the death of the wife, the husband, as her administrator, might reduce her choses in action into his possession and hold them *jure mariti*. It must be conceded that choses in action belonging to the wife pass at her death to her representative. That representative may be the husband, if he survives her; and, if he fails to take out administration, her administrator, after the payment of her debts, holds her personalty in trust for her husband if he be living, or for his representative if he be dead. There is no conflict between the cases. They are all in harmony and in entire accord.

The result is that the decree of the Hudson county orphans' court must be reversed, and the record remitted to that court, with instruction to grant administration on the estate of the late Nellie Moran to the appellant, who is her only surviving brother and next of kin.

(77 N. J. L. 505)

STATE v. MELLILLO.

(Court of Errors and Appeals of New Jersey.
Nov. 27, 1908.)

1. HOMICIDE (§ 340*)—WRIT OF ERROR—HARMLESS ERROR—INSTRUCTIONS.

Although the notion expressed by "preconceived" is not so exactly the equivalent of "premeditated" as to render the former a satisfactory substitute for the latter in a definition of the statutory crime of murder in the first degree, the context in which it occurs in a given case may be such that the employment of "preconceived" for "premeditated" in a charge to the jury, although not to be approved, is not an error by which the defendant was injured.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 715; Dec. Dig. § 340.*]

2. HOMICIDE (§ 340*)—WRIT OF ERROR—HARMLESS ERROR—INSTRUCTIONS.

Although the statement in a charge that "murder in the second degree is devoid of the element of the intention to kill" is erroneous, it is not an error that should lead to reversal, if its legal effect, in view of other parts of the charge, was injurious only to the state.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 717; Dec. Dig. § 340.*]

3. HOMICIDE (§§ 116, 340*)—SELF-DEFENSE—WRIT OF ERROR—HARMLESS ERROR—INSTRUCTIONS.

The victim of an unprovoked assault may protect himself even to the extent of taking the life of his assailant, when that act is or reasonably appears to him to be necessary in order to preserve his own life, or to save his body from serious harm. Hence a judicial charge that limits such right to what is necessary, and thereby deprives the defendant of the right to have his act tested by the reasonableness of his belief in the existence of such necessity, is erroneous; but such error is not injurious to the defendant when his sole defense is that an unprovoked and murderous assault was made upon him, and there are no grounds or circumstances going to the reasonableness of the defendant's belief apart from the grounds and circumstances that go to prove the actual existence of the danger and necessity that confronted him, if his testimony be believed.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 158-163, 715, 716; Dec. Dig. §§ 116, 340.*]

(Syllabus by the Court.)

Error to Court of Oyer and Terminer, Hudson County.

Sabino Mellillo was convicted of murder in the first degree, and he brings error. Affirmed.

Joseph B. Noonan, for plaintiff in error.
Pierre P. Garven, for the State.

GARRISON, J. The plaintiff in error was convicted in the Hudson county court of oyer and terminer of murder in the first degree. The judgment now brought up by this writ of error is attacked upon three grounds, all of which relate to the charge of the trial court.

The first ground of error assigned is that the jury was instructed that "murder in the first degree is where death results from a deliberate, willful purpose to take life, a deliberate intention preconceived beforehand to kill, and that intention executed and carried out."

The charge of the trial court upon the question of murder in the first degree from which the foregoing is excerpted was as follows: "The statute concerning murder in this state which is applicable to this inquiry reads as follows:

"Murder which shall be perpetrated by means of poisoning or lying in wait or by any other kind of willful, deliberate and premeditated killing shall be murder in the first degree, and all other kinds of murder shall be murder in the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such

person guilty, so designate by their verdict whether it be murder in the first degree or murder in the second degree.'

"You will, therefore, observe that, in order to constitute murder in the first degree, the killing must be done willfully, with deliberation and with premeditation. The statute says the killing must be willful, deliberate, and premeditated to constitute murder in the first degree, but the statute does not say that such willfulness, such deliberation, and such premeditation shall have existed for any fixed length of time before the act; and therefore all the jury need be satisfied of in order to return a verdict of murder in the first degree is that the killing was willful, that it was deliberate, and that it was premeditated, and that such were the conditions of the mind of the accused for a time sufficiently long before the act of killing to allow him to have fully and clearly conceived the design to kill, and that he did conceive such design, and then premeditatedly and deliberately and willfully carry out that design. It must consist of time sufficiently long for him to have formed the design to kill or not to kill and to make a choice whether he would kill or not kill, and, having deliberately determined to kill, to have executed that purpose. That satisfies the statute.

"The law, as I have read to you, states that you shall return by your verdict, if you find the defendant guilty of murder, whether it shall be murder of the first degree or murder of the second degree.

"Murder in the first degree is where death results from a deliberate, willful purpose to take life; a deliberate intention preconceived beforehand to kill, and that intention executed and carried out."

From this judicial exposition, which is not otherwise excepted to, the concluding cause, or rather the word "preconceived," is singled out, and made the basis of the argument that the notion expressed by "preconceived" is not the exact equivalent of "premeditated" which is the word used in our statute defining murder in the first degree.

Whether this is so or not, or whether the clause in question standing apart from its context would be in all respects a satisfactory definition of murder in the first degree, need not now be decided. It may be that, inasmuch as premeditation as a mental process covers a less extensive field than that covered by "preconception," the broader term would not in an isolated definition of murder in the first degree be a satisfactory substitute for the narrower one used in the statute. That, however, is not the case here. Six times in the single paragraph quoted from the charge the jury had been told that premeditation was an indispensable element of murder in the first degree. When, therefore, referring to what had just gone before, the broader term "preconceived" was employed, the jury must have understood that what was meant was that sort of preconception

which they had just before and so repeatedly been told was a requisite element of the statutory crime of murder in the first degree, namely, "premeditation." While, therefore, we find in this assignment some ground for verbal criticism, we find none for reversal.

The second assignment challenges the accuracy of the statement of the charge that "murder in the second degree is devoid of the element of the intention to kill." That this statement is erroneous is apparent from the consideration that the statute touching the degrees of murder after specifying the attributes constituting murder in the first degree relegates all other kinds of murder to the second degree of that crime. Hence, inasmuch as murder perpetrated with an intention to kill that was not deliberate and premeditated is a kind of murder, and yet is not murder in the first degree, it follows necessarily from the statutory category that it must be murder in the second degree. This has already been sufficiently pointed out in this court in the cases of *State v. Bonofiglio*, 67 N. J. Law, 239, 52 Atl. 712, 54 Atl. 99, 91 Am. St. Rep. 423, and *State v. Dellso* (N. J.) 69 Atl. 218.

In the present case, however, in view of other parts of the charge, the effect of this judicial error was injurious only to the state; for the jury had been told that only verdict it would be justified in finding against the defendant was that of murder in the first degree or in the second degree. They had also been told that, unless they found a killing that was deliberate and premeditated, they could not convict the defendant of murder in the first degree. When therefore, they were further told that murder in the second degree was devoid of the element of the intention to kill, they were in effect told that it would be their duty to acquit the defendant unless his criminal act of killing in addition to being intentional was also deliberate and premeditated. This, of course, was too favorable to the defendant, but, the jury having found that the defendant's act was deliberate and premeditated, neither the state nor the defendant were injured by the erroneous statement of the law.

The third and last assignment of error to be considered relates to the charge of the court touching the law of self-defense. What the court said was this:

"Every man has a right to defend himself when he is attacked. He has a right to defend himself to any extent that is necessary to protect his person and his life. If a person who is attacked has reasonable grounds for believing that his life is in danger or his body is in great danger of being harmed, he has a right to defend himself to any extent that is necessary, even in some cases to taking life, but there must be some reasonable ground for his belief, and, if he pursues this defense, defending himself beyond what is necessary to protect himself, then he loses the right of self-defense, and is himself the

aggressor, and is responsible for any results that may result from such aggression.

"It is not the law that a man can make himself the judge of his own situation. Whether he was in danger or had reasonable ground for believing that he was is a matter for you to determine, whether the circumstances were such as to satisfy you that he was in danger, or had a right to think himself so, and whether he was, under the circumstances shown, justified in using the force that he did use, and, if he had the right to use force, was this force that he used necessary to protect himself."

This instruction viewed as a comprehensive definition is faulty in two respects: First, in that it extends the right to take life to cases in which the defendant's apprehension is that he may be harmed, whereas such right is limited to apprehension of serious harm. This error was prejudicial, however, only to the state.

The other respect in which the instruction is incorrect is that it draws a distinction between the existence of the right of self-defense and the extent to which such right may lawfully be pursued, saying of the former that it exists whenever the defendant has reasonable grounds for believing that his life or body are endangered, and of the latter that, if a man "defend himself beyond what is necessary to protect himself, he loses the right of self-defense." If the word "necessary" in the language last quoted be qualified as it was in the preceding clause by the words "or reasonably appears to him to be so," the error complained of would be cured. Abstractly considered, however, the instruction in so far as it limited the extent of the right of self-protection to what was actually necessary was an erroneous statement of the law. The correct rule is that stated by Chief Justice Gummere in *State v. Bonofiglio*, 67 N. J. Law, 245, 52 Atl. 714, 54 Atl. 99, 91 Am. St. Rep. 423, in which the existence of the right to defend oneself and the extent to which it may go are each made to depend upon what actually is or what reasonably appears to be the necessity. "A man," he says, "may protect himself, even to the extent of taking the life of his adversary when that act is or reasonably appears to be necessary in order to preserve his own life or to protect himself from serious bodily harm." Under the rule thus laid down, the jury is to test the defendant's justification, not only in the light of the actual situation as it is disclosed upon the trial, but also in the light of what the situation may reasonably have appeared to be to the defendant.

The court's instruction, therefore as a general definition of the right of self-defense, was erroneous. Whether it was injurious to the defendant in this particular case is another question. From the nature of the error in the court's definition, it is clear that such error would be injurious to the defend-

ant in any case in which the right of self-defense set up by the testimony was in the alternative, so that such right would be of equal avail to the defendant whether the danger and necessity upon which he relied for his justification were actually established to the satisfaction of the jury, or whether they were found by the jury to have been reasonably apprehended by the defendant, although not really existent in point of fact. It is, however, equally clear that the omission of such latter instruction would be harmless to the defendant where the case made by him was not susceptible of being submitted to the jury in the alternative under the proofs; for the right of the defendant to have his defense thus submitted to the jury depends wholly upon the state of the testimony, and hence arises only when the testimony is of such a character that, if the existence of the actual danger or necessity testified to by the defendant be found against him, there still remains some aspect of the case made by the proofs that would warrant the submission to the jury of the further question whether the defendant's conduct might not be justified by the reasonableness of his apprehensions, even though the danger or necessity set up by his proofs did not in fact exist. We are speaking now of cases like the present, in which the defendant's act of homicide, if the facts to which he testified be believed, was clearly justified.

There are, of course, cases of trifling assaults where the primary, and indeed, the only, question, is whether a reasonable apprehension of danger was justified, but where, as in the case now before us, the assault upon the defendant, if made, was made with a deadly weapon accompanied by threats against the defendant's life, the primary question for the jury is whether such murderous assault took place, and, this fact being resolved adversely to the defendant, there is no residuum of testimony or circumstance to support a belief alien to such fact, and hence no occasion for the submission to the jury of the reasonableness of the defendant's belief in the imminence of his danger, notwithstanding that the situation described by him did not in fact exist.

In fine, where there are no grounds or circumstances going to the reasonableness of the defendant's belief, apart from the grounds and circumstances that go to prove the actual existence of the danger or necessity that confronted the defendant, if his testimony be believed, the failure to submit to the jury the reasonableness of the defendant's belief is not an error by which he was injured.

This was the ratio decidendi of the case of *State v. Jones*, 71 N. J. Law, 548, 60 Atl. 396, recently in this court. In delivering the opinion in that case the Chief Justice said: "The case that was before them [the jury] did not present for their determination the

question, of the right of a man to take life under circumstances where it was seemingly, but not actually, necessary, to do so to preserve his own life or to save himself from grave bodily harm. If the story told by the defendant was true, the necessity of doing what he did for his own protection was absolutely beyond question, and it was with this story that the trial judge was dealing in this part of his instruction to the jury, and not with a mere abstraction. He was charging the law of the case."

That the present case is of this sort will appear from a brief recital of the cases made, respectively, by the state and by the defendant. The state's case was that the defendant remained at the window of a barroom, looking out through an opening in the curtains until Pellechio passed along in front of the window, when the defendant exclaimed, "Here he comes," and started after him, "sneaking up" behind him until close enough to strike him in the back of the head with an axe that he carried concealed in a paper covering. Pellechio's skull was fractured by a blow from behind. The defendant's version of the same affair was that Pellechio met him in the street, and instantly and without provocation assaulted him, and, with threats against his life, seized him by the throat and forced him to the ground, so that he dropped the axe he was carrying, and that, as he was about to pick up his axe, he saw Pellechio with his hand on his revolver, "going for" him. His testimony was: "He was going to get me." "He was going to shoot me." "He was so mad he was going to shoot me." At this precise juncture, according to the defendant's testimony, he recovered his axe, and struck Pellechio with it. Two utterly irreconcilable versions were thus presented to the jury for its determination, according to one of which the defendant had made an unprovoked and murderous assault upon Pellechio, according to the other of which Pellechio had made an unprovoked and murderous attack upon the defendant. Both could not be true, and the verdict shows conclusively which the jury accepted, and which they rejected, but neither version presented any circumstances that was at once consistent with the nonexistence of the necessity testified to by the defendant, and yet afforded a reasonable basis for his belief therein. The existence and the imminence of the defendant's danger having been left to the jury as one not only of fact, but also as one that the defendant may have had reasonable grounds for believing, the succeeding statement, which is the one now challenged, though abstractly erroneous, was not in a legal sense injurious to the defendant.

If, instead of the direct conflict between the two versions of the affair, the state's contention had been that the defendant had magnified his danger, that Pellechio's revolver

was not loaded or that it was a toy pistol, or that he was handling it only in sport, or any other circumstance that raised the question whether the situation was really, as the defendant had testified, or only seemed to him to be so, the defendant would have been entitled to have the jury charged that, even though they found against him on the actual necessity of the defense he had made, they should still find for him if they believed that such necessity, although nonexistent in fact, had reasonably appeared to him to be real. No such circumstances, however, appearing in the testimony, no such charge was required from the court. The charge as made covered correctly the matters to be submitted to the jury under the proofs. The charge, in so far as it was incorrect, touched a matter that could not under the proofs have been submitted to the jury; hence an error therein did not injure the defendant, and should not lead to the reversal of the judgment entered against him in the court below.

Finding in the charge of the trial judge no error that requires reversal, the judgment brought up by this writ of error is affirmed.

(75 N. J. E. 270)

GOODWIN v. MAYOR, ETC., OF CITY OF MILLVILLE.

(Court of Errors and Appeals of New Jersey.
Dec. 3, 1908.)

MUNICIPAL CORPORATIONS (§ 513*)—IMPROVEMENTS—ASSESSMENTS—INJUNCTION.

In the absence of special equities, the Court of Chancery has no jurisdiction over assessments made in the course of municipal improvements, and will not interfere by injunction to restrain the collection of such assessments merely because the complaining party, by his own laches, lost his remedy at law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1193, 1198; Dec. Dig. § 513.*]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Action by Eugene B. Goodwin against the Mayor and Common Council of the City of Millville. Decree for complainant, and defendant appeals. Reversed, and bill dismissed.

Louis H. Miller, for appellant. French & Richards, for respondent.

TRENCHARD, J. The defendant, the city of Millville, caused to be made by commissioners an assessment of benefits against the owners of lands fronting on streets where it had laid its system of sewers. On June 1, 1906, the assessment was confirmed by the city council. Among those thus assessed were Thomas S. Simmons and Eugene B. Goodwin. Simmons promptly prosecuted a writ of certiorari against the city, and the Supreme Court by its judgment of November 19, 1907, set aside the assessment against the lands of the prosecutor brought

up by the writ, and appointed commissioners to make a new assessment upon his property. As will appear by the opinion filed in that cause (*Simmons v. Mayor, etc., of City of Millville* [N. J. Sup.] 66 Atl. 895), the assessment against Simmons was set aside because certain properties along the line of the sewer were not assessed for benefits, and since substantially the whole cost of the work, so far as the statute permitted its assessment, was assessed upon certain properties, including the prosecutor's, to the exclusion of others, the result was necessarily injurious to him. The court also found that under the statute other properties, not along the line of the sewer, but which were within the territorial zone of benefits, should have been assessed, and that the assessment for that reason, also, was not made in accordance with the statute. On December 9, 1907, the complainant, Goodwin, who owns property along the line of the same sewer and whose property was assessed under the same assessment as that of Simmons, applied to the Supreme Court for a writ of certiorari to review the assessment against his property. The Supreme Court denied him the writ upon the ground of laches. On December 17, 1907, the complainant filed his bill to procure an injunction against the collection of any of the assessments until a proper reassessment is made. Upon the hearing on bill and affidavits, the learned Vice Chancellor awarded a preliminary injunction restraining the defendant, the city of Millville, and its officers, from collecting or accepting payments of any of the assessments, "until an assessment shall be made upon the properties liable to assessment, but omitted therefrom and a reassessment made upon other properties to conform thereto according to law."

This appeal raises the question of the propriety of such injunction. The remedy for an irregularity or error in the imposition of taxes or assessments is by a writ of certiorari. To warrant the interference of a court of equity, there must be some peculiar ground of equity jurisdiction. *Jersey City v. Lembeck*, 81 N. J. Eq. 255; *Hoboken Land & Improvement Co. v. Hoboken*, 81 N. J. Eq. 461, 463. In the present case the Vice Chancellor was of the opinion that the complainant as a taxpayer, irrespective of the assessment against his property, was entitled to restrain the city from enforcing its illegal assessments, the enforcement of which would operate to burden the city with a charge that the statute requires individual properties to bear. This equitable relief seems to proceed upon the theory that the complainant's remedy was not at law. To this we do not agree. In *Jersey City v. Lembeck*, 81 N. J. Eq. 255, it was pointed out that the jurisdiction of the Supreme Court to review and correct the errors or irregularities of such assessments is exclusive. It must, therefore be presumed that, if Good-

win had promptly made application to the Supreme Court for a writ of certiorari, it would have been granted, and such relief accorded him as was justified by the state of the case. This he neglected to do. He saw fit, with full knowledge of the errors and irregularities of the assessment, and of the entire situation, to speculate as to the form of relief which the Supreme Court would in its discretion grant in the *Simmons* Case from the record then before it. In view of the fact that Goodwin delayed applying for a writ of certiorari for more than 18 months after the confirmation of the assessment by city council, the Supreme Court was undoubtedly justified in denying him the writ on the ground of laches. Especially is this so in view of the legislative policy declared by P. L. 1907, p. 109, in which it is provided that no writ of certiorari shall thereafter be allowed to review any such assessment unless application therefor shall be made within 60 days after such assessment shall have been confirmed by a court of competent jurisdiction.

As was said in *Am. Dock & Imp. Co. v. Trustees of Public Schools*, 35 N. J. Eq. 181, 258, one of the principles which enters into the consideration of the matter presented by this appeal is that courts interfere with great reluctance with the collection of public revenues. *Jersey City v. Lembeck*, 81 N. J. Eq. 255, is an illustrative precedent. The city had laid an assessment on the complainant's lands, which, by the city charter, was an incumbrance. The assessment was invalid. No suit was pending in which the validity of the incumbrance could be tested. The complainant filed a bill under the statute against the city to settle the title to the land and determine the validity of the incumbrance. This court denied relief on the ground that the complainant might have had relief by a writ of certiorari, which he had lost by his own laches. To justify resort to a court of equity to stay the collection of public revenues, the party must make a case strictly within the bounds of equity jurisdiction—an injury otherwise not remediable—and he must seek and prosecute his remedy with promptitude. In the present case, as we have seen, the complainant had his remedy at law which he lost by his own laches. He cannot, therefore, resort to a court of equity on that ground.

Nor can the interference of the court of equity be justified upon the ground of the prevention of a multiplicity of suits, as was suggested at the argument. The bill appears to have been filed by the complainant in his own behalf only, and there is no indication that any other person is threatening suit. Moreover, any other taxpayer or landowner affected is presumably in the same position as the complainant with respect to laches, and for that reason would not be entitled to relief.

The decree under review should be reversed, and the complainant's bill dismissed, with costs.

75 N. J. E. 177)

In re COOPER'S WILL.

(Prerogative Court of New Jersey. Jan. 2, 1909.)

1. WILLS (§ 163*)—EXECUTION—UNDUE INFLUENCE—CONFIDENTIAL RELATIONS—ATTORNEY AND CLIENT—PRESUMPTIONS—BURDEN OF PROOF.

An attorney, who had been the legal adviser of testatrix for some years, prepared her will and codicil, whereby he was appointed executor and received a specific legacy, and a large share of the estate as residuary legatee. His son also was given a specific legacy by the will. The attorney also procured the witnesses to the will and codicil, and both were executed under his personal supervision. *Held*, that there was a presumption of undue influence on his part, and the burden of proof that the will was the free act of testatrix was on him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 338-403; Dec. Dig. § 163.*]

2. GIFTS (§ 47*)—INTER VIVOS—UNDUE INFLUENCE—PRESUMPTIONS.

In transactions inter vivos, the presumption of undue influence is raised solely because of the dependent confidential relation existing between donor and donee; and the donee, to establish the gift, must show that independent advice was relied on by the donor.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 86; Dec. Dig. § 47.*]

3. WILLS (§ 163*)—EXECUTION—UNDUE INFLUENCE—CONFIDENTIAL RELATIONS—BURDEN OF PROOF.

Where, in a testamentary transaction, the facts show the existence of confidential relation between testatrix and a beneficiary, slight circumstances in addition to such relation will throw on the beneficiary the burden of showing that testatrix's mind was not unduly influenced.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 390; Dec. Dig. § 163.*]

4. WILLS (§ 54*)—PROBATE—CONTESTS—EVIDENCE—UNDUE INFLUENCE—LETTERS OF TESTATRIX.

In proceedings to probate a will and codicil, contested on the ground of undue influence, letters written by testatrix after the making of the will, and before and after the making of the codicil, are admissible as bearing on the mental condition of testatrix, but are not competent evidence of the facts stated in the letters.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 131-134; Dec. Dig. § 54.*]

5. WILLS (§ 160*)—PROBATE—CONTESTS—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

In proceedings to probate a will, contested on the ground of undue influence, evidence of the physical and mental condition of testatrix, of the reasonableness of the gifts made by the will as compared with a prior will, of her knowledge and appreciation of the testamentary disposition made, *held* to show absence of undue influence by the principal beneficiary occupying the confidential relation of attorney.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

6. WILLS (§ 161*)—UNDUE INFLUENCE—INVALIDITY IN PART.

In a proper case, part of a will may be set aside because of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 374; Dec. Dig. § 161.*]

7. WILLS (§ 161*)—UNDUE INFLUENCE—INVALIDITY IN PART.

Where it is impossible to determine to what extent specific legacies have been tainted by undue influence, the whole will, if at all, must be set aside on the ground of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 374; Dec. Dig. § 161.*]

8. WILLS (§ 302*)—EXECUTION—KNOWLEDGE OF TESTATRIX—EVIDENCE.

The fact that testatrix was in possession of her will and codicil for a year and a half with opportunity during that time to cancel the same, is a strong indication that she was aware of their contents.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 702; Dec. Dig. § 302.*]

9. WILLS (§ 289*)—EXECUTION—KNOWLEDGE OF TESTATRIX—EVIDENCE.

Where a testatrix, after the execution of a will, drawn according to instructions given one who conveyed them to the draftsman, has the executed will in her possession a sufficient length of time, and opportunity and ability to acquaint herself with its contents, and she preserves it, it will be conclusively presumed that the will was prepared according to her instructions, especially when it followed her pronounced intentions, and provided for no unnatural disposition of her estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 653; Dec. Dig. § 289.*]

10. WILLS (§ 302*)—EXECUTION—KNOWLEDGE OF TESTATRIX—EVIDENCE.

The fact that testatrix executed a codicil, which in express terms confirms the will, but which makes changes therein, tends to prove that testatrix was acquainted with the will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 302.*]

11. WILLS (§ 297*)—EXECUTION—DECLARATIONS OF TESTATRIX—EVIDENCE.

Declarations of testatrix that she had made a will and remembered certain persons, and that she had thought a good deal about making the will, and that some people would not be satisfied, were admissible to show that she was aware of the contents of the will, contested on the ground of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 690; Dec. Dig. § 297.*]

12. WILLS (§ 160*)—EXECUTION—UNDUE INFLUENCE.

Where the evidence showed that testatrix had fixed testamentary ideas as to the disposition of her estate, and gave instructions to the attorney who drew the will, and that he followed the instructions, there was evidence that she exercised independent judgment essential to sustain the will containing a gift to the attorney.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

13. WILLS (§ 157*)—EXECUTION—UNDUE INFLUENCE.

The rule requiring a person disposing of his property by will to exercise a judgment independent of the confidence induced by his confidential relationship with his legal adviser only requires that testator exercise his independent judgment, and does not require proof of proper independent advice.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 157.*]

14. WILLS (§ 166*)—UNDUE INFLUENCE—EVIDENCE.

The testimony of a legatee, charged with having obtained the will by undue influence,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cannot be arbitrarily disregarded, where such testimony is not contradicted by other credible testimony or discredited by its improbability.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 166.*]

15. WILLS (§ 157*)—EXECUTION—UNDUE INFLUENCE.

Every person competent to make a will has a right to the aid of any person he may think proper to select, when he desires to put his testamentary wishes in legal form; and, if he exercises this right without improper influence, though he selects the person he intends to make his beneficiary, that fact, in the absence of evidence showing an abuse of confidence, is no reason why probate should be denied to the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 428; Dec. Dig. § 157.*]

16. WILLS (§ 157*)—EXECUTION—UNDUE INFLUENCE.

The contention that an attorney who sustained toward one the confidential relation of legal adviser should refuse to accept his testamentary bounty is one of professional ethics, and is not involved in proceedings to probate the will, making such attorney the principal beneficiary and executor.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 157.*]

Appeal from Orphans' Court, Morris County.

In the matter of the probate of the will of Esther J. Cooper, deceased, in which Carrie L. G. Harrison and others appeared as contestants. From a decree of the orphans' court admitting the will of the deceased to probate, the contestants appeal. Affirmed.

The following is the opinion of Mills, J., in the orphans' court:

"This is a proceeding brought to test the validity of certain paper writings purporting to be the last will and testament of Esther J. Cooper. The will is dated May 20, 1900. The codicil accompanying the same is dated March 29, 1904. A copy of each has been annexed to these conclusions. Testatrix was 86 years of age at the time of her death, which occurred on October 29, 1906. She was the widow of James J. Cooper, who died about 30 years ago. The validity of the will has been challenged by Carrie L. G. Harrison, the caveator, who is a grand niece of testatrix. Ten other persons, grand nieces and grand nephews, have joined with her in protesting against the probate of the will. The attack is made on the ground that the will with its codicil is the product of undue influence, exerted upon the testatrix by Charles F. Axtell, an attorney and counselor at law of this state. Both the will and codicil appear to have been properly executed. The attestation clauses are in proper form, and all the formalities were duly observed at the time each paper was executed. It is not contended that the testatrix was mentally incapable of making a will, but that, owing to her advanced age, her mind was unable to resist the improper influences exerted by her friend and attorney, Charles F. Axtell. She was

about 80 years of age in 1900. Axtell had been her sole legal adviser since January, 1898, and had acted for her in some matters before that time, beginning at least as early as 1888. He had known her well for many years, and intimately since 1883. She appears to have had great confidence in his judgment and integrity. He claims that, acting under instructions from her, he prepared the rough draft of the will executed in 1900, and that of the codicil executed in 1904. Each draft was copied by hand, and prepared for execution by a young man named Griffith, who was employed by Axtell in a clerical capacity in 1900, and specially employed for the express purpose of copying the draft of the codicil in 1904. Under the will of 1900 Axtell receives a specific legacy of \$500, and is the sole beneficiary under the clause disposing of the entire residue of the estate of testatrix, receiving thereunder a large part of the whole estate, nearly two-thirds thereof. His son Roland P. receives a legacy of \$250. In addition Axtell is the sole executor named in the will, Joseph H. Van Doren having been added as an executor under the codicil of 1904. Axtell also procured the witnesses to both the will and codicil, and each document was executed under his personal advice and supervision. Under this statement of facts it is clear that the legal presumption of undue influence has been raised, and that the burden of proving that the will is the spontaneous act of the decedent was thrown upon Axtell; her attorney and confidential adviser. In so holding I do not contend that the presumption of undue influence has been raised solely because of the confidential relation existing between Mrs. Cooper and her legal adviser. I fully realize that the strict rules that control in the case of transactions *inter vivos* are not applied to those of a testamentary character.

"In transactions *inter vivos* the law is so jealous of the rights of the donor that the presumption of undue influence is at once raised solely because of the dependent confidential relation, and, when once raised, is very difficult to overcome because of the rule (never applicable in testamentary cases) requiring that independent advice must be shown. For example, had Mrs. Cooper made Axtell her beneficiary by voluntary irrevocable deed of conveyance, instead of by will, the presumption of undue influence would have been at once raised solely because of the confidential relation existing between them, and the burden would at once have been placed upon Axtell of overcoming that presumption by showing that she had the benefit of 'proper independent advice.' See *Post v. Hagan* (N. J.) 65 Atl. 1026 (March 4, 1907); *Slack v. Rees*, 66 N. J. Eq. 447, 59 Atl. 406, 69 L. R. A. 393. In a testamentary transaction, however, like the one now before me the facts showing the confidential

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

relationship must be accompanied by other circumstances in order to raise the presumption of undue influence. In *Spark's Case*, 63 N. J. Eq. 242, 51 Atl. 118, it was held by the Prerogative Court that: 'The confidential relation existing between a testator and his spiritual, as well as secular, adviser, who was made residuary legatee, is not alone sufficient to raise a presumption of undue influence. The rule which raises such a presumption in transactions inter vivos does not apply to testamentary gifts. Slight circumstances, in addition to such relation, will throw upon the beneficiary the burden showing that the testator's mind was not unduly influenced.' See, also, *Wheeler v. Whipple*, 44 N. J. Eq. 141, 145, 14 Atl. 275. The 'slight circumstances in addition,' called for under the *Spark's Case*, are sufficiently shown in *Axtell's* action in attending to the preparation of the will and codicil, in drafting the residuary clause of the will in his own favor and in selecting the witnesses. In *Farnum v. Boyd*, 56 N. J. Eq. 766, 41 Atl. 422, it was held that: 'A lawyer, employed by a testatrix with unsettled testamentary notions as to the disposition of her entire estate, to draw her will, can participate in her bounty, in a material degree, only after a very clear exhibition that his conduct was fair and unobjectionable, and that the testatrix exercised, with relation to her bounty to him, a judgment independent of the confidence induced by his confidential relationship to her.' There is no question but that, under the law as applied to the facts in this case, *Axtell* must overcome the presumption of undue influence before he can benefit by the will of testatrix.

'The circumstances surrounding the execution of her will and codicil have made necessary the rigid and exhaustive investigation which has been made in this case. To relieve himself of the burden of showing that the will in question, with its accompanying codicil, resulted from the free and unconstrained action of the testatrix, without any moral or physical coercion on his part, *Axtell* has placed a large number of witnesses on the stand, and has introduced considerable documentary evidence. It is for this court to determine whether he has sustained the burden which has been thrust upon him. In my opinion he has done so. The reasons for my conclusions I will give at length; but, before discussing them, I will briefly consider the law controlling the admission in evidence of statements and declarations made by the decedent. Great light has been thrown upon the mental attitude of testatrix toward her surroundings by the witnesses, who have testified to many declarations made by her with regard to her relatives and friends. A large number of letters written by her have also been introduced in evidence. They were almost all written after the making of the will, and both before and after the making of the codicil.

Counsel for the contestants strongly opposed the introduction of this kind of evidence. Its competency cannot be questioned. In *Marx v. McGlynn*, 88 N. Y. 374, Earl, J., held that diaries kept and letters written by a testator, either before or after the execution of the will, while proper evidence, as bearing upon the mental capacity and the condition of mind of the testator, with reference to the object of his bounty, are not competent evidence of the facts stated in them, or to prove fraud or undue influence. The court said: 'They are in the nature of hearsay evidence, declarations of the deceased, which are incompetent for the purpose of defeating or destroying the will or any of its provisions.' They are competent only as bearing upon the condition of the mind of the testator at the time of the execution of the will. Such memoranda or declarations, whether made before or after the execution of the will, are competent as bearing upon the testator's mental capacity. They are also competent as bearing upon the condition of the testator's mind with reference to the objects of his bounty. They may be given in evidence for the purpose of showing his relations to the people around him, and to the persons named in the will as beneficiaries. They are, however, entitled to no weight, in proving external acts, either of fraud or undue influence.' This interpretation of the law is viewed with approval in *Hobson v. Moorman*, 115 Tenn. 73, 90 S. W. 152, 3 L. R. A. (N. S.) 749, and *Tenn. Supt. Ct. Dec. 1905*, a case in which the question of the effect of the statements and declarations made by a testator is exhaustively treated. This construction is also in line with the decisions of this state. See *Rusling v. Rusling*, 36 N. J. Eq. 603, 607, 608; *Pemberton's Case*, 40 N. J. Eq. 520, 4 Atl. 770.

'Before reaching my conclusion in this case I carefully considered: (1) The character and quality of the mind of testatrix, her physical condition and habits of life; (2) the nature of her will, with special regard, as to whether it is reasonable and natural in its treatment of the natural objects of her bounty and other relatives and friends and her mental attitude toward them; (3) the amount of her property and her realization of its value; (4) her knowledge and appreciation of the testamentary disposition she had made of her estate; (5) the question whether, in view of all the evidence, her principal beneficiary has succeeded in sustaining the burden placed upon him by his indiscreet conduct.

'1. Mrs. Cooper, considering her advanced age at the time she made her will and the subsequent codicil, was a woman of unusual mental and physical vigor. She kept an active supervision over her affairs, had an intimate knowledge of her investments, and saw that her interest was promptly collected. She was of a genial and kindly disposition, and appreciated the little attentions shown

to her by others. She generally had a relative staying with her, but kept control of her domestic establishment. There is not the slightest suspicion that she was mentally weak or unsound. Dr. A. A. Lewis, who had been her family physician for at least 20 years, testifies to her good mental condition during the time he had known her. He says her mind remained clear 'up to the last 48 hours' of her life. He also shows that she liked conversation and company. In speaking of his business relations with her he says 'she was always very precise with me.' From all the evidence it is clear that she was a self-reliant woman, with considerable shrewdness and decision of character. She enjoyed traveling. During the winter of 1901 and 1902 she spent several months at West Palm Beach, Fla. Several times after the execution of the will of 1900 she visited her so-called adopted daughter Mrs. Marks at her home in New York state. She showed in many ways that life was very pleasant notwithstanding the burden of years.

"2. I will now review the evidence to determine whether the will and codicil in question are unnatural or unjust, and in that connection will first compare the treatment which the several beneficiaries received under the canceled will (which is said to have been executed by her on December 19, 1888, and which has been offered in evidence) with that bestowed upon them by the will of May 26, 1900, and its codicil.

"(1) Mrs. Marks. By the earlier will Mrs. Marks (then unmarried and styled 'my adopted daughter Myra Kenward Cooper') received \$1,000 in cash, and the household goods and furniture absolutely. She was also given the use of the homestead for life, or 'until she marries,' together with the use of the residuary estate for life 'or until she marries.' Under the new will and codicil Mrs. Marks receives \$1,000 in cash, but not the furniture and household goods. Mrs. Marks' daughter, born since 1888, receives \$500 under the codicil. Aside from the loss of the furniture and household goods, Mrs. Marks receives the same amounts as she would have received under the will of 1888 had it now been admitted to probate, while her daughter also now receives the sum of \$500. Myra married Rufus B. Marks in 1889.

"(2) Mrs. Lydia Wolfe. Under the earlier will she was left \$1,000. Under the later will and codicil she will receive exactly the same amount, \$1,000.

"(3) Mrs. Carrie Pruden, wife of Henry H. Pruden. The bequest to her remains identical with that in the earlier will.

"(4) The six children of Henry H. Pruden receive under the will of 1900 the same identical amounts left them under the will of 1888.

"(5) Clarence C. Pruden now receives the same amount left him under the will of 1888.

"In brief every beneficiary under the will of 1888 receives, under the will and codicil now

before the court, exactly the same amount of money as he or she would have received if the will of 1888 had now been admitted to probate, with the single exception of Henry H. Pruden, the half-brother of testatrix. Of the 11 beneficiaries under the will of 1888 he is the only one to suffer from the new will. Had the will of 1888 been probated at this time Henry H. Pruden would not only have been the executor, but he would, owing to the marriage of Myra, have received more than Charles F. Axtell can now receive under the will and codicil in question because of the legacies now given to Edwin Pruden and Esther L. Marks. Under the will and codicil now offered for probate Henry H. Pruden receives the vacant lot of 25 acres situated near Morristown, which is nonproductive and of uncertain value and which I should judge from the evidence is worth certainly under \$5,000. It is well to note in this connection, however, that, had Myra never married, Henry H. Pruden would not, aside from the executorship, have received any benefit under the will of 1888 until Myra's death, showing that in 1888 Mrs. Cooper did not think it necessary to make special provision for her half-brother, and was not particularly solicitous about his welfare.

"A comparison of the wills of 1888 and 1900, taken in connection with the testimony of the several witnesses, and all the other evidence, shows pretty conclusively that Mrs. Marks, Mrs. Lydia Wolfe, Clarence Pruden, Henry H. Pruden, and his six children were the persons of whom testatrix was especially fond. They were the persons with whom she was thrown in contact, and with whom she was in constant intercourse. Mrs. Marks, to be sure, was not a relative nor even a legally adopted daughter. She is, however, called her adopted daughter in both wills and in the codicil. She lived with Mrs. Cooper from the age of 5 years until she was married at the age of 21, and was apparently nearer and dearer to her than any one else. Without any child of her own the affections of testatrix were centered upon Mrs. Marks, and those of her relatives who lived near her, and who had in many ways become endeared to her. These nine relatives (Lydia Wolfe, Clarence Pruden, Henry H. Pruden, and his children), together with Mrs. Marks and the wife of Henry H. Pruden, were the only persons remembered in the will of 1888, and are also the only persons mentioned in the will of 1900 and the codicil, excepting Stephen H. Pruden, Edwin Pruden, and the daughter of Mrs. Marks and the Axtells. I have attached to these conclusions a memorandum, showing the several persons named as relatives of Mrs. Cooper in the petition for probate. It appears that the great majority of these relatives did not live in Morristown. The testimony shows that testatrix had seen some of them at rare intervals, and that many of them she had never seen at all. It is in evidence that she once

told Lydia Pruden that 'she had not remembered the Guerins in her will'; that 'they were amply provided for without any of her money.' I am convinced that the persons of whom she was especially fond, and who might properly be called the natural objects of her bounty, were Mrs. Marks and the nine relatives whom I have enumerated, namely, Mrs. Wolfe, Clarence Pruden, Henry H. Pruden, and his six children, Lydia, Minnie, David, Harry L., Emma, and Gertrude. Curiously enough not a single one of these persons is objecting to the probate of the will and codicil now in question. How would these persons in whom Mrs. Cooper was especially interested be benefited if the will is set aside? If testatrix can be held to have died intestate, Mrs. Marks and her daughter would receive nothing. Henry H. Pruden being of the half-blood would have no interest in any of the real estate, and his share of the personal estate would probably prove to be no more valuable, if as valuable, as the real estate devised to him in the will now presented for probate. The six children of Henry H. Pruden, who receive \$2,000 in all, under will of 1900, would receive absolutely nothing, as their father is still living. Mrs. Wolfe might receive a trifle more, for, while she would receive less cash, she would have a small interest in the real estate, which might a little more than offset the loss in cash. Clarence Pruden would unquestionably be benefited if the will should be broken, but he is the only one of those who may be considered the natural objects of the bounty of testatrix, who would be substantially benefited.

"With regard to the suggestion of counsel that this court has power to set aside that part of the will under which the Axtells benefit, and should exercise that power, I will state that, aside from the fact that I do not believe that any fraud or undue influence was exercised as to any part of the will or codicil, I feel certain that, in no view of this case would it be proper to permit the partial intestacy that would result from such action. It would be impossible to determine to what extent the specific legacies, and in particular the devise to Henry H. Pruden, had been tainted and improperly reduced. In Cuthbertson's Appeal, 97 Pa. 163, 173, Chief Justice Sharswood, speaking for the Supreme Court of Pennsylvania, says: 'There may be a case where the alleged undue influence is applicable only to a single independent provision in a will, and that provision may fall, leaving the rest of the will to stand. It is certainly not this case, where the clause objected to is a residue, and that residue made up, or largely increased, by alterations made, as a jury may conclude, under the same influence for that purpose.' I do not doubt but that, in a proper case, part of a will can be set aside because of undue influence. This has been frequently held in

the English and American courts. See A. & E. Ency. of L. (2d Ed.) vol. 29, p. 108. So far as I am aware, the question has never been passed upon in this state. See, however, the comment made in *Harris v. Vanderveer's Ex'r*, 21 N. J. Eq. 561, at page 575. If Mrs. Cooper's will had been tainted by fraud or undue influence, all of it would have to be set aside. To my mind a division of the estate of testatrix under the statutes of descent and distribution would be more unnatural and inequitable than if made pursuant to the will and codicil in question.

"The removal from the operation of the bounty of testatrix of those in whom she was particularly interested, on the ground that her provisions for them had not been sufficiently ample, would, in effect, give the bulk of her property to relatives for whom she did not care, in whom she took no interest, and many of whom she had never seen, and would work great injustice. It is true that by so doing we would defeat her provisions for Axtell and his son. But is there anything unnatural in those provisions? Mrs. Cooper was a very warm friend of Axtell and his wife. She had become acquainted with Mrs. Axtell in 1883, and had known her husband much longer. In more than 25 of the numerous letters from Mrs. Cooper to Axtell she refers in affectionate terms to Mrs. Axtell. In some of these letters she expresses her appreciation of little acts of kindness extended to her by Mrs. Axtell. It appears from the evidence of Dr. Lewis that Mrs. Cooper was very fond of Mrs. Axtell, and displayed great sympathy at the time Mrs. Axtell was threatened with blindness. Minnie Pruden testifies that testatrix would frequently go and see Mrs. Axtell. The letters also show the high esteem in which Mr. Axtell was held. In one of them she addresses him as 'my very dearest friend.' They also show that her lonely life was brightened through her association with the Axtell family. Considering the relations of Mrs. Cooper with the Axtells, the provision for the head of that family can hardly be called unnatural, however we may question the wisdom of its bountiful character. It is not unnatural that she should have wished to substantially remember a dear friend with whom, apparently, her business relations had always been satisfactory, and to whose wife and family she had become greatly attached by pleasant social intercourse extending over many years. The only reason that this court has considered at length the question as to whether the will is natural or unnatural is for the purpose of ascertaining whether its provisions sprang from the natural impulse of the testatrix or resulted from coercion. Except from that standpoint, this court is not concerned in its reasonableness or justice, as any one having mental capacity, and acting freely on his own initiative, and without coercion, has a

right to make an unjust will. The possibility of establishing the will of 1888 on the ground that it was canceled through fraud or undue influence will not be considered by me, because I feel certain it was not so canceled, and further because the question as to its cancellation is one in which the parties to this proceeding are not interested. Not one of the 11 contestants, and neither of the 2 proponents, would be in any way benefited by its probate.

"3. Mrs. Cooper was possessed of a sufficient income and estate to support her in comfort. She was a woman of simple tastes, very economical in her mode of life, and very thrifty. She had the life use of the income from the estate of her husband, who died in about the year 1877. The evidence shows that estate to have been worth in the neighborhood of \$29,000. After the death of J. C. Youngblood in 1897, some partial settlement and distribution of the James J. Cooper estate was made, so that its amount was reduced to about \$18,000. It does not appear what amount of cash Mrs. Cooper received through the settlement and distribution. Mrs. Cooper at the time of her death had personal property, consisting principally of bonds and mortgages, which has since been inventoried at \$21,692.39. This amount included the value of her furniture and household goods, appraised at \$486.23. The inventoried value of her personal estate will be considerably decreased by the expenses of administration and other charges. No evidence has been presented to me in this proceeding showing what the indebtedness and other charges against her estate would amount to. She owned a house and lot on High street, Morristown, worth \$5,500 or \$6,000, and a vacant piece of land, consisting of about 25 acres, on the north side of the Baskingridge road near Morristown. What this 25-acre piece is worth does not appear. Testatrix valued it at \$5,000, but that valuation, in view of other evidence, is probably somewhat excessive. Testatrix kept close track of her investments. In her letter to Rufus B. Marks, dated May 28, 1900, she inclosed a statement showing that she then thought she was worth \$13,800 aside from her real estate. Axtell testifies that two or three years ago testatrix gave a thousand dollar bond to her niece Lydia Pruden. This would seem to have been a proper recognition of the devoted service rendered to her by a favorite niece, who resided with her a good many years, and whose fixed compensation was extremely meager.

"What appears to have been an advantageous conversion of some of her real estate into personalty was made in 1902, when she sold her land on the South side of the Baskingridge road to her nephew Harry Pruden for \$5,000, subject to a mortgage of \$3,360. In this way she apparently obtained \$1,640 cash available for investment, got rid of a

mortgage liability, and retained the tract to the north of the Baskingridge road (devised to Henry H. Pruden) free and clear of all mortgage incumbrance. Axtell states that at one time testatrix told him she was saving from \$800 to \$1,000 a year, but it does not appear over what period she believed she was saving in that manner. She apparently thought that she had increased her estate through her habits of economy and thrift. I am unable to determine from the evidence just what Mrs. Cooper was worth in 1900, or prior to that time. Her written and oral statements in that regard are only competent as they tend to show us her point of view. In that respect they are extremely valuable, but they cannot, as above shown, be received as substantive evidence of the facts stated. Enough has been developed in this case to show that testatrix was a shrewd, capable manager, and, though very careful of her expenditures, was exact and just in her dealings with others. If she believed that her estate was increased through her own care and economical management, she may for that reason have felt that the increase was peculiarly her own, and that no one of her relatives could complain if she acted in accordance with her own wishes and judgment, and made Axtell a large beneficiary under her will. She may also have looked upon that increase as a fund upon which she could make heavy drafts, in case she was obliged to live the life of an invalid for any considerable period before her death. There is no doubt in my mind but that she was fully acquainted with the character of her property and realized its value.

"4. I will next consider whether Mrs. Cooper fully understood the nature of her will. The contention that she did not realize the effect of the residuary clause, and that she really believed that her brother Henry was the principal recipient of her bounty, strikes me as being absolutely without force. It is claimed that the specific legacy of \$500 to Axtell tends to prove that Mrs. Cooper did not appreciate the value of her estate, and thought the residue, after the payment of the specific legacies, would be small. As a matter of fact, two days after the execution of the will, in her letter to Mr. Marks, above referred to, she inclosed a list of her securities, showing that she believed that she had a considerable estate. That letter certainly shows a secretive mind, and it may be that she did not object to having Marks believe that his wife would receive some considerable portion of her estate. While the letter shows a lack of frankness, it does not show that she was ignorant of what she had done with her estate. I feel certain that she knew the contents of her will and codicil and the effect of their provisions. Axtell says the will was read over to her in her presence at the time of its execution. Witte, one of the attesting witnesses to the will, says 'she

said she had read over the will and knew what was in it.' So far as the codicil is concerned Axtell says that at the time of its execution he read it over to testatrix. He further says that he delivered the will to her on the day of its execution, and did not see it again until he drew the codicil, and that after the codicil was drawn, Mrs. Cooper retained both will and codicil.

"Even if the will was in the safe deposit box for one year, as is claimed, and I have no doubt but that such was the fact, she had equal control over it with Axtell. Axtell's statement that both will and codicil were left with Mrs. Cooper at the time the codicil was executed is corroborated by other evidence. It appears that both will and codicil were in her possession about a year and a half before her death, as she then handed to Mrs. J. H. Van Doren an envelope containing both documents, and Mrs. Van Doren, pursuant to instructions from testatrix, immediately handed it to her husband, the executor appointed under the codicil to serve with Axtell. For the 1½ years that the will and codicil were in the custody of Mr. Van Doren they were of course under the control of testatrix, and could have been canceled and replaced at any time without the knowledge or consent of Axtell. The possession of the will and codicil by testatrix, taken in connection with opportunity to cancel them which she had over a long period of time, is strong indication that she was aware of their contents. It has been recently held in the Prerogative Court of this state that: 'Where a testatrix, after the execution of a will, drawn according to instructions given one who conveyed them to the draftsman, has the executed will in her possession a sufficient length of time, and with the opportunity and ability to acquaint herself with its contents, and she then preserves it, it will be conclusively presumed that the will was prepared according to her instructions, especially when it followed her pronounced intentions, and provides for no unnatural disposition of her estate.' In re Catharine McLaughlin's Will, 69 N. J. Eq. 479, 59 Atl. 892. See, also, Brick v. Brick, 44 N. J. Eq. 282, 18 Atl. 58, where it was held that, 'if a will is shown to have been in a testatrix's possession long enough for her to read it, the proponent need not prove that any one saw her read it, or heard it read to her, or in her presence, because, if she had the intelligence and capacity to read it herself, the law will presume, if the opportunity was afforded her, that she was acquainted with its contents.' The existence of the codicil, drawn in 1904, which in express terms confirms the will, tends to prove that testatrix was well acquainted with the provisions of the will, as she would not have been likely to have made changes in it without familiarizing herself with its contents. Her statement to Minnie Pruden that 'she had made a will and remembered us. She had thought a good deal about making her

will, and she thought some people would not be satisfied'—also indicates that she was aware of its contents.

"5. The question whether Axtell has sustained the burden placed upon him by his indiscreet conduct in the matter of drawing and attending to the execution of the will and codicil presented for probate has been answered by the evidence. He placed himself in a very indelicate and highly improper position, which made it necessary for him to produce voluminous testimony before this court. I am satisfied by the documentary and oral proofs (without regard to Axtell's testimony and his emphatic statements that he in no way influenced testatrix) that at the time the will was drawn, as well as at the time the codicil was drawn, Mrs. Cooper had fixed testamentary ideas as to the disposition of her estate. She knew what she wanted, gave her instructions to Axtell, and he followed them. In this respect this case is different from *Farnum v. Boyd*, above cited, where the testatrix had 'unsettled testamentary notions.' The 'independent judgment' required under *Farnum* against *Boyd* has also been exercised by testatrix in this case. All the evidence points to that conclusion.

"In particular it is indicated, by the statements and actions of testatrix in regard to the custody of her will and her statement to Minnie Pruden, above quoted, that she had given much thought to its making. The rule requiring that a person disposing of his property by will must exercise a judgment independent of the confidence induced by his confidential relationship with his legal adviser must not be confused with the rule requiring 'proper independent advice,' which is applicable in the case of a person who makes a voluntary deed, to take effect in his own lifetime, to one upon whom he is dependent for advice. The law guards with peculiar care a person of advanced years who, like King Lear, voluntarily deprives himself of his means of support in his old age, but is not so strict in the case of a person giving away his property by an instrument taking effect at his death, when he no longer has any use for it himself. In the former case it must be shown that the donor had 'proper independent advice.' In the latter case it need only be shown that the testator exercised his 'independent judgment.' Mrs. Cooper has been shown to have displayed independent judgment, and to have been free from that improper and undue influence which has been defined to consist 'in the exercise of sufficient control over the person, the validity of whose act is brought in question to destroy his free agency and constrain him to do what he would not have done if such control had not been exercised.' *Bennett v. Bennett*, 50 N. J. Eq. 489, 26 Atl. 573. Axtell has supplemented the other evidence by repeatedly and emphatically denying ever having directly or indirectly influenced Mrs. Cooper as to the disposition of her

property. His testimony in this regard is entitled to respect. Vice Ordinary Reed, speaking for the Prerogative Court in the Spark's Case, 63 N. J. Eq. 242, at page 249, 51 Atl. 118, at page 121, says: "The absence of any influence, which can be regarded as undue, must in the main, of necessity, be proved by the legatee himself." "The testimony of the legatee, unless contradicted by some other credible testimony, or discredited by its improbability, cannot be arbitrarily disregarded." The evidence clearly shows that the case now before me is within the established rule laid down in *Bennett v. Bennett*, above cited, that "every person competent to make a will has a right to the aid of any person he may think proper to select, when he desires to put his testamentary wishes in form to have legal efficacy; and, if he exercises this right without improper influence or control, though he selects the person he intends to make his principal beneficiary, that fact, in the absence of evidence showing an abuse of confidence, constitutes no reason why probate should be denied to his will." The proofs produced before me stand uncontradicted by any evidence produced by the contestants. It has been shown to my satisfaction that Axtell did not abuse the confidence of testatrix. The contention that he should, under the circumstances, have refused to accept her bounty is a question of ethics with which this court is not concerned.

"I am fully convinced that the will and codicil in question are untainted by fraud or undue influence. They represent the testamentary wishes of a woman of good mental capacity, acting free from all moral and physical coercion, and have been drawn strictly in accordance with her directions. Her wishes must control this court. An order will be made admitting them to probate as the last will and testament of Esther J. Cooper."

Vreeland, King, Wilson & Lindabury, for appellants Harrison, Huff, and Guerin. John M. Mills, for appellants Pruden, Briant, Mandridge, Groendyke, Simonson, and Mullen. Willard W. Cutler, for respondent executors. Charlton A. Reed, guardian ad litem, pro se.

PITNEY, Ordinary. Counsel for the appellants do not controvert the principles of law adopted by the court below as applicable to the case. The contention is that the learned judge erred in his conclusions of fact. My examination of the case convinces me that those conclusions are fully supported by the evidence, and that the respondent Axtell fairly sustained the burden of showing that the will was the product, not of undue influence, but of the free and independent judgment of the testatrix.

The decree under review will be affirmed.

(77 N. J. L. 19)

HILL, to Use of FERRIS, v. ADAMS EXPRESS CO.

(Supreme Court of New Jersey. Dec. 22, 1908.)

1. CERTIORARI (§ 54*)—RETURN.

A transcript of the stenographic report of the proceedings and testimony, certified by the judge of the district court under chapter 188, p. 250, of the Laws of 1905, although not transmitted to the clerk of the Supreme Court within 15 days by the party suing out a writ of certiorari, may be treated as part of the return to such writ when the defendant in certiorari has made no objection to such state of the case under the thirty-second rule of this court, and no preliminary motion to strike out such part of the return has been made.

[Ed. Note.—For other cases, see *Certiorari*, Dec. Dig. § 54.*]

2. CARRIERS (§ 113*)—CARRIAGE OF GOODS—EXPRESS COMPANIES—LIABILITY.

A box to be shipped by Adams Express Company to Ireland was called for at the residence of the shipper by a driver of a local transfer company and delivered by him to the express company with a prepayment of the charges, nothing being asked or said as to valuation. The receipt that was handed to the driver of the transfer company by the express company was delivered by him to the shipper two days later, at which time the box, while in the possession of the express company, had already been destroyed by fire. In an action brought by the shipper against the express company for the value of the box:

Held, that a motion to nonsuit was properly denied, and that a request that the plaintiff's recovery be limited to \$50, pursuant to a provision in the express receipt, was properly refused.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 113.*]

3. CARRIERS (§ 180*)—LIMITATION OF LIABILITY—EXPRESS COMPANIES—AGENT OF SHIPPER.

Where a shipper employs a common carrier (in this case the Union Transfer Company) to carry goods to an express office (in this case Adams Express Company) for shipment, the driver of the wagon of the local carrier who delivers the goods to the express company is not a servant or agent of the shipper with whom the express company may make a special contract binding the shipper, in the event of loss, to a limitation of such carrier's common-law liability.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 815; Dec. Dig. § 180.*]

4. EVIDENCE (§ 244*)—DECLARATIONS—DECLARATIONS BY AGENT.

Where the adjustment of a claim of loss against an express company was referred by its main office in New York to the general manager of its Philadelphia office, who took the matter up with a representative of the plaintiff, the relevant declarations made by such general manager in the course of such negotiations and germane to the matter in hand are admissible in evidence against the express company in an action between the same parties growing out of the same transaction.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

(Syllabus by the Court.)

Certiorari to District Court of Camden.

Action in the district court of the city of Camden by Frank Hill to the use of Mary A. Ferris, against the Adams Express Com-

pany. Judgment for plaintiff, and defendant sued out a certiorari to review the same. Affirmed.

See, also, 74 N. J. Law, 338, 68 Atl. 94.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

Gaskill & Gaskill, for prosecutor. Joseph Beck Tyler, for defendant.

GARRISON, J. This writ of certiorari brings up a judgment of the district court of the city of Camden.

A preliminary question is whether there is any return to this writ upon which the prosecutor may rely in support of his reasons for reversal. The return, apart from the judgment record, consists of a transcript of the stenographic report of the proceedings and testimony certified by the judge of the district court pursuant to chapter 138, p. 259, of the Laws of 1905. This act requires that such certified transcript "shall be transmitted by the party suing out the writ of certiorari to the clerk of the Supreme Court within fifteen days from the rendition of the judgment."

In the present case this was not done, and counsel for the defendant in certiorari contends that such transcript should on this account be rejected. Rule 32 of this court, however, provides that a state of the case not objected to within five days after its service shall be deemed to be complete. We shall therefore take the statutory return in this case in so far as it bears upon the legal merits, without considering certain questions concerning it that would have arisen if timely objection had been interposed or a preliminary motion to strike out such return had been made.

We are thus brought to the merits of the present controversy.

The plaintiff's action was brought in the district court to recover damages for the loss of a box delivered to the Union Transfer Company to be carried to the defendant's local office for shipment by express to Ireland. The case, which was tried without a jury, resulted in a judgment for the plaintiff for \$300.

The prosecutor's first reason for reversal is that a motion to nonsuit made at the close of the case should have been granted. (The defendant offered no testimony.)

Upon the review of the ruling of the trial court upon this motion, the plaintiff's case was that on March 25, 1904, she engaged the Union Transfer Company to take a box from her residence in Camden to the local office of the Adams Express Company for shipment by that company to Ireland; that a driver of one of the wagons of the transfer company called at the house of Miss Ferris (the owner of the box and the substantial plaintiff), and there got the box and carried it to the office of the transfer company, where it was marked with an address given by Miss Ferris, after which the same driver

delivered the box to the defendant at its local office in Camden, prepaying the express charge demanded, and receiving a receipt, which he took to the office of the transfer company, where he was told to deliver it to Miss Ferris, which he did two days later, at which time the box had already been destroyed by a fire that occurred at the terminal office of the defendant at New York or Hoboken. At no time was anything asked or said by any one as to the value of the box.

The mere statement of the plaintiff's case makes it too clear for argument that the motion to nonsuit could not have been granted.

The next reason for reversal is the refusal of the district court to limit the plaintiff's recovery to the sum of \$50. This reason is founded upon a clause in the express receipt handed by the defendant to the driver of the transfer company which stated that the rate charged was based upon "a valuation of not exceeding fifty dollars unless a greater value is declared," and that "the shipper agrees that the value of said property is not more than fifty dollars unless a greater value is stated herein and the company shall not be liable in any event for more than the value so stated nor for more than fifty dollars if no value is stated herein."

That a carrier may thus limit its common-law liability by a special contract with the shipper is established in this state, with the proviso that the burden of proving that the shipper actually made such a contract is on the carrier. *Russell v. Erie R. R. Co.*, 70 N. J. Law, 808, 59 Atl. 150, 67 L. R. A. 433.

The validity of such contracts does not rest upon the right of the carrier to bargain for an exemption from the results of its own negligence, but upon its right to stipulate with the shipper as to the value of the latter's property, and to predicate upon such valuation both the rate of carriage to be charged the shipper and the amount of the carrier's liability in the event of loss. *Atkinson v. N. Y. Transfer Co.* (N. J. June Term, 1908) 71 Atl. 278.

This case also decided that where the shipper knows that the rate he is being charged is based upon an undervaluation of his property his silence is tantamount to his assent that such valuation shall be the amount for which the carrier shall be liable in the event of loss. In order to determine whether a given case comes within this rule, the crucial question is: When may the shipper be said to know that the rate that he is being charged is based upon an undervaluation of his property? This question, being one of fact, is from its nature incapable of being answered by any mere formula; each case must in a measure rest upon its own circumstances. There is, however, in a very large proportion of cases a matter in limine that is of prime importance in the solution of this question, viz., whether the delivery to the shipper of a partly written and partly printed receipt or

voucher which contains the terms of a special contract based upon a valuation placed on such property in such receipt becomes in the event of loss an executed contract by which the shipper is bound if he received such document without indicating his dissent to this feature of it. Speaking of such instruments, Gummere, C. J., in the case last cited, which was a Court of Errors decision, said: "It is insisted on behalf of the plaintiff in error that Mrs. Atkinson by receiving the bill of lading became bound by its provisions; that the mere acceptance of this paper without any indication of dissent from its terms bound her as fully as if she had expressly assented to them, and that she could not afterward deprive the plaintiff in error of the protection of its provisions by asserting that she was ignorant of its contents. We are not required to pass upon the soundness of this proposition."

The question was therefore not decided in the case from which we have quoted. The same court, however, in *Hayes v. Adams Express Company*, 74 N. J. Law, 537, 65 Atl. 1044, speaking through Mr. Justice (now Chancellor) Pitney, had already decided that "mere knowledge by a shipper that a carrier's rates are based upon the value of the goods shipped will not lessen the liability of the carrier to answer for the value of the goods in the absence of the shipper's assent to such a restriction."

It will be observed that the decision was not that such result might not follow, the shipper's knowledge that the rate he was being charged was based upon a valuation stated in a receipt that was delivered to him.

There is therefore no conflict between the two decisions, although neither of them passed upon the question we have propounded, which now calls for our decision only in case the driver of the transfer company had authority from Miss Ferris to give or to withhold her assent to the valuation placed upon her property in the receipt that was handed to such driver when he delivered her box to the express company.

If the driver had such authority from the shipper, it must have arisen as a fiction of law from the mere fact of her employment of the transfer company to deliver her box to the express company, and to prepay the charges demanded, for she did nothing else to constitute the servant of the transfer company her special agent. Such fiction, however, by which the servant of a common carrier (in this case the transfer company) is by mere operation of law transferred to the service of whomsoever contracts with such carrier, not only does violence to all our preconceived notions touching the relation of master and servant, but seems to lead to the absurd result that one who thus contracts forfeits thereby all right of recovery against such common carrier for losses arising out of the negligence of one of its servants, for by force of the fiction in question such serv-

ant of the carrier becomes pro hac vice the servant of the carrier's customer, and no one can recover damages for a loss occasioned by the negligence of his own servant.

But not only is the fiction in question thus out of harmony with the general law of master and servant, it also runs counter to more than one of the established doctrines respecting that relationship such, for instance, as the independent contractor doctrine, under which agency cannot be traced through an independent actor; and the fellow servant doctrine, under which the relation of master and servant cannot be changed without the consent of the servant. It is also repugnant to the doctrine upon which the courts of this state based their repudiation of the rule laid down in *Thorogood v. Bryan*. Inasmuch as *Thorogood v. Bryan* concerned the imputation of negligence, the grounds of its repudiation may seem to be lacking in application to the question of the imputation of agency; but identity of principle is of more importance than mere analogy, and in principle the two classes of cases are not only similar, but the principle involved is even more appropriate to cases of contract than to those where conduct merely is concerned.

This will appear from a statement of the case cited and of the grounds of its repudiation. *Thorogood v. Bryan*, 8 Man., Gr. & Scott, 116, had held that, where the negligence of the driver of an omnibus contributed to a collision with another vehicle by which a passenger in the omnibus was killed, the representative of such deceased passenger could not recover from the proprietor of such other vehicle damages for its negligent management, for the reason that the driver of the omnibus was so identified with the passenger he was carrying as to be in legal effect his servant. By force of this doctrine the negligence of the driver of the omnibus was imputed as contributory negligence to his fictional master, to wit, his passenger.

This doctrine was emphatically repudiated in our Supreme Court in *Bennett v. New Jersey R. R. & T. Co.*, 36 N. J. Law, 225, 18 Am. Rep. 435, and in the Court of Errors and Appeals in *N. Y. L. E. & W. R. R. Co. v. Steinbrenner*, 47 N. J. Law, 161, 54 Am. Rep. 126, in opinions demonstrating its inconsistency with established principles of law, which are of equal cogency upon the question we are now considering. The same result was reached in the Supreme Court of the United States in *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652, in which Mr. Justice Field characterized the opinions delivered by Chief Justice Beasley and Mr. Justice Depue in the two New Jersey cases as "of marked ability and learning." The fact is that *Thorogood v. Bryan* has been quite generally discredited both in this country and in England, and in all the courts in which it has been repudiated stress has been laid upon the passenger's lack of control over

the driver as the test to be applied in such cases.

Upon principle I am unable to distinguish between a passenger's lack of control over the driver of a conveyance in which he is riding and the customer's lack of control over the driver of a transfer wagon in which his property is being carried.

In point of law their impotence is the same, while in point of fact such impotence is greater in the latter case than in the former; for the passenger being present may and often does exert some influence over the conduct of the driver of the conveyance, but in the case of the transportation of goods the owner does not accompany his property, and hence has no opportunity whatever to exercise the slightest control over the carrier's servant. Obviously the rule of our cases forbids the imputation of agency in cases such as that now before us.

I am aware that there is a line of decisions, whose soundness need not now be questioned, of which *Nelson v. H. R. R. Co.*, 48 N. Y. 498, may be taken as the type, which hold that the agreement or arrangement between two persons touching the shipment of goods may be such that the owner of the goods is bound by the terms of their shipment if assented to on his behalf by the servant of his agent or representative. And inasmuch as this doctrine was referred to arguendo by Judge Vroom in his opinion in the *Russell Case*, it may be well to point out that the decision of that case was placed solely upon the narrow point that the servant of the shipper's agent carried to the shipping office a completely made out shipping order that definitively marked the limits of his authority, hence the question as to what his authority would have been but for such limitation was not a matter of decision in that case.

Assuming, however, the correctness of the decisions referred to, they are clearly distinguishable from the present case, not only by reason of the wide difference that exists between instructions given to a personal agent to cause goods to be shipped and the mere employment of a common carrier to carry goods to a shipping office, but also, and more fundamentally, because of the legal distinction between acting through another person in the performance of an act and contracting with such other person for the performance of such act. This distinction, which lies at the foundation of the independent contractor doctrine, is too radical to be overlooked when considering the underlying principle of these cases, which is that the relation between the parties or their business custom raises a presumption of agency that includes the right to declare the value of the goods or to assent to a valuation placed on them by the carrier, which are correlative powers, neither of which will without proof be presumed in a case such as the present, where the charges demanded by the carrier were paid

by one who was himself the mere driver of teams for another common carrier.

There is nothing, therefore, in the decisions we have spoken of that militates against the conclusion we have reached, which is that the driver of the transfer company in the present case had no authority from Miss Ferris to make for her a special contract with the express company by which the liability of the latter should be limited in the event of loss. Having reached this conclusion, the question whether the driver had by his silence assented to the terms of the receipt that was handed to him does not call for decision. The reason under consideration, therefore, does not lead to the reversal of the judgment brought up by this writ of certiorari.

The only other reason urged for reversal is that the authority of A. J. Town as general agent of the defendant in Philadelphia to bind the defendant by his declarations was not established. This was the chief defect upon a previous trial of this cause, as appears from the opinion of Mr. Justice Pitney in *Hill v. Adams Express Company*, 74 N. J. Law, 338, 68 Atl. 94. An examination of the testimony given at the present trial satisfies us that the deficiency of proof thus pointed out was fully supplied by competent evidence. That evidence was that W. S. Scull, acting for the plaintiff in the assertion of her claim, went to the office of the defendant in Camden, where he was referred to the general office of the defendant in New York City, which he visited a number of times, until finally at his request the matter was referred to the Philadelphia office, from which latter office Mr. Scull soon after received a letter, signed "A. J. Town," which stated on its letter head that A. J. Town was the general manager of the defendant in Philadelphia, and in its body showed that the matter under consideration in New York had been by correspondence communicated to the Philadelphia office. Thereupon Mr. Town, in pursuance to such communication, took up with Mr. Scull the adjustment of Miss Ferris' claim, in the course of which the former made certain statements relative to the matter in hand, to whose admission in evidence the defendant objected at the trial. We think that the authority of Mr. Town to represent the defendant was clearly inferable from the proofs, and that the statements ascribed to him were germane to the matter that had been referred to him by the defendant, and hence relevant and admissible in a suit against it growing out of the same transaction.

The case for the plaintiff is much stronger than it was in *Agricultural Insurance Co. v. Potts*, 55 N. J. Law, 158, 26 Atl. 27, 537, 39 Am. St. Rep. 637, and in *Smith v. D. & A. T. & T. Co.*, 64 N. J. Eq. 770, 53 Atl. 818, and presents the exact antithesis of *Huebner v. Erie R. R. Co.*, 69 N. J. Law, 327, 55 Atl. 273, all of which cases were in the Court of

Errors and Appeals. In the same court, in *King v. Atlantic City Gas & Water Co.*, 70 N. J. Law, 679, 58 Atl. 345, it was said by way of illustration that "our cases show that where one authorizes another to speak for him he may be confronted by testimony as to what his representative said within the scope of his authority." That is the precise situation here. Town's authorization to discuss the plaintiff's claim with Scull as her representative carried with it the making of such statements and explanations from the defendant's standpoint as were germane either to the denial or the adjustment of her claim; in fine, was essentially an authority to speak for the defendant in the premises. Hence declarations made within the scope of such authority were properly admitted in evidence in a trial against the defendant growing out of the same subject-matter.

Finding in none of the reasons filed by the prosecutor any ground for reversal, the judgment of the district court is affirmed.

(74 N. J. E. 824)

KING v. KING.

(Court of Errors and Appeals of New Jersey.
Dec. 23, 1908.)

1. DIVORCE (§ 62*)—"DOMICILE" OF PLAINTIFF.

A wife who had been deserted by her husband came from the state of New York into New Jersey in October, 1904, and filed her petition for divorce here on October 9, 1907. She first resided at different places here for the purpose of finding an inexpensive place to live, and finally, but not two years before filing her petition, fixed her residence permanently at Asbury Park. Her intention when she first came into New Jersey, and thereafter continued, was to make her future home in this state. *Held*, that her residence in this state from the beginning, coupled with her intention to remain here, gave her a domicile in New Jersey within the meaning of the divorce act (P. L. 1902, p. 503), which requires a two years' residence here during the time for which the desertion continued, and a residence continued down to the filing of the petition.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 220; Dec. Dig. § 62.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2168-2179; vol. 8, pp. 7641, 7642.]

2. DIVORCE (§ 62*)—"RESIDENCE."

The word "residence" employed in the divorce statute means "domicile."

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 62.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6151-6161; vol. 8, p. 7788.]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Action by Florence Maude King against Charles Sanford King for divorce. Judgment for defendant, and plaintiff appeals. Reversed.

Franklin W. Fort, for appellant.

REED, J. This is an ex parte proceeding to secure a divorce on the ground of deser-

tion. On the coming in of the report of the master advising a decree in favor of the petitioner, the Court of Chancery dismissed the petition. The ground of this dismissal was that there was not sufficient evidence that the petitioner had acquired a residence in this state for two years before her petition was filed; that her declaration that she intended to reside in this state was not accompanied with the selection of any place which she adopted as a residence *animo manendi*; that she went from place to place within the state and selected no one place as a residence until after the two years began to run.

The petition was filed on October 9, 1907. The petitioner came from New York state, where her husband had deserted her, to New Jersey about October 1, 1904. She first went to Newark for a few weeks, then to Montclair until June, then to Europe until October, 1905, then to Lakewood for three or four months, then to Newark again, and afterward to Montclair. So she moved from place to place, remaining for different periods, until she established a residence at Asbury Park. The evidence convinces us that she left New York with no intention of returning. It clearly convinces us that she came to New Jersey with the intention of making this state her home. In respect to her migrations after coming here, she says: "I have gone from place to place in New Jersey for the purpose of seeing which place I would like best before establishing a permanent home. I found it too expensive at Lakewood and at Montclair, and I found Newark and Asbury Park cheaper."

The jurisdictional fact to be established in suits for divorce brought for desertion is that one of the parties shall have been a resident of this state during two years of the time for which the desertion shall have continued, and that such residence shall have continued until the filing of the bill or petition. P. L. 1902, p. 503. It is settled that the word "residence" employed in the statute means domicile, and that to confer jurisdiction upon the courts of this state it is essential that one of the parties shall have been domiciled in this state for the statutory period. *McShane v. McShane*, 45 N. J. Eq. 342, 19 Atl. 465. Domicile, of course, means a residence in New Jersey, coupled with an intention to remain in New Jersey. It is undenied that, with the exception of a three months' absence in Europe, the petitioner was physically present in this state for about three years before filing her petition. As already observed, the testimony leaves no doubt in our minds that she lived here with the intention of making her home in this state.

The view which led to the dismissal of the petition was obviously this: That while the petitioner was a resident here, and intended to remain within the state, she nevertheless had no fixed intention of permanently re-

maintaining in any one of the places in which she resided, until she finally removed to Asbury Park. The question of domicile may arise in relation of a person's residence in a country, in a state, or municipality. The place of residence may mean the house or home which shelters the person whose domicile is the subject of inquiry, or it may mean the country or state or subdivision thereof in which the person intends to make his home, and in some part of which he resides. In moving from one country to another, from one state to another, or from one county or town to another county or town in the same state, the person almost universally fixes his new home in some habitation; and the question is whether he did so with the intention of remaining in that habitation. The question, therefore, of his domicile in a particular town, county, or state, within which he has taken up his abode is simply a question whether he has fixed his domicile in his habitation.

But an instance is conceivable where a man who has resolved to change his residence permanently from one city to another, in pursuance of such an intention, has broken up his old home and taken his family to his new home. But he has taken them temporarily to a hotel or a boarding house until such time as he can secure a suitable dwelling in the new city; or, being unable at the time to get a suitable dwelling, rents an undesirable house until he can procure one more satisfactory in the same city, perhaps in the same street. Now it is perceived that this man has done, from the first, all that is essential to confer upon him domiciliary rights in the new city. He resides in the city with the intention of making his home there. It is impossible to say that his intention to change from his boarding house to a private dwelling, or from one dwelling to another, destroyed his domiciliary intent to live in the city, without assenting to the absurd proposition that, if he intended to change from one unsatisfactory room in his hotel to a better room when vacated, that fact would also defeat his domiciliary intention.

This is an illustration applicable to a change of municipal domicile. But the domicile required by the divorce statute seems to be more analogous to what is termed by Mr.

Jacobs, in his work on domicile, a quasi national domicile. In speaking of the necessity of residence in a particular place within a country or state as a requisite for the acquisition of domicile therein, Mr. Jacobs remarks: "It is probably not necessary that, in order to work a change in domicile from one state or country to another, the person whose domicile is in question should reach the particular spot within the territorial limits of the latter at which he intends fixing his permanent abode; and indeed it may perhaps be said that it is not absolutely necessary for such purpose that the person should ever have, either in fact or in contemplation, a permanent home within any particular municipal division of such state or country. Such cases must necessarily be rare, but it is possible to conceive of a Frenchman coming to England with the intention of permanently remaining there, but without ever fixing a permanent abode in any particular part of the country. In such case, while it would be doubtless much more difficult to prove the requisite intention than if he had, for example, purchased a dwelling house, and fixed himself in it in an apparently permanent manner, yet, assuming the requisite intention to be made out by other proofs, there is little doubt that his domicile would be held to be changed." Jacobs on the Law of Domicile, § 133. The same view is held by Mr. Dicey (Dicey on Domicile, p. 56), and by Lord Jeffrey, as expressed in *Arnott v. Groom*, 9 D. Sc. Sess. Cas. (2d Series) 142-145.

We regard these views as sound. Notwithstanding a frequent change of habitation may create a situation by which the proof of an *animus manendi* becomes difficult, yet, if proved, this, coupled with residence, although migratory, within the territory of the nation or state, equips the resident with a domiciliary status. So, assuming that this petitioner, while she resided in Newark, Montclair, or Lakewood, had no domicile in either of these places, because of the absence of an intention to permanently remain in any one of them, nevertheless, having an intention to remain in New Jersey, and residing in New Jersey, she was domiciled in New Jersey.

The decree below should be reversed.

(75 N. J. E. 219)

PFEFFERLE et al. v. HERR.

(Prerogative Court of New Jersey. Jan. 14. 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 85*)—MANAGEMENT OF ESTATE—REMOVAL—OFFICE—GROUNDS.

That an executor and trustee paid to the children of testator sums in excess of the income of the estate, while the will directed that none of the estate should be paid to them before they attained a certain age, and that until that time they should have so much of the income as might be necessary for their maintenance and education, does not justify his removal from office on the application of the children, in the absence of bad faith and a wanton and wasteful invasion of the corpus of the estate for their maintenance and education.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 85.*]

2. GUARDIAN AND WARD (§ 76*)—SALE OF WARD'S LANDS—STATUTES—CONSTRUCTION.

2 Gen. St. p. 1610, § 8, authorizing the orphans' court to order a guardian to sell so much of the ward's lands as may be adequate for his maintenance and education, applies to testamentary as well as statutory guardians.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 76.*]

3. TRUSTS (§ 198½*)—SALE OF WARD'S LANDS—ORDER OF COURT.

A testamentary trustee may in a proper case apply for and obtain the protection of an order of the court to make an encroachment on the corpus of the estate in behalf of his ward, and what may be done in advance may be subsequently ratified.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 246; Dec. Dig. § 193½.*]

4. WILLS (§ 840*)—CONSTRUCTION—ESTATES DEVISED.

A testator giving his real and personal estate to his children equally, subject to the right of dower of his wife, and directing his executor to sell such parts of the personality as may be necessary to discharge incumbrances on the real estate, expresses a clear intention to pass the real estate to the devisees unincumbered and to endow the widow from the same value therein as that value has in the hands of the devisees.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 840.*]

5. EXECUTORS AND ADMINISTRATORS (§ 85*)—MANAGEMENT OF ESTATE—REMOVAL FROM OFFICE—GROUNDS.

That an executor and trustee sold his testator's real estate and made excessive payments to the widow on account of her dower without having her dower interest ascertained according to law, and that a bill filed by the widow, pending proceedings for the removal of the executor and trustee, has not been prosecuted with due diligence, do not justify the removal of the executor and trustee, at least until it has been definitely ascertained what the fact is as to such excessive payments and delay.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 85.*]

6. EXECUTORS AND ADMINISTRATORS (§ 85*)—MANAGEMENT OF ESTATE—REMOVAL FROM OFFICE—GROUNDS.

That an executor and trustee allowed taxes on the testator's real estate to become defaulted so that penalties and interest were added to them, and so that a part of the land was sold for taxes, does not justify his removal from office on it appearing that the property has been redeemed and he has been surcharged with all

penalties and interest paid to effect the redemption.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 85.*]

7. EXECUTORS AND ADMINISTRATORS (§ 85*)—MANAGEMENT OF ESTATE—REMOVAL FROM OFFICE—GROUNDS.

P. L. 1898, p. 707, § 140, which provides that, when property in the hands of any executor or trustee is insecure or in danger of being wasted, he may be required to give bond conditioned for the faithful performance of his duty under testator's will, is a declaration of legislative policy indicating that it is not for every unwarranted act of omission or commission that an executor is to be removed, and where he has strayed from the path of fiduciary duty he may be compelled to secure those who might suffer loss by reason of his dereliction, but the stigma of removal can be placed on him only in a flagrant case.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 85.*]

8. EXECUTORS AND ADMINISTRATORS (§ 85*)—MANAGEMENT OF ESTATE—REMOVAL FROM OFFICE—GROUNDS.

Where an executor and trustee, who had made excessive payments to testator's widow on account of her dower, and had thereby made the estate insecure, gave a bond as required by the court, conditioned on his faithful performance of his duty under the will, and thereby secured the estate, his misconduct was not ground for his removal.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 85.*]

Appeal from Orphans' Court, Essex County.

Suit by Florence Pfefferle and others for the removal of Charles F. Herr, executor and trustee of John F. Pfefferle, deceased. From an order of the orphans' court refusing to remove respondent from his office of executor and trustee, complainants appeal. **Affirmed.**

Samuel A. Besson and J. M. Roseberry, for appellants. Pitney, Hardin & Skinner, for respondent.

WALKER, Vice Ordinary. John F. Pfefferle died January 1, 1892, leaving, him surviving, his widow, Margaret E. Pfefferle, who was his second wife, and who has since married, and whose name is now Margaret E. McClellan, and his three children, Florence, Gertrude, and Frederick, by his first wife, and two children, Ida and Oscar, by his second wife. At the time of his death, Florence was 12 years old; Gertrude, 9; Frederick, 7; Oscar, 2; and Ida, 3 months. Mr. Pfefferle left a last will and testament dated November 11, 1891, which was proved before the surrogate of Essex county January 25, 1892. Mr. Herr was made executor, and he and the testator's wife were appointed guardians of his children during their minority. Mr. Herr qualified as executor, and took upon himself the burden of the administration of the estate upon letters testamentary being issued to him on the date of the probate of the will. Neither he nor Mrs. McClellan qualified as testamentary guardians of the infant children of the deceased, but Mrs. McClellan in 1903 was appointed guardian

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of her two infant children by the Essex county orphans' court. The testator in his will devised and bequeathed all his real and personal estate unto such of his children as should be living at the time of his death in equal shares, subject to the right of dower of his wife in the real estate, and directed his executor to sell so much and such parts of his personal estate as might seem necessary to pay and discharge all incumbrances on his real estate; it being his will, and he did order, that none of his real or personal estate should be conveyed or paid over to his children before they attained the age of 30 years respectively, they, however, to have so much of the income and profits thereof as might be necessary for their maintenance and education during their minority and for their support until they attain said age.

The appellants in their petition to the orphans' court alleged that the executor and trustee had wasted and misapplied the estate committed to his custody and had abused the trust and confidence reposed in him by the testator; that up to September, 1901, he had paid to the widow \$9,215.42 of the principal of the estate in violation of the provisions of the will; that he had so paid out of the principal to Florence the sum of \$5,199.49, to Gertrude \$3,732.41, to Frederick \$1,661.33, to Ida \$1,012.84, and to Oscar \$829.97—in all \$21,650.56. It will be noticed that the petitioners are Florence, Gertrude, and Frederick, who were recipients of the respondent's disbursements out of their father's estate. The fact is that the respondent from the death of the testator until the filing of his second account as executor provided the petitioners and other children of the decedent with means for their support and education as seemed to him justified; but because of exceptions filed to that account, questioning among other expenditures those made for the support and education of the petitioners, and complaining that the respondent should not have allowed more moneys from the estate to be expended for the petitioners than the share of the net income belonging to them, the respondent, for his own protection, ceased making allowances to the petitioners.

In this posture of affairs, the appellants filed a bill of complaint in the Court of Chancery praying in the alternative, among other things, that the respondent as executor be decreed to pay to each of the complainants out of the income to which they are entitled under the will of their father, the sum of \$40 per month for their maintenance and support, or that he be ordered and decreed to provide in some other way for the necessary education, support, and maintenance of the complainants. The defendants to this bill were Mr. Herr, the executor, Mrs. McClellan, the widow, and her infant children, Ida and Oscar Pfefferle. The executor answered, and a decree pro confesso passed against Mrs. McClellan. The clerk in chan-

cery was appointed guardian of her infant children and filed answers on their behalf through counsel appointed for that purpose. After hearing and on February 26, 1906, a final decree was made in the cause (no opinion being filed), which ordered and adjudged that the real estate whereof the testator died seised, together with the personal estate remaining in the hands of the respondent as executor, after administering upon said estate, are held by him in trust for the complainants and the defendants Ida and Oscar Pfefferle, to keep the same and to apply the equal undivided one-fifth part of the net income and profit, or so much thereof as in his judgment may be necessary for the maintenance and education of each of said children who have not reached the age of 21 years, and for the maintenance of each who have reached that age until they shall attain the age of 30 years, and to pay to each his or her equal undivided one-fifth part of the principal of said estate, together with any accumulated income, as and when he or she shall attain said age, and upon the further trusts declared in said will, subject, however, to the right of dower of the widow, and that the trustee apply an equal one-fifth part of the net income and profits of the estate, or so much thereof as in his judgment may be necessary, for the maintenance and education of each of the children who have not reached the age of 21 years, and for the maintenance of each of them who has reached that age until he or she shall reach the age of 30 years respectively.

The question of the amount of allowance out of the estate to the children of the decedent was a question of doubt and difficulty at least, for, on a prior bill filed which was demurred to for want of parties, Vice Chancellor Stevenson in his opinion (*Pfefferle v. Herr*, 65 N. J. Eq. 325, at page 327, 55 Atl. 1103, at page 1104) said: "Whether the right of each child to maintenance, etc., applies only to the income of his share, or to the income of the entire estate, is the question of construction to be determined at the start. The will says 'that so much of the income and profit thereof'—i. e., of the entire real and personal estate—'as may be necessary,' shall be applied to the maintenance and education of the children. The will does not say that so much of the income of each share as may be necessary shall be applied to the maintenance and education of the child entitled to the share." The objection, as I understand it, is that the executor and trustee paid to the children of the testator sums of money in excess of the income of the estate; but there is no allegation that any of these sums was paid for anything other than maintenance and education. Assuming that portions of the allowances made for the support and education of the infants were advanced out of the principal of the estate upon the sale of certain portions of the realty, the executor may settle that score with the infants

when they are entitled to their shares in severalty upon attaining the prescribed age, especially in view of the fact that the trustee has given security.

By statute (2 Gen. St. p. 1616, § 3) the orphans' court may order a guardian to sell so much of the ward's lands as may be adequate for his maintenance and education, and this, as I understand it, applies to testamentary as well as statutory guardians. It was held in *Re Hannah Barry*, 61 N. J. Eq. 135, 47 Atl. 1052, that this court will leave the question of the necessity of expenditure out of the principal of an infant's estate for his maintenance to the judgment of the guardian, subject to the supervision of the orphans' court on the settlement of the accounts. In *Stephens v. Howard's Ex'r*, 32 N. J. Eq. 244, Vice Chancellor Van Fleet held that where a legacy vests in an infant, but is payable when it attains a certain age, and its father is unable to support it, and the interest arising from the legacies is not sufficient for that purpose, a court of equity may, in advance of the time fixed for payment by the will, order the principal of the legacy applied to the support of the legatee. These citations are made for the purpose of showing that encroachment upon the principal of the estate of a legatee in advance of the period of distribution is not absolutely and under all circumstances forbidden. A trustee may, in a proper case, apply for and obtain the protection of an order to make such encroachment in behalf of his ward; and it appears, too, that what may be done in advance may be ratified afterward. In the absence of bad faith, and unless there be wanton, excessive, and wasteful invasion of the corpus of an estate for the maintenance and education of its beneficiary, it would appear that a foundation does not exist for the removal of a trustee upon that score. It may be that the trustee will have to submit to a surcharge in this matter in the end, but for present purposes a showing is not made which calls for the removal of the trustee because of these advances.

When the executor sold real estate, he made payments to the widow on account of her dower, without having her dower interest ascertained according to law, and it is claimed that he has paid her excessive amounts. The testator directed that all the incumbrances on his real estate should be paid out of his personal estate. It would seem from this that the testator intended that his wife should be endowed in the gross value of his real estate, not deducting any incumbrances thereon. In *McLenahan v. McLenahan*, 18 N. J. Eq. 101, it was held that, if lands are devised subject to a mortgage not made by the decedent, the heir or devisee takes cum onere unless the decedent shall have assumed the debt in such manner to show his intention to charge his personal estate; and in *Campbell v. Campbell*, 30 N. J. Eq. 415, on a bill for dower in lands of an intestate, it was held the personal estate must exonerate the

land from a mortgage put thereon by the intestate, and dower be assigned therefrom as if unincumbered, and as to a mortgage upon the land assumed by the decedent dower must be assigned therefrom subject to the mortgage. The direction in the will for the payment of all incumbrances on the testator's real estate out of his personal property is, to my mind, the expression of a clear intention to pass the real estate to the devisees unincumbered, and to endow the widow in the same value therein as that value has in the hands of the devisees. *Hetzel v. Hetzel* (October term, 1908, not yet officially reported) 71 Atl. 755. Since this controversy has arisen between certain of the beneficiaries and the executor, the widow has filed a bill for dower in the Court of Chancery. It is asserted by the appellants that the bill for dower has not been prosecuted with due diligence. Whether this be so or not, in a collateral proceeding like this, the want of diligent prosecution of a suit for dower should not be made the basis of the removal of an executor who is said to have made overpayments on account of dower to the widow; at least, until it has been definitely ascertained what is the fact in this regard, the matter should be allowed to remain in statu quo. I fail to see that bad faith or gross incompetence is chargeable against the executor in reference to this matter.

It is charged also against the executor that he allowed taxes upon the testator's real estate to become defaulted in, and that penalties and interest were added to the amount of the taxes, and that some at least of the real estate was sold to the city of Newark. As a matter of fact, the lands have been redeemed, and the executor in his account in the orphans' court was surcharged with all penalties and interest that were paid to effect such redemption. In this respect the estate has not suffered at all. Of course, the executor was very derelict in permitting this thing, but he has atoned for his default.

Because it appeared to the judge of the orphans' court, who heard this matter below, that by reason of advances made by the trustee on account of the widow's dower the assets of the estate were to some extent insecure, it was ordered that the executor give a bond to the ordinary in the sum of \$10,000, conditioned for the faithful performance of his duty under the will, which bond I understand has been given, and the estate thus secured. By section 140 of the Orphans' Court Act (P. L. 1898, p. 767), it is provided that, when property in the hands of any executor or trustee is unsafe or insecure or in danger of being wasted, such executor or trustee may be required to give bond to the ordinary conditioned for the faithful performance of his duty under the will of the testator. This declaration of legislative policy clearly enough indicates that it is not for every unwarranted act of omission or commission that an executor is to be removed;

only that, if he has strayed from the path of fiduciary duty, he may be compelled to secure those who might suffer loss by reason of his dereliction; the stigma of removal to be placed upon him only in a flagrant case.

In *Carpenter v. Gray*, 32 N. J. Eq. 692, Chancellor Runyon, as ordinary, refused to remove an executor or require him to give security on a petition asking for an accounting as to the investment of a trust fund of \$3,000; no bad faith appearing. The Court of Errors and Appeals held, in *Holcomb v. Coryell*, 12 N. J. Eq. 289, that a testator has a right to impose confidence in whom he pleases, and if he selects as his representative an irresponsible or insolvent person, in the absence of fraud or misconduct or breach of trust, security cannot be required of such executor; but if the acts or omissions of the trustee be such as to endanger the trust property, or to show a want of honesty or a want of proper capacity to execute the duties or a want of reasonable fidelity, equity will remove such trustee. In that case (*Holcomb v. Coryell*) it appeared that executors filed an inventory containing five items of assets, one of which was "bonds, notes, and books of account, \$84,004.15." Upon a bill filed complaining of the inventory and calling upon the executors to account and state the particulars which constituted the assets, instead of availing themselves of the opportunity thus afforded of placing themselves right upon the record, they put in an answer insisting that the inventory and appraisal was all that the law required. It appeared, however, as a fact, that a true inventory and appraisal exhibited one of the executors as a debtor to the estate in the sum of \$32,000 and upwards, and the other in the sum of \$3,600 and upwards. The executor who owed the larger amount brought in a bill for his services as agent of the testator amounting to \$11,800, and for purchase money for property of his own which he had conveyed to the executors amounting to \$21,500. After full examination it was determined that he was entitled to \$1,200 for services, and that he had conveyed property to the estate for the purpose of exhausting the assets in hand, but not of liquidating his indebtedness, and charged exorbitant prices, and in a manner not authorized by law. The chancellor in the court below, upon this state of facts, remarked that he was not disposed to impute moral turpitude to either of the defendants in the discharge of their duties, but there had been such a palpable mistake on their part, as to the obligations and duties imposed upon them, such a disregard of the rights of the infant complainant, in the manner in which the suit had been defended, and such ignorance and negligence in the management of the large fund at their disposal, as imperatively demanded of the court to extend to the complainant the protection which was

invoked, and to which she was entitled when her property was in jeopardy. Security was required, but the executors were not removed, and the Court of Errors and Appeals affirmed the chancellor.

By section 149 of the Orphans' Court Act (P. L. 1898, p. 770), it is provided that upon refusal or neglect to do and perform certain enumerated acts, or for embezzlement, waste, or misapplication of the estate committed to his custody, or for abuse of the trust and confidence reposed in him, an executor or trustee may be removed by the orphans' court. Chancellor Runyon, as ordinary, in *Lett v. Emmett*, 37 N. J. Eq. 535, held that an executor should be removed because he sought by false representations and by taking advantage of her poverty to induce the residuary legatee to sell her interest in the estate to him for a small price and about one-fourth of its value. Here was no case of mistake or ignorance or carelessness, but a fraudulent act of commission of the most palpable sort, which fully merited the judgment pronounced against the executor. In *Flinn's Case*, 31 N. J. Eq. 640, Chancellor Runyon, as ordinary, held that it was not proof of waste, in a proceeding to remove a guardian who was personally responsible, that he had incurred liability to pay counsel fees in a controversy over his management of the ward's property, since such fees, if unlawful or unnecessary, might be disallowed in his account. In *Heisler v. Sharp*, 44 N. J. Eq. 167, 14 Atl. 624, it was held in this court that no man is infallible. The wisest make mistakes; but the law holds no man responsible for the consequences of his mistakes which are the result of the imperfection of human judgment and do not proceed from fraud, gross carelessness, or indifference to duty. Affirmed for the reasons given by the vice ordinary. *Heisler v. Prickett*, 45 N. J. Eq. 367, 19 Atl. 621.

There is much to criticize in the conduct of this executor and trustee, but I do not think that a case has been made which requires his removal and the revocation of his letters. The giving of security which was ordered in the court below was, I think, all that was required.

The order appealed from will be affirmed.

(75 N. J. E. 88)
VANAMAN v. FLIEHR et al.

(Court of Chancery of New Jersey. Dec. 23, 1908.)

1. CHATTEL MORTGAGES (§ 153*)—"MORTGAGEES IN GOOD FAITH"—MORTGAGE SECURING PRE-EXISTING INDEBTEDNESS.

The language "mortgagees in good faith," as used in P. L. 1902, p. 437, § 4, providing that a chattel mortgage not accompanied by immediate delivery, followed by actual and continued change of possession, shall be absolutely void against mortgagees in good faith, unless the mortgage, having annexed thereto a pre-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

scribed affidavit or affirmation, be recorded as directed, etc., includes a mortgagee whose mortgage secures a pre-existing indebtedness.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 258; Dec. Dig. § 153.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3119, 3120.]

2. CHATTEL MORTGAGES (§ 139*)—“SUBSEQUENT CHATTEL MORTGAGEE IN GOOD FAITH.”

A “subsequent chattel mortgagee in good faith” is one who receives his mortgage without knowledge of the existence of a prior mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 139.*]

3. CHATTEL MORTGAGES (§ 150*)—GOOD FAITH OF SUBSEQUENT MORTGAGEE—NOTICE AFFORDED BY RECORD.

P. L. 1902, p. 487, § 4, provides that a chattel mortgage not accompanied by immediate delivery, followed by actual and continued change of possession, shall be absolutely void as against mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit stating the consideration, be recorded as directed, etc. *Held* that, in the absence of actual notice of a prior mortgage or the record thereof, the good faith of a subsequent mortgagee is not destroyed by the constructive notice afforded by a record containing a false affidavit touching the consideration, and the subsequent mortgage will receive the protection of the statute.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 246; Dec. Dig. § 150.*]

Injunction by William D. Vanaman against Solomon R. Fliehr and others. On return of an order to show cause, complainant permitted to amend his bill and supplement his affidavits, and defendants allowed to file additional affidavits.

S. Conrad Ott, for complainant. H. F. Sutton and D. T. Stackhouse, for defendants.

LEAMING, V. C. Knowles Loom Works v. Vacher, 57 N. J. Law, 490, 81 Atl. 306, 33 L. R. A. 305, affirmed in 59 N. J. Law, 583, 39 Atl. 1114, must be regarded as conclusive in this court to the effect that the statutory language “mortgagees in good faith,” as used in section 4 of our chattel mortgage act (P. L. 1902, p. 487), includes a mortgagee whose mortgage has been executed to secure a pre-existing indebtedness.

A subsequent mortgagee in good faith is a mortgagee who receives his mortgage without knowledge of the existence of a prior mortgage. *Graham Button Company v. Spielmann*, 50 N. J. Eq. 120, 123, 24 Atl. 571, affirmed *Spielmann v. Knowles*, 50 N. J. Eq. 796, 27 Atl. 1033; *Bolce v. Conover*, 54 N. J. Eq. 531, 538, 35 Atl. 402; *Bank v. Sprague*, 21 N. J. Eq. 530, 536. It follows that complainant's mortgage will receive the protection of the statute if complainant is a mortgagee who at the time of the execution of his mortgage had no knowledge of the existence of the prior recorded chattel mortgage which contained a false affidavit touching its consideration. I am unable to reach the conclusion that any constructive notice afforded by the record of such prior mortgage operates,

in the absence of actual notice of the prior mortgage or of the record thereof, to destroy the good faith of a subsequent mortgagee. The mortgage which the record protects against creditors and subsequent bona fide mortgagees of the mortgagor is a mortgage recorded with an affidavit annexed thereto which complies with the requirements of the statute. The fifth and eighth sections of the act clearly refer to mortgages executed in conformity to the provisions of the fourth section.

While the bill in this case does not in terms aver that complainant was without knowledge of the existence of the prior mortgage at the time he took his mortgage, the affidavit of complainant states that at the time complainant received his mortgage defendant induced him to believe that no prior mortgage existed. As the relief sought will be lost unless the present status is maintained until final hearing, I think complainant should be permitted to amend his bill and supplement his affidavits that it may appear with positiveness, if true, that complainant was wholly without notice of the existence of the prior mortgage or of the record thereof. Defendant may also, if he desires, file any additional affidavits which may tend to show knowledge on the part of complainant. If, after amendment and further hearing, it clearly appears that complainant was without notice of the prior mortgage, I will advise an order that no sale be made under the prior mortgage until after a final hearing can be had.

I will hear the amendment and supplemental affidavits on Tuesday, December 22, 1908, at 10 o'clock.

(76 N. J. L. 701)

MUNDY et al. v. FOUNTAIN et al.

(Court of Errors and Appeals of New Jersey.
Dec. 23, 1908.)

APPEAL AND ERROR (§ 1010*) — REVIEW — QUESTIONS OF FACT—EMINENT DOMAIN (§§ 28, 169*)—POWER TO CONDEMN LAND.

The board of water commissioners of Perth Amboy passed a resolution for the purchase of a tract of land for the price of \$15,500, which land the Supreme Court found to be worth not more than \$1,000. The resolution was set aside because the price was unreasonable, and because the board should have resorted to its power to condemn instead of paying this exorbitant price. *Held*, there being evidence to support the finding of fact by the Supreme Court, that finding will not be reviewed by this court. *Held*, that the power to condemn this land existed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010; Eminent Domain, Cent. Dig. §§ 75, 461; Dec. Dig. §§ 28, 169.*]

(Syllabus by the Court.)

Error to Supreme Court.

Certiorari by the State, on the prosecution of John L. Mundy and others, against Asbury Fountain and James Fountain. Judge

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment for prosecutors, and defendants bring error. Affirmed.

George S. Silzer, for plaintiffs in error.
Adrian Lyon, for defendants in error.

REED, J. This writ brings up a judgment of the Supreme Court setting aside a resolution of the board of water commissioners of the city of Perth Amboy for the purchase of 32½ acres of land for the sum of \$15,500.

The Supreme Court held that the testimony showed that the price was unreasonable, as it could not have been reasonably apprehended that the fair market value of the tract was more than \$1,000. There was abundant testimony to support this finding, and, the Supreme Court having so found as a matter of fact, this court will not review it. *Moran v. Jersey City*, 58 N. J. Law, 653, 35 Atl. 950; *Vreeland v. Bayonne*, 60 N. J. Law, 168, 37 Atl. 737; *Snyder v. Commercial Union Assurance Co.*, 67 N. J. Law, 626, 52 Atl. 384; *Lehigh & Wilkes-Barre Coal Co. v. Borough of Junction* (N. J.) 68 Atl. 806, 15 L. R. A. (N. S.) 514.

The Supreme Court also observed that upon the board was conferred the power of condemnation to meet such a situation, and that the failure of the board to have recourse to condemnation proceedings in view of the excessive purchase price demanded was an unreasonable and improvident exercise of the power conferred upon the board. The counsel for the plaintiff in error denies that this power to condemn existed. He insists that the power to condemn contained in Act April 21, 1876 (P. L. p. 366), "To enable cities to supply the inhabitants thereof with pure and wholesome water" (1 Gen. St. 1895, p. 646, § 902), could not be employed by Perth Amboy because it was supplying water to South Amboy; while the power to condemn was only conferred for the purpose of supplying the inhabitants residing within the corporate limits of the condemning city. But the purpose for which the power to purchase and condemn was conferred could be enlarged by subsequent statutes, and was so enlarged by P. L. 1885, p. 267, and P. L. 1886, p. 272 (1 Gen. St. 1895, p. 655).

But aside from this, it is to be observed that the contention of the plaintiff in error, if sound, would strip Perth Amboy of the power to purchase the land and water in question; for power to purchase land and water rights stands upon the same footing as the power to condemn. With the exception that there must be an inability to agree as a condition precedent to condemnation, both rights cover the same subject-matter and exist upon the same condition.

It is also insisted by the plaintiff in error that the provisions of the act of 1907 (page 633, § 2) stood in the way of condemnation. The section mentioned enacts that "no municipal corporation shall have power to condemn land or water from any new or additional source of water supply until the water supply commission shall have approved same." It is to be observed, first, that this legislation was not in existence at the time the resolution to purchase this land was passed, namely, on June 6, 1906. Secondly, if it had existed, the duty would have been upon the board of water commissioners to apply for the approval of the plant as a step preliminary to condemnation proceedings.

Again, it is said there could have been no condemnation unless Perth Amboy had already acquired a plant; but Perth Amboy had a plant; but if it had none, and the power to condemn was for this reason absent, that would annul the power to purchase as well as the power to condemn.

The judgment of the Supreme Court should be affirmed.

CAMPBELL, MORRELL & CO. v. LEHOCKY.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1908.)

1. APPEAL AND ERROR (§ 635*)—MATTERS TO BE SHOWN BY RECORD—RETURN TO WRIT OF ERROR.

Where the printed case submitted with the briefs shows no return to the writ of error, the writ will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2781; Dec. Dig. § 635.*]

2. APPEAL AND ERROR (§ 635*)—MATTERS TO BE SHOWN BY RECORD—TRANSCRIPT OF JUDGMENT.

Where the printed case does not contain a transcript of the judgment below, the writ of error will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2780; Dec. Dig. § 635.*]

Error to Supreme Court.

Action by Campbell, Morrell & Co. against Joseph Lehocky. Judgment for plaintiff, and defendant brings error. Writ dismissed without prejudice.

William W. Watson and Robert R. Watson, for plaintiff in error. Henry C. Whitehead, for defendant in error.

PER CURIAM. The printed case submitted with the briefs herein shows no return to the writ of error, nor any transcript of the judgment below.

The writ of error will be dismissed with costs, but without prejudice.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(78 N. J. E. 205)

In re FROTHINGHAM'S WILL.

(Prerogative Court of New Jersey. Dec. 18, 1908.)

1. WILLS (§ 173*)—CANCELLATION—ERASURES.
Pencil erasures on the face of a will are as effectual to cancel the portion obliterated as if done with ink.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 173.*]

2. WILLS (§ 170*) — CANCELLATION — ERASURES.

In case of pencil erasures on the face of a will, the question is whether the erasures were intended to be the testator's final act, or whether they were dependent relative revocation, not final; intention with which the marks were made being the test.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 441; Dec. Dig. § 170.*]

3. WILLS (§ 306*) — CANCELLATION — ERASURES.

The presence of pencil marks on the draft of a new will, found in a drawer of testator's desk after his death, is prima facie evidence that the marks were made by him, and indicate that he was still in a state of dubiety as to the disposition of his property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 731; Dec. Dig. § 306.*]

4. WILLS (§ 170*) — CANCELLATION — ERASURES.

That certain gifts made by a testator are inoperative because of his altered circumstances cannot be urged as a reason for holding that erasures on his will were made *animo revocandi*.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 170.*]

5. WILLS (§ 170*)—CANCELLATION — CANCELLATION TO MAKE FRESH WILL.

If a will is shown to have been canceled for the purpose of making a fresh will, the original is not revoked if no fresh will is made.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 170.*]

6. WILLS (§ 82*) — VALIDITY OF UNNATURAL WILL.

That a testator makes an unnatural will, or allows a will to stand which, by reason of changed circumstances, would be unnatural if made at the particular time, is not a reason for overthrowing it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 203; Dec. Dig. § 82.*]

7. WILLS (§ 168*) — REVOCATION — NECESSITY OF COMPLYING WITH STATUTES.

Irrespective of intention testaments can only be revoked according to the formula prescribed by statute.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 168.*]

Appeal from Orphans' Court, Monmouth County.

In the matter of the probate of the will of Howard P. Frothingham, deceased. The will was admitted to probate, and Meredith S. Frothingham and another appeal. Reversed.

McDermott & Fisk and Bigham & Wagner, for appellants Meredith S. Frothingham and Grace Bleecker MacSymon. Benjamin P. Morris and Edmund Wilson, for respondents Maud Le Grand Frothingham, Beatrice Maude Frothingham, and James P. Dodd. Clinton E. Fisk, for respondent Lillian Low.

WALKER, Vice Ordinary. The Monmouth county orphans' court on May 29, 1907, made an order admitting to probate the last will and testament of Howard P. Frothingham, late of the county of Monmouth, deceased, omitting from the probate thereof, however, the second, third, fourth, and fifth clauses of the will, through which lead pencil lines by way of erasure had been drawn by the testator and another in his presence and with his approbation, and which erasures, it was adjudged, were cancellations made by Mr. Frothingham *animo revocandi*. In the clauses of the will thus erased, and said to have been canceled with intent to revoke the parts of the testament obliterated, Mr. Frothingham made provisions as follows: (2) To his daughters, Lillian Low and Beatrice Maude Frothingham, each an annuity of \$150 per month for life, and to his sister, Grace Bleecker MacSymon, and his brother, Meredith S. Frothingham, each an annuity of \$100 per month for life, such annuities to be a charge against his residuary estate; (3) to his friend James P. Dodd his business of negotiating loans in New York City; (4) to his daughter Lillian Low a house and land in East Orange, together with the contents of the house; and (5) to his wife, Maud Le Grand Frothingham, a house and land in New York City; also a house and grounds at Deal Beach, Monmouth county, and the contents of the house; also his one-half interest in a large tract of land located in the counties of Passaic and Bergen.

The pertinent facts concerning the cancellations referred to are these: James P. Dodd, the person to whom Mr. Frothingham in the third item of his will bequeathed his business, testified that he was employed by Mr. Frothingham at his office in New York; that, a week or so after the will had been executed, Mr. Frothingham brought it to the office to put in his safe, and it then had no pencil marks upon it. On a day in December, 1906, Mr. Frothingham had a talk with the witness about his financial situation, and said to the witness that he had almost no estate left outside of what real estate he had, and that he thought he ought to change his will, because he had provided in it for annuities, and there was no money out of which to pay them, and he was worried about what would become of his wife. He wanted her to get all she could out of the estate which was very little, and he told the witness to call his attention to the matter the next day so he could get the will out of the safe and make the changes. The next day he himself asked for the will, and the witness got it out for him, and he made the pencil marks upon it in the presence of the witness, with the exception of the marks through the names of the witness and of John Olney and John J. Edwards, which marks were made by the witness in Mr.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Frothingham's presence. The word "sold," written in lead pencil on the fifth item of the will, was made by Mr. Frothingham, and the tract so marked sold was in fact sold between the date of the will and the day of the drawing the lead pencil mark to which reference is made. The witness then asked Mr. Frothingham if he wanted him to send the will over to his lawyer, and he said: "No; send it to the man who engrossed it, and have him make a draft of it according to the directions." This was done, and the draft came back, and there was a clause in it that did not suit Mr. Frothingham, and he threw it aside, and put the old will in the safe. The new draft he put in his desk. On the day before the changes were made, and during the talk about them, he suggested that, inasmuch as Mr. Frothingham thought his family would get hardly anything out of the estate, it would be a good thing to let Mrs. Frothingham share in the business, if he thought there was anything in it; and they also talked about taking his son-in-law in the office, and Mr. Frothingham asked the witness' opinion upon the matter, and he told him he thought it would be a very good thing, inasmuch as Mr. Frothingham was going away for some time, and it probably would be better to have some representative of his family in the office, and he gave the witness instructions to have the business go to Mr. Low instead of to himself, as provided in the original will. Mr. Frothingham said nothing about the business on the day the changes were made. It was the day before when they had the long talk that the instructions were given. In pursuance of this conversation the witness, Mr. Dodd, gave the draftsman instructions to substitute the name of Mr. Low for himself in the will.

George J. Ennis testified that he was a clerk for Mr. Frothingham, and was present in his office in December, 1906, with Mr. Frothingham and Mr. Dodd, and saw the will on Mr. Frothingham's desk, and he saw Mr. Frothingham make the pencil marks on the will, and heard him say that he had some changes to make.

The only other persons sworn were the subscribing witnesses to the will, who proved its due execution.

It is settled that pencil erasures made upon the face of a will are as effectual to cancel the portions obliterated as if done with ink. *Hilyard v. Wood* (N. J. Prerog.) 63 Atl. 7. The question, however, is whether the erasures were intended to be the final act of the testator by way of canceling portions of his will, or whether they were what is called in the law dependent relative revocation, which, of course, is not final. The intention with which the testator makes the marks upon his will is the crucial test as to whether or not cancellation is intended. Vice Ordinary Bergen in *Hilyard v. Wood* (N. J. Prerog.) 63 Atl. 9, said that the manner in which the erasure is made, whether in ink or pencil, the

extent of it, and its effect upon other uncanceled portions of the will may prevent the presumption of finality. Now, in the case under consideration, if it be conceded that omitting the parts of the will said to have been canceled does not render the remaining portions ambiguous (which is true assuming the testator meant to cancel the last line of the second item which is untouched by the pencil mark), the other tests as to finality, namely, the manner in which the erasures were made, and the extent of them, certainly make against the presumption of finality. Especially is this so when the acts of the testator are considered in conjunction with his declarations.

Let me say at this juncture that in *Hilyard v. Wood*, supra, the character of the erasures made upon the will were such as to lead most strongly to the conclusion that the act was deliberate on the part of the testator, and made with intent to obliterate the portions marked, for there were three or more lines drawn through each part of the will intended to be eliminated. Not so in the case of the will under consideration. In the will of Mr. Frothingham the second item is composed of 17 lines on the first page and 1 line on the second page. Through the 17 lines on the first page are drawn two pencil marks obliquely crossing each other, while the eighteenth line of the second item, which is the first line on the second page, is without cancellation. Through the third item, in which the bequest of his business is made by Mr. Frothingham to his friend Mr. Dodd, is drawn a single and practically vertical lead pencil mark through the first 14 lines, leaving 2 lines at the conclusion of the item untouched by the vertical mark. These 2 lines are canceled by 4 oblique lines running through portions of them, 2 of which extend up into the body above. My reading of the testimony leads me to believe that the mark made by the testator upon this third item is the single vertical pencil mark to which I have referred. The testimony of the witness Dodd is somewhat ambiguous upon this point. He says that Mr. Frothingham made all of the pencil erasures with the exception of the mark through his own name in the second line of the third item, and, to use his own language, "the mark through 'James P. Dodd' was made by myself in his presence. The mark through 'John Olney' and 'John J. Edwards' was also made by me in his presence." In the answer from which the foregoing is quoted he mentions obliterating his own name twice, and in the testimony thus literally copied I take it that his mention of his name refers to the second time his name appears in that item. It should be stated in this connection that the vertical pencil mark through the third item runs through the initial letters of the names of Dodd and Edwards. This line was drawn by the testator, unless he stopped above the fifth line from the end of the item, in which

event that line was continued by the witness Dodd. An inspection of the line both with the naked eye and under the microscope clearly indicates that it is a continuous line drawn by the same hand at the same time, and, if it were efficacious to cancel all parts of the item through which it was drawn, or, for that matter, the whole item, the names of James P. Dodd, John Olney, and John J. Edwards were effectually canceled by that mark. Now, if Mr. Dodd drew the lines through his own name and the names of Olney and Edwards, he did it by making a practically horizontal line through his own name in both places where it occurs in the item, and by drawing an oblique line through the name of John J. Edwards, which line extends for a considerable distance through the item, and by drawing several other irregular lines through the end of the item where the three names occur. The following is a copy of the third item, line for line, with straight marks in ink drawn through it, which marks closely approximate the pencil marks upon the face of the item:

(Page 2.)

THIRD.—I give and bequeath to my friend JAMES P. DODD my business of negotiating time and call loans, established in 1881, conducted at No. 2 Wall Street, New York City, including my furniture and furnishings connected therewith, and I authorize him to continue the said business and direct that the income derived therefrom shall go to him absolutely and in his own right. It is my wish and I hereby request the said James P. Dodd to retain JOHN OLNEY and JOHN J. EDWARDS now in my employ in their present position so long as they shall faithfully discharge the duties appertaining thereto.—

The fourth item is obliterated by an oblique pencil mark drawn entirely through the item, as shown approximately in the subjoined copy of that item, marked in ink:

(Page 2.)

FOURTH. I give, devise and bequeath to my beloved daughter ELLIAN LOW, the house and land known and designated as No. 84 Carleton Street, East Orange, New Jersey, together with all the contents of said house absolutely and in her own right.—

The fifth item was canceled by vertical pencil marks drawn clear through the item from top to bottom, and in that item in the last paragraph in addition to the vertical pencil line the word "Sold" is written in pencil, so that some part of the pencil writing extends over the last four lines of the item, which is a bequest to the testator's wife of a half interest in a tract of land located in Passaic and Bergen counties, in this state. The following is a copy of the fifth item, showing approximately how it is marked:

(Page 2.)

FIFTH.—I give, devise and bequeath to my beloved and devoted wife MAUD LE GRAND FROTHINGHAM, the house and land known and designated as No. 20 West

(Page 2.)

77th Street New York City, and all the contents in said house, and also the house and grounds located on Milan Place, Stratford Place, Surf Lane and Deal Esplanade, at Deal Beach, Monmouth County, New Jersey, and all the contents of said house, absolutely and in her own right.

I also give, devise and bequeath to my said wife my one-half (1/2) interest in the Le Grand Lake Tract of land consisting of Twenty-one hundred (2100) acres located in the counties of Passaic and Bergen in the State of New Jersey, the other half interest being owned by Pliny Fisk of New York City.—

Mr. Frothingham was undoubtedly a man of affairs and one who seems to have been precise about the form in which his will should exist. He appeared to be unwilling that his testamentary acts should repose in any poorly written or even typewritten form, but had his will engrossed by one who was a professional scrivener, a man who wrote what is called a "court hand." After the emendations referred to were made upon the face of his will, he directed Mr. Dodd to take it to the man who engrossed it, and, to use his own language, "have him [the scrivener] make a draft of it according to the directions." "Make a draft of it" to my mind means make a draft of a will for execution by the testator. The "directions" referred to could be nothing more than the erasures upon the face of the will plus the verbal declarations of Mr. Frothingham to Mr. Dodd. It is a singular thing that upon receiving the will with the marks of cancellation upon it, and hearing the verbal directions from Mr. Dodd, the scrivener should have made a new draft containing as the third item, a devise and bequest to the testator's daughter, Mrs. Low, of the house and its contents which were devised and bequeathed to her in the fourth item of the original will, and through the entirety of which item in the original will a lead pencil mark was obliquely drawn. What occurred, then, was this: The will with the obliterations upon it was sent to the scrivener, with request to make a new draft according to directions, and the directions, aside from those that the marked will would naturally indicate, were disclosed by Mr. Dodd, and the draft of a new will, when sent over to Mr. Frothingham, gave the business to Mr. Low and the house No. 84 Carleton street, East Orange, to Mrs. Low, coupled with a devise and bequest of all the testator's residuary estate to his wife, whom he appointed his executrix with power of sale of his real estate. Mr. Dodd says that, when the draft came back, there was a clause in it that did not suit Mr. Frothingham, and that he threw it aside, and put the old will in the safe, and the draft was found after his death in a drawer in his desk with erasures upon it made by lead pencil marks. The lead pencil marks on this draft are drawn practically perpendicularly through the first, second, and third items. The first item directs his

executrix to pay his debts, the second bequeaths the business to his son-in-law Low, and the third devises and bequeaths the house and contents to his daughter Mrs. Low. One line of the third item is left untouched on the second page, and the fourth item is a gift of the residue of his estate to his wife. The fifth authorizes the executrix to sell real estate, and the sixth constitutes his wife executrix. Mr. Dodd says that one clause in the draft did not suit Mr. Frothingham, which one we are not informed, but, when the draft is produced, we find three items erased.

Let us look again at the language used by the testator at the time he made the pencil marks upon his will. Mr. Dodd says that, in a conversation with him, the testator said that he had almost no estate left, and thought he ought to change his will, and asked the witness to call his attention to the matter the next day so he could get the will out of the safe and make the changes. These expressions, read in connection with the testator's direction to the witness to take the will to the scrivener to make a new draft according to directions, one direction admittedly being that the third item, which was more effectually canceled by pencil marks than any of the other provisions, should be incorporated into the new draft, leads my mind to the conclusion that the pencil marks upon the will were not made *animo revocandi*, but were made as a guide and by way of instruction to the scrivener, concerning the drawing of a new will which the testator proposed to execute in substitution for the one upon which he had made the marks. My judgment is that there was a verbal direction given to the scrivener which Mr. Dodd forgot to tell about when he was examined as a witness, and that was concerning the fourth item of the original will, which devised and bequeathed a house and lot to Mrs. Low. Although effectually canceled by a lead pencil mark, if canceled at all, this item appears in the new draft as item 3. In my opinion the scrivener was instructed by Mr. Dodd to rewrite this item into the new draft, or it would not have appeared in it. Without directions to incorporate that item in the new draft, the scrivener could hardly have made the mistake of renumbering and rewriting it, for, as he copied it word for word and line for line from the old will into the new draft, his eyes would have beheld at every glance the mark of obliteration. He must have been instructed to rewrite that item notwithstanding the erasure. I am aware that there is no direct testimony to the effect that the testator sent word to the scrivener to embody the fourth item of the will into the draft notwithstanding the pencil erasure mark upon it, but it is reasonably to be presumed that such instruction was sent. In no other way can I account for the presence of item 3 in the new draft.

It is perfectly obvious that the testator

again determined upon changes, for the draft of a new will when produced shows an obliteration by the same character of marks across the bequest of his business to his son-in-law and the gift of a house and its contents to his daughter, as appears on the original will. The draft being found in the drawer of his desk after his death with the pencil marks upon it is *prima facie* evidence that the marks were made by him (*Hillyard v. Wood, ubi supra*), and would indicate that he was still in a state of dubiety as to what disposition he would make of his property. If anything were wanting to show the inconclusive character of the marks made upon the face of the original will, it is supplied by the testimony of Mr. Dodd, who said that the will was to be redrawn on the lines as he had proposed to make the changes and as indicated by the lead pencil marks, and those lead pencil marks were for the instruction of the draftsman as well as the ones put on by him. Now, according to this testimony, the testator did not change, but proposed to make changes, in his will, and the pencil marks made both by the testator and the witness were intended for the draftsman, and those pencil marks, and nothing more, would have indicated that the draftsman was to omit entirely from the new draft the third item which contained a bequest of the business, but, when the draft came back, it contained the clause giving the business to Mr. Low, instead of Mr. Dodd, just as Mr. Dodd says Mr. Frothingham intended. This shows conclusively that that intent, with reference to the second item, was to be gathered from the pencil marks plus the verbal instructions, and therefore there was no cancellation of the second item by the drawing of the pencil marks upon it because of a want of intent on the part of the testator thereby to revoke that portion of his will. The testimony shows that the tract in Passaic and Bergen counties devised to his wife had been sold by the testator between the date of making his will and the time of making the lead pencil marks upon it. The testimony does not disclose any sale of the property in East Orange, which he bequeathed to his daughter. The learned judge in the court below stated that, although not in proof, it was stated by counsel at the hearing that the real estate devised by the testator to his daughter Lillian Low in the fourth item of his will and to his wife in the fifth item of his will had been sold prior to making the pencil marks in December. If this be so, it is somewhat singular that he should have written the word "Sold" only upon the description of the tract in the counties of Passaic and Bergen, and not upon the description of the house and land on West Seventy-Seventh street, New York, and the house and land at Deal Beach, N. J., which tracts he devised to his wife in the fifth item, and that he should not have so written the word "Sold" upon the description of the East Orange property given to his daughter.

In other words, if all of these properties had been sold at the time he made the pencil marks upon the will, and if the word "Sold" was written with any idea of significance at all, it would seem that it would have been written upon the descriptions of all the properties similarly situated. Surely the word "Sold" written alone across the description of one of the properties would indicate that it alone had been sold, and the rest still remained to the testator. Assuming that the statement of counsel just adverted to has the same force as evidence, the facts stated can have no controlling effect. On this score the remarks of Skillman, Surrogate, in *Matter of Ralsbeck*, 52 Misc. Rep. 279, 284, 102 N. Y. Supp. 967, are pertinent. He said that some point was made that certain provisions of the paper propounded as a will in that case were invalid and that others were impossible of execution, but he remarked that with those questions he had no concern when dealing with the sole question as to what was in the testator's mind when he made the pencil marks upon the will. The application is that, although certain gifts made by Mr. Frothingham are inoperative because of his altered circumstances, that cannot be urged as a reason for holding that the erasures on his will were made *animo revocandi*. I do not say that the fact cannot be considered with other facts as indicative of such intention, but I do say that, standing alone, it is entirely without controlling effect.

Now, as the new draft contained a devise of the East Orange house to his daughter, the same as in the original will, it may be that the reason the testator drew the pencil mark through that item of the new draft was that he had sold the East Orange property between the date of making erasures upon the face of the original will and his examination of the new draft. In the absence of a precise statement by counsel giving the dates of the sales of his various tracts of land by the testator and the exact dates of the markings upon the original will and upon the new draft, it may be presumed that the sale of the East Orange property was effected during the interval just mentioned.

In the *Matter of the Will of Kirkpatrick*, 22 N. J. Eq. 463, two legacies were canceled by lines drawn by the pen across and upon the words. Besides this, there were memoranda in the margin, one opposite each canceled part signed by the testatrix in the one case and by her initials in the other, stating she wished to erase those parts. The canceling was clearly done by her, and there was no evidence to overcome the presumption that the cancellations were made *animo revocandi*. In *Theobald on Wills* (6th Ed.) p. 44, it is laid down that, if a will is shown to have been canceled for the purpose of making a fresh will, the original will is not revoked if no fresh will is made. In the *Goods of Appleby*, 1 Hagg. Ecc. Rep. 143,

the deceased delivered his will to his executor, and requested him to make certain alterations in it, which he did in pencil, drawing it through the signature at the bottom of the will. The deceased expressed his approbation of the alterations, and said he would make a copy of the instrument and execute it. He afterwards wrote a paper in substance the same as the will, but did not execute it. The court held that the signature on the will being struck through was to be regarded as preparatory to the deceased making a new will, which he did not do, and that must be construed as only a conditional cancellation, and consequently not a revocation. If, as held in the case just mentioned, the cancellation of an entire will will not be established when the signature of the testator is struck out, because the cancellation was only done with a view to the substitution of a new testament to be executed, then surely the striking out of only parts of a will made with the same intention to substitute for the document a new testament will not, in the absence of the execution of such new testament, operate as a revocation of the parts of the will which are thus tentatively canceled. In *Powell v. Powell*, 14 L. T. Rep. 800, the question was whether a will made in 1862 was revived by the destruction of a will made in 1864, which revoked the first one. The deceased intended by the destruction of the second will to revive the first, but the second will was probated as it was revoked only with intent to revive the first, which it was inefficacious to do. A draft of the second will was admitted to probate as and for the testament which had been destroyed. Speaking to the doctrine of dependent relative revocation, the court said that if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper for which the destruction of the paper in question was only designed to make way, it was clear that in such case the *animo revocandi* had only a conditional existence; the condition being the validity of the paper intended to be substituted. Upon principle, the doctrine of this case is pertinently applicable to the case in hand; for, just as surely as a prior will is not revoked by the destruction of a later will which in terms revokes the first one, erasures made upon the face of an existing will, when made with a view to the execution of a new testament to give effect to the intentions of the testator as expressed in the original will modified to the extent of the erasures made, will not operate as a cancellation of the clauses in the will thus obliterated, and especially is this so when, as in this case, the erasures upon the will do not discover all of the testator's intentions with reference to alterations, part of which reside in parol instructions to the scrivener. The case under consideration, as I view it, is essentially a fact case. There can be no doubt but that rev-

ocation can be made of part of a will or of an entire will by lead pencil erasures made upon its face *animo revocandi*. Every case of a will thus obliterated in whole or in part must be determined upon the facts of that case as to the intention with which the marks were made.

The learned judge in the court below lays great stress upon the fact that the testator realized that he had sustained great losses since the execution of his will, and had provided for annuities which his estate could not pay, and was naturally worried about what would become of his wife, and wanted her to have all she could get out of the estate. The condition of the testator at the time of making the erasures on his will was such as undoubtedly impelled him to change his testament so as effectually to protect his wife to the extent that his estate would protect her; but, in order to do what he intended, his intention must have been given expression according to the forms of law. That a man makes an unnatural will or allows a will to stand which by reason of changed circumstances would be an unnatural one if made at the particular time is not a reason to overthrow the testament. Hundreds of men fail, through neglect, to alter wills as their own circumstances and those of the natural objects of their bounty undergo a change; and thousands of men, for the same reason, entirely fail to make wills at all when every sense of duty and responsibility indicate that they should do so. We have a statute known as the statute of wills, and testaments can only be validly made according to the formula subscribed by that statute and those testaments when made can only be revoked according to the provision of that statute. Failing either in the due execution or revocation of testaments, the act of the deceased, no matter how well intended, falls utterly to accomplish his purpose.

Convinced that the testator intended to change his will, but equally convinced that he never carried his intention into effect, I am constrained to hold that the order of the Monmouth county orphans' court admitting the will to probate in an abbreviated form should be modified, and that court directed to admit the will to probate in its entirety. This leads to a reversal. The costs of all parties will be ordered to be paid out of the estate.

(75 N. J. E. 57)

REILLEY et al. v. CURLEY et al.

(Court of Chancery of New Jersey. Dec. 15, 1908.)

1. NUISANCE (§ 19*) — PURSUIT OF LAWFUL BUSINESS—INJURY TO SURROUNDING PROPERTY.

While a person is entitled to enjoy his property in pursuing a lawful business, it must be conducted with regard to the rights of sur-

rounding property owners, and, when it creates conditions clearly rendering appropriate enjoyment of surrounding properties impossible, equity will restrain the injury.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 55; Dec. Dig. § 19.*]

2. NUISANCE (§ 3*)—NOISE.

Noise may constitute a nuisance, but, in determining whether it is a nuisance, its character and volume, and the time, place, and duration of its occurrence, and the locality must be considered.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 23; Dec. Dig. § 3.*]

3. NUISANCE (§ 3*)—NOISE OF STEAM ENGINE IN RESIDENCE DISTRICT—INJUNCTION.

Where the noise created by the operation of a steam engine in depositing stone on lots in a residence district is such as to render it impossible to converse in the neighboring houses or use adjoining premises for their customary purposes, its operation is a nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 23; Dec. Dig. § 3.*]

Suit by James E. Reilley and others against Michael Curley and others to restrain a nuisance. Issuance of temporary injunction advised.

This is an application on behalf of Reilley and three other complainants against Curley and another to obtain a preliminary injunction.

The bill alleges that the complainants are owners or occupants, or both, of houses in Jersey City, in the neighborhood of Baldwin, Magnolia, and Pavonia avenues and West and East streets; that this is a strictly residential neighborhood; that on East street Curley, one of the defendants, has leased from Byron, the other defendant, two lots of land on opposite sides of that street; that he is engaged in hauling to those lots loads of broken stone; that these stones are in what are termed "boats"; that on the lots he has an engine and a derrick and a cable; that the cable is hitched to the "boats," and they are drawn up, by means of the steam engine, to the top of the pile and there dumped; that then the cable is allowed to run free, and the "boats" are lowered onto the wagons. It is charged that the noise attendant upon the operation of the engine and cable is so great as to seriously interfere with the dwellers in that neighborhood, and is a nuisance. It is also charged that the engine is a secondhand one and in an unfit condition to be used. It is suggested that a muffler could be used upon the engine so as to minimize the noise, and that repairs could be made to it to do away with some of its present defects, which defects are alleged to be one of the causes of the noise complained of. The answering affidavits are mainly directed to proving that the engine was the one ordinarily used for such operations, and that no more noise is attendant upon its operation than is usual in such operations, and that mufflers are not put upon such engines, and that no repairs are necessary to make

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the engine a proper one to be used with no unnecessary noise in this business. There is some slight attempt to show that it does not make much noise, but there is no direct denial of the allegations of the witnesses for the complainants that much noise does result from the operation. An opportunity was afforded the defendant Curley to experiment with a muffler and in such other way as he might think fit to adopt, but the proofs show that he did not succeed in minimizing the volume of noise, which was as great as theretofore.

Zeigener & Lane, for complainants. Tumulty & Cutley, for defendants.

GARRISON, V. C. (after stating the facts as above). It will be useful to consider several questions of law before dealing directly with the case at bar. Since the defendant Curley is not engaged in improving the land on which he is piling the stone, but is merely using the land as a storage place for the stone, there is no occasion for the application of the principle that neighbors must endure the usual and customary discomforts arising out of the improvement by one of his property.

The first question relates to the principle to be applied to the rights of the respective parties, and this has been well summed up in a recent case in this court as follows: "While defendant is entitled to the enjoyment of its property in the pursuit of a lawful business, that business must be conducted with due regard to the well-recognized rights of surrounding property owners. When such business becomes creative of conditions which clearly render the appropriate enjoyment of surrounding properties impossible, the rights of others are invaded, and equity will restrain the persistent pursuit of such injury." *First M. E. Church of Cape May v. Cape May Grain & Coal Company* (N. J. Err. & App.) 67 Atl. 613, 614 (Leaming, V. C., 1907).

The next question is whether noise alone may constitute such a nuisance as to subject the one creating the same to restraint in equity. That such is the case I am convinced from the authorities not only in our state, but in many other jurisdictions. Of course, the character and volume of the noise, and the time and duration of its occurrence, and the place where it occurs, and the surroundings thereof, are the important and determinative features. *Davidson v. Isham*, 9 N. J. Eq. 189 (Williamson, Ch., 1852); *Wolcott v. Melick*, 11 N. J. Eq. 207, 66 Am. Dec. 790 (Williamson, Ch., 1856); *Ross v. Butler*, 19 N. J. Eq. 294, 302, 97 Am. Dec. 654 (Zabriskie, Ch., 1868); *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201, 205 (Zabriskie, Ch., 1869); *Demarest v. Hardman*, 34 N. J. Eq. 470 (Van Fleet, V. C., 1881); *Cronin v. Bloembecke*, 58 N. J. Eq. 313, 43 Atl. 605 (Emery, V. C., 1899); *Gilbough v. West Side Amusement Co.*, 64 N. J. Eq. 31, 53 Atl. 289 (Pitney, V. C., 1902); *Laird v. Atlantic Coast*

Sanitary Co. (N. J. Ch.) 67 Atl. 389 (Pitney, Adv. M., 1907); *First M. E. Church v. Cape May Grain & Coal Co.*, supra; *Powell v. Bentley & Gerwig Furniture Co.*, 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53 (with numerous cases in the notes); *Hill v. McBurney Oil & Fertilizer Co.*, 112 Ga. 788, 38 S. E. 42, 52 L. R. A. 398; *Froelicher v. Oswald Iron Works*, 111 La. 705, 35 South. 821, 64 L. R. A. 228, and note; *Herring v. Wilton*, 106 Va. 171, 55 S. E. 546, 7 L. R. A. (N. S.) 349, 117 Am. St. Rep. 997; 2 Wood, Nuisances (3d Ed.) § 611.

The defendant Curley placed the stress of his argument, so far as the law applicable to the case is concerned, upon the distinction suggested by the Vice Chancellor in the case of *Hennessey v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374 (Pitney, V. C.). The court in that case drew a distinction between that class of nuisances which affected air and light merely by way of noise and disagreeable gases and obstruction of light, and those which directly affected the land itself or structures upon it. The only pertinence of the distinction relates to the degree of the alleged nuisance; the Vice Chancellor suggesting that in the former class of cases a much greater degree is required to entitle the party to relief than in the latter, but the whole matter is in my view set at rest by the most recent decision of the Court of Errors and Appeals upon this subject. The case of *Roessler & Hasslacher Chemical Company v. Doyle*, in the Supreme Court, reported in 73 N. J. Law, 521, 64 Atl. 156 (1906), was affirmed in the Court of Appeals (74 N. J. Law, 850, 67 Atl. 1102 [1907]) by the unanimous vote of that court for the reasons set forth in the Supreme Court. In the Supreme Court attention is called to the distinction above referred to, which apparently was first suggested by Lord Westbury in *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; and Judge Reed, in writing the opinion, said (73 N. J. Law, 528, 64 Atl. 159): "These observations of Lord Westbury seem to have suggested the form of the requests on the trial of the present case. The court was asked to charge that the undisputed evidence was that the odors and noise merely affected the air and plaintiff's personal comfort, that the plaintiff's residence is not (sic) in a manufacturing locality, and that the odors were incident to the proper conduct of defendant's business. Therefore the plaintiff could not recover. But it is apparent that, if the odors and noises existed as testified to by the plaintiff and his witnesses, they diminished the enjoyment, habitableness, and value of his dwelling, and so injured his property. The request was properly refused. All the requests to charge which are grounded upon a distinction between personal discomfort and injury to plaintiff's habitation were based upon a difference which in this case did not exist. Indeed no judge has ever suggested that personal dis-

comfort received by an owner of property while residing therein would not afford a ground of action." This case also reiterates the well-settled principle which lies at the foundation of all of this branch of the law, and which has been heretofore stated, namely, that the degree of personal discomfort is the determinative feature, and, "in measuring the degree, * * * all the surrounding circumstances must be taken into account in judging whether the degree is of sufficient importance to confer a right of action."

This brings me to a consideration of the facts of the case in hand. The only dispute which it may fairly be said the proofs disclose concerns the condition of the machinery in use; the complainant alleging that it is secondhand and defective, and the defendants denying this. There is practically no dispute of the complainants' testimony concerning the nature, extent, and effect of the noise created by the defendant Curley's operation of the engine and cable and the "boats." The testimony of numerous witnesses on behalf of the complainants, who all dwell in the neighborhood, is that from an early hour in the morning until 6 o'clock at night the noise of the engine and its operation practically precludes the possibility of conversing in the houses in the neighborhood when the windows of such houses are closed, and that the noise is such that the windows of the houses cannot be kept open. It seems to me clear, beyond possibility of successful refutation, that an occupant of a dwelling house in a strictly residential neighborhood, as this is, may be said to be deprived of the legitimate use of his property, or to have his property rights seriously invaded, if during all of the day so much noise penetrates his dwelling from the operation by a neighbor of machinery as to render it impossible for him to converse in or to use his premises for their customary purposes. I do not decide, because it is not necessary, that the defendant may not use these lots for the deposit of stone. I do not decide that a residential neighborhood is an improper place to store broken stone taken from excavations in other places. But it is important in the consideration to bear in mind that there are undoubtedly numerous places (where broken stone could be stored with the noise necessarily attendant on handling the same) which are so far removed from residences as not to seriously interfere with their use by their occupants. The fact that the use of these lots for this purpose is temporary does not aid the defendants at all, but rather makes in favor of the complainants. If the defendant's purpose is, as he stated, merely to use these lots temporarily for this purpose, it would seem as if his duty under the circumstances was to seek some other place for such temporary use than a thickly settled residential

portion of the city. Under all of the circumstances of this case, I think that the complainants have proven a right requiring protection, and that the defendants have invaded that right so as to be restrained.

I will advise the issuance of a temporary injunction restraining the defendants from so operating the engine or any engine upon the premises in question as to cause noise of sufficient volume to penetrate the houses of the neighbors, and destroy the peace and comfort of those dwelling therein.

ARROWSMITH v. ARROWSMITH.

(Court of Chancery of New Jersey. Jan. 7, 1906.)

1. DIVORCE (§ 99*)—DESERTION—ANSWER—SUFFICIENCY.

An answer to a bill for divorce for desertion, which gives specific instances of harsh treatment, and which alleges generally cruel treatment during a term of years, should characterize the treatment as extreme cruelty.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 99.*]

2. DIVORCE (§ 54*)—DESERTION—DEFENSES.

A husband who has for many years been guilty of numerous acts of cruelty towards his wife, including one act of physical violence, thereby endangering the health of the wife, and rendering her life one of such extreme discomfort as to incapacitate her to discharge her duties, cannot, by establishing a new home and inviting his wife to live with him, obtain a divorce based on the wife's refusal to leave the home of a son.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 54.*]

3. DIVORCE (§ 54*)—GROUNDS—CRUELTY—DEFENSES.

A husband who has for many years been guilty of numerous acts of cruelty towards his wife, endangering her health and rendering her life one of extreme discomfort, cannot by establishing a new home, and inviting his wife to live with him, defeat the right of the wife refusing to live with him to obtain a divorce on the ground of his cruelty.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 54.*]

4. DIVORCE (§ 101*)—SUIT FOR DIVORCE—CROSS-BILL.

Where, in a suit by a husband for divorce on the ground of desertion, the wife alleged in the answer such acts of misconduct as would justify a divorce and the evidence established the answer, she could file a cross-bill praying for the same.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 101.*]

Petition for divorce by William Arrowsmith against Susan B. Arrowsmith. Petition dismissed, with leave to defendant to file a cross-bill for divorce from bed and board.

John P. Lloyd and Alan H. Strong, for petitioner. Charles T. Cowenhoven, for defendant.

WALKER, V. C. The parties to this suit were married in 1872, and lived together on a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

farm in Monmouth county for 32 years. They have three sons, who are all of age and self-supporting. In November, 1903, the husband and father contracted to sell his farm to one of his children, Wood Arrowsmith, and he and his wife joined in a deed to the son, immediate possession of the farm being given to him, but the parents resided on the farm until the following spring, at which time the petitioner went away, but his wife refused to accompany him. He filed his petition for divorce in this cause in August, 1907. The defendant answered, and alleged that during all of their married life she had received the most unkind treatment from her husband, being subjected daily to fault-finding, cursing in the most profane manner, and being denounced without cause or provocation to such an extent that during her whole married life her existence had been made most miserable.

This general averment is coupled with an allegation of harsh and unfatherly treatment of the children of the parties, and gives some specific instances of harsh treatment. The answer does not characterize the treatment of the defendant as extreme cruelty. Good pleading requires that this should be done. *Davis v. Davis*, 19 N. J. Eq. 180, 182. However, no exception was taken to the answer as a pleading, and the parties went to hearing without objection. Only one personal attack was made by the complainant upon the defendant, as I recall, and that was many years ago. It was when his son, Wood, was six or seven years of age. The petitioner knocked him off his chair at the breakfast table and the mother interfered, whereupon he seized her, and dragged her out of doors. His conduct to his children at all times was most brutal, besides his cursing and swearing at them inordinately. He frequently and severely whipped them without any real cause. He appears to have offended against his whole family unceasingly and at all times. Profanity was his greatest bane. When his wife went to church, he would call her a God damn fool, and he thrashed at least one of his sons for doing the same thing. Byron says his father would thrash him several times a year for no cause, and his mother would cry. She wanted him to go to school, and his father said that would make a God damn fool of him; that he would be just like all the rest of the God damn fools, and no more account than a Guinea nigger. Byron saw his father thrash his brother Wood for going to church and Sunday school. The father whipped his son Richard with whips cut from trees and anything he could lay his hands to. When Mrs. Arrowsmith would want money to buy clothes with, the petitioner would say she was the God damnest woman he ever saw. He frequently said that he would sell the place and go so God damn far away they would never see him again, and they could all go to hell. He drove all his boys from home. When-

ever the children were beaten, the mother would cry, and that would enrage the father, and he would curse and say that she was just like them. When the mother remonstrated with him for whipping his son Wood for going to church, he said: "God damn you, they take after you, running about. You are all alike, a lot of God damn fools and aren't worth three hurrahs in hell." Richard says that when the mother wanted to send him to school, the petitioner said: "You want to make a damn scoundrel and rogue out of him." This sort of conduct was not occasional, but constant. I have been loath to spell so much profanity into these conclusions, but have done so that it may be seen at a glance to what extent Arrowsmith offended in this particular. Men blanch when oaths are directed at them, and their conduct is execrated with profanity. Vile oaths of the blackest sort denounced by a husband against his wife must wring her very soul with anguish.

The sale of the farm from Arrowsmith to his son Wood came about in this way: At one time in January, 1904, when Wood was home, his father was going on as usual about selling the place, and Wood said that he would buy it. The terms were arranged, and Arrowsmith stayed home and worked about the place until April, when he went away, but came home every week. On July 27, 1904, he said he was going to remove, and his son Wood said to him that there was a home there as long as he lived if he would stop abusing his mother. After he left the place, the petitioner requested his wife to go and live with him, at one time claiming to have rented a part of a house from Alexander Gaston, and at another time claiming to have rented a house from Ephriam Rose, and lastly claiming to have rented part of a house from Charles N. Burlew. I do not believe that any of these alleged rentings were in good faith. Certainly those of the Gaston and Rose properties were not. Gaston testified that Arrowsmith asked him if he would rent him one-half of his house, which he said he would do, but nothing was said about the rent, and he did not take it. Rose testified that Arrowsmith asked him if he would rent him a certain house, and he said he would; Arrowsmith not having asked how much it would be and no terms were agreed upon. On both of these occasions he asked Mrs. Arrowsmith to go with him, but she refused, saying she could not, and this was for the reason that her health had been broken by his long continued abusive treatment. In December, 1907, Arrowsmith went to see his wife, and took Burlew and Peter Bennett along. On this occasion he asked his wife to go along, and showed her a receipt from Burlew for one month's rent of two furnished rooms in Burlew's house. He had the privilege of taking one or two more rooms and to stay as long as he wanted. He asked his wife two or three times to accom-

pany him, and she said she could not. At this time Arrowsmith asked his wife about the affidavit she had made in this cause, saying that it was a lot of God damn lies, to which she replied that there was one or two things in the paper stronger than she had made them, whereupon he said they were all a lot of professional God damn liars. Just what things in the affidavit were stronger than she had made them was not pointed out by either side. I presume that she meant that counsel in drawing her affidavit had stated the particulars more strongly than she had stated them to him. His conduct on the occasion of his visit to the farm with Burlew and Bennett was characterized by profanity. He completely lost his temper, and I believe that he was simply trying to lay a foundation to absolve himself from the payment of alimony. About 1904 Arrowsmith paid Dr. Ervin a small bill for professional services bestowed by the doctor upon his wife in an illness occasioned, I believe, by the treatment of the husband, and he told the doctor that that would be the last God damn doctor bill that he would ever pay for her. This Arrowsmith also told his wife. Under the treatment she received from her husband, Mrs. Arrowsmith's health gave away, and she has been in poor health for the past 10 years. She was unable to go to court in New Brunswick where the hearing was had, and I went to the Arrowsmith farm that her testimony might be taken in my presence. She appeared to be broken in health and more or less of a physical wreck, a condition brought about, I believe, by her husband's abuse of herself and their children.

After Arrowsmith had left the farm, he wrote his wife a letter, which if not exactly a tissue of lies, contained two or three deliberate ones. The letter is dated August 1, 1906, and in it he says: "On my part I am willing to forgive and forget all that is past." Now, this was a covert lie, containing in it the implication that his wife's conduct toward him had been such as to call for forgiveness, which is not a fact; for, on the contrary, she had borne in patience and in silence about as much of hardship and reviling as any woman could bear. He also said, "In the past we have been happy," which, of course, is a palpable untruth. Again he says: "I now extend to you in all good faith an invitation to return to me." He admitted on examination that he wrote the letter on advice of counsel. This studied attempt to put himself in the right and to absolve himself from the consequences of a situation of his creation is unavailing. *Barrett v. Barrett*, 37 N. J. Eq. 29; *Graecen v. Graecen*, 2 N. J. Eq. 456, 466.

In *Graecen v. Graecen*, *ubi supra*, a decree of divorce a mensa et thoro was granted the complainant for life, and that, too, in a case where the parties, as in the present one, had lived together for upwards of 30 years and

raised a family of children. In that case there was no actual physical violence visited upon the complainant. There were some threats and at least one assault without a battery, which consisted of the husband chasing his wife with an axe, and raising it above her and threatening to split her down. The report of the case does not show how long it was before the parties separated when this axe episode occurred, but I take it to have been a considerable length of time prior to the separation. Chancellor Pennington says at page 465 of 2 N. J. Eq.: "It is further objected that many of the transactions referred to are too far back, and should not now be brought forward to prejudice this cause. There is some weight in this objection, and if it were an isolated occurrence long since passed by, on which alone the cause rested, I should think it ought to prevail, and especially so if a different course of treatment had of late years been pursued. But the evidence is that the bitterness and ill feeling of the defendant towards his wife has not only continued, but been on the increase up to the time of her leaving her home. It is the connection which exists between the acts of oppression on the part of this husband in former days and now, showing a series of injustice and wrong on his part, and of long endurance and forbearance on the part of the wife, that gives force and propriety to this evidence." The learned Chancellor says that this case (*Graecen v. Graecen*) is stronger than *Clutch v. Clutch*, 1 N. J. Eq. 474. In that case (*Clutch v. Clutch*) only one act of violence appeared; the defendant "having taken her [his wife] up forcibly, and turned her out of doors." So in the case under consideration there is but one act of violence that I can recall, namely, the occasion, many years ago it is true, when Mrs. Arrowsmith interfered with her husband for knocking their young son off a chair at breakfast time, when he laid hands upon her and dragged her out of doors.

In *Burton v. Burton*, 52 N. J. Eq. 215, 27 Atl. 825, Vice Chancellor Green seemed to be of opinion that the refusal of a husband to live with his wife if that had or tended to have a serious effect on her health is extreme cruelty. The case was brought in 1893, and two acts of personal violence, one committed in 1869 and the other in 1874, were relied upon. The Vice Chancellor goes on to advert to the fact that no one who knew or lived with or near the parties during their married life of 30 years was produced to corroborate a single act of personal indignity or violence, while the daughter, who was always with the mother, testified that she never knew her father to use violence toward her mother, and he emphatically denied the statements, and they were, the Vice Chancellor found, condoned if they ever occurred. This case I take to be an authority favorable to the contention of Mrs. Arrowsmith.

In *Thomas v. Thomas*, 20 N. J. Eq. 97, it was held: "Actual personal violence, not very great, nor such as standing alone would warrant a decree of separation, when accompanied by inhuman, coarse, and brutal treatment towards the wife, rendering it unjustifiable that she should be compelled to live with her husband, will entitle her to a decree of divorce a mensa et thoro, and to alimony."

In the leading case of *Close v. Close*, 25 N. J. Eq. 528, the Court of Errors and Appeals held that where the husband has inflicted upon his wife "any physical injury accompanied by such persistent exhibition of ill feeling and opprobrious epithets as will endanger her health, or render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife, the decree of separation should be pronounced." Said Mr. Justice Van Syckel, speaking for the Court of Errors and Appeals in this case (*Close v. Close*, 25 N. J. Eq. 528): "If the body is the only thing to be regarded in these cases, and the purpose and object of the court is to avert from the wife injury to her life, members, or health, there is no reason why the husband should be permitted to inflict an injury in one way which he would be restrained from doing in another."

In *Black v. Black*, 30 N. J. Eq. 215, 221, Vice Chancellor Van Fleet remarked: "To justify a divorce a mensa et thoro, actual physical violence need not be proved, but such conduct by the husband must be shown as will justify the court in believing that, if he is allowed to retain his power over his wife and she is compelled to remain subject to him, her life or health will be endangered, or that he will render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife." The doctrine annunciated by Vice Chancellor Van Fleet in *Black v. Black* received the approbation of the Court of Errors and Appeals in *Smith v. Smith*, 40 N. J. Eq. 586, 596, 5 Atl. 109, 122.

It seems that there is no reported case in this state in which a decree for divorce a mensa et thoro has been granted in which there was not at some time some physical violence used; but it seems that an act of physical violence is not absolutely indispensable to the granting of such relief. The test in the last analysis seems to be whether continued cohabitation will endanger the wife's life or health, or even that it will render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife. Certainly these conditions are present, all of them, in this case. The wife's health is already broken down, and broken down from no other cause than the long continued and unremitting ill feeling, opprobrious epithets,

coarse, brutal, and profane cursing, and other ill treatment by Arrowsmith of his wife, and, I may add, his family; for to my mind about as great an act of cruelty that a husband can be guilty of toward his wife is to unmercifully thrash her children without cause, or at least without adequate cause, and to turn them out of doors. This Arrowsmith did while his wife stood by, helpless and crying. I know that they endured all this for years, and I have not overlooked the fact that the boys are all grown and of age. The length of endurance is not condonation, but rather evidence of aggravation.

Assuming that Arrowsmith acted in good faith in requesting his wife to go and live with him in the Burlew house, which I do not concede, I find nevertheless that his extreme cruelty toward his wife during their married life and cohabitation together amply justified her in refusing to leave the home and protection of her son Wood, and therefore the petition for divorce for desertion must be dismissed, with costs. On the authority of *Costell v. Costell*, 69 N. J. Eq. 218, 60 Atl. 49, Mrs. Arrowsmith may, if she chooses, file a cross-bill praying for a divorce from bed and board with alimony, and a decree therefor will be advised.

(222 Pa. 358)

PULASKI TP. POOR DIST. v. LAWRENCE COUNTY.

(Supreme Court of Pennsylvania. Nov. 2, 1908.)

1. STATUTES (§ 94*)—LOCAL OR SPECIAL LAWS.

Act March 6, 1903 (P. L. 18), providing for the relief of sick and indigent persons, who have no legal settlement within the state at the expense of the county where relief is required, is not within the prohibition of Const. art. 3, § 7, declaring that the Legislature shall not pass any special law regulating the affairs of counties, cities, townships, etc., because of the diversity of method of accomplishing the same result necessitated by the fact that under the operation of Act June 4, 1879 (P. L. 78), there are in some counties poor districts and overseers of the poor, and in others the whole county is a single poor district and its affairs are administered by the county commissioners.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 94.*]

2. STATUTES (§ 94*)—LOCAL OR SPECIAL LAWS.

Act March 6, 1903 (P. L. 18), providing for the relief of sick and indigent persons, is not within the prohibition of Const. art. 3, § 7, declaring that the Legislature shall not pass any special law regulating the affairs of counties, cities, townships, etc., because it divides paupers into two classes, those without a settlement in the state, or whose settlement is unknown, and those who have a settlement, and establishes a different rule as to the relief of each class.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 94.*]

3. STATUTES (§ 68*)—LOCAL OR SPECIAL LAWS.

The mandate of the Constitution that laws on certain subjects shall not be local or special

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is negative, which means that they must be general, and uniformity is not a necessary requirement, but only a test of the generality which the Constitution demands.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 68.*]

Appeal from Superior Court.

Action by the Pulaski Township Poor District against Lawrence County. Judgment for plaintiff, overruling a demurrer, and defendant appeals. Affirmed.

The following is the opinion of Rice, P. J., of the court below:

"The question involved in this case is the constitutionality of the act of March 6, 1903 (P. L. 18), or, to be more exact, the constitutionality of those parts of the act which provide for the relief of needy, sick, and indigent persons, who have no known legal settlement within the commonwealth, at the expense of the county where relief is required. It may be surmised that the draftsman of the act had particularly in mind counties not operating under the act of June 4, 1879 (P. L. 78), the constitutionality of which was upheld in *Rose v. Beaver County*, 20 Pa. Super. Ct. 110; *Id.*, 204 Pa. 372, 54 Atl. 263. But the words of the act are broad enough, and must be construed to cover all counties in which a poor or almshouse for the support, care, and shelter of the needy and indigent is not maintained, either by general or local law, by and at county expense. It is claimed that the effect of the qualifying words is to limit and restrict the provisions of the act to a particular class of counties, and, therefore, they are in contravention of section 7, art. 3, of the Constitution, which declares that the Legislature 'shall not pass any local or special law regulating the affairs of counties, cities, townships, wards, boroughs or school districts.' But as, in the counties to which it is claimed the act does not apply, the duty of furnishing relief to the class of poor persons described in the act who have no known legal settlement in the commonwealth was already devolved by law upon the county, it is apparent that the immediate effect of the act was to promote uniformity by putting all other counties upon the same basis so far as that general duty is concerned.

"But until every county of the state has taken advantage of the provisions of the act of June 4, of 1879 (P. L. 78), there must of necessity be diversity of method of caring for the poor between the counties that have taken advantage of its provisions and those in which the poor district system is retained. For example, in the former, orders of relief and removal are granted to and upon the county commissioners, and, in the latter, to and upon the directors or overseers of the poor of the proper district. In the present case an order of relief issued to the overseers of the poor of the township poor district, and,

it is admitted by the demurrer, that the person from whom it issued had no known legal settlement in the state. Under the act of 1903, it became the duty of the county commissioners, from and after notice from the overseers of the poor, either to take charge of him and furnish the needed relief, or, in the event of their election not to do so, to reimburse the poor district the amount necessarily expended. The result is to compel the county to bear the expense of relief. The same result would have been reached, but by a different method, if the county, having availed itself of the privilege of the act of 1879, were operating under its provisions. This diversity of method of accomplishing the same result in this particular class of cases, necessitated by the fact that under the operation of a valid and constitutional statute there are in some counties poor districts and overseers of the poor and in others the whole county is a single poor district, and its affairs are administered by the county commissioners, is not a valid reason for declaring the act of 1903 a local or special law within the prohibition of the Constitution. In support of this conclusion we refer to *Lehigh Valley Coal Co.'s Appeal*, 164 Pa. 44, 30 Atl. 210, with the doctrine of which, we think, it is in full accord.

"But, in determining whether an act is local or special within the prohibition of this section, not only present results, but possibilities, must be considered. *Frost v. Cherry*, 122 Pa. 417, 15 Atl. 782. Hence, if the act must be construed as permanently excluding from its operation all counties which at the time of its enactment were operating under the act of 1879, or similar laws, the legal possibility of local and special results being accomplished by it upon repeal of those laws is apparent. We think it clear, however, that the words of the act do not require such construction, if any attention whatever is to be given to the sound principle that, where the legislative intent is not to evade the restrictions, the courts are not required to be astute in extending them over cases not really within the evil prohibited, though the form may have the appearance of coming within the literal words of the Constitution. *Commonwealth v. Gilligan*, 195 Pa. 504, 46 Atl. 124. As the learned compiler and annotator of the last edition of *Purdon's Digest* well says, and as the authorities abundantly show, there is a marked distinction between inclusive and exclusive provisions under this section. 1 *Stewart's Purdon's Digest*, 153. Assuming the legal possibility of a repeal of the act of 1879, and of all local or special laws under which particular counties are now charged with the duty of supporting, caring for, and sheltering poor persons needing relief, the result would be to re-establish the poor districts in such counties. When that change occurs, if it ever shall, and the duty is again

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cast primarily on the poor districts, there is no clause or provision of this act which will exclude any of those counties from its operation. On the contrary, it will at once become operative throughout the state, without any change or amendment thereof. As already stated, the immediate effect of the act is to promote uniformity, not to produce local or special results that are forbidden by the Constitution, and it does not appear that it can by any possibility have the latter effect in the future. This being so, the same principle that sustained the legislation construed in *Evans v. Phillips*, 117 Pa. 226, 11 Atl. 630, 2 Am. St. Rep. 655, *Reading v. Savage*, 124 Pa. 328, 16 Atl. 788, and kindred cases, is applicable here.

"It is argued, further, that the act is special, and therefore invalid, because it divided paupers into two classes, namely those without a settlement in this state, or whose settlement is unknown, and those who have a settlement, and establishes a different rule as to the relief of each class. But there are obvious reasons which might properly move the Legislature to conclude that it would be just and expedient to shift the burden from the poor district into which a poor person, without legal settlement there or in any other poor district of the state, might chance to come, to the county, which would not hold good in the case of a poor person who has a legal settlement in some poor district of the state to which he can be removed. There is no provision of the Constitution which so ties the hands of the Legislature that it cannot do the former, unless it also relieves all poor districts of the burden of caring for the poor who have legal settlements therein and casts it on the county. This, it seems to us, does not require discussion.

"The judgment is affirmed."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

A. W. Gardner, for appellant. Aaron L. Hazen, John P. Lockhart, and Gregory & Dickey, for appellee.

PER CURIAM. There is no constitutional requirement of uniformity in legislation, except in taxation. "The mandate of the Constitution is negative that laws on certain subjects shall not be local or special. That means that they must be general, and the uniformity which is discussed in the decisions is not a necessary requirement, but only a test of the generality which the Constitution commands." *Com. v. Moir*, 199 Pa. 534, 552, 49 Atl. 351, 356, 53 L. R. A. 837, 85 Am. St. Rep. 801.

With this addition, which the course of argument seems to make desirable, the judgment is affirmed on the opinion of the learned president of the superior court.

HAYHURST v. MORIN et al.

(Supreme Judicial Court of Maine. May 8, 1908.)

1. MORTGAGES (§ 305*) — PAYMENT — CHANGE IN FORM OF DEBT.

A mortgagee is entitled to have his mortgage upheld and enforced according to the terms and stipulations of the contract therein specified, which the mortgage was originally designed to secure, and no mere change in the form of indebtedness, without actual payment of the debt, is deemed sufficient to entitle the mortgagor to a discharge or release.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 889; Dec. Dig. § 305.*]

2. MORTGAGES (§ 121*) — CONSTRUCTION AND OPERATION — EXTENSION TO NEW DEBT.

In an action at law to foreclose a real estate mortgage, an oral agreement, even for a valuable consideration, cannot be enforced for the purpose of attaching a new debt to the debt which the mortgage was originally given to secure.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 238; Dec. Dig. § 121.*]

3. MORTGAGES (§ 316*) — DISCHARGE — REINSTATEMENT.

After an actual extinguishment of the debt secured by a real estate mortgage, the mortgage cannot be revived by an oral agreement to keep it in force to secure any new and independent debt, which can be made the foundation of a conditional judgment in an action at law brought by the mortgagee against the mortgagor to foreclose the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 949; Dec. Dig. § 316.*]

4. MORTGAGES (§ 121*) — CONSTRUCTION AND OPERATION — EXTENSION TO NEW DEBT.

If a mortgagor for a new consideration makes an oral agreement that the mortgage shall be continued in force as security for a new loan, and advances have been made by the mortgagee to the mortgagor upon the faith of such agreement, a court of equity, in a bill in equity brought by the mortgagor to redeem, will refuse to extend its aid to relieve the mortgagor from such valid oral agreement, on the principle that he who seeks equity must do equity.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 238; Dec. Dig. § 121.*]

5. MORTGAGES (§ 121*) — CONSTRUCTION AND OPERATION — EXTENSION TO NEW DEBT.

In the case at bar a writ of entry was brought for the purpose of foreclosing a real estate mortgage, given by the defendant Morin to the plaintiff October 3, 1899, to secure the payment of a note for \$900, given to the plaintiff by the defendant Morin, payable at the rate of \$200 per year. October 3, 1903, the amount due on the mortgage note was \$450. November 9, 1903, the defendant Morin gave a second mortgage of the same premises to one Marshall to secure the payment of \$800, excepting in the covenant against incumbrances the first mortgage to the plaintiff, and expressly stating that the amount then due thereon was \$450. At the time the action was brought the note for \$800 secured by the second mortgage to Marshall remained unpaid, and proceedings for the foreclosure of that mortgage were pending. October 3, 1905, the defendant Morin obtained from the plaintiff a loan of \$200, and gave the plaintiff a note therefor payable on demand, and November 6, 1905, the defendant Morin obtained from the plaintiff another loan of \$250, for which he gave the plaintiff a note payable in one year. A few days after the last-named loan was obtained the plaintiff and the defendant Morin agreed

that the last-named loans, amounting to \$450, should be secured by the aforesaid mortgage given by the defendant Morin to the plaintiff October 3, 1899. At the time this agreement was made the plaintiff had actual notice of the second mortgage to Marshall. March 5, 1906, the defendant Morin was adjudicated a bankrupt, and thereafterwards the defendant Letourneau was duly appointed and qualified as trustee in bankruptcy of the defendant Morin's estate, and in his capacity as trustee he appeared in defense in the plaintiff's action to represent the interest of the creditors of the defendant Morin. The mortgage given by the defendant Morin to the plaintiff October 3, 1899, to secure the payment of the aforesaid note of \$900 contained no stipulation respecting any other debt or further advances, and it did not appear that at the time the mortgage was given there was any oral agreement in regard to such advances.

Held: (1) That while it is competent, in answer to a bill in equity to redeem a mortgage, for the defendant to show that it would be inequitable to allow the plaintiff to do so upon the payment of the amount apparently due thereon, when it appears that further advances have in fact been made in pursuance, and upon the faith, of a valid oral agreement that the mortgage should remain as security for such further advances, yet such oral agreement cannot be set up against a subsequent mortgagee or attaching creditor, nor can it be invoked against the mortgagor himself or his assignee in an action at law brought by the mortgagee to foreclose the mortgage.

(2) That there was no new or valuable consideration for the oral agreement made "a few days" after the new loans of October 3, and November 6, 1903, respectively, were made. That such advances did not appear to have been made upon the faith of such oral agreement. And that such oral agreement, entered into without any new consideration, and not in pursuance of any understanding between the parties before the advances were made, was not a valid agreement, and cannot be enforced against the mortgagor himself in any proceeding at law or in equity.

(3) That the plaintiff was only entitled to judgment as of mortgage for \$450, with interest from October 3, 1905.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 238; Dec. Dig. § 121.*]

(Official.)

Report from Supreme Judicial Court, Kennebec County, at Law.

Writ of entry to foreclose a real estate mortgage, by John W. Hayhurst against Michael J. Morin, and J. A. Letourneau as trustee in bankruptcy. Case reported to the law court. Judgment for plaintiff.

Writ of entry, brought for the purpose of foreclosing a real estate mortgage, given by the defendant Morin to the plaintiff to secure the payment of \$900. When this cause came on for hearing at nisi prius, an agreed statement of facts was filed and the case was then reported to the law court for that court to render such judgment "as the law and the facts require." The agreed statement of facts is as follows:

"It is agreed that on October 3, 1899, said Morin borrowed of said Hayhurst the sum of \$900, and gave a note secured by the mortgage in this cause, covering the land described in the plaintiff's writ; that on different

dates between said October 3d and the 3d day of October, 1903, payments had been made on said note amounting to the sum of \$450 as witnesses by the indorsements on said note to be applied to the principal sum of said note; that all interest had been paid up to the last-named date; that on November 9, 1903, said Morin gave to Peter Marshall, of Waterville, in said county a mortgage on same real estate to secure a note for the sum of \$800, still unpaid, and in said mortgage said Morin reserved and excepted from the covenant against incumbrances a certain mortgage given to John W. Hayhurst 'on which there is now due the sum of \$450'; that said Marshall has begun foreclosure proceedings on his said mortgage; that on October 3, 1905, and on November 6, 1905, said Morin borrowed of said Hayhurst the sum of \$450 and gave notes therefor, signed by himself and his wife, Alice Morin; that an agreement was made, a few days after said last-named date, that said sum should be secured by the mortgage first given by said Morin; that at the time of said agreement said Marshall's mortgage was not recorded; that interest on all sums due from the said Morin to the said Hayhurst was paid to October 3, 1905; that said Hayhurst had notice of the mortgage that was given by said Morin to said Marshall; that said Morin was adjudicated a bankrupt on March 5, 1906, and J. A. Letourneau qualified as trustee of his estate March 25, 1907, and succeeded a former trustee who had resigned, and he now comes into this cause to be heard in his said capacity; that said Hayhurst never had but one mortgage on said real estate."

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

F. W. Clair, for plaintiff. Letourneau & Matthien, for defendants.

WHITEHOUSE, J. This is a writ of entry brought for the purpose of foreclosing a mortgage of real estate given by the defendant Morin to the plaintiff October 3, 1899, to secure the payment of \$900, for which Morin gave a note, signed by himself and his wife, Alice Morin, payable at the rate of \$200 each year. The case is reported to the law court upon an agreed statement of facts, for the purpose of determining the amount for which the conditional judgment shall be entered.

The facts disclosed by the agreed statement are as follows:

By reason of the payments of principal and interest made on the note prior to October 3, 1903, the amount due at that date on the note which the mortgage was given to secure was \$450. November 9, 1903, the defendant Morin gave to one Marshall a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

second mortgage to secure the payment of a note for \$800, with the following provision in the covenant against incumbrances: "Reserving and excepting a certain mortgage given to John W. Hayhurst on which there is now due the sum of \$450"—and it is agreed that Hayhurst never had but one mortgage on the premises. The note for \$800 secured by Marshall's mortgage remains unpaid, and proceedings for a foreclosure of that mortgage are pending.

October 3, 1905, the defendant Morin obtained from the plaintiff a loan of \$200, and gave him a note therefor, signed by himself and wife, payable on demand; and November 6, 1905, obtained from the plaintiff another loan of \$250, for which he gave a note, signed by himself and wife, payable in one year. A few days after the last-mentioned loan was obtained, an agreement was made between the parties that these loans of October 3 and November 6, 1905, amounting to \$450, should be secured by the mortgage in question of October 3, 1899, first given by Morin to the plaintiff. At the time of this agreement the mortgage of November 9, 1903, from defendant Morin to Marshall had not been recorded, but the plaintiff then had actual notice of that mortgage.

March 5, 1906, the defendant was adjudicated a bankrupt, and on the 25th of the same month, J. A. Letourneau was duly qualified as trustee in bankruptcy of Morin's estate, and in that capacity he appeared in defense of this cause to represent the interests of the creditors.

The plaintiff claims that he is entitled to a conditional judgment for a total principal of \$900, with interest on the first two notes from October 3, 1905, and on the last two notes from November 6, 1905, to which dates, respectively, the interest on the notes specified appears to have been paid. But since a judgment for this amount would include the \$450 represented by the two loans of October 3 and November 6, 1905, made by the plaintiff after he had notice of the second mortgage given by Morin to Marshall two years before, it is conceded by the plaintiff's attorney that the lien created by the Marshall mortgage must have priority over the lien claimed to have been created by the oral agreement that the last two notes should be secured by the plaintiff's mortgage, and he consents that, if a conditional judgment is rendered for the entire \$900, that part of it represented by the last two notes above specified may, if possible, be made subject to the prior lien of Marshall as second mortgagee.

The defendant trustee in bankruptcy contends that the judgment should be for \$450, and interest from October 3, 1905, that being the balance due on the original note of \$900 after deducting the payments of principal and interest made thereon.

It has been seen that the mortgage in question was given by Morin to the plaintiff

October 3, 1899, to secure a particular debt evidenced by a note of \$900. There is no stipulation in the mortgage respecting any other debt or further advances, and it is not claimed that at the time the mortgage was given there was any oral agreement in regard to such debt or advances. The payments of principal and interest made on the note between 1899 and 1903, reduced the amount due on the note to \$450. Those payments were all indorsed on the note, and it is not in controversy that the effect of these payments was to extinguish that portion of the particular debt specified in the mortgage. Thereupon, on the 9th of November following, the defendant Morin borrowed \$800 of one Marshall, and gave him as security therefor a second mortgage on the same property expressly referring to the plaintiff's mortgage as one upon which there was then due the sum of \$450. Two years later Morin negotiates a new loan with the plaintiff for \$200, giving a note signed by himself and wife, payable on demand. It is not suggested that any allusion whatever was made to the mortgage at that time, or that there was then any understanding that this loan should be secured by the mortgage. A month later, on November 6, 1905, Morin obtained from the plaintiff another loan of \$250, giving his note therefor as before; and it was not suggested that there was any agreement or understanding at that time that either of these last-named notes should be secured by the plaintiff's mortgage. But in the words of the agreed statement "an agreement was made a few days after said last-named date [November 6, 1905] that said sum [\$450] should be secured by the mortgage first given," although the plaintiff then had knowledge of the second mortgage to Marshall.

The plaintiff is entitled to have his mortgage upheld and enforced according to the terms and stipulations of the contract therein specified, which the mortgage was originally designed to secure, and it is unnecessary to cite the authorities, which are numerous, in support of the proposition that no mere change in the form of the indebtedness, without actual payment of the debt, is deemed sufficient to entitle the mortgagor to a discharge or release. The reasoning in all the cases by which this familiar doctrine is established proceeds upon the assumption that there has never been an actual payment of the indebtedness secured by the mortgage. But it is equally well established that, after an actual extinguishment of the debt, the mortgage cannot be revived by an oral agreement to keep it in force, to secure any new and independent debt which could be made the foundation of a conditional judgment, in an action at law by the mortgagee against the mortgagor to foreclose the mortgage. *Joslyn v. Wyman*, 5 Allen (Mass.) 62; *Stone v. Lane*, 10 Allen (Mass.) 74; *Upton v. National Bank*, 120 Mass. 153; *Merrill v. Chase*, 3 Allen (Mass.) 339. In the last-named case

the court say: "The demandant relies on a parol agreement between the parties that the mortgage should continue as a valid security for future advances. * * * But the difficulty of supporting such an agreement is this: That a conveyance of land in mortgage is a conveyance by a deed, defeasible on a condition subsequent. By the performance of the condition the title of the mortgage is defeated, and the mortgagor is in of his former estate." See, also, *Jones on Mortgages*, vol. 1, § 357, and cases cited, and *Cyc.* vol. 27, p. 1073.

It is true that, if the mortgagor for a new consideration makes an oral agreement that the mortgage shall be continued in force as security for a new loan, and advances have been made by the mortgagee upon the faith of it, a court of equity, in a bill brought by the mortgagor to redeem, will refuse to extend its aid to relieve the mortgagor from such valid oral agreement, on the principle that he who seeks equity must do equity. In *Upton v. National Bank*, 120 Mass. 153, the court say: "While an indebtedness other than that for which the mortgage is given cannot legally be attached to such mortgage, yet it is competent, in answer to a bill in equity to redeem a mortgage, for the defendant to show that it would be inequitable to allow the plaintiff to do so upon the payment of the amount apparently due thereon, inasmuch as the defendant had, for valuable consideration, orally agreed that it should not thus be discharged, but should remain as security for other debts." The same equitable doctrine prevailed in *Joslyn v. Wyman*, 5 Allen (Mass.) 62, and *Stone v. Lane*, 10 Allen (Mass.) 74. But in all of these cases the rule of law was clearly stated that such an oral agreement could not be set up against a subsequent mortgagee or attaching creditor; nor could it be invoked against the mortgagor himself, or his assignee, in an action at law brought by the mortgagee to foreclose the mortgage. See, also, 27 *Cyc.* 1179, and *Balch v. Chaffer*, 73 Conn. 318, 47 Atl. 327, 84 Am. St. Rep. 155.

In the case at bar, as already stated, the plaintiff concedes that this oral agreement between himself and Morin respecting the loans of October 3, and November 6, 1905, cannot be set up against the second mortgage to Marshall, of which the plaintiff had actual notice. The plaintiff admits that, as to the \$450 represented by those new notes, his mortgage must be held subject to the prior lien of the Marshall mortgage.

But the plaintiff insists that this oral agreement could be set up against the mortgagor himself, the defendant Morin, and since the rights of the defendant Letourneau, the trustee in bankruptcy, cannot be superior to those of Morin, the oral agreement must also be enforced against the trustee. It has been shown, however, by the authorities above cit-

ed that, in an action at law to foreclose the mortgage, an oral agreement for a valuable consideration cannot be enforced for the purpose of attaching a new debt to that which the mortgage was originally given to secure. But according to the facts stated in the agreement of the parties, there is another insuperable objection to the plaintiff's claim. It is distinctly stated that the oral agreement was made some days after the loans were obtained. It does not appear that the advances were made upon the faith of the oral agreement that they should be secured by the mortgage. For aught that appears they were made without any reference whatever to the mortgage. There was no new or valuable consideration for an oral agreement thus made, at a different time, and on a separate occasion, "a few days" after the advances were made. An oral agreement, entered into without consideration under such circumstances, and not made in pursuance of any understanding between the parties before the advances were made, is not a valid agreement, and cannot be enforced against the mortgagor himself in any proceeding at law or in equity.

It is accordingly the opinion of the court that the plaintiff is only entitled to

Judgment as of mortgage for \$450, with interest from October 3, 1905.

(104 Me. 203)

BRADLEY LAND & LUMBER CO. et al. v. EASTERN MFG. CO.

(Supreme Judicial Court of Maine. July 10, 1908.)

1. TROVER AND CONVERSION (§ 42*)—DAMAGES—LIMITED INTEREST OF PLAINTIFF—LOGGING PERMIT—TITLE TO LOGS RETAINED BY OWNER OF LAND—SUCH OWNER CANNOT RECOVER FULL VALUE IN TROVER, WHEN.

It is only when the plaintiff has the sole right or interest in the property, or is accountable therefor to some third party, that he can recover the full value in an action of trover. Whenever he would have to account to the defendant or the defendant's vendor for the amount of the latter's interest in the property, he can recover only the value of his own interest.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. § 248; Dec. Dig. § 42.*]

2. LOGS AND LOGGING (§ 35*)—DAMAGES—LIMITED INTEREST OF PLAINTIFF.

When, by the terms of a logging "permit," the landowner retains the title to the logs until the operator shall have fully performed all his obligations, but leaves to him the right to any balance of the proceeds of the logs after deducting all sums due from the operator to the landowner under the permit, the latter in an action of trover for the logs against the operator or his vendee can recover only the amount so due him.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 35.*]

(Official.)

Exceptions from Supreme Judicial Court, Penobscot County.

Trover by the Bradley Land & Lumber

Company and others against the Eastern Manufacturing Company. Verdict for plaintiffs, and defendant excepts. Exceptions sustained.

Trover brought by the plaintiffs against the defendant to recover the value of 9,555 spruce logs, containing 869,470 board feet, alleged to have been converted by the defendant. These logs were cut by one Charles W. Mullen on the plaintiffs' land, under a written permit, and by him were sold to the defendant. The defendant seasonably notified Mullen to come in and defend the action, and he appeared and assumed the defense. "The defendant pleaded the general issue and a brief statement setting up the title to the logs and lumber in Charles W. Mullen," and also stated therein certain alleged facts in reduction of damages.

Tried at the October term, 1906, Supreme Judicial Court, Penobscot county. At the conclusion of the testimony, the presiding justice directed the jury to return a verdict for the plaintiff for the value of the logs at the time of the conversion, and interest from the date of the writ, amounting in all to \$14,656.33. The defendant excepted to this ruling, and also to certain rulings during the trial, whereby certain evidence offered by the defendant was excluded.

The case is stated in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, CORNISH, and KING, JJ.

F. H. Appleton and Hugh R. Chaplin, for plaintiffs. P. H. Gillin and J. F. Gould, for defendant.

EMERY, C. J. The plaintiff landowners and Charles W. Mullen made an agreement in writing in the form known as a "permit," by which Mullen was to enter upon certain timber land of the plaintiffs and cut and remove therefrom and drive to market certain kinds of timber, and pay therefor a fixed stumpage price per M. In the permit were various stipulations. Mullen was to cut all the burnt timber on the land during the lifetime of the permit, and all the burnt timber left uncut was to be scaled and was to be paid for by Mullen according to the terms of the permit. The stumpage was to be paid in full by July 1st of each year, and all the other requirements of Mullen in the permit were to be performed by him, and it was further stipulated that all the logs and timber cut on the land should remain the property of the plaintiffs until stumpage bills were paid "and all other matters pertaining to this license were fully adjusted"; also that, if all these were not done within 10 days after July 1st, the plaintiffs might "take possession of and sell at either public or private sale for cash any or all of the lumber cut under this permit wherever situated and whether manufactured or not, and, after deducting reasonable ex-

penses, commissions, and all sums which may then be due or may become due from any cause whatever as herein expressed, the balance, if any there be, they shall pay over on demand to said grantee after a reasonable time for ascertaining and liquidating all amounts due or which may become due either as stumpage or damages."

Under this permit Mullen entered on the land each year, and cut and hauled and drove to market a quantity of logs and lumber. A part of these, viz., 9,555 spruce logs, he sold to the defendant. The plaintiffs afterward, claiming that the stumpage had not been paid and other stipulations of the permit had not been performed, made a demand on the defendant for the logs, which not being complied with they brought this action to trover against the defendant for conversion of the logs. Upon notice from the defendant, Mullen appeared and assumed the defense of the action.

At the trial the principal, if not the only, controversy, was over the matter of the burnt timber named in the permit. The plaintiffs claimed that a large amount of burnt timber which Mullen was bound by the terms of the permit to cut and pay for, or bound to pay for if left uncut, was left uncut and not paid for. Mullen claimed that he had not left uncut any burnt timber within the terms of the permit. The defendant claimed and offered evidence to show that the full amount due the plaintiffs from Mullen for all damage of any kind due them under the permit was \$5,166.55, and asked to have the question of those damages determined in this action of trover. The court excluded the evidence, and instructed the jury to return a verdict for the plaintiffs for the full value of the logs at the time of the conversion, and interest from the date of the writ, which amount was \$14,656.33. To these rulings the defendant excepted.

To sustain these rulings we would need to hold that the transaction between the plaintiffs and Mullen as evidenced by the written permit was only a conditional sale to Mullen of the logs and lumber cut, hauled, and driven to market by him under the permit, and that, by his failure to perform in full by the time fixed any of the conditions of the sale, he forfeited and lost all interests and rights in the logs and lumber, and the plaintiffs could take them or recover the full value of them free from any obligations to Mullen. The decisions in *Brown v. Haynes*, 52 Me. 578, *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. 14, and in other cases similar to them were made on that ground.

We think, however, that this case is not within the principle of those cases; that there is a wide difference between them. By the agreement in this case, if the plaintiffs took the logs and lumber for nonperformance of any condition in the agreement, they were to sell them or account for them as sold, and pay over the proceeds to Mullen after deduct-

ing all amounts due them under the agreement. Mullen did not lose all interest and right in the logs and lumber he had cut, hauled, and driven to market, even though he did not seasonably and fully perform some one of the terms of the contract. He retained the right that they should be sold or accounted for as sold, and that, after deduction of all sums, the plaintiffs were entitled to under the agreement the balance should be paid to him. There were no logs nor lumber when the agreement was made. There were only trees annexed to the plaintiffs' realty. It was the purpose to have these made into logs and lumber and put in the market to the mutual profit of the parties. The spirit, the real nature of their agreement, was that Mullen should sever the trees from the land, convert them into logs and other lumber, and get them to market at his own expense, thus greatly adding to their value, and that the plaintiffs should retain the title simply as security for the payment of what might be or become due them under the agreement. That amount, whatever it might be, with the right to enforce payment of it, was the full extent of their interest or property in the logs and lumber, and in an action of trover against Mullen, or his assignee or vendee, that is all they are entitled to recover, since that amount would fully indemnify them for the conversion. It is only when the plaintiff has the sole interest or right in the property, or is accountable therefor to some third party, that he can recover the full value in an action of trover. Whenever he would have to account to the defendant for the amount of the latter's interest in the property, he can only recover the value of his own interest. *Chamberlain v. Shaw*, 18 Pick. (Mass.) 278, 29 Am. Dec. 586; *Fowler v. Gilman*, 13 Metc. (Mass.) 267; *White v. Allen*, 133 Mass. 423; *Spoor v. Holland*, 8 Wend. (N. Y.) 445, 24 Am. Dec. 37; *Warner v. Vallily*, 13 R. I. 487; *Ganong v. Green*, 71 Mich. 7, 38 N. W. 661. "If the plaintiff having but a limited title, brings his action against one having the remaining interest, or against one claiming under such residuary owner, he can then recover only according to his interest." *Sutherland on Damages* (2d Ed.) § 1136, and cases cited. See, also, *Warren v. Kelley*, 80 Me. 512, 15 Atl. 49. This rule of damages in such cases is equitable and reasonable, since it saves the parties the expense, and the court the burden, of a second suit to compel an accounting and refunding in case a plaintiff should be recalcitrant, and also since under it the defendant would run no risk of the plaintiff's insolvency. In this case at bar we find no evidence of facts or conditions requiring a separate suit for the adjustment of the amount due the plaintiffs from Mullen under the permit, since he has come in and assumed the defense. So far as the defense in reduction of damages is equitable only, it was pleaded,

and is available in this action under Rev. St. c. 84, § 17; and whether legal or equitable the question of the amount or value of the plaintiff's interest in the property, so far as now appears, can be fully determined in this action. *Ganong v. Green*, 71 Mich. 7, 38 N. W. 661. If difficulties develop requiring it, an auditor can be appointed, or the case held until other necessary proceedings are had.

It may be that the whole amount due the plaintiffs from Mullen under all the terms of the permit would exceed the full value of the logs converted by the defendant. In such case the plaintiffs would be entitled to the full value, but the defendant has the right to be heard upon that question and have it determined before being condemned.

It follows that the ruling directing a verdict for the full value of the logs and excluding evidence as to the amount due the plaintiffs was erroneous, and that the exceptions to that ruling must be sustained. This makes it unnecessary to consider the other exceptions.

Exceptions sustained.

New trial ordered.

(104 Me. 157)

CHAPLIN v. GERALD et al.

(Supreme Judicial Court of Maine. June 29, 1908.)

1. CONTRACTS (§ 175*)—CONSTRUCTION—EVIDENCE.

When a plaintiff attempts to establish an oral agreement as collateral to a written one, the scales of proof at the start are materially borne down against the plaintiff by the presumption that the written contract contains the whole agreement, and the plaintiff should be required to adduce clear, strong, and convincing evidence to outweigh such presumption; otherwise the stability of written contracts will be impaired, and resulting confidence therein destroyed.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 175.*]

2. RELEASE (§ 57*)—EVIDENCE—SUFFICIENCY.

July 23, 1902, the plaintiff lost his right foot in a collision between two cars on the defendants' street railway, one of which he was operating as a motorman. He did not bring any action to recover damages for his injuries. Also, the defendants denied all liability in the matter. February 9, 1903, the plaintiff received and accepted from the defendants the sum of \$1,000 and at the same time an instrument under seal and of the following tenor was executed in duplicate: "In consideration of the sum of one thousand dollars (\$1,000) to me in hand paid, the receipt whereof I herewith acknowledge, I, John Chaplin, of Topsham, Maine, for myself, my heirs and assigns, do hereby release Amos F. Gerald, E. J. Lawrence, A. B. Page, S. A. Nye, Henry M. Soule and Cyrus W. Davis, associates, and also the Portland & Brunswick Street Railway, from any claim by me of any name or nature in the past or at the present time, or that may arise in the future, by reason of the accident occurring during the summer of 1902, at or near Mallett's gulley, so called, in Freeport, Maine, in which accident I sustained the loss of my right foot; and in consideration of the above payment, Amos F. Gerald, for the associates, Cyrus W. Davis, Treas-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

urer Portland & Brunswick Street Railway, for the Portland & Brunswick Street Railway, and John Chaplin for myself, my heirs and assigns, agree together by our signatures herewith affixed, that the above settlement shall be final and conclusive. Made in duplicate this ninth day of February, A. D. 1903." This instrument was duly signed by the defendants Gerald and the Portland & Brunswick Street Railway, and also by the plaintiff. The plaintiff claimed that at the time the aforesaid instrument was executed the defendants orally agreed, in addition to the \$1,000, named in the aforesaid instrument as the consideration therefor, to furnish him employment at \$85 per month so long as he could work, and that afterwards, having entered the employ of the defendants, he continued to work for them until March 2, 1904, when he was wrongfully discharged. The plaintiff then brought an action of assumpsit to recover damages for breach of the alleged oral contract. The defendants denied that any such oral contract was made. The jury returned a verdict for the plaintiff for \$6,944.19.

Held:

(1) That to establish, by parol evidence, such an extraordinary agreement, as a part of the consideration for the aforesaid written release, wherein it was stipulated to be given in consideration of the sum of \$1,000, the proof must arise above the mere conflict of testimony and become clear, convincing, and conclusive.

(2) That the unsupported testimony of the plaintiff, resting only upon his memory of a conversation that occurred four years before the trial, was not such clear, convincing, and conclusive proof as should be required to establish a contract so indefinite in its term of duration and so unreasonable and improbable as that upon which the plaintiff's action was founded.

(3) That the finding of the jury that such a contract was made was so manifestly against the weight of evidence that it ought not to stand.

[Ed. Note.—For other cases, see Release, Dec. Dig. § 57.*]

8. EVIDENCE (§ 419*)—PAROL EVIDENCE AFFECTING WRITINGS—RELEASE OF PERSONAL INJURY—LIABILITY.

Although in the case at bar no exception was taken to the admission of the testimony of the plaintiff that the defendants agreed, in addition to the \$1,000 expressed in the release as the consideration therefor, to furnish him employment so long as he should be able to work, and consequently the question of the admissibility of such testimony was not directly raised, yet the court is of the opinion that the plaintiff's testimony was subject to the general rule that oral evidence will not be received to add to or vary the terms of a written contract which is complete on its face and appears to embrace an entire contract between the parties, and that the plaintiff's testimony was not competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1928; Dec. Dig. § 419.*]

(Official.)

On motion from Supreme Judicial Court, Sagadahoc County.

Assumpsit by John Chaplin against Amos F. Gerald and others. Verdict for plaintiff, and defendants move to set the same aside. Motion sustained and new trial granted.

Action of assumpsit to recover damages for breach of an alleged oral contract to furnish the plaintiff employment at \$85 per month so long as he could work. The action was against "Amos F. Gerald, El. J. Lawrence,

S. A. Nye and A. B. Page, all of Fairfield, in the county of Somerset and state of Maine, Cyrus W. Davis and Henry M. Scule, all of Waterville, in the county of Kennebec and said state, associates, and the Portland & Brunswick Street Railway, a corporation created by law and having its office at Waterville, in the county of Kennebec and said state of Maine." Writ dated September 9, 1905. Ad damnum, \$10,000. Plea, the general issue, with brief statement alleging "that the contract declared on was not in writing, and no memorandum thereof was signed by the defendants to this suit or either of them."

Tried at the April term, 1907, Supreme Judicial Court, Sagadahoc County. Verdict for plaintiff for \$6,944.19. The defendants then filed a general motion to have the verdict set aside.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

Foster & Foster and C. E. Sawyer, for plaintiff. Edward W. Wheeler and Wm. H. Newell, for defendants.

KING, J. This cause is before the court on defendants' motion to set aside a verdict against them of \$6,944.19 rendered in an action of assumpsit for breach of an alleged oral contract to furnish the plaintiff employment at \$85 per month so long as he could work.

July 23d, the plaintiff sustained the loss of his right foot in a collision between two cars on the defendants' railway, one of which he was operating as motorman. No action for damages was brought for his injuries, but on the 9th of February, 1903, he met the defendants in Waterville at the office of Mr. Davis, where he received from them, \$1,000, and the following contract or agreement was executed in duplicate:

"In consideration of the sum of one thousand dollars (\$1,000) to me in hand paid, the receipt whereof I herewith acknowledge, I, John Chaplin, of Topsham, Maine, for myself, my heirs and assigns, do hereby release Amos F. Gerald, El. J. Lawrence, A. B. Page, S. A. Nye, Henry M. Soule and Cyrus W. Davis, associates, and also the Portland & Brunswick Street Railway, from any claim by me of any name or nature in the past or at the present time, or that may arise in the future, by reason of the accident occurring on the line of the Portland & Brunswick Street Railway during the summer of 1902, at or near Mallett's gulley, so called, in Freeport, Maine, in which accident I sustained the loss of my right foot; and in consideration of the above payment Amos F. Gerald, for the associates, Cyrus W. Davis, Treasurer Portland & Brunswick Street Railway, and John Chaplin for myself, my heirs and assigns, agree together by our signatures herewith affixed that the above settlement

shall be final and conclusive. Made in duplicate this ninth day of February A. D. 1903.

"A. F. Gerald. [Seal.]

"Portland & Brunswick Street Railway,

"By Cyrus W. Davis. [Seal.]

"John Chaplin. [Seal.]"

In his action the plaintiff alleges: That at the time the above release was executed the defendants "promised him that if he would sign a certain acknowledgement of satisfaction, and accept the sum of \$1,000 in money, they on their part would pay him \$1,000 and give him employment at \$65 per month as long as he could work"; that afterwards he did "enter the employ of the defendants at their car barn and power house at Freeport, Me., and continued in their employ in a faithful attempt to perform his duties for them until the 2d day of March, 1904," when he was wrongfully dismissed. The writ is dated September 9, 1905.

The defendants contended that no such oral agreement was made, that the plaintiff became so inefficient, remiss, and negligent in his work that his discharge was justifiable, but that in fact he secured a position elsewhere and left their employ without being discharged.

The testimony of the plaintiff in support of the alleged oral agreement is contained in his answer to the following question: "Q. Now, what other consideration, other than that contained in the writing, was offered you at that time? A. Mr. Davis had a clerk read that paper to me and then passed it to me and asked me if I would sign it. I says: 'I don't hardly think I can. It don't look to me as if there was anything after the bills were paid.' He says: 'Look here, we are going to employ you. We are going to make a further agreement from that paper and give you a chance to work in the Freeport car barn and give you \$65 a month, same as you were getting when you were hurt, and give you employment as long as you are able to do any work. Furthermore,' he says, 'there will be no time, if we should sell out the Brunswick & Portland Railroad, there will be no time but some one of us men are doing business, and we will see you have a job.' 'If you are going to use me that way it is all right.' I says: 'I don't think I should sign that paper for \$1,000 unless I have a writing for my continuing labor.' They says: 'You don't mean to doubt our word, do you?' I says: 'No, sir; if you say you will honestly and justly give me \$65 a month as long as I am able to work to earn my living, I will sign the paper.' Mr. Page says: 'We will certainly do that, Jack, just as we say we will.'"

No exception was taken to the admission of this testimony. The general rule that oral evidence will not be received to add to or vary the terms of a written contract applies, we think, to such a release as the one above quoted.

The only exception to the rule is found

where from an inspection of the instrument it appears to be incomplete and not to embrace the entire contract. In such case resort may be had to oral testimony to supplement, but not to vary or contradict, the written instrument.

The instrument in the case at bar is not incomplete, but comprehensive, and appears to embrace an entire contract between the parties. It is not merely a receipt for money, which may be explained by parol. On the contrary, it is a formal release witnessing in plain and explicit terms an agreement discharging the defendants from all liability to the plaintiff for the injury he had received and "which was to be final and conclusive." The testimony of the plaintiff that the defendants agreed, in addition to the \$1,000 expressed as the consideration for the release, to furnish him employment as long as he should be able to work, is, we think, inconsistent with and tends to vary and contradict the written instrument. *Myron v. Union Railroad Co.*, 19 B. I. 125, 32 Atl. 165; *White v. Richmond & D. R. Co.*, 110 N. C. 456, 15 S. E. 197; *Horn v. Miller*, 142 Pa. 557, 21 Atl. 994; *The Cayuga*, 59 Fed. 483, 8 C. C. A. 188; *James v. Bligh*, 11 Allen (Mass.) 4; *Goss v. Ellison*, 136 Mass. 503.

The above authorities are cited not merely in support of the general rule, but as showing its applicability to the case at bar.

However, in view of the fact that the question of the competency of this testimony is not presented by exceptions, and upon which counsel have not been heard, we pass to a consideration of the motion for a new trial upon the evidence as presented to the jury.

It is of the utmost importance, we think, in passing judgment upon conflicting testimony in cases where an attempt is being made to establish an oral agreement as collateral to a written one, not to forget the old and salutary rule that when parties reduce their contract to writing the law presumes that the writing contains the whole agreement.

In such cases the scales of proof at the start are materially borne down against the plaintiff by that presumption. He should therefore be required to adduce clear, strong, and convicting evidence to outweigh it; otherwise, the stability of written contracts will be impaired, and resulting confidence therein destroyed.

The oral agreement, as claimed to have been made at the meeting in Waterville, is most extraordinary. The defendants did not admit liability on account of the accident to the plaintiff. The \$1,000 paid over to the plaintiff by the defendants was made up of the amount of the plaintiff's lost time between the time of the accident and February 9, 1903, at full wages, his expenses for medical attendance, nursing, etc.; but, not

withstanding a denial of liability on the part of the defendants, and the payment of the \$1,000, the plaintiff claims that the defendants further agreed to furnish employment for him so long as he should be able to work. The full import and meaning of the alleged oral agreement is now clearly manifested by what has since transpired as the result of it. The services of the plaintiff while in the defendants' employment after February 9, 1903, were unsatisfactory, at least, and the cause of much annoyance to them. The cessation of those services has produced litigation resulting in this verdict of \$3,944.19 as damages for the alleged breach of that oral agreement.

To establish by parol evidence such an extraordinary agreement, as part of the consideration for a written release, wherein it is stipulated to be given in consideration of the sum of \$1,000, the proof "must rise above the mere conflict of testimony and become clear, convincing, and conclusive." *Liberty v. Haines*, 103 Me. 182, 68 Atl. 738.

All the individual defendants, except Henry M. Soule, viz., Amos F. Gerald, E. J. Lawrence, S. A. Nye, A. B. Page, and Cyrus W. Davis, were present at the Waterville conference of February 9, 1903, and J. W. Amick, a director of the railway company, was also present.

Page, Gerald, and Amick were witnesses at the trial; Lawrence and Nye were sick; and Davis was in New York. Each of these witnesses in defense testified that no such oral agreement was made. We deem it useful to quote in part some of their testimony.

Mr. Page testified: "Q. Who suggested the basis of settlement between you and your associates and Mr. Chaplin, at this conference at Waterville on February 9, 1903? A. Mr. Chaplin. Q. Will you explain to the jury exactly what his proposition of settlement was made at that time? A. In a general way, he said his medicine cost so much, his doctor's bills were so much, he had been out of employment so long, and he ought to have a thousand dollars. Q. Did he at that time name any other sum? A. No. Q. Was his proposition accepted by you and your associates? A. It was. Q. Did you or any of your associates that were present at that conference tell Mr. Chaplin whether or not you recognized any liabilities from his injuries? A. We did. Q. What did you say to him? A. We told him we didn't consider we were in any way liable for the accident. Q. Was any promise or agreement made by you, or your associates, as a consideration of Mr. Chaplin's signing this written contract or release, except the consideration of \$1,000, stated in the paper? A. None whatever. Q. Was any promise made by you, or your associates, that Mr. Chaplin should have employment by you? A. None whatever, except in a general way. Q. Was anything said about his having wag-

es at \$65 a month? A. I think not. Q. Or that he should have employment as long as he was able to work? A. It never was mentioned. * * * Q. Did Mr. Chaplin request you and your associates to agree with him that he should have employment? A. Yes, sir; he asked us. Q. Did he ask that as a condition of his signing this agreement? A. He wanted it inserted in the agreement. Q. What answer was made to him? A. We refused to do it. Q. Did you give him any reason why you declined to do it? A. I think Mr. Gerald cited something about it where he had some trouble once. Q. What further was said about including that in the written agreement? A. I don't remember, but he flatly refused to do it. * * * Q. Will you state to the jury the entire conversation relating to Mr. Chaplin's employment by you and your associates? A. At that time? Q. Yes, sir. A. He asked, as I remember it, if he could have a job in the car barn, and it was assented to. I think Mr. Gerald made the remark, if I remember right, that he had a job there which we could probably give him if he could attend to it, and was satisfactory. Q. Were any wages stated? A. Nothing. Q. Or the time of the employment? A. It was not mentioned."

Amos F. Gerald also testified: "Q. Was there any other promise or agreement made by you and your associates with Mr. Chaplin as a condition, or consideration, of his signing this paper marked 'Plff's Ex. A,' except the consideration stated in the instrument itself? A. Nothing whatever. Q. Was this paper written before or after Mr. Chaplin met the directors and associates in Mr. Davis' office? A. It was written, the whole of it, after he had been there and had discussed the amount of his bill and what he wanted, and had had a general conversation in regard to the amount. Q. Did Mr. Chaplin ask that you and your associates would provide him with employment? A. Yes, sir. Q. Did he ask that that promise be made to cover his employment as long as he was able to work? A. Yes, sir; I think so. Q. Without any wages stipulated that he was to receive? A. No, sir. Q. Did you consent to making such an agreement with Mr. Chaplin? A. No, sir. Q. Was any such agreement made? A. No, sir. Q. What reply did you make to Mr. Chaplin when he requested you to make such a promise? A. If permitted, I would like to give an illustration. Court: Just the conversation, what was said and done. Q. State the entire conversation so far as you can recollect it. A. I told him that we had had trouble enough in hiring men for a given length of time without any other condition connected with it, and I says we will never do it again for even a very short time. We hired a man in Bath, at the Bath car barn, as a painter. I hired myself at a thousand dollars a year. He was to take charge of the

painting in the car barn. The man's name was Mr. Dale. After he had been there a short time; he took the notion in his head to paint the cars in another color, and any designs he saw fit, and he told me one day it was none of my business how he painted the cars. He was boss of those cars, and he told the men afterwards that I couldn't discharge him because he had been hired for a year. I undertook to discharge him, and he stayed a day or two longer, but the next time I went out he went out and didn't come back, and he commenced a lawsuit for a year's time, and I gave that as a reason for not doing it. Q. At that time, did Mr. Chaplin request you to insert such provision as that in the written agreement for settlement? A. Yes, sir. Q. And what answer did you make? A. I emphatically refused it, that is the reason I made the illustration."

Mr. Amick also testified that no such oral agreement was made.

Against the testimony of these three witnesses is the plaintiff's uncorroborated statement, unless, perhaps, the circumstance that he went to work in the car barn soon after February 9th, 1903, and the letters from Mr. Gerald, the general manager, in answer to his, may have some tendency to support his position; but the fact that the plaintiff went to work in the car barn is not inconsistent with the defendants' contention about his subsequent employment, and for that reason can have no material probative weight in support of his testimony.

Neither do the letters of Mr. Gerald recognize any agreement to furnish the plaintiff employment, but rather the contrary is indicated therein. In his letter of March 1, 1904, Mr. Gerald says in part: "I always put all the power of hiring and discharging men in the Super's hands and never do it myself, for they are responsible for their helps' labors. I have written Mr. Strout to act as he thinks best about letting you go, and I think by his letter that he will do so."

It is unnecessary, were it possible within reasonable limits, to analyze all the testimony in the record and point out that which militates against the plaintiff's contention. It is worthy of note, however, that the plaintiff asserts with emphasis that no check for \$1,000 was made to him, and even when shown the canceled check with his name indorsed upon it he denied the signature with an imputation that it was a forgery. The significance of this testimony is not merely that it is manifestly untrue, but rather that it demonstrates the unreliability of his memory, and its apparent lack of capacity of being readily refreshed.

The Waterville conference was had more than four years before the trial—a long period through which to carry the exact words of a conversation, such as the plaintiff attempts to reproduce in his testimony.

A slight change in the words of that conversation as reproduced would account for the difference between the contentions of the parties. The defendants admit that they assented, but without any reference to the release and entirely independent of it, to the plaintiff's request for a place to work provided he was able to attend to it and was satisfactory. His contention is that they promised him, as a part of the consideration for the release, to furnish him employment so long as he should be able to work.

The former contention is natural, reasonable, and consistent with the situation of the parties at the time. The latter, however, is improbable, unnatural, and irreconcilable with the circumstances and conditions of the defendants.

The unsupported testimony of the plaintiff, resting only upon his memory of a conversation that occurred four years previous, is not such clear, convincing, and conclusive proof as should be required to establish a contract so indefinite in its term of duration, and so unreasonable and improbable, as that upon which the plaintiff's action is founded.

And when against that unsupported testimony is placed the positive statements of the three witnesses for the defense that no such oral agreement was made by the defendants, together with the weight of that written release in which the plaintiff himself declares that the settlement therein recited "shall be final and conclusive," the conclusion is irresistible that the finding by the jury that such contract was made is so manifestly against the weight of the evidence as shown by the record that it ought not to stand.

Accordingly, the entry must be:

Motion sustained. New trial granted.

(104 Me. 281)

STATE v. JELLISON.

(Supreme Judicial Court of Maine. July 10, 1908.)

1. CRIMINAL LAW (§ 293*)—PLEADING—DEMURRER—ADMISSIONS.

While a demurrer admits the truth of allegations of fact well pleaded, it does not admit the correctness of statements or conclusions of law made in the pleading demurred to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 672; Dec. Dig. § 293.*]

2. CRIMINAL LAW (§ 293*)—PLEA OF FORMER ACQUITTAL—DEMURRER.

While a demurrer to a plea of autrefois acquit may admit that the acts of the defendant were the same in both cases, it does not admit that the offenses charged were the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 672; Dec. Dig. § 293.*]

3. CRIMINAL LAW (§ 29*)—DIFFERENT OFFENSES—SAME ACTS.

The same act, or group of acts, may constitute two or more distinct offenses, different in kind as well as degree.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 29.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. CRIMINAL LAW (§ 200*)—FORMER JEOPARDY—SAME ACT.

While the constitutional provision that "no person for the same offense shall be twice put in jeopardy" prohibits another prosecution for the same offense when the jeopardy has been once incurred, it does not prohibit another prosecution for a different offense, though the act, or group of acts, was the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 386; Dec. Dig. § 200.*]

5. CRIMINAL LAW (§ 202*)—FORMER JEOPARDY—UNLAWFUL ASSEMBLY AND RIOT—ASSAULT AND BATTERY.

The offense of unlawful assembly and riot, under Rev. St. 1903, c. 124, § 2, and the offense of assault and battery are distinct offenses, different in kind, and a conviction or acquittal for either does not bar a prosecution for the other offense, even though based on the same acts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 391; Dec. Dig. § 202.*]

6. CRIMINAL LAW (§ 290*)—DILATORY PLEA—RIGHT TO PLEAD OVER.

When a plea of *autrefois acquit* is overruled, and the defendant excepts and stands upon his exceptions, instead of pleading over, he must abide the fate of the exceptions. If they be determined against him, there must be final judgment for the state. Rev. St. 1903, c. 79, § 56.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 679; Dec. Dig. § 296.*]

(Official.)

Exceptions from Supreme Judicial Court, Hancock County.

Otha H. Jellison was indicted for the offense of unlawful assembly and riot. A plea of former acquittal was interposed, to which a demurrer was sustained, and Jellison excepts. Exceptions overruled, and judgment for the state.

Indictment against the defendant for the offense of unlawful assembly and riot, under the provisions of Rev. St. 1903, c. 124, § 2, found by the grand jury at the April term, 1907, Supreme Judicial Court, Hancock county, charging that the defendant, on April 5, 1907, at Eden in said county, "with certain other persons to the number of three and upwards, to wit, with Joe Emery, Charles Conners, Frank Leighton, and certain other wicked and ill-disposed persons, said certain other wicked and ill-disposed persons being to the jurors unknown, with force and arms, to wit, with eggs, stones, sticks, staves, and clubs as rioters, routers, and disturbers of the peace of the state, in a violent and tumultuous manner and unlawfully, did assemble and gather themselves together to do an unlawful act, to wit, to make an assault upon one Henry N. Pringle, and so being assembled and gathered together the day and year aforesaid, at the county aforesaid, with force and arms, in a violent, unlawful, and tumultuous manner, to the terror and disturbance of others, in and upon the said Henry N. Pringle, in the peace of the state then and there being, an assault did make with said eggs, stones, sticks, staves, and clubs, and him, the said Henry N. Pringle, did then and

there beat, wound, and ill treat, and other wrongs to the said Henry N. Pringle then and there did, to the great injury of the said Henry N. Pringle, against the peace of the said state, and contrary to the form of the statute in such case made and provided."

The defendant pleaded in bar an acquittal by the Bar Harbor municipal court, upon a complaint against him for the offense of assault and battery upon the aforesaid Pringle, averring in his plea that the offense of which he was acquitted by the Bar Harbor municipal court and the offense for which he was indicted were one and the same offense.

To this plea the state by the county attorney filed a general demurrer. The presiding justice sustained the demurrer, and the defendant excepted.

The case appears in the opinion.

Argued before EMERY, C. J., and SAVAGE, PEABODY, CORNISH, KING, and BIRD, JJ.

Charles H. Wood, Co. Atty., for the State.
Edward S. Clark, for defendant.

EMERY, C. J. The defendant was indicted for the offense of unlawful assembly and riot, under Rev. St. 1903, c. 124, § 2, viz., for being one of three or more persons who unlawfully assembled in a violent and tumultuous manner to commit an assault upon Henry N. Pringle, and who, being so assembled, did in the same manner commit the assault. He pleaded in bar an acquittal by the Bar Harbor municipal court upon a complaint against him for the offense of assault and battery upon the said Pringle, averring in his plea that the offense of which he was thus acquitted and that for which he is now indicted are one and the same offense. To this plea the county attorney demurred. The court sustained the demurrer, and the defendant excepted. The demurrer, of course, did not admit the correctness of any statements or conclusions of law made in the plea. Hence, though it admits that the acts of the defendant were the same in both cases, it does not admit that the offenses charged are one and the same. Whether they are the same or different offenses is a question of law now to be determined by the court.

It was said by the Connecticut court in *Hurd v. State*, 2 Root, 186: "If a prosecution and conviction before a justice for a simple breach of the peace be a good plea in abatement or bar of information for riot, it would be attended with the most pernicious consequences, and the most atrocious offenders would be exculpated by punishments totally inadequate to their crimes." As to that, an acquittal would be attended with as pernicious consequences; but, passing that consideration, we proceed to consider whether the offense of unlawful assembly and riot charged in the indictment is the same offense as that of assault and battery charged in the com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaint on which the defendant was acquitted. It is to be noted that the Constitution does not prohibit a second jeopardy for the same act, or group of acts, but only "for the same offense." Dec. of Rights, art. 1, § 8. The acts and the offense they constitute are different things, and the same acts may constitute more than one offense, and also different offenses, subjecting the actor to as many punishments as the offenses his acts constitute.

Thus a person by the same acts, or group of acts, may violate the statute against selling liquors; also the statute against being a common seller of intoxicating liquors; also that against keeping a drinking house and tipping shop; and also that against maintaining a common nuisance. If he be charged and convicted, or acquitted, of the violation of one of these statutes, he has been put in jeopardy only for that one offense, and not for the offense of violating any of the other statutes. *State v. Coombs*, 32 Me. 529; *State v. Maher*, 35 Me. 225; *State v. Inness*, 53 Me. 536. In the opinion of the court in this last case are cited many instances where it was held that a person may be punished more than once for the same act where the act constitutes more than one offense. We refer the reader to that opinion for the cases.

The offense of assault and battery and the offense of unlawful assembly or riot are different offenses. Neither included the other. A person may commit either without committing the other. Nevertheless the same acts may sometimes constitute both offenses; but, when they do, the offenses are still different though the acts are the same, and the perpetrator of the acts may be punished twice, once for each offense. *State v. Inness*, 53 Me. 536, at page 537; *Hurd v. State*, 2 Root (Conn.) 186; *U. S. v. Peaco*, Fed. Cas. No. 16,018; *Freeland v. People*, 16 Ill. 380. We are aware that in some states the courts hold otherwise, but we think the above is the law of this state. It follows that the exceptions must be overruled.

In the case of *State v. Inness*, 53 Me. 536, where the court overruled the exceptions to sustaining a demurrer to a plea of former jeopardy, final judgment was ordered for the state after full consideration of the question whether the judgment should be final or only respondeas ouster. The decision was based on Rev. St. 1857, c. 77, § 28, now Rev. St. 1903, c. 79, § 56. "When a dilatory plea is overruled and exceptions taken, the court shall proceed and close the trial, and the action shall then be continued and marked 'law,' etc. The defendant's plea of former jeopardy was a dilatory plea, since, if overruled, the judgment, but for the statute cited, would be simply respondeas ouster. He pleaded his dilatory plea alone, without obtaining leave to plead double, and, his plea

having been adjudged insufficient, he excepted, and, without obtaining leave to plead over if his exceptions should be overruled, he brought them directly to the law court before the trial was closed. Under the statute it must be held that by taking the course he did he waived whatever right he may have had to plead over when his dilatory plea was overruled, and that, having thus elected to abide by that plea, he must fall with it. *State v. Inness*, 53 Me. 536; *Furbish v. Robertson*, 67 Me. 35, page 38; *Smith v. Hunt*, 91 Me. 572, 40 Atl. 698.

Exceptions overruled.

Judgment for the state.

GOFF v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. Feb. 1, 1900.)

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Action by Horace E. Goff against the Rhode Island Company. Verdict for plaintiff. Defendant excepted. Remitted for new trial.

Waterman, Curran & Hunt (Lewis A. Waterman, of counsel), for plaintiff. Joseph C. Sweetney, for defendant.

PER CURIAM. The evidence presented by the record in this case as to the negligence of the defendant so preponderates in behalf of the defendant as to bring the case within the rule laid down in *Riley v. Rhode Island Co.*, 29 R. I. 143, 71 Atl. 592, which was decided after this case was tried in the superior court.

Inasmuch as further evidence may be produced on another trial, the cause will be remitted to the superior court for a new trial.

(83 Vt. 24)

COREVO v. HOLMAN et al.

(Supreme Court of Vermont. Orange. Jan. 16, 1900.)

WATERS AND WATER COURSES (§ 107*) — RIGHTS AS APPURTENANCES—INSTRUCTIONS.

The charge that water running in a house or other buildings may be an appurtenance, and that water running in premises so situated and under such circumstances that it belongs there belongs to the building or premises conveyed, passes with the building or premises in the deed, under the head of appurtenances, but it must be so used in connection with the building or premises, and under such circumstances that it constitutes a part of such property so conveyed, for the purpose for which it is used, that it belongs there, is appurtenant thereto—is erroneous, as calculated to mislead the jury to believe that to be an appurtenance passing under a deed the water must have been running into the buildings or on the premises deeded in such circumstances as to belong to them, and must have been used in connection with them so as to constitute a part of the property, thereby excluding the idea that the right to take water from a spring could be an appurtenance if the water was carried from a watering trough, into which it ran from the spring, to the buildings and premises in pails.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 107.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Exceptions from Orange County Court; E. L. Waterman, Judge.

Trespass quare clausum by Joseph Corevo against Elbridge Holman and another. Verdict and judgment for plaintiff. Defendant George Trask brings exceptions. Reversed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

N. L. Boyden and R. M. Harvey, for plaintiff. Cowles & Moulton and David S. Conant, for defendant Trask.

WATSON, J. This action was brought to recover for the alleged trespass of defendant in laying a pipe into a certain spring claimed by the plaintiff, which was situated on land adjoining that of defendant, but belonging to a third person. As to defendant Trask the verdict was guilty, and on his exceptions the case is here. The plaintiff produced a deed from one Sault and wife to him, conveying the farm on which he resided and containing the clause: "With the right to a spring on the J. Seymour place, meaning the spring where water is now taken." It was conceded by both sides that this is the spring here in question. Defendant introduced evidence tending to show that for upwards of 60 years the occupants of the premises owned by his father under whose authority he acted when he did the acts complained of had taken all their water for household purposes from a watering trough on the roadside, situated eight or ten rods from the house. This watering trough was supplied with water from the spring in question by means of "pump logs." The deed of the house and land to the defendant's father included the appurtenances. This conveyance was before the deed from Sault to the plaintiff. Evidence was introduced by both parties in respect to which party repaired the spring, pipe line, and trough. But defendant's evidence tended to show that his father had used the water ever since he had purchased the premises and so under a claim of right, and that the defendant had kept the spring in repair, replaced the logs by a pipe, and in 1906 laid a pipe from the trough to his house.

A prescriptive right to take water from this spring for the necessary use and benefit of the defendant's house and premises could be acquired by taking water from the watering trough for that purpose in pails uninterruptedly under a claim of right for the requisite period, as well as by taking water therefrom by pipe running to the house and premises, the only difference being in the method of conveying the water from the watering trough, or by both taken together in succession, and pass as an appurtenance

in a deed conveying the property with which it is thus connected. The plaintiff does not controvert this proposition in argument, but, on the contrary, says there is nothing in the charge indicating that an appurtenance must be connected with the house or building; that there was no claim on the part of defendant Trask that at the time he took his deed water from this spring was running to his house or land, but only that he had a right to go to the spring to get water or to the watering trough on a third person's land; and that the charge of the court rightly understood means that the right to go to the spring or trough for water may be an appurtenance. The charge in this respect, to which exception was taken, was as follows: "Water running in a house or other building may be an appurtenance. Running water in premises so situated and under such circumstances that it belongs there belongs to the building or premises conveyed, passes with the building or premises in the deed, under the head of appurtenances, but it must be so used in connection with the buildings or premises, and under such circumstances that it constitutes a part of such property so conveyed, for the purpose for which it is used, that it belongs there, is appurtenant thereto." Then continuing the charge, the court said: "The water was not in fact running in the old logs when these deeds were made, according to the situation as I remember it. When it did run, it did not run across or upon the land conveyed which was the Trask place, and was in no way directly connected with the premises. Take the testimony in view of what I have said, and say whether the water or line of logs or the spring, or any right therein, was appurtenant to the premises conveyed. If it was not, then it did not pass as an appurtenant to those deeds."

We think that portion of the charge excepted to was well calculated to mislead the jury into believing that, in order to be an appurtenance passing under the deeds, the water must have been running in the buildings or on the premises in such circumstances as to belong to the building or premises deeded, and must have been used in connection with them so as to constitute a part of the property, thereby excluding the idea that the right to take water from the spring could be an appurtenance if the water was carried from the watering trough to the defendants' buildings and premises in pails, and the tendency of what the court said to the jury immediately thereafter was to strengthen such belief. This was error.

It is unnecessary to consider the other exceptions argued, as they are not likely to arise on another trial.

Judgment reversed and cause remanded.

(21 Vt. 549)

ALEXANDER & HUTCHINSON v. CITY OF MONTPELIER.

(Supreme Court of Vermont. Washington. Jan. 16, 1909.)

1. JUDGMENT (§ 493*)—COLLATERAL ATTACK—GROUNDS—WANT OF JURISDICTION.

A judgment, void for want of jurisdiction may be collaterally impeached by a party thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 931; Dec. Dig. § 493.*]

2. JUDGMENT (§ 506*)—COLLATERAL ATTACK—GROUNDS—IRREGULARITIES.

A judgment open to objection because of irregularities in the exercise of jurisdiction cannot be collaterally impeached by a party thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 949; Dec. Dig. § 506.*]

3. MUNICIPAL CORPORATIONS (§ 649*)—ESTABLISHMENT OF STREET—COUNTY COURT—JURISDICTION.

The jurisdiction of the county court in laying out and establishing highways in cities is statutory.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1423; Dec. Dig. § 649.*]

4. MUNICIPAL CORPORATIONS (§ 649*)—STREETS—ESTABLISHMENT—COUNTY COURT—JURISDICTION.

The county court has no jurisdiction, on appeal from the determination of the council of a city, ordering the resurvey, on application, of a street, and grading it and building a retaining wall on the side thereof, to order the city to move the wall on it, determining that the wall was in the street as resurveyed by commissioners appointed by it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1423; Dec. Dig. § 649.*]

Exceptions from Washington County Court; Alfred A. Hall, Judge.

Application by Alexander & Hutchinson against the City of Montpelier for the imposition of a fine on the city for nonperformance of an order of the county court. There was a judgment imposing a fine rendered on the report of a referee and report of commissioners in the original case, and the city excepts. Reversed, and judgment for defendant.

Geo. W. Wing, for plaintiffs. Frederick P. Carleton, for defendant.

ROWELL, C. J. This is an application under what is now section 3908 of the Public Statutes, to fine the city of Montpelier for not performing an order of the county court as to making a highway therein called Wilder street. The city council laid out and surveyed said street at one time, but gave the petitioners, abutting landowners and dwellers thereon, no notice of a hearing in the matter, and no record of the survey was preserved. So the petitioners applied to the council to resurvey the street, and to make a record thereof, which it did, and proceeded to grade the street, and to cut it down in places, and to build a wall on the northerly

side thereof, as hereinafter stated. The petitioners, being dissatisfied with the action of the council, appealed therefrom to the county court, when commissioners were appointed, who resurveyed the street and reported that a retaining wall had been built, as aforesaid, and was in the street as laid out and surveyed by them, and improperly located, and should be placed further back on the bank, and onto the land of one Blanchard. The report was accepted, and the street established as surveyed by the commissioners, with the usual orders as to time, etc. After this the city moved the wall some at the easterly end, but none of the rest of it, and it still stands within the surveyed limits of the street, and that is the nonperformance of the order complained of. The court accepted the report of the referee in this case, adjudged, pro forma, that the city had not performed said order, and fined it so much, to be expended in making the street according to the report of the commissioners, under the direction of a commissioner to be appointed by that court.

The city claims that the county court had no authority to order the wall to be moved out of the surveyed limits of the highway as it did, and consequently that that part of its judgment is void. The petitioners claim that, as the city was a party to the proceedings in which the judgment was rendered, it is bound thereby as long as the judgment stands, and cannot impeach it collaterally, and relies for this on *State v. Vernon*, 25 Vt. 244. But that case is not in point, for it did not go upon the ground of want of jurisdiction, but only, at most, of irregularity of its exercise, and therefore the judgment could not be impeached collaterally by a party thereto. But a judgment void for want of jurisdiction may be impeached by a party thereto in any way, and at any time, for it is no judgment in law.

So the question is whether the court had authority to order the wall to be moved. If it had, it was statutory, for that is its only source of authority in laying out and establishing highways; and, on the question here involved, the statute is essentially the same as it was in 1852, when the order was made, the nonperformance of which gave rise to the case of *State v. Williston*, 31 Vt. 153. That was an indictment against four towns on this very statute for not building a bridge across Onion river according to the order of the county court. The commissioners recommended in their report that a bridge should be built upon a plan and in the manner therein set forth, and specified with great particularity how it should be done, the material to be used, the workmanship of its construction, and the like. The court accepted the report, established the bridge, and ordered it to be built as specified in the report. This court said that the duty of laying out, establishing, building, and keeping in repair

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

highways and bridges is imposed upon towns through the agency of their officers, and that the sole object of the Legislature in conferring jurisdiction of the subject in certain cases on the county court is to compel towns to discharge that duty; but that the court has no jurisdiction over the manner in which that duty shall be performed, except as to grading hills; that all that towns are required to do is to make a highway that is safe and convenient for public travel, and such as the public necessity requires, but that the form, material, and manner of construction are left to the judgment and discretion of the town on which the duty is imposed, the only limitation being that it shall be done so as to be safe and sufficient and convenient for public use; that if the court had a right to control towns in this respect, they would be bound to perform their orders strictly, and if any insufficiency arose by reason of such performance, it would be unjust to make them responsible for it. It was held, therefore, that the county court had no power to order the bridge to be constructed upon the plan submitted, nor to be built in any particular manner, nor to prescribe the material nor the workmanship, and that consequently its order to that extent was void. This case is not distinguishable from that in legal effect, and therefore it must be held that the order in question to the extent here involved is void for want of jurisdiction in the court to make it.

Judgment reversed, and judgment for the defendant to recover its costs.

(82 Vt. 1)

PERRY v. WARD et al.

(Supreme Court of Vermont. Washington.
Jan. 16, 1909.)

1. MORTGAGES (§ 283*)—TRANSFER OF PROPERTY—ASSUMPTION OF INCUMBRANCE—LIABILITY—GRANTOR AS SURETY.

A grantee who accepts a deed reciting his agreement to assume and pay as a part of the price a mortgage made by the grantor and who goes into possession under the deed, is primarily liable for the mortgage debt, and the grantor is a surety and may sue the grantee on his failure to pay the interest on the debt, whether the grantor has paid it or not.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 756, 757; Dec. Dig. § 283.*]

2. INDEMNITY (§ 15*)—PLEADING.

In all cases of conditions to indemnify and save harmless or to discharge and acquit plaintiff from any damage by reason of a particular thing, the proper plea is non damnificatus, and, if there be any damage, plaintiff must set it up by reply.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 42; Dec. Dig. § 15.*]

3. INDEMNITY (§ 15*)—PLEADING.

The plea of non damnificatus cannot be pleaded when the condition is to discharge and acquit plaintiff from a bond or other particular thing, and defendant must set forth affirmatively the special manner of performance.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 42; Dec. Dig. § 15.*]

4. MORTGAGES (§ 284*)—TRANSFER OF PROPERTY—ASSUMPTION OF INCUMBRANCE—LIABILITY TO GRANTOR.

A grantee assumed to pay a mortgage on the land executed by the grantor. The mortgagee sued the grantor for the interest due on the debt, and sued to foreclose the mortgage. The decree of foreclosure became absolute, and the mortgagee took possession. The land was then worth more than the amount of the decree. Subsequently the grantor settled the suit against him by paying to the mortgagee a sum less than the amount of interest due at the commencement of the suit and the costs. Held, that the act of the mortgagee in taking possession on the decree becoming absolute operated as a purchase of the land in satisfaction of the debt and the grantee was liable to the grantor only for the amount expended in the suit against him for the interest.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 284.*]

Exceptions from Washington County Court; Alfred A. Hall, Judge.

Action by D. A. Perry against W. H. Ward and another. There was a judgment for defendants, and plaintiff excepts. Reversed and rendered.

John W. Gordon and J. Ward Carver, for plaintiff. M. M. Gordon and A. A. Sargent, for defendants.

ROWELL, C. J. On February 26, 1902, one Sprague sold and conveyed a farm to the plaintiff, who gave back a mortgage thereon to secure his note for \$2,750 for part of the price, payable at five years date, with interest annually. Six months later the plaintiff sold and conveyed the farm to the defendants, who, in the deed to them, assumed and agreed to pay the mortgage debt as part of the price. Subsequently the defendants sold and conveyed the farm to Carr and wife, who in like manner assumed and agreed to pay said debt as a part of the price; and they sold and conveyed it to Curtis and wife in the same way. After all this, and on April 24, 1905, Sprague sued the plaintiff to the June term of the county court for the interest then due on the note. He also brought a petition to the same term against Curtis and wife and a subsequent mortgagee to foreclose said mortgage, and obtained a decree limiting by agreement between the parties thereto, the time of redemption as to part of the note to December 1, 1905, which not being paid the decree became absolute, and Sprague took possession of the farm, and remained in possession until he sold it. When he took possession, the farm was worth more than the amount of his decree. After that and on May 14, 1906, the plaintiff settled Sprague's suit against him by paying to Sprague \$216.80 damages, which was less than the amount of interest due on the note at the commencement of the suit, and \$65.76 as and for the costs of foreclosure and the motion to shorten time, making in all \$282.56, which he seeks to recover here, together with \$24.15 that he laid out and expended for legal services and his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

own expenses in and about that suit. On the facts found the court rendered judgment for the defendants, to which the plaintiff excepted. The plaintiff claims certain other exceptions that the court disallowed as not being properly taken. But, as counsel say they regard it immaterial whether they were properly taken or not, we do not consider the matter.

The defendants, by taking their deed from the plaintiff and going into possession under it, thereby assumed and agreed to pay Sprague's mortgage as part of the purchase price, whereby as between the plaintiff and the defendants the defendants became primarily liable for the payment of the mortgage, and the plaintiff became their surety therefor, and, according to some of the cases, the land became the primary fund out of which payment was to be made, while according to others the purchase money reserved by the grantees became the primary fund. *Wells v. Tucker*, 57 Vt. 223, *Green v. Kelley*, 64 Vt. 309, 24 Atl. 133, *Field v. Hamilton*, 45 Vt. 35, *Comstock v. Drohan*, 71 N. Y. 9, and *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547, are of the first class. *Rice v. Sanders*, 152 Mass. 108, 24 N. E. 1079, 8 L. R. A. 315, 23 Am. St. Rep. 804, and *Torrey v. Thayer*, 37 N. J. Law, 339, are of the second class. See an extended note on this whole subject in 78 Am. Dec. 72-90.

As the defendants agreed to pay, they were bound to do more than to indemnify and save harmless. They were bound to pay; and so, when the interest fell due for which Sprague sued the plaintiff, the defendants should have paid it, and, not having done so, the plaintiff could have sued them and recovered the amount of it, whether he had paid it or not. This is so by all the cases. *Locke v. Homer*, 131 Mass. 98, 41 Am. Rep. 199; *Rice v. Sanders*, 152 Mass. 108, 24 N. E. 1079, 8 L. R. A. 315, 23 Am. St. Rep. 804, above cited. And it is well shown by the rules of pleading. Thus in all cases of conditions to indemnify and save harmless the proper plea is non damnificatus, and, if there be any damage, the plaintiff must reply it. But this plea cannot be pleaded when the condition is to discharge and acquit the plaintiff from such a bond or other particular thing, for there the defendant must set forth affirmatively the special manner of performance. It is otherwise, however, when the condition is to discharge and acquit the plaintiff from any damage by reason of such a bond or other particular thing, for that is in effect the same as a condition to indemnify and save harmless. 1 Saund. 118, note (1). But when Sprague's decree of foreclosure became absolute, and he took possession thereunder, it operated in law as a purchase of the farm by him in satisfaction of his mortgage debt; the value of the farm then being more than the amount of his decree. After that the plain-

tiff had no right to settle with Sprague and pay him as he did and charge it to the defendants, for Sprague had already been paid in full. But the plaintiff was damnified by that suit to the amount of \$24.15 that he laid out and expended in and about the same as aforesaid, for which the defendants were to blame, as they should have paid as they agreed. The plaintiff, therefore, is entitled to recover that sum, with interest thereon from May 14, 1906, when he paid it.

Judgment reversed, and judgment for the plaintiff accordingly.

(81 Vt. 517)

PORTER v. EVERTS' ESTATE.

(Supreme Court of Vermont. Rutland. Jan. 14, 1909.)

1. CONTRACTS (§ 22*)—ACCEPTANCE OF OFFER—FORM.

The acceptance of a proposal may be communicated by conduct.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 67-93, 104-108; Dec. Dig. § 22.*]

2. CONTRACTS (§ 22*)—ACCEPTANCE OF OFFER—SUFFICIENCY.

Under a written proposal by decedent to have paid from her estate to plaintiff money if she should refrain from certain acts, etc., it is immaterial to plaintiff's rights whether she accepted it in writing, where it appears that plaintiff's conduct conformed to the proposal, and that decedent knew that plaintiff had undertaken to perform on her part.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 67-93, 104-108; Dec. Dig. § 22.*]

3. WILLS (§ 88*)—WILL DISTINGUISHED FROM CONTRACT—INSTRUMENT CONSTRUED.

Decedent executed an instrument providing in the first paragraph that, if plaintiff should refrain from certain acts, decedent would have paid from her estate to plaintiff a specified sum. The second paragraph provides that, "if she promise all this, I agree that this sum shall be paid to her next after my funeral expenses, and that at the same time and in the same way shall be paid to her a sum sufficient to pay the three mortgages on her land." The third paragraph recited that decedent would leave furniture, etc., with plaintiff to dispose of in her own family and wherever decedent might direct. The fourth paragraph provided: "I leave this as an obligation to whomsoever shall settle my estate," etc. Held, that the first two paragraphs imposed a contract obligation upon decedent's estate, and that, while the instrument is of a twofold character, the third paragraph being in the nature of an attempted testamentary disposition, the point of division is at the end of the second paragraph, making the provision for the payment of the mortgages part of the contract obligation.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. § 88.*]

Exceptions from Rutland County Court; John H. Watson, Judge.

Action by Jennie L. Porter against the estate of Frances P. Everts; James A. Merrill, executor. From the judgment, plaintiff brings exceptions. Reversed and rendered.

Argued before ROWELL, C. J., and TYLER, HASELTON, POWERS, and MILES, JJ.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

E. L. Waterman and F. S. Platt, for plaintiff. Hunton & Stickney and O. M. Barber, for defendant.

HASELTON, J. This is an action of assumpsit. The facts were found by a referee, who reported that there was due the plaintiff on the 29th day of September, 1903, the sum of \$6,921.68. The county court rendered judgment for the plaintiff for \$2,065.71, with interest thereon from September 29, 1903. The plaintiff excepted, claiming that she should have had judgment for \$6,921.68, with interest from the date last named. Whether or not judgment should have been for the larger of the two sums named depends upon the construction of an instrument in writing which will presently be set out in full. Frances P. Everts was a widow lady residing in Rutland. The plaintiff, Jennie L. Porter, who had a husband and children, was the niece of Mrs. Everts. The relations between Mrs. Everts and her niece, and the Porter family generally, were of a very friendly character, and so remained until the death of Mrs. Everts, September 29, 1903. Mr. Porter, husband of the plaintiff, received financial assistance from Mrs. Everts at different times, and the plaintiff and other members of the Porter family were in various ways of assistance to Mrs. Everts. In order to an understanding of the written instrument referred to, we quote from the referee's report as follows: "During her frequent sicknesses the last years of her life, Mrs. Everts was accustomed to call upon the Porter family for their care, and I find that the different members of the Porter family always responded, and that on some occasions the plaintiff stayed with Mrs. Everts night and day. The plaintiff, in order to assist in maintaining her family, canvassed to some extent for books, pictures, and other articles, and at times rented rooms in her house to families and for the storage of goods." In these circumstances, Mrs. Everts, on the 9th day of October, 1899, signed and delivered to the plaintiff, Mrs. Porter, the following written instrument: "Rutland City Hospital. October 9, 1899. I make this contract, or bargain, or agreement with my niece, Jennie L. Porter, because I do not want her to go about the streets, selling pictures, books, or anything else (as she has done the last two or three years, and as she has commenced to do now, for Mr. Brehmer), and so that I may feel free to call upon her for such services as I may need or want, and which she has for a long time rendered me, I agree to have her paid from my estate, after my death, such a sum as will pay her ten dollars a week during my life, whether I live one year or ten. The first week for which she shall be paid to begin this 9th day of October, 1899, providing she shall tell Mr. Brehmer to-night that she cannot sell his book, and will promise that during my life, she will

not leave Rutland except for a drive during one day and back at night, without letting me know, and that she or some member of her family, shall see or hear from me, at least once in every twenty-four hours as for a long time past, when I have been in Rutland—unless I shall at any time release them from doing so. Also she must promise me that she will not rent or allow to be rented any room or rooms in her home, either to any family or for the storing of any goods without my consent. If she promise all this, I agree that this sum shall be paid to her next after my funeral expenses, and that at the same time, and in the same way shall be paid to her a sum sufficient to pay the three mortgages on her land. One held by H. H. Dyer of \$3,200.00, one held by B. F. Dunklee of \$500.00, and one held by the Marble Savings Bank, of \$750.00, together with whatever interest, taxes and insurance may be then due. So that she may have her home free from debt, if she so chooses. I also leave with Jennie, to dispose of, in her own family and wherever I shall direct her, whatever of my furniture, books, pictures, clothes, etc., which shall be in her house or in my possession when I die, and she shall not give up anything belonging to me, to any one, at any time, except as I shall direct her, for I want her to have what have been called my 'old duds.' I leave this as an obligation to whomsoever shall settle my estate after my death, and no sums of money found charged to Ned or his children are to be deducted from this sum. Neither any bequest I may make. Frances Porter Everts."

The body of the above instrument was written by Mrs. Porter, but Mrs. Everts at the time she signed and delivered it was in full possession of all her faculties. At the foot of the foregoing instrument is an undated paragraph signed by Mrs. Porter, which reads as follows: "I agree to faithfully perform my part of the above agreement, and that this paper may be destroyed at any time when Mrs. Everts shall consider any of its conditions broken by me, she to be the only judge of my faithfulness, and my possession of this paper to be proof that she is entirely satisfied with my discharge of the obligations imposed upon me. Jennie L. Porter." The referee does not find when Mrs. Porter signed, nor does he find that she ever signed to the knowledge of Mrs. Everts, but he does find: "That the plaintiff after the 9th day of October, 1899, ceased to go about the streets selling books, pictures, or anything else, and that plaintiff notified Mr. Brehmer, on the evening of October 9, 1899, that she could not canvass for him any longer; that the plaintiff did not leave Rutland after October 9, 1899, without the knowledge and consent of the said Frances Porter Everts; that some member of the plaintiff's family saw or heard from Frances Porter Everts, at least once in every 24 hours after said date; and

that the plaintiff thereafter rented no rooms in her house to families or for the storage of goods."

In view of the above and other findings of the referee, it is immaterial when the plaintiff signed the paragraph beginning, "I agree to faithfully perform." It would be immaterial if she never signed it. Her conduct from the 9th day of October, 1899, to the death of Mrs. Everts, four years afterwards, was a full performance of the things required of her in the proposal of Mrs. Everts, and carried with it an acceptance of the proposal, and a promise to perform. The close relations of the aunt and niece continuous up to the time of the death of the former, the direct way in which the things the niece did and refrained from doing related to and affected the aunt, the fact that on two or three occasions Mrs. Everts made remarks to the effect that she had made provision whereby Mrs. Porter would be well paid, showed that Mrs. Everts knew that her proposal had been at least tacitly accepted, and that Mrs. Porter had undertaken to perform on her part, and was carrying out her undertaking, and with the other facts found compelled the finding of the referee as to the amount due the plaintiff. It is quite elementary that the acceptance of a proposal may be communicated by conduct. *Wald's Pollock on Contracts*, p. 9.

The undertakings on the part of Mrs. Everts embodied in the first and second paragraphs of the instrument signed by her became and are contract obligations binding upon her estate. The third paragraph of the instrument, relating to the furniture, books, pictures, clothes, etc., of Mrs. Everts, things left with Mrs. Porter, is no part of the contract, although it throws some light upon the relations of Mrs. Everts and Mrs. Porter and the probability of the contract above stated. That paragraph is in the nature of an attempted mortuary disposition of things which she desired no stranger to her affections to have or use or handle, and while it shows, as is argued for the executor, that the written instrument in question is of a twofold character, it shows with equal clearness that the point of division is at the close of the second paragraph. It is argued for the executor that the point of division should be deemed to be at a comma after the phrase "funeral expenses" in the second paragraph; but the provisions of the first paragraph and of the second are all inseparably bound together in a clear expression of a proposed contract natural and proper to be entered into, and to dismember the second paragraph, and treat the promise of money to pay the mortgages otherwise than "in the same way" that the promise to pay \$10 a week is treated, is something which no rule of interpretation permits us to do. By the contract Mrs. Everts exacted much, no one can say other-

wise, and, as became her, she agreed to pay generously.

It is said in the brief for the executor that the paper signed by Mrs. Everts is a suspicious document, and that the fact that the body of it is in the handwriting of Mrs. Porter stamps her as a schemer, and "the concoction of her scheme" is mentioned. She is spoken of as "inducing" Mrs. Everts to sign, but there is absolutely nothing in the case as presented to this court to warrant these expressions. The final paragraph of the agreement reads: "I leave this as an obligation to whomsoever shall settle my estate after my death, and no sums of money found charged to Ned or his children are to be deducted from this sum. Neither any bequest I may make." It is argued that this indicates that the provision of money to pay the mortgages was in the nature of an attempted testamentary disposition of property, but its bearing is the other way. The sum from which nothing was to be deducted obviously included both the aggregate amount of the \$10 a week, for none of this was to be paid in the lifetime of Mrs. Everts, and the amount necessary to pay the mortgages. All this, as Mrs. Everts made clear, was to be a contract obligation binding upon her estate, and the language used was well calculated to prevent any such contest as is here made.

Judgment reversed, and judgment for the plaintiff for \$8,921.68, with interest thereon from September 29, 1903, and costs of suit. Let the judgment be certified to the probate court.

(82 Vt. 24)

DAVIS' ADM'X v. RUTLAND R. CO.

(Supreme Court of Vermont. Rutland. Jan. 16, 1909.)

1. PLEADING (§ 238*)—AMENDMENT—NEW CAUSE OF ACTION.

Where it is sought to amend an original declaration, if the court is in doubt, on inspection of the original declaration and the amendment, whether the amendment declares upon the same cause of action, it may inquire dehors them.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 623; Dec. Dig. § 238.*]

2. APPEAL AND ERROR (§ 918*)—REVIEW—PRESUMPTIONS—AMENDMENT OF PLEADING.

If necessary to support the lower court's action in allowing the amendment of a declaration, it may be presumed on appeal that the court inquired dehors the pleadings and found that the amendment declared on the same cause of action as the original declaration.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3710; Dec. Dig. § 918.*]

3. PLEADING (§ 248*)—AMENDMENT—DIFFERENT CAUSES OF ACTION.

An amendment to a pleading setting up the same matter more fully or differently is allowable, but not an amendment setting up a different matter.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 686; Dec. Dig. § 248.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. PLEADING (§ 248*)—AMENDMENT.

A declaration, in an action for the death of a railroad employé, which did not allege that decedent did not know of the breaches of duty alleged therein, was properly amended to supply the omission; the amendment not declaring on a different matter, but on the same matter more fully and accurately laid.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

5. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTION FOR JURY.

In an action for the death of a railroad employé, a motion for verdict on an amended count of the declaration because there was no evidence of decedent's ignorance of breaches of duty alleged therein, one breach of which was not properly equipping a car, leaving the brakes in a defective, negligent, and dangerous condition, was properly overruled, where defendant practically conceded that decedent neither knew nor could be charged with knowing the condition of the brakes, it appearing that the car was a foreign car received under such circumstances that decedent could have known nothing about it, since plaintiff had a right to go to the jury on the claim of negligence in not properly equipping the car.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 236.*]

6. MASTER AND SERVANT (§ 206*)—ASSUMPTION OF RISK.

In a death action, a motion for a directed verdict, on the ground of absence of testimony to show decedent's knowledge of defendant's alleged breaches of duty, did not raise the question of decedent's assumption of the risk of one of the breaches as a usual risk of the employment, since such risks are assumed whether the servant knows of them or not.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 550; Dec. Dig. § 206.*]

7. APPEAL AND ERROR (§ 273*)—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS—SUFFICIENCY.

Where defendant submitted instructions covering practically the whole law of the case, an exception to the court's refusal to charge as requested and to the charge as given on the subject-matter of the requests is too general and indefinite to be available on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620-1621; Dec. Dig. § 273.*]

8. MASTER AND SERVANT (§ 145*)—RULES—CONSTRUCTION.

A railroad company's rule that when cars are placed on a siding the brakes must be set, and if on a grade the wheels must also be blocked, and derailing switches when in use must be set to ground, applies when cars are placed on a siding to be left, and not where a car was shifted to a siding by one train for the purpose of passing over it to be taken by a train then waiting for it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 288; Dec. Dig. § 145.*]

9. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS OF FACT—CONCLUSIVENESS.

Where the construction of a railroad company's rule was submitted to the court, the matter of practical construction thereof by employes being pertinent to the question, its finding of such construction is conclusive, there being evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

10. MASTER AND SERVANT (§ 293*)—ACTION FOR DEATH OF SERVANT—INSTRUCTIONS—GOING BEYOND THE EVIDENCE.

In an action against a railway company for the death of an employé in a collision with a runaway car, where there was no evidence that better means of stopping runaway cars were in use by other railroads, nor that any means other than those used by defendant would have been more effective, except that there was evidence that switch keys had been taken from station agents along the line so that they were unable to derail the car when notified by the dispatcher, a charge, going beyond the matter of the switch keys, and allowing the jury to inquire generally whether any and what other means should have been provided, was erroneous as not justified by the evidence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

Exceptions from Rutland County Court; Wm. H. Taylor, Judge.

Death action by Silas H. Davis' administratrix against the Rutland Railroad Company. Judgment for plaintiff, and defendant excepts. Reversed and remanded.

Butler & Moloney, for plaintiff. M. O. Webber and P. M. Meldon, for defendant.

ROWELL, O. J. This is case for negligence in causing the death of the intestate by means of an escaped freight car colliding with an engine that was being run by the intestate as defendant's servant, hauling a passenger train from Rutland to Bellows Falls.

The original declaration, which contained but one count, did not allege that the intestate did not know of the different breaches of duty therein alleged, and the plaintiff was allowed to file an amended count supplying that omission. It is objected that this was error, for that the original declaration showed no cause of action, and to amend by showing one was to declare upon a new cause of action, which is not allowable. But there was something to amend by, and if the court was in doubt, on inspection of the original declaration and the amended count, whether the latter declared upon the same cause of action as the former or not, it could inquire de hors them, to ascertain how the fact was; and, if necessary in order to support its action, we should presume it did inquire and found that it declared upon the same cause. *Lycoming Fire Ins. Co. v. Billings*, 61 Vt. 810, 17 Atl. 715. And, besides, the test is whether the proposed amendment is a different matter, or the same matter more fully or differently laid. If the latter, you can amend; if the former, you cannot. *Daley v. Gates*, 65 Vt. 591, 27 Atl. 193. Now here it is obvious on inspection that the amended count does not declare on a different matter, but on the same matter more fully and accurately laid, and so no error.

The defendant moved for a verdict on the amended count, for that there was no evidence tending to show that the intestate did

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not know of the different breaches of duty therein assigned. The motion was overruled. Six breaches were assigned, but only four submitted to the jury. These were: (1) Not properly equipping said car, in that the brakes were defective, insufficient, and in a negligent and dangerous condition; (2) allowing the derailing device to be insufficient and misplaced; (3) not establishing rules and regulations for the government of employes in operating said device and having it in proper condition; and (4) not providing means for derailing cars that had escaped onto the main line, and for preventing them from doing damage. But the court could not grant the motion, for that would have deprived the plaintiff of the opportunity of going to the jury on the claim that the defendant was negligent in not properly equipping the car, in that the brakes were defective, insufficient, and in a negligent and dangerous condition; whereas, the defendant practically concedes that the intestate neither knew, nor can be charged with knowing, the condition of the brakes in this respect, for it says in its brief that the uncontradicted testimony was that the intestate knew, or should have known, of all the risks, "except the alleged defective brake." And this exception is justly made, for the car was a foreign car, and came into the defendant's yard at Rutland only eight days before the accident, and was taken to East Wallingford three days later, and placed and loaded on a spur track, where it remained till the day of the accident, so that it is easy to say that the intestate knew nothing about the car nor the condition of its brakes.

The defendant invokes under this motion the doctrine that the servant assumes the usual and ordinary risks incident to his employment, and applies it to the failure of the brake to work and hold the car because the chain suddenly kinked, as its testimony tended to show, a thing that sometimes happens; but the motion did not raise that question, for such risks are assumed whether the servant knows of them or not; whereas, the only ground of the motion is absence of testimony to show want of knowledge on the part of the intestate.

The defendant submitted 10 requests to charge, covering practically the whole law of the case, and excepted to the refusal of the court to charge as requested, and to the charge as given on the subject-matter of the requests. This exception is too general and indefinite to be available.

The defendant had a set of "standard rules" governing the operation of its road and instructing its employes, one of which was that, "when cars are placed on a siding, the brakes must be set, and if on a grade, the wheels must also be blocked, and derailing switches, where in use, must be set to ground." The defendant claimed that its duty to protect its main line from escap-

ing cars and to make its derailing devices efficient by proper rules and regulations had been fulfilled by promulgating said rule, and that its construction was matter of law for the court, and that the court should instruct the jury thereon, which the court did, and instructed that the rule did not apply to the situation presented in the case, but was made to apply when cars were placed on a siding to be left, and not for the purpose of passing over the track in shifting. The court said that it arrived at that construction from the language of the rule itself, but found it consistent with the conduct of the defendant and its employes in operating under it, and therefore further instructed that the testimony disclosed no rule that was applicable to the case. The defendant excepted to this part of the charge, and contends that it was erroneous, for that the rule itself shows that it did apply to the case, and for that the testimony furnished proof of the understanding of employes as to the application of the rule, and that as matter of fact it was understood to apply to just such a case as the shifting from the main line to a siding, and that in view of this evidence it was error to charge that the rule did not apply. But we think the court was right, for the car, with a brakeman on it, was shifted to the siding for the purpose of passing over it to be taken north in a train then awaiting for it, and it would have to pass over the derailing switch in the lower end of the siding, or the train would have to back over that switch to reach the car, and to block the wheels and set the derailer to ground in these circumstances would have so hindered and delayed the business in hand that it seems reasonable to say that the rule was not intended to apply in such a case; and, if that rule did not apply, the testimony disclosed none that did apply. And especially do we think the court was right, for it found that its construction of the rule was consistent with the conduct of the defendant and its employes in operating under it, which amounts to finding that they gave it the same construction the court did, and, there being doubt as to the meaning of the rule, this practical construction is entitled to great weight. And although, as claimed by the defendant, the testimony of one witness to which it refers tended to show that the employes understood that the rule applied to cases like this, and that it was in fact so applied, yet that is not controlling, for as the construction of the rule was submitted to the court, and the matter of practical construction was pertinent to the question, its finding of such construction is conclusive if there was evidence to support it, and it appears that there was, and it is not claimed that there was not. *Cleveland v. Washington*, 79 Vt. 408, 65 Atl. 534.

As to not providing means for derailing cars that escape onto the main line, and for preventing them from doing damage, the

court charged: That it was the duty of the defendant to exercise the care and prudence of a prudent man to secure the reasonable safety of its ways in that regard, and that the jury would say whether it was negligent in not providing "other means" for arresting such a car than those that were available at the time of the accident; that the thing complained of was that "other means" than those available were not provided; that it was said in argument that it was not the duty of the plaintiff to point out what other means should be used, but that it was the duty of the defendant to foresee what might happen, and provide means so that, in case a runaway car escaped down over the grades above Rutland, there should be some means at hand to arrest its progress; and that that was the question to be considered under that ground: "Would a prudent man have provided some means other than those that were available for that purpose?" The court told the jury: That it would not rehearse the testimony bearing on that particular phase of the case, as they would have in mind what took place—the sending of the message from East Wallingford to the train dispatcher at Rutland, his wiring the station agent at Cuttingsville and at East Clarendon, the attempts made at those places to stop the car, the facts as to the switch keys not being in the hands of those agents, those things and others disclosed by the evidence bearing upon the question, which was not whether the station agents at those places were negligent, but whether the defendant was negligent in not providing "other means" than those that were available for arresting the progress of that car—that the defendant said that that could be done only by having some device in the form of a derailing switch in the main line, which could not be tolerated, but that it was suggested that "other means" might have been provided, and argued that the switch keys should have been in the hands of the station agents, so that they could use them readily for the purpose of making a derailment; that those were all matters to be considered as bearing upon the question whether what had been done by way of preparation for a possible accident of this kind was what a prudent man would have done under the circumstances; that, if it was, the defendant would not be liable on that ground; but if the jury was satisfied that the defendant was negligent in not providing "other means" for stopping or derailing the runaway car, and that that negligence was the proximate cause of the injury, the defendant would be liable, if the other elements of the plaintiff's case were made out.

The defendant contends that this was error, for that no evidence had been submitted that any better means were in use by other railroads, nor that any other means would

have been more effective, nor that it would have been practicable to provide other means, and that the jury was allowed to speculate as to whether any other and what means should have been provided, and permitted to consider whether some means suggested by counsel, or by their own ingenuity or folly, would not have prevented the accident. The plaintiff's answer to this is: That there was no submission of any speculative means, but only of the issue made by the evidence without objection; that the plaintiff had shown that the station agents had been deprived of their switch keys; that when the trouble came the dispatcher called upon them, helpless as they were, to derail the car any way they could; that the court submitted only the fact of the switch keys having been taken from the agents, and, if that was not a proper issue for the jury, the defendant should have refrained from putting it in evidence to sustain its side of it, and waived its right to make the claim now insisted upon when it allowed the plaintiff's testimony to come in without objection. But the charge went beyond the matter of the switch keys having been taken from the station agents, and it would seem that the court so understood it, else it would have confined the charge to that issue, and not left the jury at liberty to inquire generally and at large, as it did, whether any and what other means should have been provided; and the charge went not only beyond that issue, but beyond the testimony in the case, for, barring the matter of the switch keys, there was, as the defendant claims, no testimony that any better means were in use by other railroads, nor that any other means would have been more effective, nor that it would have been practicable to provide other means. This exception is sustained.

As the questions presented by the exception to the admission of certain testimony, and the exception to the charge on the subject of damages, are such that they are not likely to arise again, they are not considered.

Reversed and remanded.

(81 Conn. 562)

BROWN v. CLARK et al.

(Supreme Court of Errors of Connecticut. Jan. 22, 1909.)

1. JUDGMENT (§ 306*)—CORRECTION—RECORD—SUBSEQUENT TERM.

Courts possess the power to correct and amend their recorded judgments, so as to truly show what the judicial action in fact was; clerical mistakes, by which the judgment as recorded fails to agree with the rendered judgment, being subject to correction at a subsequent term, on proper notice.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 598; Dec. Dig. § 306.*]

2. JUDGMENT (§ 314*)—RECORD—ERRORS—CORRECTION.

Plaintiff, as administrator of a savings bank depositor, sued the depositor's widow and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the bank to determine the ownership of the deposit at the depositor's death, on May 27, 1900. There was no issue as against the bank, and it was undisputed that the amount of the deposit on that date was \$212.03, and that the owner was entitled to the subsequently accrued interest. The court in a memorandum decided that the title to the deposit, amounting on "December 1, 1906," to \$212.03, and accrued interest from December 1, 1906, was in the plaintiff's administrators, and that plaintiff recover the same from defendant bank and from the widow's executor. On this memorandum judgment was rendered for plaintiff for \$212.03, and accrued interest from December 1, 1906. *Held*, that the memorandum showed a finding for plaintiff for the amount of the deposit, with interest from the date of the depositor's death, which was erroneously stated as December 1, 1906, instead of May 27, 1900, and that the judgment was therefore subject to correction at a subsequent term so as to award plaintiff interest from the earlier date.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 611; Dec. Dig. § 314.*]

3. JUDGMENT (§ 323*)—CLERICAL ERROR—CORRECTION—NOTICE.

Where defendant's attorney appeared, and was fully heard on an application by plaintiff to correct a judgment in his favor by adding interest from an earlier date, it was no objection to an order granting such relief that defendant was not previously notified thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 622; Dec. Dig. § 323.*]

4. APPEAL AND ERROR (§ 1199*)—AFFIRMANCE—CORRECTION OF JUDGMENT.

A judgment in favor of plaintiff, containing a clerical error as to the date from which plaintiff was entitled to interest, was entered March 30, 1907. An appeal was taken on which the judgment was affirmed in March, 1908, after the error was first discovered, when plaintiff applied for an order correcting it, which was granted September 4th of that year. *Held*, that plaintiff was not chargeable with laches in making his application.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4673; Dec. Dig. § 1199.*]

Appeal from Superior Court, Middlesex County; Edwin B. Gager, Judge.

Action by Thomas S. Brown as administrator of Gilbert M. Clark, deceased, against Sarah A. Clark and another. Plaintiff moved to correct a judgment in his favor, and from an order granting the motion defendant Clark appeals. Affirmed.

See, also, 80 Conn. 419, 68 Atl. 1001.

Rollin U. Tyler, for appellant. Frank D. Haines, for appellee.

HALL, J. In March, 1904, the plaintiff, as administrator of the estate of Gilbert M. Clark, brought an action to the superior court of Middlesex county, under section 1019 of the General Statutes of 1902, against Sarah A. Clark, widow of Gilbert M. Clark, and the Society for Savings of Hartford, the allegations of which, and the facts found upon the trial as well as the decision rendered in March, 1908, upon the appeal to this court, appear in said case as reported in 80 Conn. 419, 68 Atl. 1001.

After the trial of said case in the superior

court Judge Gager filed the following memorandum of decision: "Brown, Adm'r, v. Clark et al. Superior Court, Middlesex County, March 30, 1907. Decision. In this case, upon amended complaint dated September 9, 1906, and counterclaim dated December 31, 1906, judgment is rendered that the title and ownership in and to deposit book No. 41,250 in the Society for Savings of Hartford, and the amount represented thereon on December 1, 1906, viz., \$212.03, and accrued interest from December 1, 1906, is in the plaintiff administrator, and that the plaintiff recover the same from the defendant the Society for Savings, and that the plaintiff recover of the defendant Adelbert S. Clark, executor of the will of Sarah A. Clark, his costs. Also judgment for plaintiff on counterclaim of defendant Clark, executor. Gager, Judge."

The judgment file as originally prepared, following the regular caption, was as follows: "Judgment. This action by complaint, claiming title to a certain savings bank deposit and the book representing the same, known as deposit book No. 41,250 in the Society for Savings of Hartford, Conn., came to this court on the first Tuesday of April, 1904. The defendant Sarah A. Clark died after the suit was entered in this court, and thereafter her executor, Adelbert T. S. Clark, entered his appearance in this action. The case came, then, by continuance to the present time, when the parties appeared, and were at issue to the court, as on file. The court, having heard the parties, finds the issues for the plaintiff. Whereupon it is adjudged that the plaintiff recover of the defendant the Society for Savings, the said deposit, viz., two hundred and twelve dollars and three cents (\$212.03), and accrued interest from December 1, 1906, and that the plaintiff recover of the defendant Adelbert T. S. Clark, executor of the will of Sarah A. Clark, his costs, taxed at ——— dollars and ——— cents. Gager, Judge."

On the 22d of June, 1908, at a term of said superior court subsequent to that at which said judgment was rendered and held by Judge Gager, the plaintiff filed a written motion asking for a correction of the original judgment file, upon the ground that by a clerical error the amount of said deposit was stated to be but \$212.03 on the 1st of December, 1906, when in fact it was \$212.03, with interest from May 27, 1900. This motion was not entered upon the docket as an independent proceeding, nor was any notice of it given to any of the defendants, except that the attorney for the defendant Clark was present at the short calendar session when the motion was reached for hearing, and informed the court that the defendant Clark was a nonresident, and had not been notified of the motion, and asked for a post-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ponement to enable him to communicate with Clark, and to prepare a defense if Clark so desired, and to file pleadings to the motion. The court refused said request because that day was the last short calendar day of that session of the court, and thereupon said attorney, assuming to speak in behalf of defendant Clark, and apparently upon the facts of record having sufficient authority to do so, was fully heard upon the question of the jurisdiction of the court to grant the motion, and the question whether the judgment in the form it was originally recorded correctly expressed the decision rendered. On the 4th of September, 1908, the court, Gager, J., granted the motion to correct the record of judgment, and on said date a corrected judgment file, stating upon its face that it was "as of 30th of March, 1907," was signed by Judge Gager. This corrected file differed from that of March 30, 1907, only in the last paragraph, which was made to read as follows: "Whereupon it is adjudged that the title and ownership in and to deposit book No. 41,250 in the Society of Savings of Hartford, and the amount represented thereon, on May 27, 1900, to wit, \$212.03, and accrued interest thereon, is in the plaintiff administrator, and that the plaintiff recover of the defendant the Society for Savings the said deposit, to wit, two hundred and twelve dollars and three cents (\$212.03), and accrued interest from May 27, 1900. * * *" The defendant Clark complains that the court had no power to make such correction, and that it was irregularly made. The superior court possessed the power to make such correction at the time it was made. Over their recorded judgments courts possess the power "to correct and amend the record so that it shall truly show what the judicial action in fact was," and "mistakes, merely clerical, by which the judgment as recorded fails to agree with the judgment in fact rendered, may be corrected at a term subsequent to that in which the judgment was rendered, upon proper notice to all concerned." *Goldreyer v. Cronan*, 76 Conn. 113-115, 55 Atl. 594.

The principal question in the case before us, therefore, like that in *Goldreyer v. Cronan*, is whether the mistake sought to be corrected was a judicial error, in failing to include in the judgment actually rendered the interest on \$212.03 from May 27, 1900, to December 1, 1906, which the court had no power to correct at a subsequent term, or was a clerical mistake in failing to make the language of the judgment file conform to the decision actually rendered and announced by the memorandum, which the court might correct even at a later term. In *Goldreyer v. Cronan* it was held that the trial court improperly granted the plaintiff's motion to correct a judgment of \$300 rendered at a previous term, by adding to it interest to the amount of \$100.50. The

ground of that decision was that the amendment did not correct a variance between the recorded judgment and the judgment actually rendered, by adding to the former something included in the latter, but that it added to the judgment a sum not included in the judgment actually rendered. The facts in the present case are materially different. None of the parties to this suit appear to have had any controversy with the savings society. No money judgment against it is asked for by the complaint. The savings society does not appear to have answered, or even appeared, in the case. The contest was wholly between the plaintiff administrator and the defendant executor, and the decisive question between them was, Did the plaintiff, or did Sarah A. Clark, own the bank book No. 41,250, and the deposit which it represented, at the time of the death of Gilbert M. Clark, on the 27th of May, 1900? It was undisputed that the amount of the deposit at that date was \$212.03, and that the owner of that deposit was entitled to all of the subsequently accrued interest.

In his memorandum of decision the trial judge decided the issue of the ownership of the bank book, and the entire amount represented thereon in favor of the plaintiff. He said in his memorandum that judgment was rendered that the title and ownership in and to the deposit book No. 41,250, and the amount represented thereon on December 1, 1906, and accrued interest since that date, was in the plaintiff administrator, although he added a misstatement of the amount due on that date. The statement in the memorandum of decision that judgment was rendered "that the plaintiff recover the same of the plaintiff" was, in effect, a direction that the Society for Savings pay to the plaintiff the deposit so adjudicated to belong to him. The real mistake in the memorandum which furnishes such ground as there is for questioning its meaning is the misstatement of the date of the death of Gilbert M. Clark as December 1, 1906 (Mrs. Gilbert, the finding shows, died in 1906) instead of May 26, 1900, and of course the consequent misstatement of the amount represented on the deposit book on December 1, 1906, as \$212.03. By substituting, in the memorandum of decision, either "May 27, 1900," for "December 1, 1906," or omitting as surplusage the word and figures "viz., \$212.03," it will conform in effect to the judgment file as corrected. If the language of the memorandum adjudging the title and ownership of the bank book and deposit in the plaintiff had been included in the judgment file of March 30, 1907, it would perhaps have sufficiently expressed the adjudication of title to the book and entire deposit in the plaintiff, notwithstanding the repetition in it of the mistake in the date of the death of Gilbert M. Clark or in the amount represented by the bank book. But in recording in the judgment file of March 30, 1907, the decision rendered by the

memorandum of the same date, not only was the erroneous date, or amount, repeated, but the adjudication of title and ownership of the bank book and the amount it represented was omitted, evidently because it was thought that, the date of December 1, 1908, and the amount \$212.03 being correct, the adjudication of title in the plaintiff to the entire deposit was sufficiently expressed by substituting for the omitted words of the memorandum the statement that the issues were found for the plaintiff. It is unnecessary for us to decide whether or not the original judgment file, although it did not follow the language of the decision actually rendered in the memorandum, contained, without correction, a sufficient statement of an adjudication of title in the plaintiff to the bank book and the entire deposit. However that may be, it was not improper to make the correction to enable the plaintiff to obtain the deposit from the Society for Savings.

The mere signing of the judgment file of March 30th by the judge is not to be regarded as the rendering of a later and different judgment from that described in the memorandum of the same date. *Smith v. Moore*, 38 Conn. 105-111. The finding by the judge who signed both the memorandum and the judgment file shows that he signed the latter merely as a record of the former. The finding states that the judgment file should be corrected "to carry out the manifest intent of the memorandum of decision," and because the judgment file of March 30th "did not cover and make effective the decision as shown by the memorandum of decision."

Before ordering, after the expiration of the term at which the original judgment was rendered, such a correction of the record as that made in this case, proper notice of the application for correction should be given to the interested parties. In the present case the Society for Savings makes no complaint of want of notice. The attorney for defendant Clark appeared, and was fully heard upon the application to correct the record. There was no undue delay in making the application for the correction of the record. The appeal to this court was not decided until March, 1908, and the mistake in the judgment file was first discovered when demand was thereafter made upon the officer of the Society for Savings.

There is no error. The other Judges concurred.

(81 Conn. 547)

PATON v. ROBINSON et al.

(Supreme Court of Errors of Connecticut. Jan. 22, 1909.)

1. WILLS (§ 565*)—CONSTRUCTION—PERSONALTY AND REALTY.

A joint will of husband and wife bequeathed to the survivor all sundry goods, gear, debts,

sums of money, furniture, and other effects and in general all other personal property and goods in common belonging to either at the death of the first decedent with the whole interest, profits, and produce of the premises and the writings, vouchers, and securities thereof. *Held*, that the bequest included personal property only, and did not pass to the surviving widow any title to the realty.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 565.*]

2. ADVERSE POSSESSION (§ 50*)—CLAIM OF TITLE—OUTSTANDING INTEREST—ACQUESCENCE.

A widow occupied certain land of her deceased husband, claiming it as her own from 1886 to 1890, when she sold it to plaintiff. In 1896 plaintiff discovered that he had no valid title, and attempted to purchase an outstanding heir's interest, but failed, such interest being acquired by a prospective purchaser of the balance from plaintiff, after which plaintiff recognized the purchaser's title so acquired by dividing the rents and profits. *Held*, that plaintiff did not hold adversely to the purchaser's interest so acquired under the rule that occupation to be adverse must not only be hostile in its inception, but must continue so during the required period of limitation.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 255-261; Dec. Dig. § 50.*]

3. ADVERSE POSSESSION (§ 41*)—TIME.

Where a widow occupied land of her husband, claiming to own it after his death from 1886 to 1890, when she sold it to plaintiff, who continued to occupy until 1897, when he recognized title in the husband's heirs, plaintiff's occupation united with that of the widow was not sufficiently long to establish his title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 41.*]

4. CHAMPERTY AND MAINTENANCE (§ 7*)—CONVEYANCE BY PERSON OUT OF POSSESSION—STATUTES.

Gen. St. 1902, § 4042, declares that all conveyances of any land of which the grantor is ousted by the entry and possession of another, unless made to the person in actual possession, shall be void. *Held*, that such section was but an affirmation of the common law, and that a deed was only so far void thereunder as it was opposed to common-law principles or prohibited by affirmative statutory provisions.

[Ed. Note.—For other cases, see Champerty and Maintenance, Dec. Dig. § 7.*]

5. CHAMPERTY AND MAINTENANCE (§ 7*)—CONVEYANCE OF LAND ADVERSELY HELD—ESTOPPEL—RIGHTS OF GRANTEE.

A deed by heirs of land adversely possessed is void only as to the person in possession and those in privity with him. Such a deed is valid as against the grantor and his heirs by way of estoppel; the grantee being entitled to sue for and recover possession in the grantor's name, and then protect his possession and title under the deed.

[Ed. Note.—For other cases, see Champerty and Maintenance, Dec. Dig. § 7.*]

6. QUIETING TITLE (§ 51*)—PARTIES—DECREE.

Where all persons interested were made parties to an action to determine the title to land, the court is authorized by Practice Book 1908, p. 257, § 195, to determine the ultimate rights of all the parties on each side as against themselves, and grant to the defendant any affirmative relief to which he may be entitled.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 101; Dec. Dig. § 51.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. CHAMPERTY AND MAINTENANCE (§ 7*)—DEED BY PERSON OUT OF POSSESSION—OUSTER.

Where plaintiff at and before a conveyance of an heir's interest in the property in question to R. admitted the heir's title, plaintiff's possession did not constitute an ouster of the heir, under the rule that ouster which will make a grantor's deed void is the same as that which, if continued for 15 years, will establish title by adverse possession.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Dec. Dig. § 7.*]

8. SUBROGATION (§ 1*)—NATURE OF RELIEF.

Subrogation is an equity called into existence to enable a party secondarily liable, but who has paid the debt, to reap the benefit of any securities or remedies which the creditors may hold as against the principal debtor, and by use of which the party paying may be made whole.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6721-6727; vol. 8, p. 7807.]

9. SUBROGATION (§ 23*)—MORTGAGES—PAYMENT BY PURCHASER.

Plaintiff, believing that a widow had title to certain land of her husband, purchased the land from her, and furnished her \$400 to pay a mortgage in order that she might convey an unincumbered title. The widow had no title, and plaintiff was compelled to purchase a two-thirds interest in the property from the heirs of the deceased husband. *Held*, that plaintiff was entitled to subrogation to the rights of the mortgagee as against the outstanding interest in the land.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. §§ 60-66; Dec. Dig. § 23.*]

10. LIENS (§ 5*)—CREATION—CONSENT OF OWNER.

In general a lien can only be created with the owner's consent by a contract express or implied with the owner of the property, or by some one by him duly authorized, or without his consent by the operation of some positive statute or rule of law.

[Ed. Note.—For other cases, see *Liens*, Cent. Dig. §§ 23, 25; Dec. Dig. § 5.*]

11. VENDOR AND PURCHASER (§ 337*)—FAILURE OF TITLE—PURCHASE PRICE—LIEN.

Plaintiff purchased certain land from a widow which had belonged to her deceased husband, paying \$600, which she used for her personal expenses and \$400 to satisfy a mortgage on the land. The title was, in fact, in the husband's heirs, and they owed no debt chargeable against the land, nor did the widow have any authority to contract or create a lien on their interest. *Held*, that plaintiff had no lien on the land for the part of the price paid to the widow, though the husband's equity in the land might have been taken for the widow's support during her life.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 337.*]

12. VENDOR AND PURCHASER (§ 239*)—BONA FIDE PURCHASER—EQUITABLE CLAIM.

A purchaser of the heirs' interest in mortgaged land without notice that the land was subject to be taken for the support of the ancestor's widow was entitled to urge the defense of bona fide purchaser against such claim, though the heirs' interest so purchased was but an equity, and not a legal title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 239.*]

Appeal from Superior Court, New Haven County; Silas A. Robinson, Judge.

Action by Robert Paton against William J. Robinson and others to determine title to real estate. Judgment for defendants, and plaintiff appeals. Affirmed.

Newton, Church & Hewitt, for appellant. W. B. Stoddard and A. D. Penney, for appellee.

RORABACK, J. It appears from the finding that in 1886 one James Stevenson died testate owning certain real estate, leaving a widow, Martha Stevenson, and three heirs at law, Mary Gorham, Hugh Caldwell, and Thomas Baird. Mrs. Stevenson supposed the land to be hers, and on or about September 29, 1890, gave the plaintiff a warranty deed of the land, and received from him the sum of \$600 in money, and the plaintiff also furnished the sum of \$400, which was paid to the Connecticut Savings Bank in full payment of the balance that was due upon a mortgage, which the savings bank then released. The plaintiff took possession of this land under said warranty deed, and claimed title to the same until about 1896. During that year one Samuel Robinson, late of New Haven and now deceased, applied to the plaintiff to purchase the land. They had negotiations about it, and this resulted in a title search. It was then discovered that the plaintiff had no valid title to the land. The plaintiff thereupon attempted to purchase the title of the heirs, and did contract with and purchase the title of two of the heirs, namely, Hugh Caldwell and Thomas Baird. They conveyed to him their interest in such land by a deed which has since been lost and cannot be found. The plaintiff was unable to purchase the title vested in Mary Gorham, and the plaintiff and Robinson then entered into an agreement that Robinson should purchase Mary Gorham's title, and, when Robinson had obtained his title from Mary Gorham, he, the plaintiff, would complete the sale of the other two-thirds to Robinson. In pursuance of this agreement, Robinson purchased from Mary Gorham her interest in the property, and paid her therefor and obtained a deed of the same dated May, 25, 1897. After that time and up to the time of his death, Robinson claimed a one-third interest in the land, and did so, with the knowledge and acquiescence of the plaintiff. The plaintiff recognized Robinson's right and interest in the land from and after May, 1897, and paid one-third of the annual rent collected by him on this property, and treated Robinson as an owner with him so long as Robinson lived. Each paid taxes thereon according to their respective shares as listed, namely, Robinson one-third, and the plaintiff two-thirds. This continued up to the death of Mr. Robinson. It did not appear in evidence that the plaintiff and Robinson, or either of them, after Robin-

son received his deed from Mrs. Gorham, ever resumed negotiations looking to a sale by the plaintiff to Robinson of the plaintiff's two-thirds interest. Since the death of Robinson his estate has paid taxes upon one-third of said premises. Up to the time that Mrs. Stevenson deeded this land to the plaintiff in 1890 she had the exclusive possession of it from the death of her husband in 1886, and treated it as her own. Up to the time Robinson obtained his deed from Mary Gorham in 1897 the plaintiff had the sole, actual possession of this land, and recognized no claim, interest, or right of any one else in or to it, except as hereinbefore stated. The plaintiff contended that his grantor, Martha Stevenson, obtained title to the real estate under the will of her husband, James Stevenson. This document which was introduced in evidence and made part of the record was executed jointly by James Stevenson and his wife Martha, purported to be a mutual will, and described the property to be affected thereby as follows: "All and sundry goods, gear, debts, sums of money, furniture and other effects and in general the whole personal property and goods in communion now belonging to us or either of us at the time of the death of the first decedent with the whole interest, profits, and produce of the premises and the writings, vouchers and securities thereof." This was a bequest of personal property only, and did not pass to Mrs. Stevenson any title to the real estate now in controversy.

The plaintiff claims that the possession of Martha Stevenson, his grantor, from 1887, joined with his possession from 1890, established his title by adverse possession. To this claim there are decisive objections. It appears that Mrs. Stevenson occupied the land from 1886 to 1890, when she sold it to the plaintiff. In 1897 the plaintiff discovered that he had no valid title, and attempted to purchase the Gorham interest, but failed in his effort. Under an arrangement with Robinson, this one-third interest was at that time purchased by him. Since that time the Robinson interest has been fully recognized and admitted by the plaintiff in dividing the rent. The possession of one who recognizes or admits title in another either by declaration or conduct is not adverse to the title of such other. 1 Green. Ev. (14th Ed.) § 109; Smith v. Martin, 17 Conn. 399, 400; Deming v. Carrington, 12 Conn. 5, 30 Am. Dec. 591; Rogers v. Moore, 10 Conn. 13. Occupation must, not only be hostile in its inception, but it must continue hostile, and at all times during the required period of 15 years challenge the right of the true owner in order to found title by adverse use upon it. Lewis v. N. Y. & H. R. R. Co., 162 N. Y. 202-220, 56 N. E. 540. After the purchase of the Gorham interest by Mr. Robinson, there was nothing in the conduct of the plaintiff showing a repudiation of this right. Upon the other hand, as stated, there was an un-

mistakable recognition and admission that the Robinsons were the owners of this one-third interest, and the plaintiff's occupation must be presumed to have been subservient to their rights. It clearly appears that the adverse occupation of the plaintiff when united with that of Mrs. Stevenson is at least four years short of the time required by statutory regulation to acquire title by adverse possession.

The plaintiff claims that Mary Gorham was so ousted of the possession of said land at the time of the execution and delivery of the deed made by her to Samuel Robinson that said deed was utterly void. Gen. St. 1902, § 4042, provide: "All conveyances and leases for any term, of any building, land or tenement, of which the grantor or lessor is ousted by the entry and possession of another, unless made to the person in actual possession, shall be void." The provisions of this statute is only in affirmance of the common law which disabled a grantor ousted from transferring his title to another on the ground that such alienation tended to increase maintenance and litigation, and afforded means to powerful men to purchase rights of action and oppress others. Such deeds, therefore, are only so far void as they are opposed to the principles of the common law and prohibited by the affirmative provisions of the statutes. Goodman v. Newell, 13 Conn. 75-77, 33 Am. Dec. 378. Assuming it to be true that there was adverse occupation in the plaintiff at the time Mrs. Gorham deeded her interest to Robinson, and that no title was transferred as against the party then in possession, under the circumstances disclosed it cannot affect the result. A deed of lands adversely possessed is void only as to the person in possession, and those claiming in privity with him, as to the grantor, and his heirs it is good, by way of estoppel, and the grantee may sue for and recover possession in the name of the grantor, and then protect himself in his title under such deed. Livingstone v. Proseus, 2 Hill (N. Y.) 526; Williams v. Jackson, 5 Johns. (N. Y.) 489; Brinley v. Whiting, 5 Pick. (Mass.) 348. Mrs. Gorham and all parties interested are made parties to this action, and "the court may determine the ultimate rights of the parties on each side as against themselves, and grant to the defendant any affirmative relief to which he may be entitled." Practice Book 1908, p. 257, § 195. Ouster which will make a grantor's deed void is the same as that which, if continued for 15 years, would make a perfect title by adverse user in the occupant. Merwin v. Morris et al., 71 Conn. 555-574, 42 Atl. 855. The actions of the plaintiff at and before the execution and delivery of the deed to Robinson was a plain admission and acknowledgment of Mrs. Gorham's title, and his possession did not constitute an ouster, but should be regarded as in submission to that title.

In the judgment rendered by the superior

court it was found that the plaintiff is the owner in fee simple of an undivided two-thirds part of said premises subject to said mortgage, and that the remaining undivided one-third part of said land at the time of his death was owned in fee simple by said Samuel Robinson, deceased, subject to the mortgage of \$400. The ground on which the court below proceeded was that the plaintiff was subrogated to the rights of the Connecticut Savings Bank to the extent of \$400. Subrogation is an equity called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities or remedies which the creditors may hold as against the principal debtor, and by use of which the party paying may thus be made whole. *Bispham's Eq. p. 450, § 335*. In the present case the plaintiff furnished the \$400 to Mrs. Stevenson with which to pay the balance of the mortgage to the Connecticut Savings Bank that she might give him a clear and unincumbered title. The plaintiff obtained no valid title under the deed given him, and was compelled to purchase the two-thirds interest which he now owns from the heirs of James Stevenson. This money was paid for the protection and benefit of those owning this land, and the plaintiff is entitled to be subrogated to the rights and securities of the bank. *Regan v. N. Y. & N. E. R. R. Co., 60 Conn. 142, 22 Atl. 503, 25 Am. St. Rep. 306; Dutcher v. Hobby, 86 Ga. 198, 12 S. E. 356, 10 L. R. A. 472, 22 Am. St. Rep. 444; Everston v. Central Bank, 33 Kan. 332, 6 Pac. 605*.

It is also urged that the plaintiff has a lien, not only for the \$400 which was paid to satisfy the mortgage, but for the additional sum of \$600 which was paid to Mrs. Stevenson and used in paying her personal expenses. Upon this subject the court has found: On March 2, 1885, there was paid to the Connecticut Savings Bank upon said mortgage the sum of \$600, \$300 in cash and \$300 that was drawn from a deposit book in said bank, which stood in the joint names of the said James and Martha Stevenson. It did not appear in evidence who deposited the money in the bank that stood in the names of Mr. and Mrs. Stevenson.

A lien may be created when a party in making expenditures upon real estate has acted in good faith with an honest but mistaken assumption that he was the owner. In such cases the lienor's rights must necessarily be limited to such disbursements as were beneficial to the property. This implies that the debt is due from the person as against whom the pledge is claimed, unless the owner by some express act or implication pledged or authorized another to pledge his property for the debt of another. In 1890, when Mrs. Stevenson gave the warranty deed to the plaintiff, the owners of the property which she attempted to convey were the heirs of James Stevenson. There was no debt due from them; neither did Mrs. Stevenson have

any authority express or implied to make a contract or create a right for the lien upon the realty which they owned. Generally a lien can only be created with the owner's consent; that is, by a contract express or implied with the owner of the property or with some one by him duly authorized, or without his consent by the operation of some positive rule of law, as by statute. 25 Cyc. p. 663, 664.

The fact that the equity in this real estate might have been used for the necessary support of Mrs. Stevenson during her lifetime in no way strengthens the plaintiff's claim for a lien for the money paid by him in excess of the mortgage. There are no facts alleged or found which will permit a favorable consideration of this proposition. Upon general principles, the defendant would have the right to defend against this claim of a prior incumbrance upon the ground that he is a bona fide purchaser of the property for a valuable consideration without any notice of the existence of such a claim. The plaintiff in substance replies to this proposition that to entitle himself to this legal protection it should appear that the defendant obtained a legal title, and not a mere semblance of title from one who was ousted of possession. It is not indispensable to protect himself that the defendant should be the purchaser of the legal title. "The rule in equity is that if a defendant has in conscience a right equal to that claimed by the person filing a bill against him, although he is not clothed with a perfect legal title, this circumstance, in his situation as a defendant, renders it improper for a court of equity to compel him to make any discovery, which may hazard his title. In short, courts of equity will not take the least step against an innocent purchaser in such a predicament, and will, on the other hand, allow him to take every advantage which the law gives him; for there is nothing which can attach itself upon his conscience in such a case in favor of an adverse claim." 2 Story, Eq. Jur. p. 883, §§ 1502, 1503. It appears that Robinson made this purchase, paid his money, and obtained this deed at the instance and request of the plaintiff. There is no suggestion that Robinson, when he obtained his deed, had any knowledge of the existence of a claim for money paid upon this mortgage or of an incumbrance which had been fully discharged of record seven years before he was induced by the plaintiff to part with his money in obtaining his title. "If a plaintiff comes into equity, seeking relief upon a legal title, against a bona fide purchaser of an equitable title, if he is entitled to relief in such a case (which is perhaps doubtful), still he must obtain it upon the strength of his own case, and his own evidence; and he is not entitled to extract from the conscience of the innocent defendant any proofs to support it." 2 Story, Eq. Jur. p. 884, § 1503.

The plaintiff's exception to the finding of facts cannot be considered by this court. It

does not appear that there was any motion to correct, or any assignment in the reasons of appeal upon this ground. Practice Book 1908, p. 268, § 9.

There is no error. The other Judges concurred.

(81 Conn. 578)

FAY v. HARTFORD & S. ST. RY. CO.
(Supreme Court of Errors of Connecticut. Jan. 22, 1909.)

APPEAL AND ERROR (§ 1177*)—REVERSAL—REMAND.

Under Gen. St. 1902, § 802, providing that, if the Supreme Court of Errors shall find error in the rulings of the trial court, it shall reverse the judgment or order a new trial, a reversal because facts claimed to have been proved did not authorize plaintiff in an action triable by a jury to recover did not entitle defendant to a final judgment; plaintiff being entitled to a new trial and an opportunity to present different or additional facts to establish a cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4620; Dec. Dig. § 1177.*]

On application to correct the mandate sent to each of the judges under Practice Book 1908, p. 279, § 41. Application denied.

For opinion on main appeal, see 71 Atl. 364.

BALDWIN, C. J. We are now asked to alter our mandate so as to make it, after setting aside the judgment for the plaintiff, remand the cause, with instructions to the superior court to enter judgment for the defendant. The judgment which has been set aside followed the verdict, and it is plain that the facts found by that verdict could not support a judgment for the defendant veridict non obstante. The request now made ignores two things: The nature of a trial by jury, and the function of an appeal from a judgment rendered on a verdict.

The plaintiff had a right to have her cause determined, as to the facts in issue, by the verdict of a jury. This could only be that of a jury which had heard the evidence of those facts, after receiving instructions from a judge who had presided at the trial. It is an ancient feature of the jury system that, when the evidence in a civil cause is so clear for one side or the other that reasonable men cannot differ as to the verdict which ought to be rendered, the judge may require the jury to return that verdict. In so doing, however, they still determine the issues of fact. They are directed to decide the issues in a certain way, because these could not reasonably be decided in any other way, and it is assumed that every juror will desire to give his decision according to the dictates of reason.

The appeal to this court recited the facts which the plaintiff claimed that she had established on the trial, and also those which the defendant claimed that it had established. These recitals had no force, except for the purposes of the appeal. They showed that, on the assumption that the plaintiff had proved all she claimed, she had no right of recovery; but they did not show what evidence might be produced on a new trial, be-

fore a new jury. Should such a trial be claimed, it will be for that jury to determine the issues before it, on the pleadings as then made up, subject only to such directions as may be properly given by the judge then presiding over the court. Gen. St. 1902, § 802, proceeds upon these principles in providing that, "if the Supreme Court of Errors shall find error in the rulings or decisions of the court below, it shall reverse the judgment or order a new trial." The judgment of the superior court was the only one which could be rendered upon the verdict, as returned and accepted, and could not, therefore, be changed into a judgment for the defendant. The error lay deeper—in the refusal to direct a different verdict, or to set aside the verdict as against the evidence. To remedy that, a new trial is the only method known to our law.

Leave to file the motion in question was therefore denied.

(81 Conn. 579)

HARLOW et al. v. PARSONS LUMBER & HARDWARE CO.

(Supreme Court of Errors of Connecticut. Jan. 22, 1909.)

1. FRAUDS, STATUTE OF (§ 84*)—AGREEMENTS FOR SALE OF PERSONALTY.

An agreement for a sale of lumber for more than \$50 to be thereafter delivered, no part of which was ever accepted, was within the statute of frauds (Gen. St. 1902, § 1090), and could be proved in an action for the price only by a memorandum of the agreement in writing, signed by the buyer or its agents.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 157; Dec. Dig. § 84.*]

2. EVIDENCE (§ 455*)—PAROL TESTIMONY—MEANING OF TECHNICAL TERMS.

Parol evidence was admissible in an action for the price of lumber to show the technical meaning of the words, "when transit car," on the sale slip.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2104, 2105; Dec. Dig. § 455.*]

3. SALES (§ 81*)—SALES SLIPS—CONSTRUCTION—TECHNICAL TERMS.

The words, "when transit car," on a sales slip covering a sale of a car load of lumber, did not fix any date of delivery; and did not show that delivery should be made on arrival of the car.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 217; Dec. Dig. § 81.*]

4. SALES (§ 81*)—DELIVERY—WHEN TO BE MADE.

Where parties to a contract of sale do not agree upon the date of delivery, the law implies that it is to be made within a reasonable time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 218; Dec. Dig. § 81.*]

5. SALES (§ 182*)—DELIVERY—TIME FOR MAKING—REASONABLE TIME.

Ordinarily what is a reasonable time for delivery of goods sold is a question of fact; but, when the circumstances are such that but one conclusion is reasonably possible, the court may assume or declare to the jury that conclusion.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 492; Dec. Dig. § 182.*]

6. SALES (§ 182*)—ACTION FOR PRICE—JURY QUESTION.

In an action for the price of rejected lumber, whether the lumber was delivered within a reasonable time *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 492; Dec. Dig. § 182.*]

7. SALES (§ 172*)—DELIVERY—TIME—REASONABLENESS—EVIDENCE.

Delay of the carrier in transporting goods is an important circumstance to be considered in determining whether delivery was made within a reasonable time.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 428; Dec. Dig. § 172.*]

8. APPEAL AND ERROR (§ 909*)—REVIEW—PRESUMPTIONS.

On appeal in an action for the price of rejected lumber, successfully defended on the ground of failure to deliver within a reasonable time, it will be presumed that the trial court considered the carrier's delay in transporting the lumber in determining that it was not tendered within a reasonable time.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3675; Dec. Dig. § 909.*]

9. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting evidence under one defense was harmless where the case was not decided on that defense.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4175, 4176; Dec. Dig. § 1052.*]

Appeal from City Court of Hartford, Herbert S. Ballard, Judge.

Action by Frederick M. Harlow and others against the Parsons Lumber & Hardware Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

The plaintiffs, doing business in Hartford, and the defendant, doing business in Unionville, Conn., by telephone entered into a contract for the sale and purchase of a car load of lumber then in transit by rail from Laurel, Miss., to Wallingford, Conn. The plaintiffs thereupon caused a sales slip and invoice of the lumber to be made out, which read, respectively, as follows:

"Harlow, Todd & Co., Hartford, Conn. Wholesale Lumber. Order No. 1409. Date, May 15, 1906. Sold to the Parsons Lbr. & Hardware Co., at Unionville, Ct. Route: When transit car. Terms 1½% 15 days. One (1) car 1x4 (3¼" face) A Sap rift fig. D. & M. at \$38.50. Thank you. Harlow Lumber Co., M. P. H."

"Harlow Lumber Co., Successor to Harlow, Todd & Co. Wholesale Lumber. Hartford, Conn., Apr. 17, 1906. Sou. Car No. 40290. Consigned to us, Unionville, Ct. Order No. 1409. Terms, 1½% 15 ds. Sold to Parsons Lbr. & Hdw. Co., 18,072 ft. 1x4 "A" Sap Rift D. & M. at \$38.50, \$695.77."

These were mailed to and received by the defendant. Afterwards the defendant, the lumber not having arrived, and the plaintiffs being unable, after repeated inquiries, to give definite information as to when it would arrive, wrote the plaintiffs the following let-

ter: "The Parsons Lumber & Hardware Co. Unionville, Conn., July 10th, 1906. Harlow, Todd & Co., Hartford, Conn.—Gentlemen: Please cancel the order for car No. 40290. We have had our agent here wire to Harlow River and have received word June 28th that there was no account of any such car there. We have been waiting a few days since to see if it would come but as it has not please cancel as before directed, as we will procure it somewhere else. Yours very truly, The Parsons Lumber & Hardware Co." The lumber arrived in Wallingford on the 13th of August, 1906, and the plaintiffs at once offered to forward it to the defendant at Unionville, but the defendant refused to accept it. The plaintiffs then sold the lumber for a less price than the defendant was to have paid. This action is brought to recover the difference.

Josiah H. Peck, for appellants. Joseph P. Tuttle, for appellee.

THAYER, J. (after stating the facts as above). The complaint alleges that on May 15, 1906, the plaintiffs and the defendant mutually agreed that the plaintiffs should sell to the defendant, and that the defendant should purchase from the plaintiffs, one car load of lumber, consisting of 18,072 feet of yellow pine flooring, for \$38.50 per 1,000 feet, said lumber being then in transit and to be delivered by the plaintiffs to the defendant on arrival, and that on the 15th of August following, on the arrival of the lumber, the plaintiffs offered to deliver the same to the defendant, and the defendant refused to accept it. As the complaint thus alleges an agreement for the sale of personal property for upwards of \$50 to be thereafter delivered, no part of which was ever accepted, such agreement was within the statute of frauds, and could be proved only by a memorandum thereof in writing signed by the defendant or its agents. Gen. St. 1902, § 1090.

For such memorandum the plaintiffs relied upon the sales slip, invoice, and letter of the defendant which appear in the statement of the case. It nowhere in either of these documents expressly appears that the lumber was to be delivered on arrival or within what time it was to be delivered. The sales slip is dated May 15th, the day the contract was made. The invoice is dated April 17th, nearly a month earlier. In the sales slip appear the words "When transit car." The plaintiff insists that these words express the date of delivery, and that such date is the arrival of the lumber in Unionville. Unless they have in the lumber trade a technical meaning different from their ordinary meaning, it is clear that they give no information as to the time when the lumber should be delivered. But the plaintiffs insisting in the trial below, as they insist here, that the words had such technical meaning, the court properly receiv-

ed parol evidence to show what that meaning is. *Hatch v. Douglas*, 48 Conn. 116, 128, 129, 40 Am. Rep. 154; *Soper v. Tyler*, 77 Conn. 104, 106, 58 Atl. 699. From such evidence the court found that such sales slips are customarily used in the lumber trade, and that it is the custom to fill in the blank after the printed word "when" with the date of shipment; but that, when filled as this was with the words "transit car," they mean that the lumber has left the mill and is in transit. The words, therefore, do not fix the date of delivery. If the parties to the contract did not agree upon the date of delivery, the law would imply that it was to be within a reasonable time. *Soper v. Tyler*, 73 Conn. 660, 661, 49 Atl. 18, 19. But this is not the contract alleged in the complaint, and the memorandum relied upon fails to prove the special contract alleged to deliver on arrival. The court correctly ruled, therefore, that the memorandum is not sufficient to prove the contract alleged.

If the memorandum is construed as requiring the delivery to be within a reasonable time, the plaintiffs claim that this is not "a question of primary fact," but a conclusion which is, in such cases, a question of law. Ordinarily what is a reasonable time under the circumstances of a given case is a question of fact for the jury. When the circumstances are such that but one conclusion is reasonably possible, the court may assume or declare to the jury the conclusion which must inevitably be reached. *Loomis v. Norman Printers' Supply Co.*, 81 Conn. 343, 71 Atl. 358. In the present case it was a question of fact to be determined under the evidence, and was so treated in the pleadings. In the case of *Soper v. Tyler*, 73 Conn. 660, 662, 49 Atl. 18, 19, it is said that "what was such reasonable time was a question of fact for the jury." In that case the question being considered was whether an order to ship grain was given within a reasonable time. In the present case the first defense of the answer sets up in substance that the delivery was not tendered within a reasonable time, the plaintiffs joined issue on that question of fact, and the court has found the issues in favor of the defendant. There is nothing in the case as it comes before us from which we can see that the court adopted any wrong

conclusions of law in making the determination. If, therefore, the plaintiffs proved a contract to deliver within a reasonable time, they failed to prove performance on their part.

One of the conclusions reached by the court was that the unexplained failure on the part of the railroad to transport the lumber promptly did not excuse the plaintiffs' failure to make delivery either within the usual time required for transportation or within a reasonable time. Whether it would excuse nondelivery within the usual time of transportation it is unnecessary to consider, as that is not a question in this case. Such a delay would be an important circumstance to be considered in determining whether the delivery was made within a reasonable time. Delays of that character will, in the ordinary course of things, occur and are to be considered in determining the reasonableness or unreasonableness of a party's conduct. We must assume that the court took into consideration the fact of the railroad's lack of promptness in arriving at the conclusion that the lumber was not tendered to the defendant within a reasonable time. It cannot be said, therefore, that the court was wrong in the conclusion mentioned.

Two witnesses called by the defendant were asked to relate what they heard of a telephone conversation between the parties to the suit at the time the contract was made. Their answers tended to show an agreement on the part of the plaintiffs to deliver the lumber in ten days or two weeks, and was admissible in support of the allegations of the second defense upon which issues of fact were joined. The evidence was objected to as tending to vary the terms of the written memorandum. The objection was overruled, upon what ground is not stated. As the case was decided upon the ground that the memorandum did not support the contract alleged in the complaint, and that the lumber was not tendered within a reasonable time, and was not decided upon the grounds stated in the second defense, the plaintiff can have received no harm from the reception of the evidence, and the ruling of the court in admitting it affords no ground for a new trial.

There is no error. The other Judges concur.

HARRIS v. HIBBARD et al.

(Court of Chancery of New Jersey. Dec. 14, 1903.)

1. PARTITION (§ 111*)—PARTITION DECREE—MODIFICATION—SALE—PROCEEDS.

Where a decree for the sale of land in partition adjudged that a deed to a receiver in supplementary proceedings, which deed contained no words of inheritance or succession, conveyed only an undivided half interest in a life estate instead of the fee, the land having been sold under the decree, a subsequent order modifying the decree, so as to declare that the receiver took an undivided half of the fee subject to the inchoate right of dower of the grantor's widow, constituted in effect a reformation of the deed, so as to entitle the receiver to a share of the proceeds of sale proportioned to a fee interest, instead of merely a life estate.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 402; Dec. Dig. § 111.*]

2. EXECUTION (§ 409*)—SUPPLEMENTARY PROCEEDINGS—PROPERTY IN FOREIGN JURISDICTION.

A foreign receiver in supplementary proceedings appointed at the instance of the creditor was entitled to possession of a fund arising from a sale of property in New Jersey, a part of which had been conveyed to the receiver under direction of the court by which he was appointed, as between the judgment creditor and his attorney claiming a lien on the fund for fees and the receiver, the fund to be administered under the direction of the court by which the receiver was appointed.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1173, 1175; Dec. Dig. § 409.*]

3. PARTITION (§ 111*)—SALE OF LAND—PROCEEDS—DISTRIBUTION—ATTACHMENT.

A judgment debtor, having been directed in supplementary proceedings in New York to convey to his receiver an undivided interest in certain real estate in New Jersey, executed a deed, but before it was delivered the debtor's wife, through a trustee, instituted a suit against him in New Jersey in which the land was attached. *Held*, that though the trustee in such action might be guilty of inexcusable laches in proceeding to establish his claim, and though it had been held unfounded in contempt proceedings in New York, the proceeds of the sale of the property in partition could not be distributed without the presence of the trustee as a party.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 402; Dec. Dig. § 111.*]

4. RECEIVERS (§ 205*)—FOREIGN RECEIVERS—BONDS.

Where a foreign receiver executed a bond of \$200 in the jurisdiction of his appointment, and thereafter became entitled to receive a sum approximating \$1,000 from the sale of property in New Jersey, he should be required to give a new bond in New Jersey for at least \$2,000.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 409; Dec. Dig. § 205.*]

Action by Charles F. Harris against Omri F. Hibbard, as receiver, and others. On application for the payment of moneys in court. Application for present distribution denied.

Samuel D. Oliphant, Jr., for petitioner Walter I. McCoy. Samuel C. Kulp, for petitioner William Johnston.

WALKER, V. C. On April 18, 1906, William Johnston, of Trenton, N. J., filed a petition in this cause, in which he averred that on October 31, 1899, he recovered against William S. Harris in the Supreme Court of the state of New York a judgment for \$1,533.91, debt and costs, and caused an execution to be issued thereon, and that afterwards the defendant Omri F. Hibbard was, by the Supreme Court of New York, appointed receiver in supplementary proceedings in aid of the execution which was issued on that judgment; that on October 25, 1900, the defendant William S. Harris conveyed, subject to the inchoate right of dower of his wife, the defendant Elizabeth J. Harris, all his right, title, and interest in and to a certain lot of land and premises in the city of Trenton; that on December 11, 1901, Charles F. Harris, only brother of William S. Harris, filed a bill for the partition of the same lands and premises of which William S. Harris conveyed his interest to Mr. Hibbard as receiver; that on July 2, 1902, Mr. Hibbard, as receiver, filed a petition in this cause, and thenceforward participated therein for the purpose of protecting the rights of the petitioner, Mr. Johnston, in the premises conveyed; that by the final decree in this cause it was adjudged that the complainant, Charles F. Harris, and the defendant Omri F. Hibbard, the receiver, were each seized of, in and to the fee, and entitled to, the undivided one-half part of the premises above mentioned, and that the undivided one-half part thereof to which the receiver was entitled was subject to the inchoate right of dower of Elizabeth J. Harris, wife of William S. Harris; that on June 23, 1902, the premises were sold by virtue of the decree of this court and brought the sum of \$2,150, of which sum, after deducting costs and expenses, one half was paid to Charles F. Harris and the other half was deposited in this court, where it yet remains, waiting the final order of this court; that the order requiring the sum of \$978.87, being one-half of the net proceeds of such sale, to be deposited in this court, was made upon the strength of the representation that before the sale in partition the right, title, and interest of the defendant William S. Harris was on October 24, 1900, attached by virtue of a writ of attachment out of the Supreme Court of this state at the suit of Eugene M. Coffield, trustee, against William S. Harris; that, beyond causing the interest of Mr. Harris in the premises to be attached, neither Mr. Coffield as trustee nor any other person for him or on his behalf in any way or manner prosecuted the attachment suit, but, on the contrary, has been and is in such laches as entirely to lose his lien under the attachment; that the conveyance by William S. Harris to Omri F. Hibbard, as receiver, was for the benefit of the petitioner William Johnston and that the sum so de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

posited in this court, and which but for the attachment would have been turned over to the receiver for the petitioner to be credited as a payment on his judgment and execution against William S. Harris, is justly the petitioner's and of right should be paid over to him; that Mr. Hibbard, as receiver, has neglected and failed to make any effort to have the sum withdrawn from this court for the petitioner's benefit, and he therefore prays that an order be made directing the clerk to pay to him, Mr. Johnston, the sum of \$978.87, with its accumulations, or such other order as shall seem proper.

Upon the filing of this petition, an order was made upon all of the defendants, being Omri F. Hibbard, receiver, William S. Harris and Elizabeth J. Harris, his wife, to show cause why the prayer of the petition should not be granted. In the meantime Walter I. McCoy, Esq., an attorney and counselor at law of the state of New York, residing in this state, filed a petition in this cause, in which he avers that the judgment, execution, supplemental proceedings, order of the Supreme Court of New York appointing Omri F. Hibbard receiver, and compelling the execution and delivery of the deed by William S. Harris to him, the receiver, were all procured and brought about by the petitioner as a practitioner at law of the Supreme Court of New York at the expense of much time and labor; that just before the delivery of the deed referred to the defendant William S. Harris, or those acting in his interest and for his benefit in the name of his wife, Elizabeth J. Harris, acting through Mr. Coffield, her sister's husband, procured out of the Supreme Court of this state as a means of defeating the order to convey the writ of attachment referred to in the petition of Mr. Johnston, under which writ the right, title, and interest of William S. Harris in the property referred to was attached; that for the purpose of procuring the judgment of the Supreme Court of New York and the orders and deed made thereunder, and to compel Mrs. Harris to discontinue the attachment suit, brought as a pretense for her benefit, but really for the purpose of defeating the orders and deed mentioned, the petitioner, Mr. McCoy, instituted, carried on, and brought to a successful conclusion proceedings in the Supreme Court of New York to attach Mrs. Harris for contempt of that court; that the matter was referred to a referee of that court to take proofs and report his conclusions; that it became necessary to take a large amount of testimony before the referee to controvert and disprove the testimony of Mrs. Harris and her husband and others, to the effect that the attachment suit was brought by her without knowledge on her part of the judgment and order thereunder of the Supreme Court of New York; that the fraud thus perpetrated upon the order of the Supreme Court of the state of New York was one so cunningly conceived and executed

that its disclosure was a matter of great difficulty to the petitioner, and involved the expenditure of a very large amount of study, time, and proofs, and the raising of novel and difficult questions of law; that the report of the referee upon the proofs was duly confirmed, and the Supreme Court of New York made an order July 28, 1902, holding Mrs. Harris guilty of contempt of its order of July 11, 1900, and fining her the amount of the judgment and various costs and expenses of the contempt proceedings, amounting in all to the sum of \$1,908.08, and further ordering that she be committed until she pay the fine or until she pay all of the fine except the amount of the judgment and vacate the attachment; that all proceedings taken by the petitioner Mr. McCoy in obtaining and protecting the judgment and the orders of the Supreme Court of New York and the deed of Mr. Harris to Mr. Hibbard, receiver, under which Mr. Johnston now claims the fund in this court, were taken by the petitioner as attorney at the instance and employment of Mr. Johnston and for his benefit; that the petitioner has received from Mr. Johnston over and above his necessary disbursements in the proceedings the sum of \$30.32, and has received no other fee for or on account of his services, and he prays that he may be made a party to this cause for the purpose of his application, and that he may be permitted on the hearing of the petition of Mr. Johnston to make proof of the nature and value of his services, and that he may be decreed to have a lien for the payment of his services in procuring the fund in court upon any and every part of the fund that may be found to be payable to Mr. Johnston, and that an order may be made that such amount be paid by the clerk to him or to his solicitor. Upon the filing of this petition an order was made upon William Johnston to show cause why the prayer of Mr. McCoy's petition should not be granted, and both petitions came on to be heard together.

The petition of Mr. Hibbard, filed on July 2, 1902, avers that the master to whom the cause was referred reported that he, Mr. Hibbard, had only a life estate in the premises sought to be partitioned, because of the omission of words of inheritance in the deed to him, and the use in the conveyance after the petitioner's name of the words "successors and assigns"; that under the laws of the state of New York where the deed was drawn, executed, and delivered, and under the well-settled practice of attorneys having to do therewith, the words of limitation of the estate, which are properly used to convey all the estate, including one of inheritance, of a judgment debtor to a receiver appointed in proceedings supplemental to execution, are those used in the deed to the petitioner; that the order of the Supreme Court of New York in the proceedings supplemental to execution required Mr. Harris to convey his entire estate in the premises to the petitioner, and

that it was in obedience to that order that the deed was made; that to the best of the knowledge and belief of the petitioner both parties to the deed fully intended that it should convey, and fully believed that it did in fact convey, to the petitioner the entire estate of Mr. Harris in the premises, and he prays that he have leave to show that under the deed as it stands he is entitled to one-half of the proceeds of sale subject to the inchoate right of dower of Mrs. Harris, and that, if under the deed it should be determined that he is not so entitled, he have leave to take proper proceedings to reform the deed so as to carry out what may be shown to have been the purpose and intention of the parties to it, and for further or other relief. On the filing of this petition, an order was made that the complainant show cause on July 7, 1902, why the relief prayed should not be granted.

The decree for sale, which was filed on May 22, 1902, confirmed the master's report, and ascertained, adjudged, and declared that the rights and interests of the parties to this suit in the premises sought to be partitioned were as follows: The complainant was seised in fee of an equal undivided one-half part of the premises. The defendant Omri F. Hibbard, receiver, was seised of a life estate in an equal undivided one-half part of the premises, subject to the inchoate right of dower of the defendant Elizabeth J. Harris, wife of William S. Harris, therein. The defendant William S. Harris was seised of an equal undivided one-half part of the premises, subject to the life estate of the defendant Omri F. Hibbard, receiver, therein, and also subject to the inchoate right of dower therein of his wife, and the defendant Elizabeth J. Harris was seised of an inchoate right of dower in an equal undivided one-half part of the premises. On July 9, 1902, an order was made that the defendant William S. Harris show cause on July 15, 1902, why the above-mentioned decree should not be opened and amended so that the right and interest of the defendant Omri F. Hibbard, receiver, should be by final decree ascertained, adjudged, and declared to be that he was seised in fee simple of an equal, undivided one-half part of the premises subject to the inchoate right of dower of the defendant Elizabeth J. Harris, the wife of William S. Harris. This order to show cause and also the one last above mentioned it would seem were heard together on July 15, 1902, and on that date an order was filed in which it was adjudged and decreed that the report of the master stand ratified and confirmed, except as to the rights and interests of the defendants Omri F. Hibbard, receiver, and William S. Harris, and that the complainant, Charles F. Harris, and the defendant Omri F. Hibbard, receiver, were each seised of an undivided one-half part of the premises, and that the undivided one-half to which Mr. Hibbard was entitled was subject to the inchoate right

of dower of the defendant Elizabeth J. Harris therein, and the decree was thereby opened and modified to the extent indicated, and no further. The order amending the decree in this cause operated, in effect, to reform the deed given by the defendant William S. Harris to the defendant Omri F. Hibbard, receiver; the actual reformation of the conveyance being entirely unnecessary because the land had been sold by virtue of the decree and a good title made to the purchaser, the proceeds of sale taking the place of the land for the purpose of distribution, and in making that distribution the question of the character of the title of Mr. Harris, as it stood at the time of the sale, was only incidentally, though necessarily, involved. On the hearing before me counsel for Mr. McCoy, who, in turn, is counsel for Mr. Hibbard, pressed for an order that the fund be turned over to Mr. Hibbard. This contention in my opinion is sound, and should prevail. Mr. Johnston cannot complain of it, as by his own sworn petition it is made to appear that Mr. Hibbard was appointed in his behalf, in aid of his execution, issued upon his judgment, recovered against Mr. Harris in the state of New York. Mr. McCoy, as I understand it, does not object to this disposition of the matter, as he is the attorney of both Mr. Johnston and his receiver, Mr. Hibbard; his, Mr. McCoy's petition having been filed as a precautionary measure for the purpose of protecting himself, and having this court adjudge what he is reasonably entitled to have and receive by way of compensation for his services to Mr. Johnston in the New York Supreme Court, and to have it awarded to him by this court out of the fund in case it be ordered to be distributed directly to Mr. Johnston without the intervention of the New York receiver.

The view I take of this matter renders it unnecessary for me to find what upon the testimony is the value of Mr. McCoy's services, or how much Mr. Johnston paid him on account of services and expenses in the New York proceedings. I would not hesitate for one moment to make this ascertainment and adjudication as between Mr. McCoy and Mr. Johnston, were it not for the fact that I am firmly convinced that the law of this state recognizes Mr. Hibbard, receiver, as the person entitled to administer the fund which is in this court in this cause; and that, too, under the direction of the court that appointed him, namely, the Supreme Court of the state of New York.

In *Bidlack v. Mason*, 26 N. J. Eq. 230, it was held that on principles of comity the aid of this court will be extended to a receiver of a foreign corporation seeking to obtain possession of property of the corporation here, as against the officers of the company, who may be endeavoring by fraud or subterfuge to withhold it. In the case just cited a suit had been brought in the Supreme Court of New York and an order made enjoining

the company and appointing a receiver. Chancellor Runyon remarked, at page 233 of 28 N. J. Eq., that it was apparent that the defendants Mason and Fleming were contriving to protect Mason in the possession of the property of the company as against the receiver and those whom he represented, namely, the creditors and stockholders. Mr. Johnston, in the case under consideration, is not endeavoring surreptitiously to possess himself of the property to which the receiver is entitled. He is openly demanding the fund as his, and he certainly has the beneficial interest in it; but it is the property of the New York receiver who has a right to take it into his possession and administer it under the laws of the state of New York. He is bound to make a report to the court appointing him and obtain his discharge in that court, and on the state of facts here presented it would, in my judgment, be a great violation of interstate comity and of the respect due from one court to another for this court to distribute this fund. In *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666, it was held that an assignment of an annuity, though due from parties and property out of the jurisdiction of this court, made by the person to whom it belongs to a receiver here under the direction of the court, is good, and would enable the receiver to collect it in a foreign state. The principle thus enunciated is entirely apposite to the facts of the case at bar. Chancellor Runyon in that case remarked at page 318 of 19 N. J. Eq. (97 Am. Dec. 666) that an assignment of a chose in action by the person to whom it belongs, even if by compulsion of the law of the place where made, is good everywhere. Therefore it follows that the conveyance made by William S. Harris to Omri F. Hibbard, the receiver appointed by the Supreme Court of the state of New York by the compulsory order of that court, is good here, and by comity will be enforced here. In *Orient Ins. Co. v. Rudolph*, 69 N. J. Eq. 570, 61 Atl. 28, it was held that, where property belonging to a resident of New Jersey is garnished in another state by valid proceedings taken in that state, the title of the receiver based thereon may be asserted in this state. In *Falk v. Janes*, 49 N. J. Eq. 484, 23 Atl. 818, it was held that a foreign receiver will not be refused recognition as a suitor in our courts, even if a claim of one of our own citizens be injuriously affected thereby, if the receiver prosecutes solely in behalf of a party who is also a citizen of this state. Now this is entirely pertinent. Here the foreign receiver, Mr. Hibbard, is prosecuting solely in behalf of Mr. Johnston, a citizen of Trenton. This case of *Falk v. Janes* was reversed in *Janes v. Falk*, 50 N. J. Eq. 468, 26 Atl. 138, 35 Am. St. Rep. 788, but not upon the point just exploited, and therefore the law on this question is that stated by Vice Chancellor Emery in the case in this court.

Having reached the conclusion that Mr. Hibbard, as receiver, is entitled to the money

in court, namely, the proceeds of the sale of the undivided interest in the land which was conveyed to him by Mr. Harris, the judgment debtor, I am confronted with the practical difficulty that an attachment, in form at least, appears to be a lien upon the fund, because of the levy of the writ upon the interest of the defendant William S. Harris in the land the day before he conveyed it to the receiver, Mr. Hibbard, and the attaching creditor is not before the court. The order of the New York Supreme Court requiring Mr. Harris to convey is in evidence before me, and it contains a provision forbidding Mr. Harris, his agents, servants, and attorneys, and all others, from making or suffering any transfer or other disposition of, or interference with, the property of the judgment debtor, except in obedience to the order until further direction. It is under this clause doubtless that the proceedings for contempt were taken against Mrs. Harris for her alleged fraudulent conduct in causing the attachment to be issued by Mr. Coffield, as her trustee, against the premises in question, to defeat, as it is said, the claim of the complainant, and in which contempt proceedings she was condemned.

The interest, if any, which Mr. Coffield, as trustee for Mrs. Harris, has in the proceeds of the sale, by virtue of his attachment, has not been settled. Mr. Coffield is not a party to this cause at all, and any rights which he may have would not be affected by any order or decree made on the petitions which I have been considering. His laches may be entirely inexcusable, and, aside from laches, the claim on which the attachment was issued may be entirely unfounded; but surely I cannot summarily and in collateral proceedings adjudge his claim to be invalid, and that is what, in effect, I would have to do if I made an order distributing the funds in court without Mr. Coffield being a party. Furthermore, it should be stated that the evidence before me shows that Mr. Hibbard gave a bond in the sum of \$200 only in New York when appointed receiver by the Supreme Court of that state. The security was doubtless sufficient at the time the bond was given; but, as it now appears that he is entitled to receive a sum approximating \$1,000, he should be required to enter into bond in at least the sum of \$2,000 in this state before receiving the money, assuming that it will ultimately go to him.

The situation with reference to the pleadings and the parties being as above set forth, the matter is not in a posture in which an order distributing the fund in court can properly be made at this time. Unless Mr. Hibbard shall within 30 days after the filing of these conclusions apply by appropriate pleading in this cause or by original bill, as he may be advised, for the relief to which I have indicated he is entitled, I will entertain a renewal of the applications of Mr. Johnston and Mr. McCoy for an order distributing the

fund. While I hold that, on the record before me and the arguments made, the fund should go to the receiver, the question must not, as it cannot legally, be considered settled against any one not before the court and consequently unheard. As to such a party the question is an open one. And it may be, too, that the attachment will have to be vacated in the court out of which it issued. These suggestions are for the consideration of counsel.

(76 N. J. E. 171)

**GALLAGHER v. TRUE AMERICAN
PUB. CO.**

(Court of Chancery of New Jersey. Jan. 2, 1909.)

1. TIME (§ 11*)—FRACTIONS OF A DAY.

The law will take account of the fraction of a day when justice so requires.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 53; Dec. Dig. § 11.*]

2. JUDGMENT (§ 772*)—LIEN—PRIORITY.

If, on a day when this court adjudicates that a corporation is insolvent and appoints a receiver thereof in whom title to the company's real and personal property thereupon vests, a judgment is recovered and entered against the corporation at an earlier hour, the judgment is to be paid out of the proceeds of the sale of the company's land as a preferred claim, because the judgment was a lien upon the land at the time of the appointment of the receiver. *Doane v. Milville Mutual Ins. Co.*, 43 N. J. Eq. 522, 11 Atl. 739, distinguished.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1329, 1331; Dec. Dig. § 772.*]

(Syllabus by the Court.)

Bill by Charles H. Gallagher against the True American Publishing Company. From a decision of the receiver of defendant corporation refusing a preference of a claim, the Trenton Trust & Safe Deposit Company appeals. Reversed.

Charles E. Gummere, for appellant. James & Malcolm G. Buchanan, for receiver.

WALKER, V. C. On April 23, 1908, at 10 minutes after 4 o'clock in the afternoon, a judgment was recovered in the Supreme Court of this state against the defendant company, impleaded with others. The suit was on a promissory note of which the defendant company was the maker, and consequently the party primarily liable. The other defendants were indorsers. At 8 o'clock in the evening of the same day the bill of complaint in this cause was presented to this court, and an order was thereupon made appointing Edward L. Katzenbach, Esq., receiver of the defendant company. The bill and order were, according to the practice, marked filed as of April 23, 1908, the date of their presentation and consideration, and were actually filed in the clerk's office the next day. Mr. Katzenbach qualified as receiver on the 29th, the day the papers were lodged in the clerk's office. A claim by the plaintiff as a preferred creditor against the defendant

corporation in respect to the lands of the defendant was duly made and presented to the receiver, who disallowed it as a preference. Hence this appeal.

The solution of the question here presented depends upon whether the law will take account of the fraction of a day. Our act concerning judgments (1 Gen. St. 1895, p. 1841, § 2) provides that a judgment shall bind lands from the time of the actual entry thereof on the records of the court. Section 68 of our present corporation act (Revision 1896 (P. L. pp. 277, 299)) provides that, upon the appointment of a receiver, the property of an insolvent corporation forthwith vests in him; and therefore the property of the defendant company vested in the receiver on the day the appellant's judgment was recovered. Qualification by giving bond and taking the statutory oath is only necessary to enable the receiver to act. It is not a prerequisite to the vesting of title in him. Further, the corporation act in section 86 (P. L. 1896, pp. 277, 304) provides that, upon distribution by the receiver, judgment creditors shall be preferred when the judgment has not been by confession for the purpose of preference.

In *Doane v. Milville Mutual Ins. Co.*, 43 N. J. Eq. 522, 11 Atl. 739, it was held in this court that a bona fide judgment creditor is entitled to preference in payment of general creditors of an insolvent corporation, but that such preference does not include a judgment obtained against the company on the day when the court took control thereof by issuing an order restraining the company from transacting business. This proceeded upon the principle that the law knows no parts of days. This case was reviewed in the Court of Errors and Appeals and reversed, but not upon the question to which reference has just been made. In this case (*Doane v. Milville Mutual Ins. Co.*, 45 N. J. Eq. 274, 282, 17 Atl. 625) the Court of Errors and Appeals remarked that it was in accord with prevalent judicial views to hold that judgment creditors should be preferred so far as they had acquired liens, and if real estate had become subject to judgment, or if personal property had been bound by delivery of an execution to the sheriff, the rights thus created should not be disturbed. This observation appears to modify what was held by this court in the same case regarding the lien of judgment creditors whose judgments are recovered on the same day a bill in insolvency is filed against a corporation, and the court takes control of it by the issuance of a restraining order, but does not, as I understand it, modify the views of this court in that case on the facts of that case which were before the court, for in that case there does not appear to have been any proof as to the time in which the judgment was entered with reference to the time when the order

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to show cause and restraining order was made. Had these facts been made to appear, the decision of the court of chancery in that case might have been otherwise than it was; and, in the absence of such proof, the decision to my mind is unassailable. Certainly the court cannot take cognizance of a fraction of a day unless the particular time is brought to its attention. Regarding, then, the case of *Doane v. Milville Mutual Ins. Co.* in this court to have been decided with reference to the particular facts of that case, and having regard to the observation of the Court of Errors and Appeals in the same case, effect can be given to the ruling in the latter court without holding that it overrules the decision of this court. After all, the rule that the law does not take account of the fraction of a day is, like almost every other rule, subject to exceptions, and one exception is that which is recognized in the contest between judgment creditors as to who has the prior lien by virtue of a levy made on the same day with another or with other levies. Now, as it is incumbent upon courts to decide who is first in point of time with reference to the delivery of a writ to a sheriff or other officer, and of the priority of a levy upon property as between several executions, it would be quite an anomaly, if not absurd, for this court to refuse to take account of time as between a judgment creditor and a receiver each claiming priority of right in the real estate of an insolvent corporation,—the judgment creditor by reason of the entry of a judgment, which, by the terms of the statute, is a lien upon the land of the defendant upon its entry, and the receiver in behalf of unsecured creditors asserting that the judgment merely ascertains the amount of the debt due to the creditor, and that no lien thereunder exists upon the land in his possession and to which he holds title by virtue of the statute and order of his appointment.

The law does take account of parts of days in cases where it is essential so to do in order that justice may be done. *Johnson v. Pennington*, 15 N. J. Law, 188. And the exact time of the entry of a judgment may be proved as matter de hors the record. *Hunt v. Swayze*, 55 N. J. Law, 33, 25 Atl. 850. The doctrine that the law will not take cognizance of the fractions of a day is a legal fiction, and it will not be permitted to work injustice. *Clark v. Bradlaugh*, L. R. 7 Q. B. Div. 151, per Denman, J., at page 153, and per Williams, J., at page 154, affirmed on appeal S. C. 8 Q. B. Div. 63.

In *Hoppock's Ex'rs v. Ramsey*, 28 N. J. Eq. 413, it was held that where a conveyance of land was made on the same day that a judgment was recovered against the grantor, and there was no allegation or proof to show which preceded the other in point of time, the master's report that the judgment

was entitled to priority should be sent back for further proofs. This is a decision to the effect that, as between a judgment and a conveyance made on the same day, it is proper and lawful to show which preceded the other in point of time. And that is practically the question which is before me on this appeal. The petitioner is a judgment creditor, whose judgment was entered against the defendant at 10 minutes past 4 o'clock on a certain day, and the receiver occupies the position of a grantee, upon whom title devolved, not by a deed it is true, but by act of the law operating through the order of his appointment, made at 8 o'clock in the evening of the same day. The fact is that the appellant's judgment was entered 3 hours and 50 minutes (practically 4 hours) before the appointment of the receiver, and the consequent divesting of title to its lands out of the defendant and into the receiver by virtue of the order of his appointment. To hold that the appellant's judgment was not a lien upon the lands of the defendant at the time of the appointment of the receiver would be to refuse to give effect to two statutes, namely, that which makes a judgment a lien upon lands from the time of its entry and that which provides that bona fide judgment creditors shall be paid by way of preference out of the assets of an insolvent corporation.

These views lead to a reversal of the decision of the receiver. I will advise an order that the appellant's judgment be paid by way of preference out of the proceeds of the sale of the defendant corporation's real estate in the hands of the receiver.

HYMAN et al. v. TASH.

(Court of Chancery of New Jersey. Aug. 1, 1908.)

1. DEEDS (§ 175*)—BUILDING RESTRICTIONS—ESTOPPEL.

Where adjoining lots are held under building restrictions, one landowner cannot complain of building operations of his neighbor where he has conducted operations of the same character.

[Ed. Note.—For other cases, see *Deeds*, Dec. Dig. § 175.*]

2. DEEDS (§ 176*)—BUILDING RESTRICTIONS—ENFORCEMENT—IMMATERIAL VIOLATION.

A landowner cannot complain of a neighbor's violation of a building restriction, where the violation is immaterial and does not prevent execution of any general building plan.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 546; Dec. Dig. § 176.*]

3. DEEDS (§ 171*)—BUILDING RESTRICTIONS—EFFECT—"DWELLINGS."

A clause in a deed restricting the location of "dwellings" applies to business buildings and other structures, where the neighborhood is a residential section and it appears that the original owners never contemplated the erection of business buildings on the street.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 538; Dec. Dig. § 171.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2285-2295; vol. 8, p. 7646.]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. DEEDS (§ 170*)—BUILDING RESTRICTIONS—CONSTRUCTION.

A building restriction must be construed so as to make the parties' intention effective.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 170.*]

5. DEEDS (§ 173*)—BUILDING RESTRICTIONS—EFFECT—ORDER OF PURCHASE.

Complainants' right to enjoin defendant from violating a building restriction depends upon the relative dates of their titles, where the common grantors did not impose any restriction upon themselves, the scheme was not made public, and it does not appear that each purchaser was made aware that every other purchaser was to be subject to and have the benefit of the plan; and, one of the complainants having acquired title the same day defendant's immediate grantor acquired his subject to the restriction, neither he nor defendant, as between themselves, is a prior or subsequent grantee, but the remaining complainants having acquired title subsequent to that time, they can enforce the restriction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 543; Dec. Dig. § 173.*]

6. INJUNCTION (§ 62*)—BUILDING RESTRICTIONS—ENFORCEMENT.

Property owners having acted promptly to enforce a building restriction against defendant, and he having progressed with the building in violation of the restriction and in face of warning, injunction lies to secure removal of the building.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124-127; Dec. Dig. § 62.*]

Bill by Susie Hyman and others against Albert T. Tash. Decree for complainants, excepting complainant Vann.

George O. Vanderbilt and Adrain S. Appleget, for complainants. Fergus A. Dennis, for defendant.

WALKER, V. C. The complainants and the defendant are owners of lots fronting on the easterly side of Witherspoon street in Princeton. The properties of all of the parties were part and parcel of a larger tract of land of which John Murphy, late of the borough of Princeton, died seised intestate, and which was afterwards sold off in building lots by his heirs at law. On December 7, 1894, Robert S. Murphy, attorney in fact for the heirs of John Murphy, deceased, sold and conveyed to William W. Nixon a portion of the lands, and he Nixon, on October 23, 1901, sold and conveyed the same premises to the defendant, Albert T. Tash. In the deed from Murphy to Nixon is the following restriction: "Second. That no dwelling shall be erected upon this lot except those facing upon said Witherspoon street, and the front line of said dwelling house shall not be less than fifteen feet from said street, and said dwelling house shall be erected in the center of said lot hereby conveyed, and equal distant from the side line fences of the lot." The same identical restriction is contained in the deed from Nixon to Tash. The same identical restriction is to be found in the deeds of the complainants. The scheme of the original owners, the Murphy heirs,

undoubtedly was to make the tract of land abutting on Witherspoon street owned by them a residential section, but the testimony does not show that the grantees of the Murphys assented to the scheme or even knew of it. The defendant, Tash, in disregard of the restriction in his deed, and shortly before the filing of the bill and while occupying a dwelling house erected on his lot in practical conformity with the restrictions in his deed (the side lines being somewhat at variance with the restriction), commenced the erection of a frame building immediately adjoining the side line of his dwelling house on the southwest, and extending laterally from the dwelling to the line of the Hymans and out to the end, binding upon the easterly line of Witherspoon street. This building, at the time the injunction issued, was inclosed. It is one story high, and shuts off the view up and down Witherspoon street from the front porches and the windows in the first story, and to some extent, necessarily, the second story, of the houses of the complainants.

The defendant in his answer admits the erection of the building in question, and seeks to justify it under a claim of right. He says that the erection of the building is for store purposes only, and forms no part of his dwelling house and is entirely detached therefrom, and that he has therefore not done anything in contravention or breach of what he calls the "special covenants and stipulations in the conveyances under which he claims title." He also claims that the complainants have not built in strict conformity with the restrictions in their deeds, and insists that they have not built in the center of their lots. Neither has he done so. None of the lots run at right angles to Witherspoon street; but are deflected at some angle. The fronts of the buildings are parallel, or nearly so, with the street, hence the side lines of the buildings are not parallel with the side lines of the lots. It does not lie in the mouth of the defendant to criticize the complainants in respect of this feature of their building operations, for they are all practically alike. And, whether so or not, the defendant cannot successfully contend against the complainants in this regard if the violations of the restrictions be immaterial, and such as do not prevent the general plan relating to the street from being carried out, assuming that there be a general plan. *Morrow v. Hasselman*, 69 N. J. Eq. 612, 616, 61 Atl. 369.

A question raised in limine is whether the restriction is not directed solely against dwellings, in which case the building of stores and erection of buildings other than dwellings would not be prohibited. This question, in my judgment, is easy of solution. The neighborhood is a residential section, and undoubtedly the heirs of the Murphy

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

estate never contemplated the erection of business buildings on Witherspoon street. The photographs offered in evidence show that that idea has been acted upon by the building of cottages by the parties to this suit, complainants and defendant, and by others owning property on the tract. To prohibit the building of a dwelling within 15 feet of the street and to permit a store or other building to be run out to the street seems at a glance to be destructive of the idea that was originally entertained in imposing the restriction, which idea has been fully carried out by all of the owners of lots.

In *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206, Chancellor Runyon, in restraining the violation of a building restriction, remarked, at page 215 of 24 N. J. Eq., that in *Child v. Douglas*, 1 Kay, 560, it was held that building a wall or fence across a strip on which the defendant was bound by covenant not to erect a building would be a violation of the covenant. Now, if the putting up of a wall in lieu of a building is violative of the spirit of a covenant against erecting a building, then surely the erection of a store where a dwelling could not be erected is a violation of a restriction in a deed forbidding the placing of a dwelling within 15 feet of a street line.

The restriction must of course be construed so as to effect the intention of the parties. See, also, *Ogontz L. & I. Co. v. Johnson*, 168 Pa. 178, 31 Atl. 1008.

The leading case in this state on the subject of building restrictions of the character of those under consideration is, I take it, *De Gray v. Monmouth Beach Co.*, 50 N. J. Eq. 329, 24 Atl. 388, affirmed on the opinion of Vice Chancellor Green. See *Atlantic City v. New Auditorium Pier Co.*, 67 N. J. Eq. 610, 619, 59 Atl. 158.

In *De Gray v. Monmouth Beach Co.* it was held: "Where there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues, and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser; and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof; and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan—one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase."

And in *Leaver v. Gorman* (N. J. Ch.) 67 Atl. 111, it was held: "Equity will restrain the violation of a covenant entered into by

a grantee, restrictive of the use of lands conveyed, not only against the grantee covenantor, but also against all subsequent purchasers with notice of the covenant, whether it run with the land or not; but if the original grantor does not bind himself, then his grantee, having no right of action against him, cannot pursue any other grantee to whom the original grantor may subsequently convey the whole or a part of the remaining lands."

In this case (*Leaver v. Gorman*) Vice Chancellor Stevens observed, at page 112 of 67 Atl.: "There is, however, this distinction: The original grantor, in imposing the covenant upon the grantee, either may or may not bind himself. If he does not bind himself, then his grantee, having no right of action against him, cannot pursue any other grantee to whom he may subsequently convey the whole or a part of the remaining lands."

In *Leaver v. Gorman*, the complainant was the owner of two improved lots of land in Asbury Park, and the defendant the equitable owner of two other lots. Mr. Bradley, who laid out the park, while imposing building restrictions upon his grantees, had remained unbound himself. Vice Chancellor Stevens in this connection remarked, also at page 112 of 67 Atl.: "The consequence is that, while a subsequent grantee of Mr. Bradley of one lot could enforce the covenant against a prior grantee of another lot, a prior grantee could not enforce the covenant against the subsequent grantee. * * * It so happens that in the case of defendant's unimproved lot the Bradley deeds under which complainant derives title were given before the Bradley deed under which defendant derives title, consequently complainant is not in a position to enforce the covenant against the owner of this lot. As to the lot already used as a mineral water factory, it so happens that complainant's is the later title, and, consequently, she is in a position to enforce the covenant; * * * and she possesses this right, scheme or no scheme, for the covenant required by Mr. Bradley of his grantee of lot 141 was undoubtedly intended for the benefit of the remaining land, of which complainant's predecessor in title afterwards obtained a part."

While I believe that the Murphy heirs had in mind a scheme of improvement for their lands binding upon Witherspoon street, which contemplated the erection of dwellings at a uniform distance from the street line, nevertheless they imposed no restriction upon themselves, and the scheme was not made public, and it does not appear that each purchaser was made aware that every other purchaser was to be subject to and to have the benefit of the plan. Therefore the complainants' right to an injunction in this case depends upon the date of their title with reference to the date of the defendant's title, it

being perfectly apparent that the restriction in the Nixon and Tash deeds was intended for the benefit of the remaining land.

The complainant, Vann, acquired title from the Murphy estate upon the same day that Nixon, the grantor of the defendant, acquired his title, namely, June 1, 1895. Therefore neither Vann nor Nixon, under whom Tash claims, can be said, as between themselves, to be prior or subsequent grantees of the Murphy estate; but, the deeds from the Murphy estate to the complainants, Brownley, Hyman, and Woodson, were all made long after the deed to Nixon, and that of the complainant, Brownley, was made after Nixon's conveyance to Tash.

Assuming, then, that the complainant Vann is not in a position to ask the interposition of this court because his conveyance is contemporaneous with and not subsequent to that under which the defendant claims, nevertheless the other complainants, because holding titles subsequent in point of time to that derived by Tash mediately from the Murphy estate, are entitled to the injunction for which they pray.

As the complainants acted promptly in this matter, and as the defendant progressed with his building in the face of warning, the complainants are entitled to a mandatory injunction to secure the removal of the structure which has been erected by the defendant in violation of the restriction in his deed. *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 869. The complainants are entitled to costs.

The decree will be entered, and the injunction go in the name of the complainants other than Vann; but the result will necessarily be exactly the same as though he had, like the other complainants, a beneficial interest in the decree.

(75 N. J. E. 274)

BUCHANAN et al. v. BUCHANAN.

(Court of Errors and Appeals of New Jersey. Feb. 9, 1909.)

1. DESCENT AND DISTRIBUTION (§ 89*)—ACTION TO RECOVER ASSETS—PARTIES.

The next of kin of a decedent have no standing in a court of law or equity to maintain an action for the recovery of property alleged to belong to the estate of their decedent. Such actions can be brought only by the duly appointed personal representative of the deceased.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 346; Dec. Dig. § 89.*]

2. EXECUTORS AND ADMINISTRATORS (§ 438*)—RECOVERY OF ASSETS—ACTION BY NEXT OF KIN.

The exception to this rule arises where the personal representative of the deceased, by reason of collusion with the defendant or otherwise, is derelict in the performance of his duty, when, as in the case of a delinquent trustee, the next of kin, like the cestui que trust, may maintain the action, joining the administrator as a party defendant. *Flagler v. Blunt*, 32

N. J. Eq. 518; *McCarter, Attorney General, v. Clavin* (N. J. Ch.) 68 Atl. 599, distinguished.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1766; Dec. Dig. § 438.*]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by George Buchanan and others against Reba Russell Roselle Buchanan. Decree for plaintiffs (68 Atl. 780), and defendant appeals. Reversed and remanded.

Carrow & Kraft, for appellant. John W. Westcott, for respondents.

DILL, J. This suit was brought in equity by the heirs at law and next of kin of Dr. John Buchanan, deceased, to impress a trust *ex maleficio* upon certain real and personal property in the possession of the defendant, which it was claimed was derived from or purchased with moneys embezzled from the decedent. The complainants allege in their bill that they are the only next of kin of the late Dr. Buchanan; that at his death he owed no bills; that no letters of administration were taken out on his estate; that Dr. Buchanan was the owner of and conducted a large and profitable business in proprietary medicines and in the publication of medical works; and that the defendant, while acting as his clerk or assistant, appropriated to her own use, both before and after his death, the profits of the business, together with moneys and other property of the decedent, and invested the same in specific real and personal property. The relief prayed for was that the defendant be required to deed to the complainants the real estate in her name, that she pay over to them and account for all moneys and deliver all securities in her possession or under her control, all of which were claimed to belong to the decedent's estate, and that the complainants should have full discovery and an injunction against the disposition of the property. The defendant by her answer denied that the business referred to belonged to the deceased, and averred that the business and its earnings and the real and personal property described were all her own, and that Dr. Buchanan had no money or property at the time of his death. The learned Vice Chancellor found the essential facts to be as stated in the bill, and advised a decree, enjoining the defendant from in any wise disposing of the property in her possession or under her control until the appointment of an administrator, to whom, when appointed, defendant is required to surrender the same. The decree, in accord with the theory of the bill, was in effect an adjudication, which stripped the defendant of all title to the property in her possession or under her control, and directed her to surrender it to an administrator, when appointed. The defendant appeals from the decree, and urges that the com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plainants, as next of kin, have no standing in equity to recover or to establish a resulting trust as to property of a decedent which is in the actual possession of and claimed by a third person, but that such equitable rights and remedies vest only in the executors or administrators as the duly appointed personal representatives of the decedent.

We think that this position is well taken. Heirs, next of kin, and creditors cannot, in their own names, prosecute actions at law or suits in equity to recover the unadministered estate of a decedent or to collect debts or other choses in action due him. Such suits can be maintained only by the qualified personal representatives of the deceased.

Heretofore the precise question involved in this case does not appear to have been fully considered by this court, although the basic principle was recognized and applied by our Supreme Court in 1813, in *Mathis v. Sears*, 3 N. J. Law, 1043, and by the Court of Chancery in 1831, in *Shaver v. Shaver*, 1 N. J. Eq. 437. In 1889 the Court of Chancery (*Van Fleet, V. C.*) touched upon the doctrine in *Hayes v. Hayes*, 45 N. J. Eq. 461, 17 Atl. 637, affirmed by this court as *Hayes v. Berdan*, 47 N. J. Eq. 567, 21 Atl. 339.

Chancellor Williamson, in 1857, in *Harrison v. Righter*, 11 N. J. Eq. 389, applied the rule even where the next of kin of a deceased partner sought to call the surviving partner to account, the administrator being a party defendant, and held that, in the absence of collusion, a suit could not be maintained.

In *Mathis v. Sears*, supra, the children of Paul Sears, deceased, sued the defendant on the ground that their father during his lifetime had paid the defendant for a piece of land; that the defendant had promised their father a deed, but had failed to perform. The plaintiffs recovered judgment below. The Supreme Court reversed, saying: "The legal representative of either party is not brought before the court. A child, as such, cannot sue for a debt due to his father; it must be his executor or administrator."

From the opinion in *Shaver v. Shaver*, supra, a chancery suit by the next of kin to recover a legacy claimed to be due their ancestor, we quote the following: "Next of kin are not personal representatives, and cannot come as such into court representing the ancestor. If they were permitted to do so, it is conceived that much inconvenience would result from it; more, probably, than can well be foreseen. I have examined the books with some care, and have not been able to find a single case or principle to support the present proceeding." After referring to and recognizing the right of next of kin to bring executors or administrators to an account, the court adds: "But in this case the complainants seek to get in their hands the moneys of the estate or of the intestate, not from the administrator, but from some third person in whose hands the property happens to be; and to get it, not for the purpose

of paying debts, or applying it in a course of administration, but of appropriating it directly to their own use."

The same principle was recognized in the decision of Vice Chancellor Van Fleet in *Hayes v. Hayes*, supra: "The title to the debt in question, on the probate of the testator's will, vested in his executrix, together with the right to all remedies given by law for its recovery. All goods and chattels, actions and commodities, which were of the testator in right of action or possession, as his own, at the time of his death, pass, on his death, to his executor."

That the law has been so applied, whether the next of kin sue at law upon debt or for conversion of property belonging to the estate of the deceased, or whether they invoke the aid of a court of equity, may be shown by a brief review of the leading cases in England and the United States.

An early case (1737) is *Bickley v. Donington*, 2 Eq. Cas. Abr. 253, in which a legatee brought suit against the executor and debtors of the estate of the deceased. Lord Chancellor Hardwicke dismissed the bill in the following words: "The bill is totally improper, and inconsistent with the principles of law and the rules of this court. * * * The whole management of the estate belongs to the executor, and the right of it is vested in him, and not to be taken out of him by creditors or legatees."

In 1802, Lord Eldon, in deciding the case of *Alsager v. Rowley*, 6 Ves. 743, followed the same rule and quoted with approval from the notes of Lord Hardwicke.

Later, the Court of Chancery applied the doctrine strictly in *Stainton v. The Carron Company*, 18 Beav. 146. Legatees filed a bill against the defendant company, in which the testator had been shareholder and agent, and against the legal representatives of the estate, for an accounting and settlement of alleged dealings between the testator and the company, and for a decree requiring the company to turn over certain funds to the executors. Sir John Romilly, Master of the Rolls, sustained a demurrer to the complaint in the following concise language: "It is obvious that the relief prayed by this bill, if proper to be sought by any one, ought to be at the instance of the trustees and executors of the testator's will. * * * I think it unnecessary to go in detail through all the cases to be found on this subject. I think that they may be summed up thus: That the persons interested in the estate of the testator, not being the legal personal representatives, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would probably be lost to the estate."

In *Walker v. Walker*, 25 Law Times Rep. 481 (1871), a bill was brought by legatees against Margaret Walker and the executors

of the will. The complaint alleged that the testator, during his lifetime, had purchased stock of the Bank of Scotland in the name of his sister Margaret; that she held it merely as trustee for the testator, and that it formed part of his estate. Complainants prayed for a declaration accordingly, and for a transfer of the said stock to the executors. Lord Romilly dismissed the bill on the ground that "the executors were the proper persons to sue to recover assets belonging to the testator's estate."

In the United States courts, the case of *Allen v. Simons*, 1 Curt. 122, Fed. Cas. No. 237 (U. S. Circuit Court for Rhode Island), is not only parallel to the case at bar, but is also a leading authority. William Simons died intestate, leaving personal property consisting of a newspaper plant. The bill alleges that, after the death of the intestate, William Simons, Jr., continued to run the business under an apparent title; that he had been merely an agent before his father's death, and that the documents under which he claimed title were invalid. The answer of the heirs of William Simons, Jr., was that he held a valid title to the property in his own name, and not as trustee. Judge Curtis, in refusing to allow the bill for account and surrender of the property, adhered to the well-established rule: "Whatever may have been the interest of William Simons, Sr., in this property, his children did not acquire that interest by his decease. The rule of the common law laid down by Lord Coke (Co. Lit. 8a), that a man, by the common law, cannot be heir to goods or chattels, for *hæres dicitur ab hæreditate*, is in force in Rhode Island, and, upon the decease of any one having personal estate, his children do not become its owners. They acquire only that qualified equitable right to distributive shares of what shall remain after payment of the just debts and funeral charges of the deceased, and the expenses of settling his estate, which is conferred upon them by the statute of distributions. This qualified equitable right can only be worked out through a settlement of the estate by an administrator, appointed according to the laws of the state, who alone has the title to personalty cast on him by those laws, and who alone is competent to sue, either at law or in equity, to reduce the personal property and rights of the intestate to possession."

Flynn v. Flynn, 183 Mass. 385, 67 N. E. 314, decided by the Supreme Court of Massachusetts in 1903, is directly in point. The plaintiff, widow of David Flynn, brought a bill in equity to recover personal property which, she alleged, had been fraudulently conveyed by her husband to his son, the defendant, with the intention of depriving her of her estate. Defendant demurred on the ground that there was no cause for equitable relief, and that the plaintiff was not the proper party to sue. Judge Knowlton sustained the demurrer, and stated his rea-

sons as follows: "If the property was wrongfully conveyed, as the plaintiff alleges, the executors or administrators who are the personal representatives of the deceased are the proper parties to recover it for the benefit of those who are entitled to it. The title to all the personal property of a deceased person vests in his executor or administrator by relation from the time of his death, and no one else can maintain an action for it. Not even the sole heir at law, or a legatee, has any title which he can enforce by suit against a third person. But the plaintiff's rights cannot be enforced by a suit in equity in her own name against those holding her husband's property."

The Supreme Court of Errors of Connecticut ruled upon the question in 1803, in *Taber v. Packwood*, 1 Day, 150: "The right of action, * * * if an action can be maintained, does not belong to the defendant in error, as heir at law, the only capacity in which he sues, but to the executors or administrators on the estate."

Likewise in *Hunter v. Hallett*, 1 Edw. Ch. (N. Y.) 388, the court ruled: "Although a husband holds a bond and mortgage made out in favor of his wife, and receives the interest, yet this is not a reduction into possession. And, if she dies, he cannot sue upon it without taking out letters of administration, even though he may be exclusively entitled. * * * This appears to be a well-established rule, and one which cannot be dispensed with even in a court of equity."

Again, in *Jenkins v. Freyer*, 4 Paige (N. Y.) 47, it was held that one of the next of kin cannot maintain a suit in equity for an account and distribution of the decedent's estate without first taking out letters of administration, although he is exclusively entitled to the beneficial interest therein.

In *Muir v. Trustees*, 3 Barb. Ch. (N. Y.) 477, the complainants, as next of kin of the deceased, filed a bill in equity against the representatives of deceased persons who, pursuant to a paper writing which had been admitted to probate and which appointed them executors, had transferred a large part of the estate of the deceased to the defendant trustees and to the other defendants. The bill alleged that the paper writing was void, and that the deceased died intestate, and prayed for an accounting, and that the property of the deceased which had been transferred as above stated he turned over to them. Chancellor Walworth dismissed the bill, and held that the defendants were "liable to the personal representatives, whenever such shall have been appointed, but not to the complainants. The proper course for the complainants, in that case, would be to procure the appointment of an administrator, and have a suit instituted in his name, to recover the property from any person into whose hands it may have come, and who had converted it to his own use."

Further analysis is unnecessary, but other leading cases which enforce the same rule strictly are: *West v. Howard*, 20 Conn. 581; *Lawrence v. Wright*, 23 Pick. (Mass.) 128; *Woodin v. Bagley*, 13 Wend. (N. Y.) 453; *Caleb v. Mearn*, 72 Me. 231; *Lee v. Gibbons*, 14 Serg. & R. (Pa.) 105; *Champollion v. Corbin*, 71 N. H. 78, 51 Atl. 674; *Douglass v. McCarer*, 80 Ind. 91; *Pond v. Sweetser*, 85 Ind. 144; *Somervall v. McDermott*, 116 Wis. 504, 93 N. W. 553; *Palmer v. Palmer*, 55 Mich. 293, 21 N. W. 352; *Davis et al. v. Corwine and McGuire, Ex'rs*, 25 Ohio St. 688; *McChord v. Fisher's Heirs*, 13 B. Mon. (Ky.) 194; *Davidson v. Potts*, 42 N. C. 272; *Leamon v. McCubbin*, 82 Ill. 263.

These authorities are conclusive of the case at bar. If the defendant embezzled and misappropriated the property of Dr. Buchanan, investing it in the real estate, bank stock, and other property described, she may be liable to the legally qualified personal representative of Dr. Buchanan, but not to the complainants.

On the same principle that permits a cestui que trust to maintain actions which his trustee should bring when the latter neglects or refuses to bring them, the only exception to the rule above stated arises when, although there is an administrator, he neglects or refuses to prosecute suits for the recovery of his decedent's estate. In such case, the next of kin may sue to recover the property, joining the personal representative as a party defendant.

The complainants contend that the decree may be supported upon the doctrine that the next of kin of a decedent may obtain an injunction and the appointment of a receiver for the purpose of conserving the property of a decedent pending the appointment of an administrator. But in our opinion this principle is inapplicable to the present case. The learned Vice Chancellor apparently adopted this theory of the complainants, citing *Flagler v. Blunt*, 32 N. J. Eq. 518; *Hansford v. Elliott*, 9 Leigh (Va.) 79. Although these authorities establish the jurisdiction of a court of equity to conserve property of a decedent in the possession of a third person, yet an analysis of the cases cited and many others shows that this equitable jurisdiction has been assumed only where there is danger of loss if the property, presumptively or actually belonging to the estate, is not protected by an injunction or the appointment of a receiver, pending an application for administration upon the estate.

In *Flagler v. Blunt*, supra, it clearly appeared in a suit by a creditor of a decedent that the defendant was in possession, through a sale made by himself under a claim of ownership, of the proceeds of all the property of which his uncle died possessed, and was about to remove the same from the jurisdiction.

We fully agree with the decision of Chancellor Runyon when he rules that in such a

case a court of equity has power to appoint a receiver to conserve the property, and that, "If it had not such power, there would be a failure of justice. The property would be liable to be taken away out of the state by any designing person before administration could be obtained, and thus those entitled to the estate be defrauded. It must be within the power of this court to prevent so obvious and gross a wrong."

With *Hansford v. Elliott*, supra, also relied upon by the Vice Chancellor, we likewise agree so far as the court there said: "It would be productive of much inconvenience and injustice, if they [the legatees or distributees] could not avail themselves of their equitable rights to enjoin a sale (as in the present case), or to prevent other irreparable mischief, before an administration of the estate could be obtained, or where an executor or administrator should be indisposed to interfere." But further than this we decline to follow this case as an authority, because the judgment apparently affirmed a decree in favor of the complainants for a distribution of the property in question.

The recent case of *McCarter, Atty. Gen., v. Clavin* (N. J. Ch.) 66 Atl. 599, in our Court of Chancery, is not only consistent with the views herein expressed, but well illustrates the precise situation to which the rule of *Flagler v. Blunt* is applicable. In the *Clavin* Case the deceased died seised of real estate of value, and the defendant, claiming to be a creditor of the deceased, had obtained letters of administration, but had permitted the property to be sold for taxes. Foreclosure proceedings had been brought, and the property was likely to be entirely lost. Moreover, a paper had been offered for probate as the will of the deceased, giving rise to litigation that threatened to be protracted. The state claimed the property by escheat, and filed a bill asking that a receiver be appointed to collect the rents and to pay off and discharge the taxes. The prayer was granted, the Vice Chancellor holding that: "Equity would seem to require that a receiver should be appointed to protect the property from loss, and to hold it for the benefit of those to whom it may be finally determined it belongs. * * *

The property is in great danger of loss owing to tax sales and threatened foreclosure. It is clear that, in the absence of an heir, in the absence of an executor or of any lawful appointee entitled to hold the property together, it will be lost, and, in any event, the rents and profits will be misapplied."

Flagler v. Blunt, supra, and like authorities go no further than to maintain that creditors or next of kin of a decedent may appeal to equitable jurisdiction to conserve a decedent's property, which is in danger of loss, pending the appointment of a personal representative, or during the trial of title to such property in a legal proceeding to which

the personal representative of the decedent is a party.

But essentially different is the contention that creditors or next of kin may dispense altogether with a personal representative, and proceed, either at law or in equity, to recover, in their own name and for their own use, property alleged to belong to the estate of the decedent, and that in the same proceeding they may have the title adjudicated and a decree entered ousting a third party of title and possession, whether the decree is that such third party shall deliver to an administrator to be appointed or otherwise. This theory of the law has been rejected by a long line of authorities, which follow Lord Chancellor Hardwicke's vigorous declaration in 1737 (*Bickley v. Donington*, supra) that such a proposition is "totally improper and inconsistent with the principles of law." It was upon the view of the law condemned by Lord Chancellor Hardwicke that the bill was framed, the case was tried, and a decree was entered finally adjudicating upon the title to the property described therein, by the terms of which defendant was ousted of title and possession of the property standing in her name, leaving her no alternative but to deliver the same to an administrator when appointed. Such decree, as matter of law, cannot be upheld.

The result of this determination as to the law would be to dismiss the bill, if the issue of law had been presented by demurrer. But although, for the reasons stated, the bill cannot be maintained in its present form, justice requires that the complainants be permitted to amend its frame so that it seeks for the appointment of a receiver to conserve the property, which is the subject of the litigation, until an administrator of the estate of Dr. Buchanan shall have been appointed and the true ownership of the property determined by judicial decision, provided the proofs which have been submitted raise a presumption that the property is that of that estate. We have therefore examined these proofs for the purpose of determining whether such an amendment should be permitted. They are quite fully set out in the opinion below, and a full recital of them here is unnecessary. We quite agree with the Vice Chancellor that the story told by the defendant of the way in which she came into possession of the property must be rejected as false, and, further, that the proofs justify the conclusion that the property was purchased with moneys which came out of the business of Buchanan & Co. But this alone will not support the presumption that this property belongs to the estate of Dr. Buchanan, rather than to the defendant. The business was that of Buchanan & Co. The name raises the presumption that it was a partnership business.

The only persons engaged in carrying it on were the doctor and the defendant. This raises the presumption that they were the partners. Most of the property was purchased by the defendant during the doctor's lifetime. The defendant presumably was entitled to half the earnings. There is nothing to show that her investments exceeded that. But if they did, there is nothing to justify the conclusion that she fraudulently, and without the knowledge of her partner, abstracted more than her share from the partnership funds. On the contrary, the presumption is that the excess, if any, was appropriated by her with the knowledge and approval of the doctor, particularly in view of the relation existing between them.

So, as to all investments made during the life of the doctor, there is no presumption that they were made in fraud of his rights. This includes 14 shares of stock of the Farmers' & Mechanics' National Bank of Philadelphia; 21 shares of stock of the Kensington National Bank of Philadelphia; 16 shares of stock of the Manufacturers' National Bank of Philadelphia; 6 shares of stock of the Corn Exchange National Bank of Philadelphia; 13 shares of stock of the Market Street National Bank of Philadelphia; the proceeds of the sale of the real property in the city of Brooklyn, state of New York, designated as No. 1129 Forty-Second street, in said city. As to investments made from the proceeds of the sale of the business after his death, the presumption is that, as to one-half of it, the defendant holds such proceeds in trust for the doctor's estate, for the reason that, as the doctor had a half interest (presumably) in the business, his estate was entitled to half of the proceeds of its sale. Complainants therefore, should be permitted, if they desire, to amend their bill for the purpose of applying for a receiver appointed to take possession of so much of the property as represents the one-half of such proceeds of the business, and hold the same until an administrator of the estate shall be appointed and an opportunity afforded him to litigate the question of the true ownership of this part of the property.

The decree of the court below is accordingly reversed, with costs, and the cause is remanded in order that the complainants may, if by counsel so advised, reframe their bill of complaint in accordance with this opinion and apply for a receiver to take possession of so much of such property as it shall appear are such proceeds of the sale of the business since the death of Dr. Buchanan, and to hold the same pending the appointment of an administrator, who may litigate the claim of ownership of this portion of the property.

BOARD OF HEALTH OF STATE OF NEW JERSEY v. INHABITANTS OF TOWN OF PHILLIPSBURG.

(Court of Chancery of New Jersey. Jan. 30, 1909.)

MUNICIPAL CORPORATIONS (§ 708*)—SEWER.

Every municipality having a public sewer, or system of sewers, drain, or system of drains, legally constructed at the date of the passage of "An act to secure the purity of the public supplies of potable waters in this state" approved March 17, 1899 (P. L. p. 73), is, under the first proviso of the first section, exempt from the provisions of the enacting clause, and therefore is exempt from the provision against dumping refuse on the bank of a river, as well as from the provision against discharging sewage into it; the clearly expressed legislative intention being to exempt such municipalities from all the provisions of the act.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 708.*]

(Syllabus by the Court.)

Application by the State on the relation of the Board of Health of State of New Jersey against the Inhabitants of the Town of Phillipsburg. Application for preliminary injunction. Application denied.

Nelson B. Gaskill, Asst. Atty. Gen., for complainant. J. I. Blair Reiley, for defendant.

WALKER, V. C. The bill alleges that the town of Phillipsburg, maintains on the easterly bank of the Delaware river two garbage dumps, one of which is located at the southerly extremity of the town, at the juncture of Lopatcong creek and the river, and the other at the northerly end of the town, on which dumps the municipal authorities place and deposit, and suffer to be placed and deposited, and suffer to remain, domestic and factory refuse, consisting of ashes, decayed vegetables, house rubbish of all kinds, tin cans, old clothes, discarded shoes, broken barrels, glass bottles, and in fact everything which might be considered as domestic and factory refuse, which refuse in normal times, by reason of the natural slope of the ground at the two dumps, will and does find its way into the waters of the river, and in case of freshets is washed directly into the waters of the river; that the city of Trenton now is, and for some time past has been, supplying its inhabitants with water for domestic use, and obtains its public supply of water from the Delaware river below the town of Phillipsburg; that by reason of the refuse so placed and suffered to remain on the banks of the river at Phillipsburg, and the finding of its way into the waters of the river, those waters are greatly polluted, and the refuse so placed and suffered to remain on the banks of the river, and finding its way into the waters of the river, tends to corrupt and impair, and in fact does corrupt and impair, the quality of the water, and tends to render, and in

fact does render, such waters injurious to health, and tends to pollute, and in fact does pollute, the public supply of water for domestic use in the city of Trenton; that these acts are directly within and subject to the provisions of an act of the Legislature entitled "An act to secure the purity of the public supplies of potable waters in this state," approved March 17, 1899 (P. L. p. 73), and that the town of Phillipsburg in operating and maintaining the dumps directly violates the provisions of the act. The defendant does not deny the maintenance of the dumps in question, but contends that no factory refuse, but only domestic and store refuse, is deposited thereon; that because the town of Phillipsburg has a public sewer system constructed under municipal authority, discharging its drainage and sewage into the river, it is within the first proviso of the act, and is therefore not liable to be enjoined in this suit; further, that it would be futile and inequitable to enjoin the town from using the dumps while the refuse of the city of Easton, Pa., just across the river, having a population of about three times that of the town of Phillipsburg, is being dumped into the channel of the Delaware by boats and from wagons driven out upon the bridge which connects Easton and Phillipsburg.

The act of the Legislature under which the bill was filed (P. L. 1899, p. 73) provides, among other things, in its first section that no sewage, drainage, domestic or factory refuse, excremental or other polluting matter of any kind whatsoever which, either by itself or in connection with other matter, will corrupt or impair, or tend to corrupt or impair, the quality of the waters of any river, brook, stream, or other reservoir from which is taken, or may be taken, any public supply of water for domestic use in any city or other municipality of this state, or which will render, or tend to render, such waters injurious to health, shall be placed in or discharged into the waters of any such river or other reservoir above the point from which any city or other municipality shall or may obtain its supply of water for domestic use, nor shall any such sewage, drainage, domestic or factory refuse, excremental or other polluting matter, be placed or suffered to remain on the banks of any such river or other reservoir above such point. The proviso under which it is claimed the town of Phillipsburg is exempt enacts that the provisions mentioned shall not be held to apply to any city or other municipality of the state which at the date of the passage of the act had a public sewer or system of sewers, drain, or system of drains, legally constructed under municipal authority, discharging its drainage or sewage into any such river or other reservoir. The public sewerage system of the town of Phillipsburg was, in fact, constructed under prop-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

er authority prior to the passage of the act.

The Attorney General argues that the proviso is not a shield to the town, and that it extends no further than to permit of the maintenance of the sewerage system which was lawfully constructed before the passage of the act, and that the proviso was plainly intended to preserve the usefulness and legality of a sewerage system, which could not lawfully be constructed in the face of the statute, and that, as the proviso is only meant to protect an established system of sewers and drains, legally constructed under municipal authority, it is not intended to permit a municipal corporation which has such a system to place, or suffer to remain, upon the banks of a river, domestic or factory refuse, excremental or other polluting matter which, either by itself or in connection with other matter, will corrupt or impair, or tend to corrupt or impair, the quality of the water in such river for potable purposes; and he contends that the only rational way to read the proviso, as it mentions only sewage and drainage, is, that it does not affect deleterious matter dumped on the river bank, which it does not mention. I am unable to adopt the construction contended for by the Attorney General. The enacting clause provides that no deleterious matter shall be discharged into the waters of a river used for potable purposes, and that no polluting matter shall be placed or suffered to remain upon the banks of such river. It is plausibly, but not convincingly, argued that as the proviso excepts from the operation of the enacting clause municipalities having a public system of sewers, legally constructed, the only exception intended is as to a sewerage system, because it would be unjust to have authorized a municipality to expend its money in the construction of a sewer emptying into a river, and to now require that sewer to be closed and discontinued, thereby casting large and unnecessary expense upon a given municipality, and perhaps breeding pestilence therein by the forcible discontinuance of such a public necessity as a system of sewers. But it is to be observed in this connection that the act in question does not provide that, where there is an existing sewerage system, another method of sewage disposal shall be adopted by the municipality, and then the existing system discontinued. On the contrary, the only provision is one whereby it is rendered impossible for municipalities thereafter to lawfully build such sewerage systems. And it is urged that all that is intended to be protected by the proviso is an existing sewerage system, and that the additional pollution of the water resulting from the dumping of deleterious matter on the river banks is prohibited without qualification. To this I am unable to assent. There is nothing ambiguous about the proviso. Its language is as plain as it is general. It is that the act "shall not be held

to apply to any * * * municipality * * * which * * * has a public sewer or system of sewers * * * legally constructed * * * discharging its drainage or sewage into any such river." The statute is penal in character, and doubtless remedial also. The section authorizing the State Board of Health, instead of proceeding to recover the penalty prescribed for violation of the act, to file a bill in chancery in the name of the state, on the relation of such board for an injunction to prohibit further violation appears to be remedial. The general rule for the construction of provisos in statutes is that they are strictly construed, and take no case out of the enacting clause which does not fall fairly within their terms; but in penal statutes the provisos must be liberally construed. And this, subject to the cardinal rule that the court must, if it can, give effect to the legislative intent to be gathered from the whole act. *Am. & Eng. Ency. of L.* (2d Ed.) vol. 26, p. 680.

In *Van Relpen v. Jersey City*, 58 N. J. Law, 282, 287, 33 Atl. 740, 742, the Supreme Court said: "The proviso of an act is sometimes resorted to for the interpretation of ambiguous or doubtful language in the enacting clause, but there is nothing ambiguous or doubtful for interpretation in this case." So in the case in hand there is nothing ambiguous or doubtful either in the enacting clause or in the proviso. Regarded either as a remedial statute, in which case the proviso is to be strictly construed, or as a penal act, in which case it is to be liberally construed, the defendant prevails, because there is no ambiguity discoverable in the enactment; the clearly expressed legislative intention being to except from all the provisions of the act such municipalities as had sewerage and drainage systems at the time of its approval. There is nothing to construe; nothing to interpret. The defendant is clearly within the exemption in the proviso. If we were required to go outside of the words, and look to the subject-matter as an aid in interpretation, it would be found to be at least, if not more reasonable to say that the Legislature intended to except municipalities having the required sewerage system from the provision against dumping upon the banks of a river, as well as against sewerage into it, because it would be more or less absurd to enjoin the dumping of deleterious matter upon the banks of a stream into which an unlimited quantity of filth could be discharged through the sewers. In other words, it seems reasonable that the Legislature should have intended that in the case of municipalities lawfully discharging sewage into a river from a given area and thereby polluting the stream, the same municipality, if it chose, might dump refuse upon the banks of the stream, for thereby its waters would doubtless not be any more effectually polluted. If a town is permitted to discharge its entire sewage into a river through a sew-

er system, it seems almost absurd to say that that may continue, but that the dumping of refuse upon the bank shall be prohibited because the refuse may find its way into the waters and corrupt, or tend to corrupt, them.

Because Easton is polluting the river much more than Phillipsburg (which is regrettable) is no ground for denying an injunction, even if the issuance of the writ would be "futile or inequitable," as claimed by the defendant. The act in question has been construed in this court, and held to extend to a case of refuse which will impair, or tend to impair, the quality of the water. *State Bd. Health v. Diamond Mills Paper Co.*, 63 N. J. Eq. 111, 117, 51 Atl. 1019. In this case the proviso is adverted to, but was not under review, and was not considered. It is not because an injunction would be futile, which I do not concede, but it is because the defendant is saved by the proviso in the act, that the injunction is denied.

If, in the general scheme upon which the state has entered for the purification of our potable waters, it is deemed necessary to prevent a municipality from dumping deleterious matter upon the bank of a river into which it may nevertheless discharge the sewage of its inhabitants numbering, as in the case in hand, several thousand people, the remedy lies with the Legislature. The courts are powerless to extend it.

(75 N. J. E. 123)

NEWBERRY v. BARKALOW et al.

(Court of Chancery of New Jersey. Jan. 21, 1909.)

1. VENDOR AND PURCHASER (§ 230*)—BONA FIDE PURCHASER—NOTICE.

A corporation authorized by its act of incorporation to purchase and sell land, and to require any grantee to make such improvements as might seem expedient, purchased land, laid out streets, and adopted a resolution fixing a building line. It then conveyed a tract subject to the restrictions in the act of incorporation, and bound the grantee and assigns not to violate the act of incorporation or regulations made by the corporation. The tract conveyed was subsequently divided into lots, and conveyed to different persons, subject to conditions and restrictions previously imposed by the corporation. *Held*, that such persons were chargeable with notice of the building restrictions contained in the resolution of the corporation, though it appeared only in its complete form in the minute book of the corporation.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 511; Dec. Dig. § 230.*]

2. COVENANTS (§ 49*)—CONSTRUCTION—"AT ANY TIME."

The words "at any time," in a deed by a corporation authorized to purchase and sell lands subject to restrictions, which recites that the conveyance is subject to the restrictions in the act of incorporation, and that the grantee, his heirs, and assigns agree not to violate any of the provisions in the act of incorporation, "by-laws, rules or regulations made by the said" grantor "at any time" refer to the date of the

violation, and not to the date of the adoption of the by-laws, rules, or regulations.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 49; Dec. Dig. § 49.*]

For other definitions, see Words and Phrases, vol. 1, pp. 602, 603.]

3. COVENANTS (§ 49*)—CONSTRUCTION—CERTAINTY.

To authorize one to insist on restrictive covenants in deeds, and to invoke the injunctive powers of the court to enforce them, the restrictive covenants must be clear and satisfactory.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 49; Dec. Dig. § 49.*]

4. COVENANTS (§ 51*)—CONSTRUCTION—CERTAINTY.

A corporation authorized to purchase and sell lands, and to require any grantee to make such improvements as might seem expedient to secure a uniform development, purchased land, laid out streets and avenues through it, the avenues running at right angles to the streets, and being 20 feet wider than the streets. It adopted a resolution for a uniform building line "on the main avenues," and conveyed tracts subject to restrictions contained in rules of the corporation, which the grantee agreed not to violate. *Held*, that the restrictive covenant applied not to the streets at all, but applied to each and all of the avenues; the word "main" in the quoted phrase being surplusage.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 50; Dec. Dig. § 51.*]

5. COVENANTS (§ 79*)—BUILDING RESTRICTIONS—ENFORCEMENT—VIOLATION.

Where an owner of land laid it out into streets and blocks, and by restrictive covenants in the deeds fixed a building line, the fact that a purchaser violated the restriction by the construction of an open piazza which extended into the restricted area, but did not obstruct the view from adjacent property, did not prevent him from enforcing the restrictions against the adjacent owner; the purchaser's violation being immaterial.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 78; Dec. Dig. § 79.*]

6. INJUNCTION (§ 189*)—BUILDING RESTRICTIONS—VIOLATION—SCOPE OF RELIEF.

Where an owner of land laid it out into streets and blocks, and by restrictive covenants in deeds to purchasers fixed a building line, the court, in a suit to restrain specific violations of the covenant, was limited to a consideration of the facts relating to the street on which the violations were.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 409; Dec. Dig. § 189.*]

7. DEEDS (§ 175*)—BUILDING RESTRICTIONS—ABANDONMENT.

An owner of land laid it out into streets and blocks, and by restrictions in deeds to purchasers fixed a building line. An owner of a lot on one street sought to restrain the adjacent owner from violating the building restrictions. Of the 36 houses on one side of the street 9 were over the restrictive line from 1 inch to 4½ inches. There was also an old house at the extreme westerly end of the street which had a closed-in veranda extending over the line a distance of over 9 feet. Of the 43 houses on the other side of the street, 18 were over the line from 2 inches to a little over 2 feet. There was nothing to show that the original owner had consented to the violations. *Held*, that the violations were too insignificant in extent and in number to justify the court in inferring a general abandonment of the building restriction, even if the original owner

could abandon or release a restriction which it had made for the benefit of all its grantees.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 545; Dec. Dig. § 175.*]

Suit by Emma V. Newbery against Mary M. Barkalow and another. Heard on bill to restrain defendants from building within a restricted area. Decree for complainant.

Aaron E. Johnston and Charles H. Ivins, for complainant. David Harvey and Alan H. Strong, for defendants.

HOWELL, V. C. The Ocean Beach Association was incorporated on March 18, 1873 (P. L. p. 1089). It was authorized to purchase and sell lands, and was especially empowered to require any grantee from it to make and maintain such style and character of improvements on the lands conveyed, or on the streets fronting thereon, as might seem most expedient for securing a uniform system of development and improvement. The corporation purchased a tract of land extending from the Atlantic Ocean to Shark river, in Monmouth county, with the intent of promoting the seaside resort which is now known by the name of "Belmar." It at once laid out streets and avenues through the property east of F street, and filed maps thereof, the streets running north and south being designated by the letters of the alphabet, and the avenues running east and west at right angles to the streets being designated by numbers. The streets were laid out 60 feet wide, and the avenues 80 feet wide. Before any lots were sold by the corporation its board of directors, on June 9, 1873, passed the following resolution: "Resolved, that it is highly important to maintain uniformity in the line of buildings on the main avenues of the association, and for securing said object that no building be erected on said avenues nearer to the line of same than twenty feet." This resolution was entered upon the minutes of the corporation, and no public filing or other general notice was given of it. On March 27, 1877, the corporation made a deed to Ellen T. H. Harvey for a plot of land containing about $3\frac{1}{4}$ acres, including the lots now owned by the complainant and the defendant. This plot lay west of F street, and between that street and Shark river, and at the time of the conveyance had not been plotted into lots, nor had there been filed any map showing the lines of streets and avenues through it. It will be observed, however, that the deed refers to several streets and avenues by name. These were afterwards plotted and made coterminous with the streets and avenues which had been previously laid out east of F street. This deed of conveyance is in the usual form of a warranty deed, but it was made "subject, nevertheless, to the covenants, conditions and restrictions contained in the aforesaid act

entitled 'An act to incorporate the Ocean Beach Association.'" The deed also contained a covenant made by the grantee in the following words: "And the said party of the second part, for herself, her heirs and assigns, does covenant and agree to and with the said the Ocean Beach Association, their successors and assigns, that the said party of the second part, her heirs and assigns, shall not sell or suffer to be sold on the said premises hereby conveyed any spirituous or intoxicating liquors, nor violate any of the provisions contained in said act of incorporation, by-laws, rules or regulations made by the said association at any time."

The title to these two lots passed by several mesne conveyances to a corporation known as the Land & Loan Company, by deed dated January 23, 1907. All the intervening deeds, with the exception of one made by an auditor in attachment, make reference to the covenants, conditions, and restrictions contained in the deed from the Ocean Beach Association to Mrs. Harvey. On February 2, 1907, the Land & Loan Company by its deed to Cyrus B. Honce made the first severance of the title to the lots in question. By this deed it conveyed to Honce lot No. 1,963 on the corporation's map, which was on September 18, 1907, conveyed by him to the complainant, Mrs. Newbery. The deed to Mr. Honce is made subject to certain conditions, covenants, and restrictions theretofore imposed upon said land and premises by the Ocean Beach Association, and the deed from him to Mrs. Newbery is made subject to all the covenants, conditions, and restrictions contained in the former deeds for the same premises. On June 1, 1907, the Land & Loan Company conveyed to the defendant lot 1,964 which adjoins the complainant's lot on the west. This deed contains the following, at the end of the description: "Under and subject, nevertheless, to certain conditions, covenants and restrictions heretofore imposed upon said land and premises by said Ocean Beach Association." The complainant and defendant, therefore, own adjoining lots on the association tract, both fronting on Tenth avenue and lying west of F street; the complainant's lot being the more easterly and the defendant's lot the more westerly of the two. On the complainant's lot is erected a dwelling house, in which reside the complainant and her family. On the defendant's lot is a livery stable, the main building of which extends within the limited area about 3 inches. The defendant has laid a foundation for an office, which extends about 11 feet within the restricted area, and is about to construct an office building thereon. The distance between the complainant's house and the defendant's livery stable is about 6 to 8 feet. The complainant's bill is based upon the allegation that there was a general plan

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for the improvement of Tenth avenue by maintaining the front line of the houses 20 feet away from the street line, of which general plan the defendant had notice.

There was evidence tending to show that all the deeds of conveyance made by the Ocean Beach Association for lands covered by their maps contained the same covenant that appears in the deed from that corporation to Mrs. Harvey. And it likewise appears that that corporation did formulate and lay out a general plan for the uniform improvement of all the property which it owned at that point. Both complainant and defendant must be charged with notice of these facts, for the reason that they are specifically referred to in both their deeds. Such was the determination of this court in the case of *Hayes v. Waverly and Passaic Railroad*, 51 N. J. Eq. 345, 27 Atl. 648, and my conclusion is that the lands of the complainant and the defendant were bound by the resolution of June 9, 1873, although it only appears in its complete form in the minute book of the private corporation which owned the land. This must be the only conclusion that can be reached, because the first deed in this title refers to the by-laws, the rules, and the regulations made by the grantor upon the first transfer of the title. The phrase "at any time" contained in the covenant in the Harvey deed refers to the date of the violation, and not to the date of the adoption of by-laws, rules, or regulations. The complainant having thus established the application of the restrictive covenant to the lands of the defendant, it next becomes necessary to inquire whether the covenant is of a character that can be enforced, and whether the complainant is in a position to be entitled to insist upon it.

The first objection made by the defendant is that the covenant is uncertain. It must be conceded that restrictive covenants must not be vague or uncertain; that the complainant's right to insist upon the covenant and to invoke the injunctive powers of the court must be clear and satisfactory. *Sutcliffe v. Elsele*, 62 N. J. Eq. 222, 50 Atl. 69. The covenant applies the building line restriction to what it calls the "main avenues." Defendant insists that this description of the highways to which the covenant was intended to apply is illusory, vague, and uncertain, because no one can tell from the context what is meant by the word "avenues," or by the words "main avenues." The first map of the Ocean Beach property appears to have been made on May 9, 1873, and to have been filed in the office of the county clerk of Monmouth county on October 4th of that year. The map was consequently made before the passage of the restrictive resolution. The map appears upon inspection to have distinguished between the two classes of public highways laid out upon it, calling one class streets and the other class

avenues. The avenues, being somewhat wider than the streets, must have been then considered to be the main public highways. At that time there were no buildings upon the property, and there were no physical marks from which it could be deduced that one avenue was more of a main avenue, or that one street was more of a main street, than any other avenue or street. The only thing the board of directors could have had before them was the map, on which it plainly appeared that the avenues were the main highways, because they were wider than those highways which were called streets. It is therefore quite apparent that the word "main" is surplusage, and that the covenant was intended to apply not to the streets at all, but to apply to each and all of the avenues. The objection of invalidity on account of vagueness and uncertainty is therefore not tenable.

The right of the complainant to bring the suit is, in my opinion, very clear. She is within the authority of *De Gray v. Monmouth Beach Association*, 50 N. J. Eq. 329, 24 Atl. 388, affirmed 67 N. J. Eq. 731, 63 Atl. 1118; and see the most recent declaration of the English Chancery Division on the subject in the opinion of Mr. Justice Parker, in *Elliston v. Reacher* (1908) 77 L. J. Ch. 617. One of the objections to her position as a complainant is that she has violated the covenant herself, and therefore ought not to be heard to complain of violations of others. It is true that the piazza in front of the complainant's house extends within the restricted area, but it is an open piazza, and is no obstruction to the view from the defendant's property, and is within the ruling of Vice Chancellor Emery in *Morrow v. Hasselman*, post. Although the Ocean Beach Association formulated a plan for building line restrictions which should cover all its property, yet when it comes to specific violations the consideration of the subject must be confined to the street on which the violations are. This was so held by Vice Chancellor Emery in *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369, and applies with peculiar force to the case in hand. Therefore, taking into consideration Tenth avenue alone, we find that the street extends westerly from the Atlantic Ocean to the Shark river, a distance of about 2,000 feet. It is cut up into eight blocks, the property of the parties hereto being on the seventh block from the ocean.

Recurring to the particular statements about the houses, it appears that there were at the time of the hearing 79 houses erected on Tenth avenue, of which 36 are on the south side and 43 on the north side. Of the 36 on the south side 9 appear to be over the restrictive line from 1 inch to 4½ inches. In addition thereto there is an old house at the extreme westerly end of Tenth avenue and near the Shark river which has a closed-

in veranda that extends over the line a distance of 9 feet 2 inches. Of the 43 houses on the north side 18 appear to be over the line, although the witness who speaks of them gives the distances of 16 only. These encroach from 2 feet $3\frac{1}{2}$ inches down to 2 inches, those extending over the line as much as a foot being wholly east of F street. It thus appears that of the total number of houses on the street (79) 52 are erected in compliance with the terms of the resolution, and 27 extend over the restricted line. Of the 27 there are but 6 which are 1 foot or more over the line. These 6 all lie east of B street, and are distant to the eastward of the complainant's lot nearly 1,300 feet. All the remainder extend from 1 inch to $10\frac{1}{2}$ inches over. I do not think that this situation discloses an abandonment of, or a disposition to abandon, the line which was fixed by the resolution of 1873. There is no evidence whatever that the original grantor, the Ocean Beach Association, gave its consent or in any way actively promoted any of these violations, or that it tacitly assented thereto. It appears that several years ago, and probably not later than 1896, the association disposed of all its lands, and, as a corporation, has not had since that time any interest in the property; and indeed it is difficult to see how the association could abandon or release a covenant which it had entered into for the benefit of all its grantees. Neither do I think that mere acquiescence by the complainant in the violations above referred to would be any evidence of consent on her part. The violations are too insignificant in extent and in number to justify the court in inferring a general abandonment of the covenant. The fact that six owners saw fit to subject themselves to the liability of a lawsuit by violating the covenant certainly cannot be held to be a general abandonment of the contractual relation between the Ocean Beach Association and its various grantees. Acquiescence in a trivial breach of such a covenant does not conclude a complainant from relief in respect of a more important character. Mr. Justice Fry, in *Richards v. Revett*, 7 Ch. D. 224, 47 L. J. Ch. 472; *German v. Chapman*, 7 Ch. D. 271, 47 L. J. Ch. 250; *Woodbine L. & I. Co. v. Relner* (N. J. Ch.) 65 Atl. 1004. The case of *Barton v. Slifer* (N. J. Ch.) 66 Atl. 899, is applicable to the facts in this case. The situation there was very much the same as here. There the Ocean City Association became the owner of a tract of land which now comprises Ocean City, in Cape May county, and laid it out, in streets and lots, and inserted in all their original deeds covenants restricting the construction of buildings; and it was held that a small number of violations of the restrictive covenant could not be held to be presumptive of a general abandonment of the plan originally determined upon, and that where such a plan existed, any purchaser had

a right to enforce the covenant. It was held in *Morrow v. Hasselman* that slight and immaterial violations of the restrictive covenant would not be considered, unless they went to the extent of showing a general abandonment of the restrictions by the owners of the property along the line of the street. It is clear that the original grantor who first imposed the restrictions upon the property, and with whom the contractual relation originally existed concerning the house line, has done nothing which would indicate an intention upon its part to disregard or abandon the covenant. Nothing short of general acquiescence in the violation of the covenant would be sufficient, in my opinion, to raise the presumption of abandonment.

The decree will therefore be for the complainant.

(74 N. J. E. 776)

HETZEL v. HETZEL et al.

(Court of Chancery of New Jersey. Sept. 24, 1908.)

WILLS (§§ 567, 838*)—CONSTRUCTION—DEVISE TO WIDOW IN LIEU OF DOWER.

A testator devised to three children certain real estate, upon which there were mortgages at the time of its acquisition by him, which mortgages were assumed and agreed to be paid by him, and the amount of which was allowed to him as so much purchase money. He afterwards made one mortgage upon the premises to secure a debt created by himself. By his will he devised the residue of his real estate to the children mentioned, and bequeathed to his widow, in lieu of dower, a sum of money equal to one-third of the value of such real estate, to be paid to her by the children, and to be a lien upon the real estate until paid.

Held, that the value of the lands, to one-third of which the widow is entitled, is the same value as those lands have in the hands of the devisees; that is, that they are entitled to have the mortgage made by the testator paid out of his personal estate in exoneration of the lands, but must accept the lands subject to the mortgages which were upon them at the time of their acquisition by the testator, and which mortgages he assumed. Consequently the widow is entitled to one-third of the value of the lands, deducting the amount of the mortgage incumbrance created by the testator, but subject to the amount of the incumbrances assumed by him.

[Ed. Note.—For other cases, see *Wills*, Dec. Dig. §§ 567, 838.*]

(Syllabus by the Court.)

Bill by Mary Hetzel against John Hetzel and others. Decree for complainant.

Joseph E. Hunt, A. V. Dawes, and John Rellstab, for complainant. Linton Satterthwait, for defendants.

WALKER, V. C. The construction of the last will of Jacob Hetzel, late of the city of Trenton, is involved in this cause. He died in the month of September, 1907, and his will was proved before the surrogate of the county of Mercer on the 20th day of that month. It was made August 9, 1900, and consisted of eight items. Afterwards, and on various

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dates, he made four codicils. The will and the codicils were all proved together. Such provisions of the will and codicils as are necessary for the determination of the question involved are as follows: The testator provided (1) that all of his just debts and funeral expenses be paid; (2) he bequeathed to his wife, Mary Hetzel, certain articles of furniture, and \$500 in cash; (4) he devised and bequeathed to his son Charles certain personal property and a lot of land; (5) he devised to his sons, Charles and John, and his daughter, Mary, all the rest and residue of his real estate, subject to his wife's right of dower; (6) he ordered and directed his executor to sell all the rest and residue of his personal property, and from the proceeds thereof to pay his debts, funeral expenses, and the cost of a monument; (7) the bequests to his wife to be in lieu of dower in the lot devised to Charles, and in lieu of any interest she might claim in his personal property. By a codicil of April 26, 1904, he recited the devise of the rest and residue of his real estate to his sons and daughter, subject to his wife's right of dower, and then provided: "Now I do give to my wife, Mary Hetzel, a sum of money equal to one-third of the value of the said real estate, to be paid to her by my said children and to be a lien upon said real estate until paid, the said sum of money to be in lieu of her dower therein mentioned." Mr. Hetzel died seised of seven different tracts of land, which he acquired in five different conveyances. All of the tracts are incumbered by mortgages, assumed by the testator as part of the consideration given for them, save in one instance, in which a mortgage of \$1,000 was made by him. The value of his real estate is \$17,200. The incumbrances thereon amount to \$7,200, including the mortgage made by himself. The personal estate is sufficient to satisfy the testator's debts, including the mortgages upon his real estate. The real estate being worth \$17,200 gross, its net value, after deducting the mortgage made by the testator, is \$16,200. After deducting the mortgage incumbrances assumed by the testator upon the acquisition of the property, and omitting the \$1,000 mortgage made by himself, the net value is \$11,200. After deducting all the mortgage incumbrances, it is \$10,000.

The question is, Shall the widow, in lieu of her dower, have one-third of \$17,200, or of \$16,200, or \$11,200, or of \$10,000? On behalf of the complainant it is contended that the testator meant that his widow should have one-third of the value of his real estate without any deduction of the mortgage incumbrances; while the defendants insist that he meant to give her one-third of the value of his lands, first deducting the mortgage incumbrances thereon, except, possibly, the amount of the mortgage made by himself, which was for a debt created by him. My opinion is that the testator meant that his widow should have one-third of the value of

the residue of the real estate he devised to his sons, Charles and John, and his daughter, Mary, just as that value passed to them by virtue of the devise, for in the codicil of April 26, 1904, the testator, after reciting the devise of the residue of his real estate to his sons and daughter just mentioned, subject to his wife's right of dower, in the fifth item of his will, proceeds to give her "a sum of money equal to one-third of the value of said estate"—that is, the residuary estate—"to be paid to her by my said children and to be a lien upon said real estate until paid." In the presence of such expressions it would be hard to find, it seems to me, that the testator meant that the devisees, his children, should give his widow one-third of the gross value of the lands devised to them if those lands in their hands were subject to incumbrances amounting to more than one-third of their value. So the solution of this question depends, in my opinion, upon the status of these devisees with reference to the lands devised, and the question is, Are the lands subject to the incumbrances in the hands of the devisees, or are the devisees entitled to have the lands exonerated by the personal estate? The fact that the widow is not the mother of decedent's children is, I take it, quite unimportant. That the testator meant that the value of the lands to his wife (for the purpose of his bequest to her in lieu of dower) should be the same as their value to his children is plain, it seems to me, by reason of the juxtaposition of the two gifts; the bequest to the wife being a condition annexed to the devise to the children. By the language he used the testator could not, I think, have intended one value for his wife and another for his children. It is true that the testator charged the payment of his debts upon his real estate; his personal property being the primary fund for their payment. Such was the effect of the first item in his will. *Suydam v. Voorhees*, 53 N. J. Eq. 157, 165, 43 Atl. 4; *Roll v. Roll*, 68 N. J. Eq. 227, 229, 59 Atl. 296. By the sixth item of his will he directed a sale of all of his personal property, not specifically bequeathed, to pay his debts, funeral expenses, and the cost of a monument. By these provisions for the payment of his debts the testator did not, in my judgment, intend to include obligations upon which he was liable only by way of indemnity, in the case of mortgages which he had assumed but did not create, and which neither he nor his estate might ever be called upon to discharge. If in his lifetime he had divested himself of title subject to the mortgages, his grantees might eventually have paid the mortgage debts. So, too, his devisees after him may convey the mortgaged premises in the same way. The testator, in my opinion, wrote into his will the directions concerning the payment of his debts in view of the law upon the subject, which law he is presumed to have known, and which will now be noticed.

In *Mount v. Van Ness*, 33 N. J. Eq. 262, in the Prerogative Court, it was held that the assumption of the payment of a mortgage upon lands purchased, and the allowance of its amount as so much of the purchase money, was not such personal assumption of the mortgage as entitled the heir to whom the premises descended to exoneration out of the personal estate for the amount of the mortgage. This case was decided upon the authority of *McLenahan v. McLenahan*, 18 N. J. Eq. 101, and *Campbell v. Campbell*, 30 N. J. Eq. 415. In the former case (*McLenahan*) it was held in this court that if lands descend or are devised, subject to a mortgage not made by the decedent, the heir or devisee takes cum onere, unless the decedent shall have assumed the debt in such manner as to show an intention to charge his personal estate; that making himself or his representative liable to be called on by the mortgagee is not sufficient, of itself, to charge the personal estate in relief of the lands. The latter case (*Campbell*) was one on a bill for dower in lands of an intestate, which were subject to a mortgage put thereon by the intestate, and also lands which were purchased by him subject to a mortgage, the amount of which was allowed to him as so much of the purchase money, and the payment thereof assumed by him; and it was held that as to the first the personal estate must exonerate the land, and dower be assigned therefrom as if unincumbered, and that as to the second a mere assumption of a mortgage by the decedent was not such proof of an intention to make the debt his own as rendered his personal estate primarily liable therefor; and dower must be assigned therefrom subject to the mortgage. The assumption of a mortgage does not make the debt a personal one of the grantee covenantor. *De Grauw v. Mehan*, 48 N. J. Eq. 219, 223, 21 Atl. 193. In the case of *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650, the Court of Errors and Appeals held that the assumption of a mortgage in a deed of conveyance is a contract with the grantor simply for his indemnity, and will not be regarded, either at law or in equity, as a contract with the mortgagee for his benefit. In this case Mr. Justice Depue, speaking for the Court of Errors and Appeals, says, at page 655, that the right of a mortgagee to enforce payment of the mortgage debt as against the grantee of the mortgagor does not rest upon any contract of the grantee with him, or with the mortgagor for his benefit. Clearly, then, the mortgages upon the property of which the testator died seised, and which were not given by him as security for debts of his own creation, but which were upon the premises at the time he

acquired them, and the payment of which he assumed, were merely contracts of indemnity by him with the mortgagors, his grantors. They were not his debts in a technical sense. He did not create them, and did not give the bonds or obligations for their payment at the time of their inception. Under the law, therefore, as it is settled in this state, neither the heir at law nor the dowress could call upon the personal representatives of a decedent to discharge such obligations out of the personal estate in exoneration of the land. The situation is no different where the parties are devisee and dowress, unless by the terms of his will a testator clearly evinces an intention that the personal property shall exonerate the land.

Chancellor Runyon in *Campbell v. Campbell*, 30 N. J. Eq., at page 416, speaking of land purchased by an intestate subject to a mortgage, said: "His personal estate is not bound to exoneration. In such case, to make his personal estate primarily liable, there must be clear evidence of an intention to make the mortgage debt his own." The same Chancellor, as Ordinary, in *Mount v. Van Ness*, 33 N. J. Eq., at page 263, said: "If land descends or is devised subject to a mortgage debt not created by the decedent, the heir or devisee takes the property cum onere, and is not entitled to have the debt paid out of the personal estate unless the decedent has already assumed the debt, intended to make it a charge on his personal estate, or shall have so expressly directed by the will." This is a directly controlling authority on the subject under consideration. Mark the language of Chancellor Runyon: "The devisee is not entitled to have the mortgage paid out of the personal estate unless the testator shall have so expressly directed by will." Now no express direction to pay the mortgages assumed by the testator upon the acquisition of his lands can be found in his will. Not only that, but, so far as I can see, no language is contained in the will which can be construed into an implied direction for such payment.

The result is that the widow is entitled to a payment of one-third of the value of the testator's real estate, first deducting the amount of the mortgages assumed by him, but not including in the deduction the amount of the mortgage made by him, and for which his personal estate is liable and must exonerate the mortgaged premises for the benefit of the devisees, and also of the widow, the legatee. The sum, to one-third of which she is entitled, is approximately \$11,200. I will advise a decree in accordance with the views above expressed.

(104 Me. 502)

**STATE v. INTOXICATING LIQUORS
(MAINE CENT. R. CO., Claimant).**

(Supreme Judicial Court of Maine. Dec. 11, 1908.)

**1. COMMERCE (§ 33*)—INTERSTATE COMMERCE—
PROHIBITED ARTICLES—ADULTERATED LIQ-
UORS.**

By the act of Congress known as the "Pure Food Law," approved June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928), misbranded and adulterated intoxicating liquors are forbidden transportation into any state from another state or foreign country, and hence are removed from the protection of the "commerce clause" of the federal Constitution.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 33.*]

**2. COMMERCE (§ 33*)—INTERSTATE COMMERCE—
PROHIBITED ARTICLES—POLICE POWER.**

Such liquors, brought into the state in violation of Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928), become subject to the police power of the state immediately upon arrival within its territory, and can be seized under such power before delivery to a consignee.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 33.*]

(Official.)

Exceptions from Supreme Judicial Court, Piscataquis County.

Search and seizure process by the State against certain Intoxicating Liquors. The Maine Central Railroad Company interposed a claim. The municipal court declared the liquors forfeited, and claimant appealed, and on a hearing before the presiding justice the judgment was affirmed, and claimant excepts. Exceptions overruled.

Search and seizure process, whereby certain intoxicating liquors, shipped from Boston, Mass., and consigned to Henry N. Bartley, Greenville Junction, Piscataquis county, Me., were seized at Foxcroft, in said county, while in the possession of the Maine Central Railroad Company, a common carrier.

The liquors seized were as follows: "Two kegs containing 20 gallons of ale, 1 keg containing 30 gallons of gin, 1 barrel containing 72 quarts of gin, 36 quart bottles of Manhattan cocktail, 1 barrel containing 71 quart bottles of whisky, 1 barrel containing 72 quart bottles of whisky, 1 barrel containing 70 quart bottles of whisky, 1 barrel containing 36 quart bottles of rum, 1 barrel containing 36 quart bottles of brandy, 1 barrel containing 50 gallons of whisky, and 1 keg containing 20 gallons of whisky."

At the hearing before the municipal court the Maine Central Railroad Company duly appeared and claimed the liquors. The municipal court declared the liquors forfeited, and thereupon the claimant company appealed to the Supreme Judicial Court, in said county, January term, 1908. The case was then heard before the presiding justice at said term of said Supreme Judicial Court,

upon the following agreed statement of facts:

"The car containing the liquors arrived at Foxcroft, Me., on the morning of the 19th day of September A. D. 1907, and on the same day, before the said car was transferred from the tracks of the Maine Central Railroad to the tracks of the Bangor & Aroostook Railroad, the liquors were seized by the officers, while in said car. The warrant was duly and properly issued and served, the liquors were properly labeled, and the claimant duly appeared and became a party. It is admitted that Professor Ora W. Knight of Bangor, Me., an expert chemist, will testify that all of the whisky is either misbranded or adulterated, or both, under the provisions of United States Pure Food Law, Act June 30 A. D. 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928); that all the rum is misbranded under the provisions of said act; that the brandy is both adulterated and misbranded under the provisions of said act; that all other of said seized liquors comply with said act.

"It is further admitted that all said goods were billed as crockery; and that said liquors were intended for unlawful sale in the state of Maine."

The presiding justice "ordered and decreed that 2 kegs containing 20 gallons of ale, 1 keg containing 30 gallons of gin, 1 barrel containing 72 quarts of gin and 36 quart bottles of Manhattan cocktail be returned by the officers to the said claimant forthwith." The presiding justice further ordered and decreed "that the remaining liquors and the vessels in which they were contained," to wit, "1 barrel containing 72 quart bottles of whisky, 1 barrel containing 71 quart bottles of whisky, 1 barrel containing 70 quart bottles of whisky, 1 barrel containing 36 quart bottles of rum, 1 barrel containing 36 quart bottles of brandy, 1 barrel containing 50 gallons of whisky, 1 keg containing 20 gallons of whisky, be declared forfeited, and that the same be turned over to the sheriff of said Piscataquis county, to be disposed of by him in accordance with the law."

To the ruling declaring a forfeiture of the liquors last above enumerated the Maine Central Railroad Company excepted.

The United States "Pure Food Law," approved June 30, 1906, entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," is chapter 3915 of the "Statutes of the United States of America passed at the first session of the Fifty-Ninth Congress, 1905-06."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Argued before EMERY, O. J., and WHITEHOUSE, SAVAGE, PEABODY, and SPEAR, JJ.

W. A. Burgess, Co. Atty., and O. W. Hayes, for the State. Forrest Goodwin, for claimant, Maine Central Railroad Company.

EMERY, O. J. The intoxicating liquors in question, the rum, whisky, and brandy, were seized in this state in the car of the claimant railroad company while in transit from another state to a consignee in this state. It is admitted they were intended for unlawful sale in this state. The claimant contends that, having been seized while in such transit, they are protected from forfeiture, and even seizure, under the state law by "the commerce clause" of the Constitution of the United States.

It appears from the evidence, however, that in addition to being intoxicating and intended for unlawful sale in this state, the liquors were misbranded, or adulterated, or both, within the meaning of the United States "Pure Food Law," approved June 30, 1906. That act of Congress prohibits the introduction into any state from another state or country of any liquors misbranded or adulterated within the meaning of the act, and provides that if so transported from one state to another, they shall be liable to seizure and confiscation by the United States, and shall not be sold in any jurisdiction contrary to the law of that jurisdiction. By this statute Congress has, in effect, enacted that adulterated or misbranded liquors shall not be lawful articles of commerce between the states or with foreign nations. As to such liquors the statute removes the federal barrier to the operation of the police power of the state upon them. Having been brought into the state in violation of the act of Congress, they became subject to the laws of the state the moment they came within its limits.

The claimant urges that only the United States can enforce the act of Congress; that the act does not confer upon the states the power to seize and confiscate such liquors. This process is not to enforce the act of Congress, but only to enforce the laws of the state. The proceeding is not under the act of Congress, but under the statutes of the state. Granting that the act of Congress does not confer any new power upon the state, it removes the federal barriers to the exercise of the powers conferred upon the state by its own people.

The judgment of forfeiture rendered by the presiding justice was right, and the exceptions to his decision must be overruled. Exceptions overruled.

(304 Me. 233)
INHABITANTS OF MILFORD v. BANGOR RY. & ELECTRIC CO.

(Supreme Judicial Court of Maine. June 11, 1908.)

1. ACTION (§ 27*)—CONCURRENT REMEDY WITH ASSUMPSIT.

Case will lie concurrently with assumpsit for a breach of duty arising out of an express or implied contract.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 27.*]

2. ACTION ON THE CASE (§ 1*)—CONCURRENT REMEDY WITH ASSUMPSIT.

In many cases where assumpsit is a concurrent remedy, case will also lie for a violation of the duty which the contractual relations of the parties involve.

[Ed. Note.—For other cases, see Action on the Case, Cent. Dig. § 36; Dec. Dig. § 1.*]

3. ACTION ON THE CASE (§ 1*)—BREACH OF DUTY ARISING FROM CONTRACT.

Although assumpsit will usually lie for breach of a contract, yet an action on the case for the breach of the common-law duty is often the better remedy.

[Ed. Note.—For other cases, see Action on the Case, Cent. Dig. § 36; Dec. Dig. § 1.*]

4. DAMAGES (§ 22*)—BREACH—"MEASURE OF DAMAGES."

When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally—i. e., according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of the parties, at the time they made the contract, as the probable result of the breach of it.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 58, 62; Dec. Dig. § 22.*]

5. WATERS AND WATER COURSES (§ 209*)—INSUFFICIENCY OF SUPPLY—DAMAGES—RIGHT TO RECOVER.

In an action on the case, brought by the plaintiff town against the defendant corporation to recover the value of the town hall and certain sidewalks and hose, the property of the town, which were destroyed by fire by reason of the alleged negligence of the defendant corporation in failing to perform its contract to supply through its pipes water of sufficient current, pressure, and volume to extinguish fires within the range of its hydrants, it appeared, among other things, from the allegations in the plaintiffs' declaration that the defendant corporation entered into a contract with the plaintiff town whereby, for the sum of \$800 per year, it agreed to supply the plaintiff town with 16 post hydrants and water for the same before the 1st day of August, 1892; that it also agreed that said hydrants should have two nozzles, and should be supplied with pipes at least four inches in diameter; that it also agreed that said hydrants should be so placed that proper protection against fire should be secured; that it also agreed that the waterworks should be supplied by a pump, or pumps, of a capacity of not less than 1,000,000 gallons per day; also that the defendant corporation engaged, and became bound and obliged to furnish through its pipes and hydrants, water of sufficient current, pressure, and volume to extinguish fire within range of such hydrants, and especially and particularly fires originating in or communicated to the aforesaid building and property of the plaintiff town.

Upon demurrer to the declaration, with the right to plead anew, held: (1) That upon proof

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the facts stated in the declaration the defendant corporation would be liable to the plaintiff town, in an appropriate action, for the damages caused by its negligence in failing to perform a duty arising from its contractual relations with the plaintiff town; (2) that the plaintiff town was legally entitled to bring an action on the case to recover damages for the consequential injuries resulting from the negligent manner in which the defendant corporation performed a duty created by its express contract with the plaintiff town.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 302; Dec. Dig. § 209.*]

6. WATERS AND WATER COURSES (§ 206*)—CONTRACT FOR FIRE PROTECTION—CARE REQUIRED.

With respect to the issue presented in the aforesaid action for negligence, the defendant corporation was required to use ordinary care to maintain pipes and furnish water of the pressure and volume stipulated in its written contract. It was only required to exercise such prudence, vigilance, and precaution as would meet the requirements of ordinary care according to the exigencies of the situation, having due regard to the nature and importance of the contract, the rights and interests of those to be affected by it, and the manifest consequences of a failure to perform it.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.*]

(Official.)

Report from Supreme Judicial Court, Penobscot County.

Action on the case by the Inhabitants of the Town of Milford against the Bangor Railway & Electric Company. Defendant filed a demurrer to the declaration, and the cause was then, by agreement of the parties, reported to the law court for determination. Demurrer overruled; defendant to plead anew.

Action on the case, brought by the inhabitants of the town of Milford against the defendant corporation to recover the value of the town hall and certain sidewalks and hose, which were the property of the municipality, and were destroyed by fire in April, 1905. It was alleged that this loss was caused by the negligence of the defendant corporation in failing to perform its contract to supply through its pipes water of sufficient current, pressure, and volume to extinguish fires within the range of its hydrants.

The two counts especially relied upon by the plaintiff town were the second count in the original declaration and an "amended count," both of which appear in the opinion.

The defendant corporation filed a general demurrer to the declaration, with joinder by plaintiff town, and then by agreement the cause was reported to the law court for determination, with the stipulations that the case should "be heard by the law court on declaration as amended, demurrer, and joinder. If the demurrer is overruled, defendant shall have the right to plead anew; if sustained, the plaintiff shall be nonsuited."

Argued before WHITEHOUSE, SAVAGE, PEABODY, SPEAR, CORNISH, and KING, JJ.

Louis C. Stearns and Taber D. Bailey, for plaintiff. E. C. Ryder, for defendant.

WHITEHOUSE, J. This is an action on the case, brought by the inhabitants of the town of Milford against the defendant corporation to recover the value of the town hall and certain sidewalks and hose, which were the property of the municipality, and were destroyed by fire in April, 1905. It is alleged that this loss was caused by the negligence of the defendant in failing to perform its contract to supply through its pipes water of sufficient current, pressure, and volume to extinguish fires within the range of its hydrants.

A general demurrer to the declaration was filed by the defendant, and it was stipulated by the parties that the cause should be heard by the law court on the amended declaration, demurrer, and joinder; that if the demurrer was overruled, the defendant should have the right to plead anew, and if sustained, the plaintiff should be nonsuited.

The two counts especially relied upon by the plaintiffs are the second count in the original declaration and the "amended count." The second count is as follows:

"Also for that there was on the 23d day of July, A. D. 1891, a corporation called the Penobscot Water & Power Company, organized under the laws of Maine, among other things, for the purpose of supplying towns and communities with water for domestic use and the extinguishment of fires, and said corporation then and there entered into a contract with the plaintiffs, whereby for the sum of \$800 per year it agreed, among other things, to supply the plaintiff with 16 post hydrants, and water for the same, before the 1st day of August, 1892. It also agreed that said hydrants would have two nozzles, and should be supplied with pipes at least four inches in diameter, and that said hydrants should be so placed that proper protection against fire should be secured. It was also agreed that the waterworks to be established under the contract should be supplied by a pump, or pumps, of a capacity of not less than 1,000,000 gallons per day, and the plaintiffs say that said hydrants were erected according to contract, and that they ever paid the sum of \$800 per annum to the said Penobscot Water & Power Company; and the plaintiffs say that said Penobscot Water & Power Company assigned said contract, by its deed in writing, with all its property and franchises, to a corporation called Public Works Company, organized under the laws of Maine, and having its principal place of business in Bangor in said county, whereupon the Public Works Company maintained said hydrants and supplied them with water, and the plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiffs paid them by and after the same rate of \$800 per year for the use of the same until the 7th day of April, 1905. On said 7th day of April the Public Works Company, by its deed in writing duly executed, assigned and delivered to a corporation called Bangor Railway & Electric Company, the defendant, all its property and franchises, including said contract, whereupon the said Bangor Railway & Electric Company undertook to maintain said mains and hydrants and assume control thereof, and to supply the same with water, and the plaintiffs say that they paid the said company up to and beyond the 28th day of April, 1905, for the use of said hydrants by and after the rate of \$800 per year, in accordance with the terms of their contract with the Penobscot Water & Power Company, and now the plaintiffs say that by reason of the premises and the matters hereinbefore stated the defendant was bound and obliged and owed the duty to maintain said hydrants with a supply of water therein for the extinguishment of fires in the town of Milford, and particularly for the extinguishment of fires communicated to the property of the inhabitants of said town as a corporation; and the plaintiffs further say that on said 28th day of April they were the owners of a certain public building called a town hall, of the value of \$5,000, and of a certain large number of planks constituting a sidewalk, of the value of \$250, and a hose pipe of the value of \$250. Now on said 28th day of April the defendant did not fulfill its duty and obligation to furnish water in said hydrants; but, on the contrary, wrongfully and negligently failed to supply said hydrants with water capable of use for the extinguishment of fires, and left the same empty and useless, and on said 28th day of April said building of the plaintiffs took fire, and although the defendant's hydrants were in easy reach of said building, they supplied no water, and albeit the plaintiffs used their utmost endeavor to extinguish said fire, they failed because of the lack of water, and pressure of water, in said hydrants, and the building and the sidewalk and the hose aforesaid were utterly consumed, all which results were entirely due to the wrongful conduct of the defendant in not supplying water in said hydrants according to its obligation and duty."

The "amended count" is as follows:

"In a plea of the case, for that on the 28th day of April, A. D. 1905, the said inhabitants of Milford were the owners of a certain public building called a town hall, of the value of \$5,000, and certain planks and timbers, constituting a sidewalk of the value of \$250, and certain fire hose of the value of \$250; and the plaintiffs aver that on said 28th day of April, 1905, the defendant had engaged and was bound and obliged to furnish through its mains, conduits, pipes, and hydrants, the same being laid and placed in the streets of said plaintiffs' town, water of sufficient cur-

rent pressure, and volume to extinguish fire within range of said hydrants, and especially and particularly fires originating in, or communicated to, plaintiffs' said building and property, in consideration of the sum of \$800 per annum paid to it by said plaintiffs. Now the plaintiffs say that on said 28th day of April a fire started in a board pile at a considerable distance, to wit, a quarter of a mile, from plaintiffs' said buildings and property, which said fire might easily have been extinguished and put out had there been any pressure and volume of water in said mains and hydrants, but the defendant, unmindful of the duty and obligations in this behalf, wrongfully, carelessly, and negligently suffered and allowed said mains, pipes, and hydrants to be destitute of any current of water of sufficient pressure, force, and volume to be of any value or utility in extinguishing said fire, or any fire, so that the plaintiffs were unable, by the use of the greatest diligence and the strongest efforts, to quench the fire in said pile of boards, although they were in the use of due care in this behalf; and the plaintiffs aver that said fire in said board pile was communicated to the said buildings and property of plaintiffs by sparks, firebrands, or cinders, so that the same were utterly burned and consumed, although hydrants were at hand and in close proximity to said buildings and property, and competent and capable men were at hand with suitable hose and appliances ready to extinguish the fires started by said cinders and firebrands upon plaintiffs' said building and property, and were prevented from doing so solely by the lack and want of water in said hydrants, which it was the duty and obligation of said defendant to furnish; and the plaintiffs aver that the sole cause of the said loss and damage was the wrongful neglect of duty of said defendant, to the damage of said plaintiffs (as they say) the sum of \$6,000."

In support of the demurrer the following statement of the defendant's claims was presented as the basis of the argument in its behalf, viz.:

"(1) The company does not agree to extinguish fires, or to insure property against loss by fire. Its agreement is simply to furnish a water system and supply it with water. It is impossible to say that failure to furnish water was the proximate cause of the loss, and consequently no action can be maintained to recover for the loss of property by fire. The cause of the loss is too remote, and the damages too uncertain, to allow of a recovery.

"(2) Damages must be such as were in contemplation at the time the contract was made. It cannot be claimed that it was the intention of the company to make good loss by fire for the small compensation which it received for installing its plant.

"(3) In making a contract with the water company for the protection of property against fire the town acts for the general pub-

lic good. The town as a property owner derives the same benefit that every other property owner does. The contract does not protect any particular property, but is for the benefit of all.

"(4) If an action can be maintained, it must be an action of assumpsit. There is no statute or common-law duty imposed upon the defendant to furnish water to the municipality. The duty imposed grows out of the contract itself. Recovery, if any there be, must be by virtue of the contract, and not on account of any legal duty independent of the contract."

The important question thus raised by the pleadings and contentions of the parties has never before been presented to this court, nor, so far as appears, has the precise question ever been directly involved and expressly determined in any jurisdiction, state or federal, in this country; the only analogous case cited by counsel being distinguishable from this in essential particulars. There is no prevailing American doctrine upon the question, and no precedent in this state, that can in any way embarrass this court in its efforts to reach a solution of the problem that shall appear to be warranted by the well-established and fundamental law of contracts, consonant with the principles of justice and sound reason, and in harmony with the considerations of public policy involved in the inquiry.

The plaintiffs are a municipal corporation, and by section 76, c. 4, of the Revised Statutes, such corporations are empowered to "contract for a supply of water, gas and electric light for municipal uses upon such terms as may be mutually agreed, * * * and may raise money therefor." The plaintiff town of Milford was also specially authorized by chapter 331, p. 484, of the Private and Special Laws of 1891, "to contract with the Penobscot Water & Power Company for a supply of water for municipal and sanitary purposes and for the extinguishment of fires," and it appears from the averments in the plaintiffs' declaration that the defendant corporation acquired all the powers, privileges, and franchises, and assumed all of the obligations, of the Penobscot Water & Power Company.

It is provided by chapter 46, p. 53, of the Private and Special Laws of 1905 that the defendant corporation "shall have, possess and enjoy all of the powers of a corporation formed under the provisions of chapter 47 of the Revised Statutes" of Maine, and it thus appears to have been invested with full power to make contracts and to sue and be sued.

It is not in controversy, therefore, that both of the parties to this suit were competent to enter into the contract set out in the plaintiffs' declaration. According to the allegations therein contained, the defendant entered into a contract with the plaintiffs, whereby for the sum of \$800 per year it agreed to supply the plaintiffs with 16 post hydrants, and water for the same, before the 1st day of

August, 1892. It also agreed that said hydrants should have two nozzles, and should be supplied with pipes at least four inches in diameter, and that said hydrants should be so placed that proper protection against fire should be secured. It was also agreed that the waterworks should be supplied by a pump, or pumps, of a capacity of not less than 1,000,000 gallons per day. The defendant also engaged and became bound and obliged to furnish, through its pipes and hydrants, water of sufficient current, pressure, and volume to extinguish fire within range of such hydrants, and especially and particularly fires originating in, or communicated to, the plaintiffs' said building and property. The hydrants were duly erected, and the plaintiffs paid to the defendant corporation the sum of \$800 per annum, in accordance with the terms of the contract, up to and beyond the time of the fire in which the plaintiffs' property was destroyed.

Here, then, is a formal written contract, entered into by parties competent to make it. It is not in controversy that it was complete, definite, and certain; that it was free from misapprehension, fraud, or mistake, and entirely fair and reasonable in all its parts. It was not characterized by any lack of mutuality, either in the terms of the contract when made, or in the remedies available to both parties. The plaintiffs had fully performed the contract on their part, and it contains no clause or phrase that would afford the defendant any reasonable ground for claiming exemption, either from the legal obligation or the moral duty of performing on its part a contract so manifestly indispensable to the protection of the plaintiffs' property and so vitally important to the welfare of the people. With respect to the issue presented in this action for negligence the defendant was required to use ordinary care to maintain the pipes and hydrants and furnish water of the current pressure and volume as stipulated in its written contract. It was only required to exercise such prudence, vigilance, and precaution as would meet the requirement of ordinary care, according to the exigencies of the situation, having due regard to the nature and importance of the contract, the rights and interests of those to be affected by it, and the manifest consequences of a failure to perform it. There is nothing in the contract to indicate, and nothing in the situation of the parties to suggest, that the performance of its duty would have been attended with any oppression or hardship on the defendant.

But the demurrer admits the truth of the plaintiffs' allegations that the defendant "wrongfully, carelessly, and negligently suffered and allowed the mains, pipes, and hydrants to be destitute of any current of water of sufficient pressure, force, and volume to be of any value or utility in extinguishing said fire, or any fire." And the plaintiffs aver that the "sole cause of the

said loss and damage was the wrongful neglect of duty of said defendant."

But it is suggested, in behalf of the defendant, that the corporation does not agree to extinguish fires, or to insure property against loss by fire; that its agreement is simply to furnish a water system; that it is impossible to say that failure to furnish water was the proximate cause of the loss; and that damages can only be such as were in contemplation at the time the contract was made.

That the defendant did not agree to extinguish fires or to insure property against fire is unquestioned. The statement is true, but the argument is fallacious. The conclusion, which is evidently sought to be deduced, that the defendant is not liable for the damages resulting solely from a breach of its contract to furnish water to extinguish fires does not necessarily follow. A corresponding statement directing attention to the particular thing which the defendant agreed to do, or not to do, could with equal propriety be made respecting every cause of indirect damages. This method of reasoning obviously excludes from consideration the distinctive character of consequential damages for the breach of a contract, and hence affords no aid in determining the question of liability. In the leading English case of *Hadley v. Baxendale*, 9 Exch. 353, so often cited as authority in this country, the plaintiffs gave the broken shaft of their mill to the defendant carrier to be forwarded immediately to an engineer, to serve as a model for a new one. The delivery was delayed, and the mill remained idle for want of the new shaft. The plaintiffs claimed damages for loss of profits while the mill was idle. The carrier only undertook to deliver the broken shaft immediately. He did not contract to provide a new shaft, or to furnish business for the mill. But the familiar rule was then enunciated "that when two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally—i. e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract—as the probable result of the breach of it. So in what has been termed "the leading American case" of *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, it was held that the plaintiff was entitled to damages for the loss of the ordinary rental of his mill, resulting from the breach of the defendants' contract to deliver a steam engine built for the purpose of running the mill. But the defendant did not contract to run the mill, or to supply business for it. He only agreed to deliver a steam engine to furnish power for it. The statement of the rule of damages is substantially identical with

that in the English case of *Hadley v. Baxendale*, *supra*.

Equally pertinent illustrations are readily found in our own state. In *Grindle v. Eastern Express Company*, 67 Me. 317, 24 Am. Rep. 31, the plaintiff's intestate delivered \$24.90 to the defendant express company, at Castine, to be sent to Belfast to pay a premium on his life policy, which by its terms would lapse in eight days if the premium was not paid. It was held that for failure to deliver the money according to its undertaking the defendant was liable for the net value of the policy on the day it lapsed, on the ground that both parties must be presumed to have contemplated such damages from a knowledge of the circumstances. But the defendant's only undertaking was to carry a package of money. See, also, *Frye v. Maine C. R. R. Co.*, 67 Me. 414, and *McPheters v. Moose River Log Driving Co.*, 78 Me. 329, 5 Atl. 270.

Further apposite illustrations are found in numerous cases involving facts more closely analogous to those at bar. In *Watson v. Inhabitants of Needham*, 161 Mass. 404, 87 N. E. 204, 24 L. R. A. 287, the defendant town, acting through its water commissioners, undertook to furnish the plaintiff with water for use in a boiler to generate steam to heat his greenhouse, but omitted to use proper diligence to discover a leak in the main pipe, and the plaintiff failed to receive a sufficient supply of water, whereby his plants were damaged by freezing to the extent of \$400. Here the defendant had not contracted to heat the plaintiff's greenhouse, or to insure his plants against freezing. It had only contracted to furnish water to make steam. But the court held that subject to the right to shut off the water when necessary to make extensions and repairs, which had been expressly reserved, "the town was bound to use reasonable care and diligence to have ready for delivery a sufficient supply of water for the plaintiff's use so long as the contract remained in force." The plaintiff was accordingly allowed to recover the full amount of his damage by freezing.

In *Stock v. Boston*, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430, a similar contract existed between the parties, and the plaintiff sustained damage by the freezing of his plants, caused by the neglect of the defendant to furnish water according to the contract. It was contended in behalf of the defendant that the damage was too remote, but the court said that the defendant was "liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act. * * * The true inquiry is whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated." See, also, *Metallic C. C. Co. v. Fitchburg R. Co.*, 109

Mass. 277, 12 Am. Rep. 689; *Hand v. Inhabitants of Brookline*, 126 Mass. 324.

The same doctrine is exemplified in *New Orleans & N. E. R. Co. v. Meridian Water-works Co.*, 72 Fed. 227, 18 C. C. A. 519. This case is precisely analogous to the case at bar, being distinguishable only by the fact that the plaintiff in this case is a railroad company instead of a municipal corporation. In the federal case the water company, in consideration of \$1,200 per year, contracted to furnish the tanks and shops of the railroad company with a full and sufficient supply of water, "not less than 60 pounds pressure for all purposes for which water may be needed or used at said shops," and as a part of this agreement the defendant water company laid its pipes to the plaintiff's premises, and attached hydrants thereto to enable the plaintiff to run the water as a protection against fire, knowing that the railroad company had no other available source of water supply, and no other means of extinguishing fires on its premises; but it was alleged in the declaration that the plaintiff's shops and tanks were destroyed by fire in consequence of the defendant's failure to furnish water at 60 pounds pressure. It was held that upon these facts the plaintiff was entitled to recover. In the opinion the court say: "The breach of contract occurred when the defendant failed to furnish the plaintiff's servants with an adequate supply of water at not less than 60 pounds pressure. * * * The plaintiff's declaration alleges that the proximate cause of its damages was not the fire, but was in the fact of the defendant's failure to furnish water at 60 pounds pressure. If such be the fact, the plaintiff's damages were not too remote or consequential to be sustained by the law applicable to the facts"—quoting in extenso the rule in *Hadley v. Baxendale*, 9 Exch. 341.

In *Middlesex Water Company v. Knappman Whiting Co.*, 64 N. J. Law, 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. Rep. 467, the Supreme Court of New Jersey, on a claim for recoupment set up in an action of contract, rigidly enforced the obligations of the defendant's contract. In that case the water company, in consideration of \$600 per year, agreed to furnish the plaintiff company with water "suitable for use in steam boilers, and with a pressure sufficient for fire purposes," but by reason of a leak in the water main, and the consequent failure of the company to furnish water according to the contract, the plaintiff's factory was destroyed by fire, causing damage to the extent of \$20,000. In an action of contract by the water company to recover the amount due for water supplied the plaintiff in error presented its claim for recoupment, based on the failure of the water company to perform its agreement to supply water of sufficient pressure for fire purposes, and it was held that under such a clear and unqualified

contract the water company was liable for the damages sustained by the consumer from fire, in consequence of a failure in the water pressure, though the failure was due to a break in its pipes, without the water company's fault. In the opinion the court say, *inter alia*: "The principle underlying all these cases is that where the contract is express, as it is in this case, to furnish water with a pressure sufficient for fire purposes to do a thing not unlawful, the contractor must perform it; and if, by some unforeseen accident the performance is prevented, he must pay damages for not doing it. No distinction is made between accidents that could be foreseen when the contract was entered into and those that could not have been foreseen. Where from the result of such an accident one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather leaves it where the agreement of the parties has put it, and will not insert for the benefit of one of the parties, by construction, an exception which the parties have, either by design or neglect, omitted to insert in their agreement."

It will be perceived that in this action of contract the exercise of reasonable care and diligence by the water company was not made the criterion of its liability.

In *Skowhegan Water Company v. Skowhegan Village Corporation*, 102 Me. 323, 66 Atl. 714, the competency of the parties to make a contract for a constant and ample supply of water "under sufficient pressure for the extinguishment of fires" and the obligation of the defendant to perform its contract were distinctly recognized. The water company brought suit to recover the rental stipulated in the contract, but the defendant contended that the plaintiff had failed to furnish water of sufficient pressure for the extinguishment of fires, and was therefore not entitled to recover the rental specified. The court sustained a verdict in favor of the defendant, saying in the opinion: "The plaintiff was entitled to recover the fair value of the service, having regard to the contract, and considering how much less the service was worth to the corporation by reason of the plaintiff's breach of the contract. * * * The question of recoupment, properly so termed, is not involved. But if the plaintiff's breach of the contract be such as to subject the defendant to consequential damage, that may be the foundation for a legitimate claim to recoupment, with respect to which the burden of proof would be upon the defendant."

The case of *Ukiah City v. Ukiah Water & Imp. Co.*, 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107, is cited by counsel for the defendant as a "case on all fours" with the principal case, and as a direct authority against the plaintiffs' contention. But, as already suggested, that case differs materially from this, and is legally

distinguishable from it. In that case there was no express contract, written or oral, between the defendant water company and the plaintiff town respecting the quantity of water to be furnished, or the manner and means of furnishing it. As stated by the court in the opinion, "the same relations existed between the town and the defendant, as to the furnishing of water for general fire purposes, as ordinarily exist between the private consumer and the water company as to water for domestic purposes." The water company had not agreed to supply the town with any definite number of hydrants, or specified the number of nozzles for the hydrants, the diameter of the pipes with which they should be supplied, or the manner in which the hydrants should be placed to afford protection against fire. It had not agreed that its works should be supplied by pumps of any stated capacity, or become bound to furnish, through its pipes and hydrants, water of "sufficient current, pressure, and volume to extinguish fire within the range of such hydrants," or made any special reference to "fires originating in, or communicated to," the property of the municipality. It was principally for want of a contract on the part of the defendant water company to do any specific thing that judgment was given for the defendant. After enumerating the many cases in different jurisdictions in which it has been held that a water company is not liable to individual owners of property destroyed by fire by reason of its failure to perform its contract to supply the town with sufficient water to extinguish fires, the opinion proceeds to show that *Paducah Lumber Co. v. Water Co.*, 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536, and *Gorrell v. Water Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598, in which the opposite conclusion was reached, are to be distinguished from the California case against the Ukiah Water Company, by reason of the fact that in the case of the *Paducah Lumber Company* and in the *Gorrell Case* there was an express contract to do certain specific things, which appears to have been equivalent to the stipulations in the plaintiffs' contract in the case at bar. The court further say: "In each of these cases it will be observed that the court was dealing with contracts whereby the water companies, for valuable concessions and exclusive privileges, had agreed to do and to maintain certain specific things by way of protection from fire, and the gravamen of the charge against each and all of the companies was that they had violated their contract in failing to do the particular things for the doing of which they had expressly contracted. The broad distinction between those cases and the one at bar is, as pointed out in the opinion of the trial judge, that there is no express covenant in the contract between this plaintiff and this defendant, and the security

to plaintiff's property was only the same security which, in the exercise of its governmental functions, the plaintiff had obtained for the whole town."

"Doubtless a water company may so bind itself by contract with a person to furnish him water for the extinguishment of fires as to render itself liable for the value of property of such person destroyed by fire, by reason of its failure to furnish him a sufficient supply of water. * * * It may be assumed here that it is within the power of a municipality, as a property owner, to enter into such a contract with a water company, for the protection of the property which it owns, as a legal individual; but it certainly needs something more than evidence showing an accepted service for general fire purposes to establish such a contract, and the evidence here shows nothing more."

It has been seen that in the written contract as set out in the plaintiffs' declaration in the case at bar, the defendant water company, in consideration of \$800 per annum, did expressly agree to furnish water for 16 post hydrants which should have two nozzles each, and be supplied with pipes four inches in diameter, and that its works should be supplied with pumps of a capacity of 1,000,000 gallons per day. It also expressly "engaged" to furnish, through its pipes and hydrants, water of sufficient pressure and volume to extinguish fire within range of its hydrants, "and especially and particularly fires originating in, or communicated to, the plaintiffs' said building and property." But instead of the pressure and volume specified, the plaintiffs allege that by reason of the defendant's negligence these pipes and hydrants had become destitute of any current of water of sufficient pressure and volume to be of any utility in extinguishing fires, and that this negligence on the part of the defendant was the sole cause of the plaintiffs' loss and damage.

The defendant corporation proceeded to construct and operate its plant and entered upon its public service and the performance of its contract. It well knew that the plaintiff town, relying upon its express contract with the defendant, would omit to make any other arrangements for the supply of water, or provide any other means for the extinguishment of fires. The defendant's servants did not need to be informed that the elaborate provisions of the contract respecting the supply of water through its hydrants were for the purpose of affording protection against the destruction of property by fire. They well knew the disastrous results likely to flow from any neglect on their part to perform the contract to furnish water of sufficient volume and pressure to extinguish fires. Under such circumstances damages from loss of property by fire are not only the natural consequences of the defendant's wrongful neglect, but "such as may reasonably be supposed to have been in the contem-

plation of the parties at the time they made the contract as the probable result of the breach of it." The injuries sustained are manifestly such as, according to common experience and the usual course of events, might reasonably be anticipated. Indeed it is impossible to conceive of any class of contracts, or of contracts relating to any subject-matter, with respect to which the consequences of a breach are more palpably natural or more readily anticipated.

Under the stipulation in the report the defendant is entitled to plead anew in the event that the demurrer is overruled. All of the other objections interposed by the defendant to the maintenance of the action involve a question of fact to be heard upon the trial of the cause. Whether the defendant's breach of duty in connection with the performance of its contract was culpable negligence, and, if so, whether such breach of duty on its part, or "the negligence of the plaintiffs themselves, or the criminal act of a stranger, or an atmospheric condition," was the proximate cause of the plaintiffs' loss are questions not raised by the demurrer, but are determinable by the trial court. The solution of them may often be attended with difficulty, but there is no reasonable ground for apprehending that such difficulty will be essentially different from that experienced in numerous other cases of a similar character.

When, therefore, the established principles of law are applied to this case as to all others, and the contract between these parties is held to possess the binding force and efficacy of all other analogous contracts, the conclusion is irresistible that, upon proof of the facts stated in the declaration, the defendant would be liable to the plaintiffs, in an appropriate action, for the damages caused by its negligence in failing to perform a duty arising from its contractual relations with the plaintiffs.

2. But the defendant further contends that the plaintiffs have misconceived their remedy, and that if any action can be maintained, it must be an action of assumpsit, and not of tort.

It is the opinion of the court that this contention is not sustainable, either upon reason or authority. As observed by the court in *Ashley v. Root*, 4 Allen (Mass.) 504: "This is one of a numerous class of cases where a party may elect to sue either in contract or tort. At common law he might sue in assumpsit for breach of contract, or in case for breach of duty." In that action a principal was allowed to recover in an action of tort against his agent for all the damage caused by a breach of duty by the agent, including his neglect to pay over on demand money which he had collected as agent. Either case or assumpsit may also be supported for a false warranty in the sale of goods. *Mahurin v. Harding*, 28 N. H. 128, 59 Am. Dec. 401. In the opinion the court say: "The warranty is none the less a contract

because it is the means by which a fraud is accomplished, and the fraud is in no way diminished because the seller has at the same time bound himself by a warranty."

In 28 Am. & Encyc. of Law (2d Ed.) p. 625, it is said: "Case will also lie for a violation of the duty which the contractual relations between the parties involve, in many cases where assumpsit is a concurrent remedy. * * * Although assumpsit will also usually lie for a breach of the contract, action on the case for the breach of the common-law duty is often the better remedy. * * * It will also lie concurrently with assumpsit for a breach of duty arising out of an express or implied contract." *Burnett v. Lynch*, 5 Barn. & Cres. 589 (12 E. C. L. 327) is cited in support of the last statement. In that case the defendant had taken an assignment of a lease subject, not only to the payment of rent, but to the performance of the covenants, and had thereby made it his duty to pay the rent and perform the covenants. It was held by Abbott, C. J., that either assumpsit or case was maintainable for a breach of that duty, citing *Kinlyside v. Thornton*, 2 Wm. Bl. 1111. In the opinion of Bailey, J., it is said: "It is unnecessary to go through the cases in which it has been decided that although there be an express contract, a party is not bound to resort to that contract as the gist of the action, but he may declare on the tort, and say that the party has neglected to perform his duty. In *Dickson v. Clifton*, 2 Wils. 319, there can be no doubt that an action of assumpsit might have been maintained against the captain for not receiving and carrying the corn, or for not taking care of the cargo; but there the plaintiff described the contract in specific terms, and brought case against the defendant for negligence in the performance of his duty. That could only be because the express contract between the parties created a duty, for the breach of which an action of tort might be maintained." See, also, 1 Chitty on Plead. (16th Ed.) p. 162, with the observations of Lord Ellenborough on *Govett v. Radnidge*, 3 East, 70, there cited, and *Broom's Legal Maxims*, 201, 202, and cases cited.

In the case at bar an action on the case is brought to recover damages for the consequential injuries resulting from the negligent manner in which the defendant company performed a duty created by an express contract between the parties. It is not, properly speaking, an action based on the non-feasance of the defendant. It is brought to recover damages for the refusal of the defendant to perform the contract. It sufficiently appears that the defendant laid the pipes, erected the hydrants, and fully established its plant, and for a time operated it to the satisfaction of the plaintiffs. The action is based on the defendant's negligence in the operation and management of the plant, negligence which would be exempli-

fied by a want of vigilance and attention in discovering a leak or adjusting a shut-off. An action *ex contractu* might have been maintainable, as in *Knappman Whiting Co. v. Water Co.*, 64 N. J. Law, 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. Rep. 467, where the obligation of the contract was enforced and the water company held liable for a loss by fire resulting from a failure in the water pressure which was not due to any negligence of the company. But here the plaintiffs elected to bring case, as they were legally entitled to do, a form of action obviously more favorable to the defendant, since it imposes upon the plaintiffs the burden of proving negligence on the part of the defendant respecting the duty which it engaged to perform.

According to the stipulations in the report, the entry must therefore be

Demurrer overruled.

Defendant to plead anew.

(104 Me. 198)

GETCHELL v. ATHERTON.

(Supreme Judicial Court of Maine. July 8, 1908.)

1. DEEDS (§ 118*)—AMBIGUITY IN DESCRIPTION—EVIDENCE TO EXPLAIN.

When, upon applying to the surface of the earth the language used in a deed to describe the land conveyed, an ambiguity in the language is revealed, the court, in order to determine the ambiguity, may receive and consider evidence of the situation and the circumstances and of the acts of the parties previous and subsequent to the conveyance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 239, 599; Dec. Dig. § 118.*]

2. DEEDS (§ 118*)—LATENT AMBIGUITY—DESCRIPTION.

The owner of a double tenement conveyed one tenement by a deed describing it as "the northerly tenement," and describing the dividing line as "running a westerly course by the partitions as they now stand," etc. At the westerly end of the building were two partitions, both running westerly and inclosing between them a small yard. *Held*, that a latent ambiguity was revealed as to which of these two partitions was the one intended by the parties to the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 239, 599; Dec. Dig. § 118.*]

3. DEEDS (§ 114*)—CONSTRUCTION—DESCRIPTION.

It appeared from the evidence that the small yard could be entered only from the southern tenement, that it had been used before and after the conveyance almost exclusively by the tenants of the southern tenement as a part of that tenement, and that the southern tenement could have no other yard while the northern tenement had ample room for a yard. *Held*, that, in the conveyance of the northern tenement, the parties intended the northern of the two partitions and that the yard south of it was not conveyed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 316; Dec. Dig. § 114.*]

(Official.)

Report from Supreme Judicial Court, Penobscot County.

Action by Louise M. Getchell against Elbridge A. Atherton. Case reported. Judgment for plaintiff.

The declaration in the plaintiff's writ was as follows:

"In a plea of trespass, for that the said defendant at said Bangor, on the 1st day of August, A. D. 1907, with force and arms broke and entered the plaintiff's close in said Bangor, and then and there dug up and subverted the soil and earth, and then and there caused to be put, placed, and erected a wooden building in and upon the said close, and kept and continued the said wooden building so there put, placed, and erected, without the leave or license, and against the will of the said plaintiff, for a long space of time, to wit, from the said 1st day of August, A. D. 1907, hitherto, and thereby and therewith during all the time aforesaid greatly incumbered the said close, and hindered the said plaintiff from having the use, benefit, and enjoyment thereof in so large and ample a manner as she might and otherwise would have done. And other wrongs to the said plaintiff the said defendant then and there did, against the peace of the state, and to the damage of said plaintiff (as she says) the sum of \$300."

Plea, the general issue, with brief statement "that the premises described in the writ and declaration of the plaintiff are not the property of the said plaintiff, but is now and was at the date of the plaintiff's writ and prior thereto the property and freehold of the said defendant, and the defendant says that he is not guilty of the acts of trespass complained of in said writ and declaration of the plaintiff."

Tried at the January term, 1908, Supreme Judicial Court, Penobscot county. At the conclusion of the evidence, the case was reported to the law court "for determination upon so much of the evidence as would be legally admissible. If judgment be for the plaintiff, damages to be awarded to be ten dollars and costs."

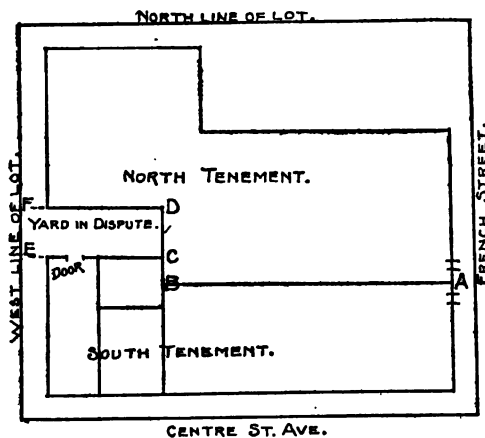
Argued before EMERY, C. J., and SAVAGE, PEABODY, CORNISH, KING, and BIRD, JJ.

A. J. Merrill, for plaintiff. P. H. Gillin, for defendant.

EMERY, C. J. The question is which party has title to a small open space or yard, 12x21 feet in extent, in the rear of a double tenement house in Bangor, bounded on the east by French street. The title to the whole house and lot including both tenements was in the same person from 1870 to December 30, 1890, though the occupants of the different tenements were different persons. In 1890, December 30, the owner of the whole property divided it by granting the northerly tenement with the following

description: "Beginning at a point on the west line of French street between the front doors and running a westerly course by the partitions as they now stand to the west line of land described in a deed recorded in the Penobscot Registry of Deeds, vol. 336, page 379. Meaning to convey the land north of the partitions, being the northerly tenement, and as a part of the consideration the partitions are to remain as they now are between said tenements." The defendant's title to the northerly tenement is derived from this deed, while the plaintiff owns the southerly tenement, and the question is thus narrowed to this, viz.: Is the small yard in the rear included in the description in the deed?

In applying this description to the premises as they were at the date of the deed, we find they were as indicated upon the plan here sketched from the surveyor's plan in the case, though not to scale.



The parties agree that the division line in the deed starts from the point A, between the doors on French street, and runs west by the main partition to the point B, where it meets a north and south partition, and then runs north by that partition to the point C. The defendant contends that from the point C the line runs west again by the partition C E. This would include the yard in the deed of the northerly tenement owned by him. The plaintiff contends that the line from the point C continues to run north by the partition C D, and then west again by the partition D F. This would leave the yard attached to the southern tenement owned by her.

A latent ambiguity is disclosed. There were two partitions in the back part of the tenements with the yard between. The language of the deed does not in terms distinguish between them. It does not specify

the dividing partition as north or south partition, nor as first or second partition, nor in any other way. It uses the plural "partitions." We are thus compelled to resort, as we may lawfully do, to evidence of the whole situation and surroundings, and as to the use or nonuse of the yard by the occupants of each tenement before and after the division of the title, in order to ascertain, if possible, which of the two partitions is to be taken as that referred to in the deed.

In the southern partition was and is a door opening into the yard from the southern tenement, while there was and is no door from the northern tenement into the yard. The yard was regularly and without interruption used by the occupants of the southern tenement as a part of that tenement both before and after the division of the title in 1890 until after the defendant took possession of the northern tenement in 1899. The yard was used by the occupants of the northern tenement only for putting on and taking off outside windows on that side of their house, except an isolated instance when some beans were planted in it next to the wall of the northern tenement. Further, it appears that the southern tenement of the house is so near the lot lines, only eight feet distant, that it has no other room for yard purposes, while there appears to have been ample room for yard purposes north of the north tenement next to French street.

From these proven facts we think it clear that the parties to the division deed of December 30, 1890, and their successors in title down to the defendant in 1899, understood the yard to be a part of the southern tenement, and that the northern partition, excluding the yard from the grant of the northern tenement and leaving it a part of the southern tenement, was the partition referred to and named in the deed as the dividing partition at that place.

It is true that, in case of doubts in grants, the presumption is against the grantor, but that presumption can be overcome by other proper considerations, and we think it is in this case.

The defendant urges that, when he purchased the northern tenement, he was assured by the real estate agent that the yard went with the northern tenement, and that he purchased with that understanding, but, of course, that was merely the opinion of the agent, and is not to be considered.

It follows that the title to the yard is in the plaintiff, and, according to the stipulation of the parties, judgment must be for the plaintiff with damages assessed at \$10. So ordered.

(104 Me. 217)

HONE et al. v. PRESQUE ISLE WATER CO.

(Supreme Judicial Court of Maine. June 9, 1908.)

1. PLEADING (§ 214*)—DEMURRER.

A demurrer only admits such facts as are well pleaded in the declaration.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 526; Dec. Dig. § 214.*]

2. PLEADING (§ 214*)—DEMURRER.

A demurrer does not confess a matter of law deduced by either party from the facts pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 527; Dec. Dig. § 214.*]

3. NEGLIGENCE (§ 111*)—PLEADING—DECLARATION.

In a declaration, an allegation of duty alone is not sufficient. There must be an allegation of facts sufficient to create the duty; otherwise the declaration will be defective.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 182; Dec. Dig. § 111.*]

4. ACTION (§ 13*)—PERSONS ENTITLED TO SUE.

Negligence which consists merely in the breach of a contract will not afford ground for an action by one who is not a party to the contract, and not a person for whose benefit the contract was avowedly made.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 13.*]

5. MUNICIPAL CORPORATIONS (§ 250*)—CONTRACTS—RIGHTS OF CITIZENS.

A municipal corporation, in making contracts for the benefit of its citizens, acts for them collectively, and for all of them, in every act; and the relation of privity is not, and cannot be, introduced into such contracts by reason of taxpaying or the discharge of any civic duty by any individual citizen.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 250.*]

6. MUNICIPAL CORPORATIONS (§ 250*)—CONTRACTS—PUBLIC WATER SUPPLY—LIABILITY TO INDIVIDUAL CITIZEN.

Although a municipal corporation maintaining a fire department levies and collects a tax to pay a water company for water furnished under a contract between the corporation and the water company for the use of such fire department, yet that fact does not create any privity of interest between the water company and a citizen or a resident or a taxpayer of the corporation.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 250.*]

7. WATERS AND WATER COURSES (§ 206*)—WATER COMPANIES—CONTRACT WITH CITY—WATER FOR FIRE USE—INSUFFICIENT SUPPLY.

Where a village corporation, authorized to maintain a fire department for the extinguishment of fires within its limits, contracted with a water company to furnish water for the use of its fire department, and certain buildings situate within such limits, and owned by individuals, were destroyed by fire by reason of the failure of the water company to furnish an adequate supply of water for the extinguishment of fires, *held*, that the water company was not liable to the individual owners of the property destroyed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 301; Dec. Dig. § 206.*]

8. WATERS AND WATER COURSES (§§ 206, 209*)—PUBLIC WATER SUPPLY—LIABILITY OF WATER COMPANIES—BREACH OF CONTRACT—LOSS BY FIRE—LIABILITY TO OWNERS OF PROPERTY.

In an action on the case, brought by individual owners of property situate within the limits of a village corporation and destroyed by fire, to recover damages from a public service water company for their loss on the ground that the loss resulted from the negligent failure of the water company to keep a certain hydrant in proper condition for use, the declaration contained two counts. The first count contained no averment of any express contract either directly between the water company and the plaintiffs or between the water company and the village corporation in which the individual property destroyed by fire was situated, but simply stated, as a legal conclusion from its undertaking to render service as a public water company, that it was the defendant's duty arising therefrom to maintain its hydrants at all times in a proper condition for use; while the second count contained a general allegation that the defendant water company undertook to furnish a supply of water under a contract with the village corporation, and stated as a legal conclusion that it was the defendant's duty under the contract to keep its hydrants at all times in proper condition for use, but failed to specify what the stipulations of the contract were which would justify such a conclusion.

Upon demurrer to the declaration, *held*: (1) That individual owners of property destroyed by fire cannot maintain an action on the case against a public service water company for a loss resulting from the negligent failure of the company to furnish a supply of water, either in a case where the duty of the company to furnish water arises solely from an accepted service for general fire purposes, or from a general contract on the part of the water company with the municipality to furnish water for such purposes, without a specification of any particular thing to be done to that end, and without any stipulation respecting liability for losses by fire. (2) That the declaration was not sufficient in substance, and that the action was not maintainable.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 301; Dec. Dig. §§ 206, 209.*]

(Official.)

Exceptions from Supreme Judicial Court. Aroostook County.

Action by John J. Hone and David A. Hone against the Presque Isle Water Company. Demurrer to the complaint sustained, and plaintiffs except. Exceptions overruled.

Action on the case brought by the plaintiffs against the defendant water company to recover damages for the loss of certain buildings owned by them and destroyed by fire, on the ground that the loss resulted from the negligent failure of the defendant water company to keep a certain hydrant in proper repair and condition for use. The declaration contained two counts, which are as follows:

"In a plea of the case, for that the said defendant is a public service corporation, created and organized under the provisions of chapter 3, p. 4, of the Private and Special Acts of 1887 of the state of Maine, duly

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

authorized to lay water pipes and mains in the village in said Presque Isle, and furnish water for public and private purposes in said Presque Isle, and that said defendant did, under and by virtue of said special act, construct a system of waterworks by pipes and mains under the streets in said village, and assumed and undertook the duties of a public water company, and began to furnish water for public and private uses, including the furnishing of water in hydrants to be used in extinguishing fires in said village, and on the 4th day of April, 1905, was, and for a long time prior thereto had been, furnishing water for said purposes, and especially for the extinguishment of fires for a reward paid to it by the Presque Isle Village Fire Department, and as such water company, organized as aforesaid, it was the duty of the defendant at all times to keep the hydrants connected with its said system of waterworks in proper repair and condition to be used at any such time for extinguishing fires in said village; that a long time prior to said 4th day of April, 1905, said water company constructed and placed in position, connected with its said mains, a certain hydrant, a part of its system, located near and in front of a building existing on the main street in said village known as 'Presque Isle Opera House,' then and there the property of the plaintiffs, which said hydrant said defendant corporation then and there undertook and was bound to maintain and keep in proper repair and condition to be used in extinguishing fires in its vicinity, but said defendant so carelessly and negligently maintained said hydrant that the water in said hydrant on said 4th day of April, 1905, was and for a long time prior thereto had been frozen, and said hydrant thereby was and had been rendered useless; that on said April 4, 1905, a fire broke out in the basement of said building known as the 'Presque Isle Opera House' in said village of Presque Isle, and in the immediate vicinity of said hydrant, frozen as aforesaid, and the plaintiffs and the village fire department in said Presque Isle relying, as they had a right to do, on the said defendant keeping said hydrant in proper repair and condition for use as aforesaid, then and there connected their hose to said hydrant for the purpose of obtaining water with which to extinguish said fire, but, by reason of the careless and negligent conduct of the said defendant in failing to keep said hydrant in proper condition and repair as aforesaid, were unable to obtain water therefrom, and were compelled to change to other hydrants at a great distance therefrom, and after great loss of time, during which said time, and as a result of said careless and negligent maintenance of said hydrant, the said fire became unmanageable and spread beyond the control of said fire department, and entirely consumed said Presque Isle

Opera House, and therefrom spread to and entirely destroyed another building of the plaintiffs then and there occupied by tenants of the plaintiffs. Both of said buildings were of the value of \$30,000. And the plaintiffs aver that said loss and damage was sustained by them solely by reason of the carelessness and negligence and breach of duty on the part of said defendant in failing to keep and maintain said hydrant in proper repair and condition for use.

"Also, for that the said defendant is a public service corporation, created and organized under the provisions of chapter 3, p. 4, of the Private and Special Laws of 1887 of the state of Maine, duly authorized to lay water pipes and mains in the village of said Presque Isle, and to furnish water for public and private purposes in said Presque Isle, and to contract for a supply of water for the extinguishment of fire or other purposes for a term of years with the town of Presque Isle, or village corporation, and other persons and corporations, and that said defendant did, under and by authority of said special act, construct a system of waterworks and lay water pipes and mains under the streets in said Presque Isle, and assumed and undertook the duties of a public water company, and began under a contract with the Presque Isle Village Fire Department, a corporation created and organized under the provisions of chapter 525, p. 764, of the Private and Special Laws of said state for the year 1885, to furnish water for public and private uses, including the furnishing of water and hydrants to be used in extinguishing fires in said village of Presque Isle, and on said 4th day of April, 1905, was, and for a long time prior thereto had been, under said contract, for a valuable and sufficient consideration, furnishing water and hydrants for said purposes, and as such water company, under said contract, it was the duty of the said defendant at all times to keep the hydrants connected with its said system of waterworks in proper repair and condition to be used at any time for the extinguishment of fires in said village; that a long time prior to said 4th day of April, 1905, said water company constructed and placed in position, connected with its said water pipes and mains, a certain hydrant located near and in front of a building belonging to the plaintiffs, and situated on the west side of Maine street in said village, known as the 'Presque Isle Opera House,' which said hydrant said defendant then and there undertook and was bound to keep in proper repair and condition to be used in extinguishing fires in its vicinity, but maintained said hydrant so carelessly and negligently that on said 4th day of April, 1905, the water in said hydrant was and for a long time prior thereto had been frozen, and said hydrant was thereby rendered useless; that on said 4th day of April, 1905, a fire broke out in the basement

of the plaintiffs' said building, known as the 'Presque Isle Opera House,' and in the immediate vicinity of said hydrant, frozen as aforesaid, and the plaintiffs and the fire department of said village, relying, as they had a right to do, on the defendant keeping said hydrant in proper repair and condition for use as aforesaid, as the defendant had agreed and was required and bound by law to do, then and there connected their hose to said hydrant for the purpose of obtaining water with which to extinguish said fire, but, by reason of the careless and negligent conduct of said defendant in failing to keep said hydrant in proper repair and condition for use as aforesaid, were unable to obtain water therefrom, and were compelled to change to other hydrants at a great distance therefrom, and after great loss of time, during which said time, and as a result of said carelessness and negligence on the part of the defendant in failing to keep said hydrant in proper repair and condition to use, the said fire became unmanageable, and spread beyond the control of the plaintiffs and of said fire department, and entirely destroyed said plaintiffs' said building, and therefrom spread to and entirely destroyed another building of the plaintiffs, both of which said buildings were then and there of the value of \$30,000. And the plaintiffs aver that said loss and damages were sustained by them solely by reason of the carelessness and negligence and breach of duty on the part of said defendant in failing to keep and maintain said hydrant in proper repair and condition for use."

The defendant water company filed a general demurrer to the declaration. The demurrer was sustained by the presiding justice, and the plaintiffs excepted.

Argued before WHITEHOUSE, STROUT, SAVAGE, PEABODY, CORNISH, and KING, JJ.

Powers & Archibald and Louis C. Stearns, for plaintiffs. Ira G. Hersey and Charles F. Daggett, for defendant.

'WHITEHOUSE, J. This is an action on the case, brought by individual owners of property destroyed by fire, to recover damages for their loss against the defendant water company on the ground that it resulted from the negligent failure of the defendant to keep its hydrants in proper condition for use.

The defendant filed a general demurrer to the plaintiffs' declaration. The demurrer was sustained by the presiding justice, and the case comes to the law court on exceptions to that ruling.

It is alleged in the first count in the declaration that, by virtue of a special act of the Legislature, the defendant company, a public service corporation, constructed a system of waterworks and undertook the duties

of a public water company, and began to furnish water for public and private uses, including the furnishing of water in hydrants to be used in extinguishing fires within the limits of the village corporation in Presque Isle known as the "Presque Isle Village Fire Department"; that it thereby became the duty of the defendant to keep its hydrants in proper condition for use in the extinguishment of fire in that village; that its hydrants were so carelessly maintained that the water in the hydrant opposite the Presque Isle Opera House, owned by the plaintiffs, was frozen, and the hydrant rendered useless, and that in consequence of the defendant's negligence in that behalf the opera house and another building owned by the plaintiffs were entirely destroyed by fire.

In the second count it is alleged that in pursuance of a special act of the Legislature the defendant constructed a system of waterworks in Presque Isle, and under a contract with the Presque Isle Village Fire Department began to furnish water for public and private uses, including the furnishing of water and hydrants to be used in extinguishing fires in the village of Presque Isle; that under its contract it was the duty of the defendant at all times to keep its hydrants in proper condition for use in extinguishing fires; that this duty was so carelessly performed by the defendant that the water in the hydrant in front of the Presque Isle Opera House, owned by the plaintiffs, was allowed to freeze and the hydrant to become useless; and that in consequence of the defendant's negligence in that behalf the opera house and another building owned by the plaintiffs, of the total value of \$30,000, were entirely destroyed by fire.

It thus appears that the first count contains no averment of any express contract either directly between the water company and the plaintiffs, or between the water company and the village corporation in which the individual property destroyed by fire was situated, but simply states, as a legal conclusion from its undertaking to render service as a public water company, that it was the defendant's duty arising therefrom to maintain its hydrants at all times in a proper condition for use. The second count contains a general allegation that the defendant water company undertook to furnish a supply of water under a contract with the village corporation, and states as a legal conclusion that it was the defendant's duty under the contract to keep its hydrants at all times in proper condition for use, but fails to specify what the stipulations of the contract were which would justify such a conclusion. An allegation of duty alone, however, is not sufficient. There must be an allegation of facts sufficient to create the duty; otherwise the declaration will be defective. A demurrer only admits such facts as are well pleaded in the declaration. It does not confess a matter of law deduced by either party from

the facts pleaded. *Nickerson v. Bridgeport Co.*, 46 Conn. 24, 33 Am. Rep. 1.

It may therefore be a matter of grave doubt whether the important question argued by counsel is properly raised by the pleadings; but inasmuch as this objection appears from the argument to have been waived by counsel, the case has been considered upon the assumption that it was the duty of the water company, as between the village corporation and itself, to keep its hydrants in proper condition for use in furnishing water for the extinguishment of fires in winter as well as in summer.

This court is thus for the first time brought face to face with the question whether an individual owner of property destroyed by fire can maintain an action on the case against a public service water company for a loss resulting from the negligent failure of the company to furnish a supply of water, either in a case where the duty of the company to furnish water arises solely from an accepted service for general fire purposes, or from a general contract on the part of the water company with the municipality to furnish water for such purposes, without a specification of any particular thing to be done to that end, and without any stipulation respecting liability for losses by fire. But the question has been decided in numerous other jurisdictions, state and federal, and it must be admitted, and it is conceded by the plaintiffs, that the overwhelming weight of authority is against the maintenance of the action. It is insisted, however, in behalf of the plaintiffs, that although an action *ex contractu* might not be maintainable, yet, the water company having received valuable franchises under its charter and compensation for the service from taxation of individual property owners in the municipality, it is bound as a matter of public duty to perform its contract, and for any negligence on its part is liable in damages to the individual sufferers, the contract serving only as a measure of the duty resting upon such a public service corporation. The plaintiffs recognize the general rule of law that one who is not a party to a simple contract, and from whom no consideration is received, cannot maintain a suit on the contract, and that a promise made by one person to another for the benefit of a third who is a stranger to the consideration will not support an action by the latter, but it is contended that in this class of cases the consideration does move from the individual taxpayer of the municipality.

It is contended in behalf of the defendant water company that its contract with the village corporation, known as the "Presque Isle Fire Department," to furnish water through hydrants for the extinguishment of fires, did not make the plaintiffs parties or privies to that contract, and that those who are not parties or privies to a contract cannot main-

tain an action of tort for the breach of a duty arising solely out of the contract.

It is the opinion of the court that the plaintiffs' declaration is not sufficient in substance, and that the action is not maintainable.

The distinctive character of municipal corporations in this state, and the circumstances and conditions under which the officials chosen by them are deemed to act either as corporate agents or as public officers engaged in the discharge of duties imposed by general law, have been subjects of frequent examination and discussion in the recent decisions of this court. *Lovejoy v. Foxcroft*, 91 Me. 367, 40 Atl. 141; *Burrill v. Augusta*, 78 Me. 118, 3 Atl. 177, 57 Am. Rep. 788; *Mitchell v. Rockland*, 52 Me. 118.

It is only necessary to be reminded here that the inhabitants of the several cities and towns in this state are not voluntary associations or business corporations, but political agencies created for the more effectual discharge of certain duties of political government, and that the powers and liabilities of these agencies are only such as are conferred and created by the Legislature.

It may be observed, then, in the first place, that, when a municipal corporation itself by authority of its charter maintains a system of waterworks for the use of its fire department, it is performing a public or governmental duty, and it is uniformly held, upon what seems to be entirely satisfactory reasoning, that in such a case the municipal corporation is not liable to individual taxpayers for failing to provide an adequate supply of water for the extinguishment of fires, unless expressly made so by provisions of the statute. 2 Dill. Mun. Corp. 976; *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90; *Miller v. Minneapolis*, 75 Minn. 131, 77 N. W. 788; *Mendel v. City of Wheeling*, 28 W. Va. 233, 57 Am. Rep. 864; *Vanhorn v. City of Des Moines*, 63 Iowa, 447, 19 N. W. 293, 50 Am. Rep. 750; *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760.

If now, instead of maintaining a system of waterworks of its own for the purpose of supplying water for the extinguishment of fires, a municipal corporation contracts with a water company to furnish water for that purpose, the numerous decisions of the courts of last resort in other states and in the federal courts, as before indicated, are practically unanimous in holding that the water company is not liable to the individual owner of property which has been destroyed by fire by reason of the company's failure to furnish an adequate supply of water to extinguish fires. The apparent exceptions will be noted and considered hereafter. As stated by the court in *Mott v. Water Co.*, 48 Kan. 12, 28 Pac. 989, 15 L. R. A. 375, 80 Am. St. Rep. 267: "The fact that a city levies and collects a tax to be paid to a water company does not create any privity of interest between the water company and a citizen or

a resident of the city. In making such contract the city discharges one of its duties for which it was created, and in raising the required money it only provides the consideration due from it by virtue of the contract. A water company could not proceed directly against a citizen or resident in the first instance for unpaid money due under the contract from the city. * * * If a city is not liable to its citizens or residents, the water company is not liable to such citizens or residents upon a contract between it and the city. The contract in such a case is between the city and the water company only. * * * The law which authorizes cities to contract with individuals and companies for the building and operating of waterworks confers no powers upon a city to make a contract of indemnity for the individual benefit of a citizen or resident of the city for a breach of the same."

In this state, section 76, c. 4, Rev. St., empowers municipal corporations to "contract for a supply of water for municipal uses," but it was obviously not the design of this statute to authorize cities and towns to make contracts to indemnify individual owners for the loss of property by fire resulting from the neglect of its officials to furnish an adequate supply of water to extinguish it, and there is no suggestion in this case that any such express contract was in fact ever made or attempted to be made between the village corporation and the defendant water company.

One of the earliest cases in which this question was directly involved was *Nickerson v. Bridgeport Hydraulic Company*, 46 Conn. 24, 33 Am. Rep. 1, which came before the Supreme Court of that state in 1878. Two of the counts in the declaration are strikingly similar to those in the case at bar, and the case has been cited above upon the question of pleading. The essential averments were that the water company had negligently failed to provide a supply of water for the hydrants to enable the city to perform a public duty which it owed to the plaintiffs and others to extinguish fires. In the opinion the court say: "The most that can be said is that the defendants were under obligation to supply the hydrants with water. The city owed a public duty to the plaintiffs to extinguish their fire. The hydrants were not supplied with water, and so the city was unable to perform its duty. We think it clear that there was no contract relation between the defendants and the plaintiffs, and consequently no duty which can be the basis of a legal claim."

In 1887 the question came before the Supreme Court of Pennsylvania in the case of *Beck v. Kittanning Water Co. (Pa.)* 11 Atl. 300. The defendant was under contract to supply the town and its residents with water. The plaintiff's brewery was destroyed by fire by reason of the neglect of the defendant to provide a supply of water for

the hydrant in that vicinity. But the court say: "The plaintiff in this case had no contract with the defendant for a supply of water for the extinguishment of fires, hence it owed him no duty in this respect, and on the basis of such contract he had, of course, no cause of action. As to the contract with the borough, with that he had nothing to do. That was a matter between the municipality and the water company, and his interest in it is too remote to raise such a privity therein as would enable him to maintain this suit."

In *Davis v. Clinton Waterworks Co.*, 54 Iowa, 59, 6 N. W. 126, 37 Am. Rep. 185, the plaintiff sought to recover the value of her buildings by fire, upon the ground that the loss resulted from the defendant's failure to perform its contract with the city to supply water for the extinguishment of fires. It was held that there was no such privity of contract between the plaintiff and the city, or between the plaintiff and the defendant water company, as would enable her to maintain an action against the water company upon the facts stated. In the opinion the court say: "The city, in exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires, and for other objects demanded by the wants of the people. In the exercise of this authority, it contracts with defendant to supply the water demanded for these purposes. The plaintiff received benefits from the water thus supplied in common with all the people of the city. These benefits she received just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace and order enforced by police regulations, and the like. It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order are liable to a citizen for loss or damages sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government." *Nickerson v. Bridgeport Co.*, supra, was one of the authorities cited in support of the decision.

This doctrine was reaffirmed in *Vanhorn v. Des Moines*, 63 Iowa, 448, 19 N. W. 293, 50 Am. Rep. 750, and in *Becker v. Keokuk Waterworks*, 79 Iowa, 419, 44 N. W. 694, 18 Am. St. Rep. 377, although in the *Des Moines* Case the city had taken a contract from the company to protect it from liability which might arise from the negligence of the company, and in the latter case it was provided by ordinance that the water company should be liable for all injuries to persons or property caused by its negligence.

To the same effect was *Howsmon v. Tren-*

ton Water Co., 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654 (1893), where it was held that a water company that contracts with a town to furnish an adequate supply of water to extinguish fires and agrees to be liable for damages from fire resulting from its negligence cannot be sued on the contract by a citizen, though he and other citizens pay a special tax to the company under the contract. In the opinion the court give the following reasons, among others: "A municipal corporation, in making contracts for the benefit of its citizens, acts for them collectively, and for all of them, in every act, and the relation of privity is not, and cannot be, introduced into such contracts by reason of taxpaying or the discharge of any civic duty by any individual citizen."

"The town had no authority to make a contract to indemnify the plaintiff for the loss of his property by fire resulting from the neglect of its agents or servants to furnish an adequate supply of water to put it out, and therefore could not make such a contract that would be binding on another."

It is true that special reference is made in the opinion to the fact that this was an action on the contract. But the existence of a duty to the plaintiff was an indispensable element of any legal claim. Negligence which consists merely in the breach of a contract will not afford ground for an action by any one who is not a party to the contract, and not a person for whose benefit the contract was avowedly made. *Heaven v. Pender*, L. R. 11 Q. B. Div. 508; *Nickerson v. Bridgeport Water Co.*, 46 Conn. 24, 33 Am. Rep. 1; *Shearman & Redfield on Neg.*, § 116. "The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance, is no tort, direct or indirect, to the private property of an individual, though he be a taxpayer to the government. Unless made so by statute, the city is not liable for failing to protect the inhabitants against the destruction of property by fire." *Fowler v. Athens City Waterworks Co.*, 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313; *House v. Houston Waterworks Co.*, 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532.

The question arose in Wisconsin in 1892, in the case of *Britton v. Green Bay Waterworks Company*, 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856, and it was held that a water company, under contract with a municipal corporation to furnish water for the extinguishment of fires, does not become liable to suit by a private citizen for loss of his property by fire owing to the negligence of the company in not furnishing a sufficient supply of water. It is said in the opinion: "It seems to be impossible to find any sound legal principle on which the liability of the defendant to the plaintiff can be predicated. * * * Could the defendant have reasonably supposed that by this

contract with the city it was contracting with or incurring liability to each of its inhabitants, and that if it might be sued by each one indirectly and separately? * * * Is it a hardship that the plaintiff cannot recover in such a case? So it is in case; the city is sued for neglect of its duty in not furnishing the necessary machinery for putting out fires. It is not greater hardship in one case than in the other; the duty of furnishing water and using it to put out fires still remains in the city. That duty has not been, if it could be, transferred to the company. The company is bound only by its contract, and liable to the city alone as the other contracting party."

In 1894 the question came before the Supreme Court of Indiana in *Fitch v. Seymour Company*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258, and upon demurrer to the complaint charging facts similar to those in *Britton v. Water Co.*, 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856, it was held that the water company had undertaken no public duty which would make it liable to the plaintiff, and that the plaintiff had no privity in the contract of the city with the water company.

In the very recent and carefully considered case of *Lovejoy v. Bessemer Waterworks Co.*, 146 Ala. 374, 41 South. 76, 6 L. R. A. (N. S.) 429 (1906), the court reached the same conclusion, citing 18 decisions in support of it. The opinion there says: "The overwhelming weight of authority is against the right of the plaintiff to maintain this action. The reason why he may not do so is that there is a want of privity between him and the defendant which disables him from suing for a breach of the contract or for the breach of duty growing out of the contract. It is impossible at this late day to say anything new upon the subject, and it would be affectation to attempt any elaborate discussion of the question involved."

"We recognize that the absence of a remedy by suit for damages for a failure by a water company to furnish water for fire purposes, according to its contract with a city, leaves the subject 'in an extremely unsatisfactory position,' as stated in the note to *Britton v. Waterworks Company*, 29 Am. St. Rep. 856, 863, yet, as the learned annotator suggests, 'the only security would seem to be in legislation, or in the incorporation of some suitable provision in future contracts of this description, whenever the taxpayer desires to reserve a personal remedy against the water company.' It is not the function of a court to make law to fit hard cases."

See, also, *Allen & C. Mfg. Co. v. Waterworks Co.*, 118 La. 1091, 37 South. 980, 68 L. R. A. 650, 104 Am. St. Rep. 525; *Eaton v. Waterworks Co.*, 37 Neb. 546, 56 N. W. 201, 21 L. R. A. 653, 40 Am. St. Rep. 510; *Bush v. Artesian Water Co.*, 4 Idaho, 618, 43 Pac. 69, 95 Am. St. Rep. 161; *Wilkinson*

v. Light H. & W. Co., 78 Miss. 389, 28 South. 877; Ferris v. Water Co., 16 Nev. 44, 40 Am. Rep. 485.

In the federal courts the adjudications have been to the same effect.

In the recent case of Metropolitan Trust Co. v. Topeka Water Co. (C. C.) 132 Fed. 702, the court said: "The question of the liability of a water company to respond in damages to a resident of a city, the owner of property destroyed by fire, on account of the failure of the water company to fulfill its contract with the city in furnishing an adequate supply of water and a stipulated pressure for the extinguishment of fires, has many times received the consideration of the courts of last resort in this country, and the almost universal holding is that there is no such privity of contract between the individual citizen, though a taxpayer who contributes to the fund disbursed by the city in the payment of hydrant rentals, and the water company, as will authorize any recovery for damages so sustained. Boston Safe Deposit & Trust Co. v. Salem Water Co. (C. C.) 94 Fed. 238."

On the other hand, three cases are cited in support of the plaintiff's contention that such an action for negligence is maintainable in favor of an individual owner of property against a water company under contract with the municipality to furnish a supply of water. The first case in which this doctrine is held is Paducah Lumber Co. v. Paducah Water Co., 89 Ky. 840, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 74, 25 Am. St. Rep. 536. But it distinctly appears in the opinion in that case that there was a private contract directly between the water company and the plaintiff lumber company, and no cases are cited in the opinion, and the case itself is not an authority, to sustain the plaintiff's contention at bar. Gorrell v. Greensboro Water Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598, and Mugge v. Tampa Waterworks Co., 52 Fla. 371, 42 South. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. Rep. 207, follow the Paducah Case in Kentucky, although the facts are materially different. It is sufficient to observe that the reasoning in those cases is not satisfactory.

These numerous expressions of judicial opinion have been so nearly unanimous, and the conclusions reached by so many courts of eminent respectability and authority have been so uniformly opposed to the maintenance of such actions by individual property owners, that the rule may properly be regarded as settled law, and, while this court has never been unmindful of the flexibility and creative power of the law to meet the progressive developments of the age, it has never hastily or inconsiderately rejected principles established by sound reason or doctrines sanctioned by long experience.

But the proposition advanced by the plaintiffs would require water companies to assume, to some extent, the responsibility of insurers, and it does not satisfactorily appear that such a doctrine would be more in harmony with considerations of public policy, or more consonant with reason and justice, than the established rule. Ample opportunities are already afforded for all property owners to obtain insurance against losses by fire, and the assumption of such risks by water companies, even in a modified degree, would result in double insurance and largely increase water rates. Furthermore, capital would not readily seek investments in enterprises involving a public service exposed to incalculable hazards and constant litigation. In the practical administration of the law the established rule has not been found the cause of extraordinary hardships or the occasion for exceptional complaints.

The entry must accordingly be:

Exceptions overruled.

Demurrer sustained.

Declaration adjudged insufficient.

(109 Md. 100)

PALATINE INS. CO. v. O'BRIEN.

O'BRIEN v. PALATINE INS. CO.

(two cases).

(Court of Appeals of Maryland. Dec. 2, 1908.)

1. INSURANCE (§ 507*)—RENTS—POLICY—CONSTRUCTION—EXTENT OF LIABILITY.

Under a policy insuring rents, but requiring insured to rebuild, and providing that insured should not be liable beyond the actual value destroyed by fire for loss caused by ordinance or law regulating construction or repair of buildings or by interruption of business or otherwise, insurer is not liable for loss of rent caused by the city authorities in delaying rebuilding, pending ordinance relocating street lines.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1283; Dec. Dig. § 507.*]

2. INSURANCE (§ 507*)—RENTS—POLICY—CONSTRUCTION—EXTENT OF LIABILITY—"INTERRUPTION OF BUSINESS."

Under a policy insuring rents, but requiring insured to rebuild as soon as the nature of the case would admit, and providing that insurer should not be liable for loss caused by "interruption of business," insurer is not liable for loss of rent from interruption of business caused by delays in rebuilding resulting from the fall of debris of the fire throughout the burnt district.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1283; Dec. Dig. § 507.*]

3. INSURANCE (§ 646*)—RENTS—POSSESSION—PRESUMPTIONS.

Under a policy insuring rents, but requiring insured to rebuild as soon as the nature of the case would admit, it must be presumed, in the absence of proof to the contrary, that insured took possession of the premises to rebuild as soon after the fire as possible.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1660, 1665; Dec. Dig. § 646.*]

4. INSURANCE (§ 615*)—RENTS—LIABILITY—ESTOPPEL.

Insurer of rents precluded itself from claiming that no rent was due under the policies sued

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on by paying into court sums of money claimed to cover insurer's liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1533; Dec. Dig. § 615.*]

Appeals from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Actions by Katherine T. O'Brien against the Palatine Insurance Company. From the judgments both parties appeal. Affirmed.

See, also, 68 Atl. 484.

The following prayers were requested by plaintiff:

(1) "The plaintiff prays the court to instruct the jury that the proper measure of damages in this case is the actual loss of such rents, if any, from the property described in the evidence, that they shall find the plaintiff has sustained, not exceeding the sum insured, from the date of the fire until such time as the premises could be restored or rebuilt as promptly as the nature of the case would admit, with interest on such rents after 60 days from the time proofs of loss were submitted to the defendant, if they so find such proofs of loss to have been submitted; provided the sum found shall be in excess of the amount paid into court in this case, to wit, \$1,150." Refused.

(2) "The plaintiff prays the court to instruct the jury that the proper measure of damages in this case is the actual loss of such rents, if any, from the property described in the evidence that they shall find the plaintiff has sustained, not exceeding the sum insured, from the date of the fire until such time as the premises could be restored or rebuilt as promptly as the nature of the case would admit, with interest on such rents after 60 days from the time proofs of loss were submitted to the defendant, if they so find such proofs of loss to have been submitted; provided the sum found shall be in excess of the amount paid into court in this case, to wit, \$1,150; but the refusal of the city authorities to allow the plaintiff to rebuild for a certain time, as set out in the evidence, if they find such refusal, is not a circumstance proper to be considered in arriving at such loss of rent." Refused.

(3) "The plaintiff prays the court to instruct the jury that there is no evidence in this case of any arbitration and award, and no consideration shall be given to the arbitration and award set aside and declared void by the United States Circuit Court." Conceded.

(4) "That, if the jury find for the plaintiff in excess of the sum of \$1,150 paid into court in this cause, they are to allow interest on the sum so found from 60 days after proofs of loss were submitted to the date of this trial, if they find such proofs of loss to have been submitted." Refused.

Defendant's prayers:

(1) "That there has been offered in these actions no legally sufficient evidence of the

amount, if any, of rents actually lost by the plaintiff by reason of the destruction by fire of the buildings mentioned in the evidence, and therefore, under the pleadings and the evidence in these actions, the plaintiff can only recover nominal damages." Refused.

(2) "That the alleged action or nonaction of the Baltimore city authorities with regard to establishing grades and building lines on German street, between Charles and Light streets, and the alleged refusal of the building inspector to issue permits for the erection of buildings at the place in question, are not, under the terms of the policies offered in evidence in these cases, to be considered by the jury in arriving at their verdict, and the delays, if any, that are caused by the same or any of them do not entitle the plaintiff to recover, under the pleadings and evidence in these cases, the amount, if any, of rents for the time covered by such delays." Granted.

(3) "That under the terms of the policies offered in evidence the plaintiff is not entitled to recover for any loss or damage by fire, other than direct loss or damage by fire to the property in said policies described; and therefore, under the pleadings and evidence in these cases, the plaintiff is not entitled to recover the amount of alleged rents of the plaintiff's premises in question for the time of alleged delays in rebuilding caused by other reasons than the destruction by fire of the buildings on her said premises, even though the jury shall find that such delays, if any, were due to the obstruction of the neighboring streets, alleys, and ground as a result of the destruction by fire of buildings and property belonging to persons other than plaintiff, and that the fire that destroyed such buildings on the property of others, as well as those of the plaintiff, was part of a general conflagration that swept over a large portion of the city of Baltimore."

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

John J. Donaldson, for Palatine Ins. Co.
Hyland P. Stewart, for Katherine T. O'Brien.

PEARCE, J. This is the second time these cases have been before this court, being argued at the October term, 1907, and decided January 8, 1908, the opinion being reported in 68 Atl. 484. They are two actions of assumpsit brought by Katherine T. O'Brien against the Palatine Insurance Company, an English corporation, upon two separate policies insuring certain rents issuing out of premises belonging to and leased by Mrs. O'Brien. The buildings upon these premises were destroyed by fire on February 7, 1904, when a large part of the city of Baltimore was swept by the great conflagration

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of that date and the day following. The rents payable at the time of the fire by the lessees of these premises were \$230 per month from the property described in one of these policies, and \$35 per month from that described in the other policy, and the policies were identical in their terms and provisions, except that in the first policy mentioned above the risk was limited to \$1,800, and in the last mentioned to \$1,040. The plaintiff claimed to recover under each the full amount insured. The defendant pleaded the two general issue pleas in assumpsit, and two special pleas, one of which set up an arbitration and award, but this award was declared void by a decree of the Circuit Court of the United States for the District of Maryland, and the defendant insurance company was enjoined from setting it up in an action on these policies. In the former appeal, a prayer granted by the lower court, taking from the jury the consideration of this award, was held to be properly granted, and that question is not involved in this appeal.

In the other special plea, in the first case, the defendant alleged "that since the date of said award it has always been, and now is, and so tenders itself, ready and willing to pay said plaintiff such sum as, but for the destruction of said building by fire, would have been payable to said plaintiff by her tenants of said building; that the amount of said rents so as aforesaid for the period of three months (that being the period by the award determined to be a reasonable time for rebuilding), and for the months of February and March, was and is the sum of \$1,150, which, together with legal interest thereon from the date of each installment of rent to the day of filing these pleas, and the plaintiff's costs accrued to said last-mentioned date, now tenders to the plaintiff, and pays here into court, in full satisfaction and discharge of plaintiff's alleged cause of action."

There was a similar plea in the second case, except that the sum paid into court thereunder was \$425, and in each case the plaintiff replied to the plea mentioned that the sum paid into court was not sufficient to satisfy her claim in respect of the matters to which the plea was pleaded, and issue was joined on this replication.

Those trials resulted in a verdict for plaintiff, in one case of \$2,088, and in the other for \$1,200.40, and from the judgments entered thereon the former appeals were taken. There was only one exception in each appeal, to the ruling on the prayers, and both judgments were reversed on appeal.

These policies contained the following provisions:

"The assured agrees to rebuild in as short a time as the nature of the case will admit. Loss to be computed from the time of the fire and to cease upon the premises again becoming tenantable. And in case the assured shall elect not to rebuild or repair,

then the loss of rents shall be determined by the time which would have been required for such other purpose. * * * But there can be no abandonment to this company."

"This company shall not be liable beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise."

The plaintiff did not rebuild the same character of buildings as were destroyed by the fire. These were distinct buildings, described in the respective policies. In rebuilding, she erected one building covering the site of the two previous buildings.

After the fire of February 7th and 8th, certain ordinances were passed for the improvement of the city in the burnt district. The lines of the streets and of the property holders were obliterated by the great fire. Surveys were necessary to re-establish these lines, and new grades of the streets were authorized and directed. Until these matters were determined, building permits could not be obtained, and the plaintiff, with alleged due diligence, did not, and could not, obtain her permit to rebuild until December 20, 1904. The main question involved in the former appeal was whether the delay in obtaining this permit prevented the plaintiff's recovery for the period covered by that delay. The lower court held that delay was a circumstance proper to be considered by the jury in determining the loss of rent; but this court, on appeal, held that loss of rent occasioned by the action of the city authorities in delaying rebuilding was forbidden by the clause of the policy we have transcribed, and we cannot hesitate to re-affirm this.

Upon the second trial of these two cases, verdicts were rendered in each case for the exact amount paid into court in each case, and from the judgments entered on these verdicts both parties have appealed, so that there are four appeals embraced in the record, and, as on the former appeals, the only exception in each case is to the ruling on the prayers. At these second trials no witnesses were examined, but by agreement the stenographer's notes of the first trial were read to the jury, and all the exhibits offered in evidence at the first trial were again offered and admitted. The bill of exceptions in the present appeals is identical with that in the former appeals, word for word, and it covers 35 pages of the record in the present appeals. These 35 pages might and should have been saved by agreement to refer for them to the former record. Counsel for Mrs. O'Brien, in his brief, states that this was inserted "at the request of the insurance company, and against the protest of the plaintiff below," and this statement was not contradicted, either in the brief for the insurance company, or at the oral argument in its behalf.

Judge Burke's opinion in the former appeals very clearly disposed of all the questions sought to be raised in the present appeals except two, namely: First, the effect of the payment into court by the defendant; and, second, whether the plaintiff could recover for loss of rents accruing during delay in building caused by the obstruction of the streets in the burnt district, apart from the inability to procure a permit to build. These questions will be considered in their reverse order. It was expressly and explicitly decided in the former case that the loss of rent occasioned by the action of the city authorities in delaying the rebuilding of the premises could not be recovered under these policies. Counsel for Mrs. O'Brien, however, contend that there is a distinction between delays caused by the city in withholding permits to build, and the delays caused by general conditions of the streets being blocked by the debris of the fire throughout the whole burnt district, and this question is raised by the plaintiff's first and second prayers and the defendant's third prayer, these prayers of the plaintiff being refused, and the defendant's third prayer being granted. These prayers, with the other granted and refused prayers, will be set out by the reporter.

Referring to the policies of insurance, it will be seen that they provide that "the assured agrees to rebuild in as short a time as the nature of the case will admit," and it is upon that language that the plaintiff's first and second prayers are predicated. If this were all, the plaintiff's contention might be sustained. But the policies also, after providing that the company shall not be liable for loss caused directly or indirectly by order of any civil authority, nor for loss occasioned by ordinance or law regulating construction or repair of buildings, also provides that it shall not be liable "for loss occasioned * * * by interruption of business, manufacturing processes, or otherwise." The fall of debris in the streets was what occasioned "the interruption of business" in this case, so far as it affected building operations, and this cause of delay is as clear a bar to recovery as was the ordinance delaying the granting of permits to rebuild. We, therefore, must hold that the plaintiff's first and second prayers were properly refused, and the defendant's third prayer properly granted, in each of the cases.

The defendant's second prayer was correctly granted, and the plaintiff's third prayer was conceded, and these require no further notice.

The defendant's first prayer raises the important question in this case, and goes to the right of recovery. It asserts that no legally sufficient evidence of the amount, if any, of rents actually lost by the plaintiff by reason of the fire, has been offered, and therefore, under the pleadings and evidence, the plaintiff can only recover nominal dam-

ages. This prayer was correctly refused, for two reasons: First. Because in considering the insurance company's first prayer in the former appeal, which asserted the same legal principle as the defendant's first prayer in this appeal, it was held that Mrs. O'Brien was obliged under the terms of her two policies to take immediate possession of the property for the purpose of rebuilding or repairing; that there was no evidence she did not do so, and that, in the absence of such evidence, the presumption is she discharged that obligation; and, further, that there was no evidence to rebut this presumption. Second. Because, by paying into court the two sums paid in under the two policies in these cases, the defendant has precluded itself from saying that no rent is due under said policies.

The leading case upon this question is *Cox v. Parry*, 1 Term Rep. 464, decided in 1786. That was an action upon a policy of insurance, and the pleas were the general issue, and payment of money into court. The policy was made in the name of De Simons, but the suit was by Cox, as executor of Shultz, who was the owner of some of the articles insured, and it was alleged that it was directed and intended by all parties that the policy should be so framed as to secure both De Simons and Shultz. The court said: "The great question is whether the defendant has not, by paying money into court, precluded himself from making the objection that under the statute 25 Geo. III the policy could not be applied to any goods except those of De Simons. Therefore it will be necessary to see what effect paying money into court has in the cause. It admits that the plaintiffs have a right to maintain the action, and reduces the question simply to the question of damages which they are entitled to recover. * * * As the defendant has paid money into court, he has thereby admitted that the plaintiffs are entitled to maintain the action on their policy to the amount of that sum. But he has admitted nothing more. He does not, by paying money into court, vary the construction and import of the policy, so as to entitle the plaintiffs to recover beyond that extent."

This case was approved in *Watkins v. Towers*, 2 Term Rep. 275, where payment of money into court was held to dispense with proof of execution of deed on which the suit was brought.

It was again approved in *Gutteridge v. Smith*, 2 Henry Bl. 374, decided in 1794. The action was on a bill of exchange by the payee against the drawer, and payment into court was pleaded. There was a nonsuit because the plaintiff was not prepared to prove the drawer's signature, but, under a rule to show cause why the nonsuit should not be set aside, the rule was made absolute. Lord Chief Justice Eyre said: "Payment into court of £5 on a £20 note would have same effect as payment of that amount before suit

brought, and would afford a just inference of the existence of the debt." And in the same case Justice Rooke said that: "On a policy where the plaintiff goes for a total loss, while it admits the policy itself, yet it does not admit that defendant is liable for more than the amount paid in."

In *Jenkins v. Tucker*, 1 Henry Bl. 90, the question was whether defendant could demur after payment of money into court, and Lord Loughborough went so far as to say: "This demurrer strikes me as being extremely absurd, since by payment of money into court the defendant admits a cause of action."

In *Bennett v. Francis*, 2 Bos. & Pul. 550, the earlier cases were reviewed by Lord Chief Justice Alvanley at length, and the doctrine established by them was maintained.

The American cases are to the same effect.

In *Enc. Pl. & Pr.* vol. 21, p. 584, it is said that, where the plea of tender is treated as an admission that the amount tendered is due, the adverse party is entitled to recover that amount, without proof on his part. But a plea of tender of a sum smaller than that claimed by plaintiff does not preclude resisting demand for a greater sum, or from making any defense consistent with the admission of the cause of action.

In *Wood v. Parry*, 1 Barb. 129, the court said: "Whenever tender is made and insisted on in the pleadings, the creditor is at least entitled to that amount. The rule is founded in good sense. Where the debtor admits a certain amount to be due, it is not a point at issue between the parties, and the creditor is not required to establish it by proof."

In *Eaton v. Wells*, 82 N. Y. 576, there was a tender of \$2,568, which was a few cents less than the amount due that day on the mortgage, and Chief Judge Folger said: "There was no issue of fact for trial. The pleadings contain the facts."

In *Foster v. Napier*, 74 Ala. 393, the court said: "Since a plea of tender admits that the amount tendered is due, the plaintiff is entitled to that amount at all events, whatever may be the result of the action; nor does his refusal to accept that sum affect his right to recover that sum."

In harmony with the cases cited is the case of *McCullough v. Hellwig*, 66 Md. 216, 7 Atl. 457, in which this court said: "In an action *ex contractu*, the defendant may tender the amount he believes to be due, and the tender operates as an estoppel, so that he cannot subsequently deny that the amount tendered is due."

The jury found for the plaintiff for the exact sum paid in each case, consequently it is unnecessary to consider the refusal of the plaintiff's fourth prayer in each case, which asked that interest be allowed on the amount found, after 60 days from submission of

proofs of loss, if the sum found should exceed the amount paid in.

For the reasons stated, the judgment appealed from in each case will be affirmed. The costs below were properly taxed against the plaintiff under section 21, art. 75, Code Pub. Gen. Laws, but the costs of these appeals should be paid by the defendant.

Judgment affirmed; costs below to be paid by Katherine T. O'Brien; costs on appeals to be paid by the Palatine Insurance Company.

FITZGERALD v. CITY OF HARTFORD.

(Supreme Court of Errors of Connecticut. Jan. 22, 1909.)

APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR.

Where a witness' statement, offered to contradict him and excluded, was not contradictory of his testimony to any fact material, and testimony admitted over objection disclosed nothing different in substance from that which had been previously testified to by the same witness without objection, the rulings, if erroneous, were harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

Appeal from Court of Common Pleas, Hartford County; John Coats, Judge.

Action by Johanna Fitzgerald for personal injuries against the City of Hartford. Verdict and judgment for defendant, and plaintiff appeals. Affirmed.

Andrew J. Broughel, for appellant. Francis H. Parker and Lawrence A. Howard, for appellee.

PRENTICE, J. The two rulings of the court, one admitting and the other excluding testimony contrary to objection, which are the subject of the only assignments of error, were harmless, even if incorrect. The answer received disclosed nothing which differed in substance from that which had been previously testified to by the same witness without objection. The statement in a deposition given by this witness, which was offered to contradict him and excluded, was not contradictory of his testimony upon the trial in respect to any fact material to the case or in respect to any fact which he asserted. The most which could be claimed for it was that it tended to disclose the uncertainty of his recollection upon the matter involved, which took place nearly three years before the trial, and thus affected his credit. The witness, however, freely and frankly stated that his recollection upon the matter was indistinct and declined to speak with any confidence thereon. The evidence excluded could have added nothing to what the jury already knew from the witness' own lips.

There is no error. The other Judges concurred.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(81 Conn. 576)

ZIMMERMAN v. GARVEY.

(Supreme Court of Errors of Connecticut. Jan. 22, 1909.)

1. BROKERS (§ 65*)—EMPLOYMENT BY BOTH PARTIES—KNOWLEDGE.

A real estate broker may not act for both parties except with their knowledge and assent.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 49; Dec. Dig. § 65.*]

2. BROKERS (§ 67*)—CONTRACT FOR COMMISSIONS—EMPLOYMENT—EVIDENCE.

A real estate broker, having information that an owner was willing to sell certain real estate and learning that defendant was desirous of making an investment, suggested to her the purchase of the property and accomplished a sale. Before a conveyance was made, it was stipulated between the parties that plaintiff should receive a commission of \$500, of which the vendor should pay \$200 and defendant the balance. *Held*, that defendant thereby approved plaintiff's engagement to act for both parties, and that she was therefore liable for the agreed commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 52; Dec. Dig. § 67.*]

Appeal from Court of Common Pleas, Hartford County; John Coats, Judge.

Action by Frank M. Zimmerman against Mary A. Garvey to recover on an express promise to pay brokers' commissions. Judgment for plaintiff, and defendant appeals. *Affirmed*.

James E. Cooper, for appellant. William F. Delaney, for appellee.

PRENTICE, J. A recognized rule of public policy forbids a real estate broker, as it does agents generally, to act for both parties to a transaction in the absence of their knowledge that he is so acting, and their express or implied assent thereto. One who acts in violation of this rule cannot recover for his services, even upon an express promise. *Farnsworth v. Hemmer*, 83 Mass. 494, 79 Am. Dec. 756; *Carman v. Beach*, 63 N. Y. 97; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528. "If, however, both parties have knowledge that the broker is acting for them both and do not object, but allow him to so act and agree to pay him commissions, they will be held to have assented to his acting in a double capacity, and neither party can object thereafter." *Clark & Sykes on Agency*, § 765; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Rowe v. Stevens*, 53 N. Y. 621; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528.

The plaintiff had not been expressly employed to act for either the defendant or the property owner from whom she purchased. Having information that this owner was willing to sell a piece of his real estate at a certain price and having incidentally learned that the defendant was desirous of making a real estate investment, he had volunteered to suggest to her the purchase by her of the property referred to, and to bring the par-

ties together with the result that a sale was finally accomplished; he participating in the negotiations. When the question as to a commission to the plaintiff and by whom it should be paid arose, this result had not been reached. An offer had been made and was under consideration. The parties were free to act as they chose as to concluding a bargain. They chose to conclude one which involved the sale by the landowner and the purchase by the defendant at a stipulated price, and also embodied a subsidiary agreement upon the matter of a commission to the plaintiff. This subsidiary agreement, to which the plaintiff became a party and assented, stipulated that he should receive the usual commission amounting to \$500, and that of this amount the owner should pay the plaintiff \$200 and the defendant the balance. Pursuant to the agreement thus reached, a conveyance was made. When it was entered into and the conveyance made in conformity with it, the parties to it necessarily had full knowledge of all the essential facts bearing upon the plaintiff's relation to the transaction, as those relations actually were, since they all lay revealed upon the surface of his known conduct. Nothing in that matter was concealed from them or lay hidden. Whatever employment or relationship the law would discover in the situation it would arise from the circumstances and the acts of the parties, and these were fully known. When, therefore, the vendor and the defendant acquiesced in the plaintiff's right to the usual commission, and concluded their bargain, and as a part of it agreed to share the amount of such commission in the way they did, they acted with full knowledge of the true situation, and gave their assent to his course of action, whether it involved service for the one, or the other, or both of them. The defendant cannot, therefore, successfully object to the payment according to her promise.

There is no error. The other Judges concurred.

(81 Conn. 581)

NEW YORK, N. H. & H. R. CO. v. CITY OF NEW HAVEN.

(Supreme Court of Errors of Connecticut. Jan. 27, 1909.)

1. EMINENT DOMAIN (§ 47*)—POWER—MUNICIPAL CORPORATIONS—CONDEMNATION OF RAILROAD RIGHT OF WAY.

A city was authorized by its charter to take any property needed for extending streets on payment of compensation. Gen. St. 1902, § 3710, authorized the railroad commissioners to direct whether a new highway thereafter constructed across a railroad should pass over or under the road, and section 3711 provided for the determination by the commissioners of the length, etc., of any bridge over a railroad. *Held* that, since the city had implied power under the statutes to construct highways across a railroad, it could condemn land for the purpose of ex-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tending a street across a railroad, and through its station building.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 108; Dec. Dig. § 47.*]

2. EMINENT DOMAIN (§ 136*)—COMPENSATION—MEASURE.

The compensation for a part of a tract taken by eminent domain is the difference between the value of the entire tract before the taking and the value of that part of the tract not taken, in view of the new conditions created by the taking.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 364; Dec. Dig. § 136.*]

3. EMINENT DOMAIN (§ 319*)—COMPENSATION—APPROPRIATION—NEW USE.

The taking of property already appropriated to public use must not interfere with the former use to a greater extent than is necessary to effectuate the new use, so that, where a city extended a street under railroad tracks, the railroad had the right to continue to use its tracks above the street which were not taken.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 319.*]

4. EMINENT DOMAIN (§ 103*)—COMPENSATION—MEASURE—EXTENT OF RIGHT TAKEN—RAILROAD RIGHT OF WAY—APPROPRIATION FOR STREET CROSSING.

Where a city extended a street under railroad tracks so that the tracks could not thereafter be used except by erecting retaining walls adjacent to the street, or otherwise supporting the soil under the tracks, the city was bound to provide such support or pay the expense thereof as part of the compensation for taking the land, and it did not affect the company's right to compensation that the cut was ordered by the railroad commission, or that the railroad might abandon its tracks, and not build the retaining wall.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 103.*]

5. EMINENT DOMAIN (§ 134*)—COMPENSATION—MEASURE.

Damages for property taken under eminent domain must be awarded on the basis of the value of the property for its present use or for purposes to which it could be most advantageously applied under existing conditions.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 356; Dec. Dig. § 134.*]

Appeal from Superior Court, New Haven County; Alberto T. Roraback, Judge.

Application by the New York, New Haven & Hartford Railroad Company against the City of New Haven to review an assessment of compensation for property taken by eminent domain. From a judgment increasing the compensation, the city appealed. Affirmed.

Edward H. Rogers and Edward P. O'Meara, for appellant. Harry G. Day and Benjamin I. Spock, for appellee.

BALDWIN, C. J. The city of New Haven, by its board of alderman, ordered an extension of Humphrey street, with a width of 60 feet, across the main line of the plaintiff's railroad, and through and across its station at Cedar Hill. On its application, the railroad commissioners, under Gen. St. 1902, § 3710, ordered that the street as thus to be extended should be constructed under the rail-

road. The city authorities thereupon assessed the damages thus accruing to the railroad company at \$5,527. The company applied to the superior court for a review of this action, and the court raised the amount of the compensation to be paid to \$32,350. The addition thus made was for what would be the expense to the company of constructing a retaining wall on its own land, immediately adjacent to the street as extended, and for temporary support to certain side tracks on this land while in use during the construction of the wall. These tracks were formerly part of the main line of the Shore Line Railroad Company, but now end at Ferry street, a few blocks east of the grounds around the Cedar Hill station. They pass from those grounds over James street by a bridge. They are used for switching purposes and to furnish a connection with a large manufacturing plant now situated on the easterly side of James street, and would furnish such a connection with any other factories or establishments which may be located in the future on land adjacent to the tracks between James and Ferry streets, which is now unoccupied. To use them for any purposes after the extension of the street would be impossible without such a retaining wall as is above described, and it does not appear that the damages could be reduced by their removal to any other place where they could be used to equal advantage for the purposes of the railroad.

By the city charter it could take "any property or property rights" needed for the purpose of extending any street "upon payment of just compensation under the rules governing the right of eminent domain." By Gen. St. 1902, §§ 3710, 3711, it has implied power to construct highways across railroads. It could, therefore, as it did, take by condemnation proceedings the right to extend Humphrey street across the appellee's railroad and through its station building. It is one of the general rules governing the right of eminent domain that just compensation for taking a part of a parcel of land or an easement in such a part is to be ascertained by comparing the value of the entire parcel before the taking with the value of what remains after the taking, and in view of the new conditions created by the taking. If the latter of these two values be less than the former, the amount of the difference measures the damages to be paid. In the case at bar, after the taking, certain railroad tracks would become incapable of use without further support than that afforded by the soil beneath them, which had been previously sufficient. These tracks are of great value for the purposes of the railroad. When property already devoted to one public purpose is to be in part appropriated to another, the interference with that previously served must be as little as is reasonably consistent with the attainment of the new purpose. The railroad company was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

therefore entitled to the continued use of its side tracks, for they would be outside the limits of the street as extended. Being so entitled, it had the right to demand that the city should either make such use safe by shoring up the soil beneath them or pay the expense of providing proper means of supporting them by structural changes in the land adjacent to the street, in which it did not seek to acquire an easement. The city not having proposed to do any such work itself, it was proper for the superior court to require it to pay the expense thus necessarily thrown upon the railroad company.

The question is not whether, had no part of the property or rights of the company been taken, damages of this nature could have been awarded. They have been allowed as being the direct effect of taking away some of its property rights in a part of an entire parcel of land, which had been previously appropriated to one and the same use. Such damages are incident to and necessarily involved in the taking of the property right. See *New York & N. E. R. Co. v. Waterbury*, 60 Conn. 1, 10, 22 Atl. 439. It is immaterial that the cut in the railroad land was required by the order of the railroad commissioners because necessary to make the grade of the street outside the bridge a proper one as related to the grade under the bridge prescribed by them. This order could not protect the city from liability to make just compensation for property actually taken in order to comply with its terms. Had the street at the point in question been laid out with such a width as to allow for the formation of a permanent slope on either side of the 60-foot roadway, it would have been necessary to include in the damages to be paid the value of the land thus taken for the purposes of the slopes. When it took a right over a less width of land, the extension of the street over which necessarily involved a fall of the adjoining soil, the city came under a corresponding duty to indemnify the company for the resulting loss. It is true that the company may never build the retaining wall, and may to-morrow abandon the further use of the side tracks for the support of which that wall would be necessary. But possibilities of such a nature cannot be contemplated by those charged with the duty of assessing damages for property taken under the right of eminent domain. They must estimate them by the standard of its value for the purposes to which it is being applied, or of its value for the purposes to which it could, under the existing circumstances, be most advantageously applied, if this be a greater sum. *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206. In respect to property so long appropriated to and in use for railroad purposes and so adapted to other similar uses in connection with factories which might be built hereafter along the line, it is to be assumed, in the ab-

sence of evidence to the contrary (of which there was none), that its devotion to railroad uses will be permanently continued.

There is no error.

(81 Conn. 598)

SWITS v. SWITS et al.

(Supreme Court of Errors of Connecticut. Jan. 27, 1909.)

DEAD BODIES (§ 5*)—INTERMENT—PLACE OF SEPULCHER—CHANGE—STATUTES—"CUSTODY AND CONTROL."

Gen. St. 1902, § 363, declares that the "custody and control" of a decedent's remains is granted to the husband or wife of the deceased unless abandoned, and living apart at the time of death, and, if there be no husband or wife surviving, then such "custody and control" is granted to the next of kin, but the probate court on petition of any of the kin may award such "custody and control" to the relative who may seem to the court most fit to have the same. *Held*, that the words "custody and control," as used in the act, were not limited to the immediate possession of a dead body prior to interment; and hence a widow, having removed and reinterred her husband's body in her own burial lot, could not be compelled to remove the same to its original place of interment in the lot of the husband's mother.

[Ed. Note.—For other cases, see *Dead Bodies*, Cent. Dig. § 5; Dec. Dig. § 5.*]

Appeal from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Suit by Harriet Swits against Edith M. Swits and others for injunction to secure the reinterment of a decedent's remains in their original place of burial in plaintiff's lot, from which they had been removed by defendant. Judgment for defendants, and plaintiff appeals. Affirmed.

Homer S. Cummings, for appellant. John H. Light, for appellees.

RORABACK, J. It is provided by section 363 of the General Statutes of 1902, that "the custody and control of the remains of deceased residents of this state is hereby granted and shall hereafter pertain to the husband or wife of the deceased; but if the surviving husband or wife had abandoned, and at the time of death was living apart from the deceased, or if there be no husband or wife surviving, then such custody and control is granted and shall pertain to the next of kin; but the court of probate for the district of the domicile of the deceased may, at any time, upon the petition of any of the kin, award such custody and control to that relative who may seem to said court most fit, for the time being, to have the same." The case now under consideration presents the question as to the meaning of the words "custody" and "control" as used in this act. The plaintiff contends that these words relate primarily to the immediate possession of a dead body prior to interment, and that, when the statutory right has once been exercised, this right is exhausted.

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In the construction of statutes; the intent is to be sought first of all in the words and language employed, and if the words are free from ambiguity and doubt, and clearly and distinctly express the sense of the legislative body passing the act, there is no occasion to resort to other means of interpretation. *McKay v. Fair Haven & W. R. Co.*, 75 Conn. 608, 611, 54 Atl. 923; *Sutherland on Statutory Construction*, § 867. As applicable to husband and wife, the object and intent of the statute under consideration are obvious, plain, and unequivocal. They are expressly declared in the first portion of the act already cited, and every portion of this enactment relates to the object and purpose expressed in the opening paragraph. The second clause points out that relative entitled to custody and control in cases of abandonment when the husband and wife are dead. The closing provision gives the court of probate power to act when there is a controversy between the next of kin as to the suitability of the person in whom this statutory right is reposed. From the entire act it is apparent that its purpose is to avoid unseemly controversies over the remains of deceased persons, and that the surviving husband or wife shall generally have the custody of the dead body for the purposes of burial, and the control of the remains after interment. This right is not absolute, or the judgment of the person in whom it is reposed conclusive.

In the present case from the facts disclosed it does not appear that the widow has so exercised her right as to call for the interference of a court of equity. After the death of her husband it appears that the relations between Edith M. and the plaintiff were of a hostile nature. No stone was erected to mark the grave of the deceased husband, although the body had been interred for two years in the burial lot of his mother. Under the circumstances then existing the widow preferred to have her husband's remains interred in a burial lot under her own control. After obtaining the necessary statutory permit, she caused their removal to her own burial lot, where she has the right to be interred by the side of her husband. Under such conditions there was nothing unnatural or unreasonable in the action of the widow.

There is no error. The other Judges concurred.

(81 Conn. 586)

SULLIVAN v. MARTIN, Mayor.

(Supreme Court of Errors of Connecticut. Jan. 27, 1909.)

1. MUNICIPAL CORPORATIONS (§ 155*)—OFFICERS—REMOVAL.

New Haven City Charter, §§ 12, 213, giving the mayor power to remove from office any person appointed by him or by his predecessor, if, after a full hearing, he shall find that the officer is incompetent or unfaithful, or that the

requirements of the public service demand his removal, provide a mode for exercising a power of removal, which is incident to executive appointment, rather than of a quasi judicial nature to hear and determine official offenses punishable by forfeiture of office.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 344; Dec. Dig. § 155.*]

2. MUNICIPAL CORPORATIONS (§ 181*)—POLICE DEPARTMENT—REMOVAL OF OFFICERS—CHARTER PROVISIONS.

The office of a city board of police commissioners is to designate the officers and policemen of the police department, make promotions, suspend, remove, or reduce them in rank. It is the duty of the individual members of the board to inform themselves of the fidelity and efficiency of members of the force, and report any information to the board. The board designates the location of polling places at elections. It is the duty of the police department to preserve the peace, good order, and security of the city, and the duty of the chief of the department to make and enforce rules to preserve the peace, enforce good order, and prevent persons not rightfully there from congregating within 100 feet of the polling place; the department of police service being under the control of and subservient to the board of police commissioners. *Held*, that the act of a member of the police commission at an election held in the city in peddling and offering ballots to voters within 75 feet of a polling place in the presence of policemen and in violation of statute was a violation of his duty as a police commissioner tending to impair the efficiency of the department, and indicated his incompetency and unfaithfulness in his office, so that he was removable from office by the mayor under New Haven Charter, §§ 12, 213, empowering the mayor to remove from office any person appointed by him or his predecessor for incompetence, unfaithfulness, etc.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 461; Dec. Dig. § 181.*]

3. MUNICIPAL CORPORATIONS (§ 181*)—POLICE DEPARTMENT—REMOVAL OF POLICE COMMISSIONER.

The fact that the commissioner might have been proceeded against under sections 139 and 140 of the charter to establish a crime on his part or his liability to a forfeiture of his office did not prevent the mayor from removing him under sections 12 and 213, as section 143 provides that nothing in the four preceding sections shall limit or change any of the powers or duties concerning the removal of officers from office as defined in other provisions of the charter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 461; Dec. Dig. § 181.*]

4. MUNICIPAL CORPORATIONS (§ 159*)—OFFICERS—REMOVAL—RIGHT TO HEARING.

There is no constitutional guaranty that a hearing in a proceeding to remove an appointive city officer shall be had before an impartial jury or other impartial judicial tribunal, and the limitation placed upon a mayor's executive power of removal as incident to the power of appointment that he shall afford a full hearing is satisfied if the mayor states to the officer the cause which induces him to contemplate the removal, being a proper cause, and gives him an opportunity to be heard in relation thereto, and assigns that cause for making the removal.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 350; Dec. Dig. § 159.*]

5. APPEAL AND ERROR (§ 1095*)—REVIEW—FINDINGS—CONCLUSIVENESS.

A finding of the superior court on appeal from an order of a mayor removing a police commissioner that the officer was given a full, fair, and impartial hearing would be conclusive upon the officer on appeal to the Supreme Court of Errors upon the question of fact whether the mayor acted unfairly and arbitrarily, if the question were open to him in the superior court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4322; Dec. Dig. § 1095.*]

6. MUNICIPAL CORPORATIONS (§ 159*)—OFFICERS—REMOVAL—HEARING—APPEAL—PURPOSE.

A hearing given an appointive city officer by a mayor contemplating his removal, not being a trial, but merely a hearing precedent to his executive action, an appeal therefrom to the superior court does not transfer the proceeding to that court for a rehearing on the facts, the decision of the mayor thereon being final, but the purpose of the appeal is only to provide a summary process by which the court may revoke the order of removal, if any essential formality has been omitted, or perhaps if the executive power has been exercised so arbitrarily as to defeat the real purpose of the law in modifying an absolute discretion in removal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 356; Dec. Dig. § 159.*]

7. MUNICIPAL CORPORATIONS (§ 156*)—OFFICERS—REMOVAL—POLITICAL MOTIVE.

A mayor having removed a city officer for proper and sufficient cause, that the motive for the removal was political is immaterial.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 346; Dec. Dig. § 156.*]

Appeal from Superior Court, New Haven County; Joel H. Reed, Judge.

Application in the nature of an appeal by Jeremiah J. Sullivan from an order of James B. Martin, mayor of the city of New Haven, removing applicant from the office of police commissioner. There was a judgment affirming the order of the mayor, and applicant appeals. No error.

Richard H. Tyner and Howard C. Webb, for appellant. Edward H. Rogers and Edward P. O'Meara, for appellee.

THAYER, J. New Haven has a "department of police service" which is under the management and control of a board of six police commissioners who are appointed by the mayor. The city charter (sections 12 and 213) gives the mayor power to remove from office any person appointed by him or by any of his predecessors "if, after a full hearing, he shall find that such officer is incompetent, or unfaithful, or that the requirements of the public service demand his removal." The defendant as mayor of the city, having first duly summoned the plaintiff to show cause why he should not be removed, after a full hearing, removed him from the office of police commissioner upon the ground that he was incompetent and unfaithful, and that the requirements of the public service demanded his removal, basing

this finding upon the fact that the plaintiff while commissioner, in the presence of certain policemen, at an election held within the city, had peddled and offered ballots to voters within 75 feet of a polling place, thus violating the statutes of the state, and had thus demoralized the efficiency of the police department and its officers, and hindered said officers in the performance of their duties. The plaintiff in the superior court to which he appealed from the order of the mayor and in this court to which he appealed from the judgment of the superior court has assumed that the cause of his removal was his offense against the laws of the state, and has insisted that the mayor had no jurisdiction to find him guilty of such an offense, and that, if he had such jurisdiction, he was acting in a judicial or quasi-judicial capacity while conducting the hearing and committed errors therein which rendered his finding and order illegal.

In *Avery v. Studley*, 74 Conn. 272, 282, 50 Atl. 752, we held that sections 12 and 213 of the New Haven charter provide a mode for exercising a power of removal incident to executive appointment, rather than one of a quasi-judicial nature to hear and determine official offenses punishable by forfeiture of office. The plaintiff's fundamental error is in his assumption that the mayor in the present case was attempting to exercise the latter, and not the former, power. He assumes this probably because his conduct as established by the evidence was such as to render him liable to punishment under the statutes of the state, and perhaps to forfeiture of office in a proceeding under sections 139 and 140 of the charter. But his conduct on that occasion was proven to show his incompetency and unfaithfulness in the office of commissioner, and not for the purpose of establishing a crime or his liability to a forfeiture of his office under sections 139 and 140. It appears from the finding and the charter and ordinances therein referred to that it is the duty of the department of police service to preserve the peace, good order, and security of the city. The board of police commissioners designate the officers and policemen of the department, and make all promotions of officers and members of the force, and have the ultimate power of suspending, removing, or reducing them in rank. They fix the pay of all members of the department except the superintendent. It is the duty of the individual members of the board to inform themselves of the fidelity and efficiency of every member of the force, and to report to the board in session any information which they may receive regarding the conduct of any officer, and to encourage and sustain every police officer in the faithful discharge of his duty. The board has the designation and selection of every polling place at all elections. It is

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the duty of the chief of the department to make and enforce rules to preserve the peace, enforce good order, and prevent persons who are not voting or waiting their turn to vote or engaged in conducting the election from congregating within 100 feet of the polling place. The department of police service and its police officers are thus under the control of and are subservient to the board of police commissioners. It being thus the individual duty of the plaintiff to inform himself of the efficiency of every member of the force and to encourage and sustain every police officer in the faithful performance of his duty, he failed in that duty, and his conduct at the voting place in the face of one of his subordinates stationed there to preserve the peace and good order, and prevent those who had no lawful occasion to be there from congregating within the prohibited space about the polls, tended directly to demoralize the efficiency of the police department and its officers, instead of encouraging them in the performance of their duty, and was a violation of his duty as a police commissioner, and indicated his incompetency and unfaithfulness in his office, and that the requirements of the public service might demand his removal. The case, therefore, comes clearly within the provisions of sections 12 and 213, and the mayor was acting within his jurisdiction, unless as the plaintiff claims there is something in the provisions of section 139 of the charter which in some way curtails that jurisdiction.

It may be, but it is not necessary to here decide the point, that the plaintiff on proof of the facts which were proven to the satisfaction of the mayor in this case would be liable to a forfeiture of his office in a proceeding under sections 139 and 140 of the charter. A proceeding under those sections is to be instituted by not less than 20 freeholders of the city by a complaint to the superior court, and, if successful, may result, not only in the forfeiture of his office by the person proceeded against, but a judgment disqualifying him for any city office for the period of five years. Some of the grounds for the proceeding are such as if proved in a proceeding under section 12 before the mayor would warrant him in finding the officer charged incompetent and unfit for his office; but section 143 provides that nothing contained in the four preceding sections shall be construed to limit or change any of the powers or duties concerning the removal of officers and employes from office as defined in other provisions of the charter. Quite likely it was intended by sections 139 and 142 that, should the mayor refuse upon proper request to remove an incompetent and unfaithful appointee, such removal may be effected by a proceeding, less summary, but more far-reaching, in the superior court upon the complaint of the freeholders of the city. But the mayor may in

a proper case as incident to the power of appointment proceed to remove such an appointee for the causes named in section 12, and repeated in section 213, although for similar causes he could be removed from the office by proceedings under the provisions of sections 139 and 140. This is what he did, and under the decision of *Avery v. Studley*, supra, he had jurisdiction to do so, and was not acting in a judicial or quasi-judicial capacity in doing it.

Several of the plaintiff's reasons of appeal assign as their ground the unconstitutionality of section 213 of the city charter, in that it does not provide an impartial judicial tribunal for the trial of the charges. The hearing before the mayor in such a proceeding is not a trial. It is a hearing given in the appointee's interest to enable him to be heard as to the sufficiency of the causes given for his contemplated removal. The limitation placed by the charter upon the executive power of removal as incident to the power of appointment "is satisfied when the mayor has stated to the officer the cause which induces him to contemplate his removal, being a proper and sufficient cause, and has given him an opportunity to be heard in relation thereto, and assigns this cause for making the removal." *State ex rel. Williams v. Kennelly*, 75 Conn. 704, 707, 708, 55 Atl. 555, 557; *Pierce's Appeal*, 78 Conn. 666, 669, 63 Atl. 161; *Avery v. Studley*, supra. There is no constitutional guaranty that such a hearing shall be had before an impartial jury or other impartial judicial tribunal.

The question whether the mayor acted unfairly, unjustly and arbitrarily, which is attempted to be raised by several of the reasons of appeal, is a question of fact, and, if open to the plaintiff in the superior court, has been answered by the court's finding that the plaintiff was given a full, fair, and impartial hearing. The proceeding before the mayor not being a trial, but merely a hearing precedent to his executive action relative to the plaintiff's removal, the appeal therefrom to the superior court did not transfer the proceeding to that court for a rehearing of the facts. The purpose of the appeal is to provide a summary process by which the court may revoke the order of removal in case any essential formality has been omitted, or, perhaps, in case it finds that the executive power has been exercised so arbitrarily as to defeat the real purpose of the law in modifying an absolute discretion in removal. *Avery v. Studley*, supra, 283; *Pierce's Appeal*, 78 Conn. 669, 63 Atl. 161. Numerous exceptions were taken to the court's exclusion of evidence offered by the plaintiff to prove the nonexistence of the cause assigned for his removal by the mayor and to prove that the defendant was actuated by political reasons in making the removal. So far as the evidence was offered for the purpose of retrying questions of fact

which had been determined by the mayor, it was properly rejected because the decision of those questions by him was final. *Avery v. Studley*, supra. The evidence to prove political motive was also immaterial. *State ex rel. Williams v. Kennelly*, 75 Conn. 709, 55 Atl. 535.

There is no error.

(81 Conn. 556)

TETREAULT v. SMEDLEY CO. et al.

(Supreme Court of Errors of Connecticut. Jan. 22, 1909.)

1. TRIAL (§ 204*)—INSTRUCTIONS—REFERENCE TO EVIDENCE.

It is not necessary for the court to state in its charge all the evidence bearing on a particular question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 495; Dec. Dig. § 204.*]

2. APPEAL AND ERROR (§ 695*)—RECORD—REVIEW—EVIDENCE.

Where defendant did not bring up the entire evidence on appeal bearing on the question whether the driver of a truck by which plaintiff was injured was its employe, an objection that there was no evidence sufficient to submit such question to the jury could not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2913; Dec. Dig. § 695.*]

3. EVIDENCE (§ 75*) — WITHHOLDING EVIDENCE—PRESUMPTION.

All evidence is to be weighed according to the proof which it is in the power of one side to produce and in the other side to contradict; the holding back of evidence being sufficient to raise a presumption of fact against the party withholding it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 95; Dec. Dig. § 75.*]

4. TRIAL (§ 244*) — INSTRUCTIONS — SPECIFIC PORTIONS OF EVIDENCE.

Where plaintiff was injured by being struck by a truck alleged to have been negligently driven by defendant's servant, a request that the fact that the truck may have had defendant's name on it was not sufficient to show that it was being driven by defendant's servant, and that, unless that fact was affirmatively proved, defendant was not liable, was properly refused, under the rule that the court need not call the jury's attention to specific portions of the evidence as supporting or refusing a claim; it being sufficient if they are instructed to take into account all of the evidence bearing on disputed points in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

5. MUNICIPAL CORPORATIONS (§ 706*)—STREET RAILROADS—PASSENGERS—INJURY BY COLLISION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where a passenger on a street car was struck by the hub of a passing truck, he was not negligent as a matter of law, as to the owner of the truck, because he was riding with his right foot on the running board of the car with his left foot on the platform.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

6. NEGLIGENCE (§ 108*)—JOINT WRONGDOERS—COMPLAINT.

Where plaintiff, while riding on the running board of a street car, was struck by the hub of a passing truck, and both the street car company and the owner of the truck were sued, the complaint was not demurrable as to the

truck owner because it alleged that the street car was running at a dangerous rate of speed and negligently managed by the motorman; such allegation being essential to show that the negligence of the servants of both defendants jointly caused the injury.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 108.*]

Appeal from Superior Court, New Haven County; George W. Wheeler, Judge.

Action by Frank Tetreault against the Smedley Company and the Connecticut Company for injuries to plaintiff while riding on the running board of a street car by the driving of a truck against him. Plaintiff recovered a judgment for \$1,800 against the Smedley Company alone, from which it appeals. Affirmed.

Levi N. Blydenburgh, for appellant Smedley Co. Harry G. Day and Thomas M. Steele, for appellee Connecticut Co. Walter J. Walsh, for other appellee.

RORABACK, J. The plaintiff was a passenger on an open car of the defendant railway company. On account of the car being crowded, he was obliged to stand on the right-hand, or outside, running board, and assumed a position near the front end, with his right foot on the running board about one foot from the end, with his left foot upon the platform, between the front dashboard and the first seat back of the motorman. While standing in this position, a furniture truck collided with the car in such a manner that the rear hub of the wheel of the truck came in contact with the plaintiff's right foot, causing the injuries complained of. The parties were at issue upon the alleged negligence of the two companies, the exercise of due care upon the part of the plaintiff, and the ownership and control of the furniture truck.

The jury found the issues as against the Smedley Company and for the railway company. The Smedley Company claimed that there was no evidence in the case proving that the driver of the truck was its agent or employe, or that this truck was then and there owned or used by the company, or its agents or employes. In this connection this defendant complains of the court's instructions for the following reasons: "The court erred and mistook the law in charging the jury that on the evidence as stated in the charge it was not a matter of law for the court to determine whether or not the truck was the truck of the Smedley Company, and operated and controlled by it at the time of the accident, and that it was entirely a question of fact for the jury." It was not necessary for the court, nor does it appear that it attempted, to state in its charge all the evidence bearing upon this question. The record discloses that the court, after calling the attention of the jury to the claims of the parties and the evidence of several witnesses

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

who had testified upon this branch of the case, said, in substance: Now from that evidence and other evidence in the case which I have not cited upon that point, you are to determine as a question of fact whether this truck belonged to the Smedley Company and whether their driver was in charge of it when the accident happened. The record discloses that the defendant appeared and contested the case upon its merits. It offered no evidence, made no motion for a nonsuit for failure to make out a prima facie case, but waited until the argument to the jury was reached before claiming that there was no evidence showing that the driver of the truck was its agent or employé. This claim, under proper instructions, was submitted to the jury as a question of fact, and a verdict returned against the Smedley Company. Had it deemed that the evidence was insufficient to establish this fact, it should have taken some proper course to bring before this court the entire evidence bearing upon this subject. Without such evidence we cannot review the question which this company attempts to raise by the first assignment of error.

The second reason of appeal is that the judge erred in its charge as to withholding testimony. The court in discussing this proposition correctly stated the presumption applicable to a claim of this nature when it said: "It is a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted; and the holding back of evidence by him is a presumption of fact against the party who withholds such evidence in a case where it could be produced." *State v. Hogan*, 67 Conn. 581, 584, 35 Atl. 508; *Throckmorton v. Chapman*, 65 Conn. 441, 454, 32 Atl. 930. Upon this subject it was, in substance, further stated: Now, of course, that depends upon the finding of the jury whether there was any holding back, and you must in passing upon that consider the argument upon the part of the defendant that it was not within their province at this time to produce that witness. There is nothing in that portion of the charge of which the defendant can justly complain.

The defendant objects, in its fourth assignment of error, because the court failed to charge in conformity with the following request: "The mere fact that the truck may have had upon it the name of Smedley is not sufficient; and unless it has been shown affirmatively by competent evidence that the driver of the truck was the servant or agent of the Smedley Company, and then and there acting as such, so far as the Smedley Company is concerned, your verdict must be for the defendant." Ordinarily, it is not incumbent upon the trial court, in charging the jury, to call their attention to specific portions of the evidence as supporting or refuting a claim. It is enough if they are

instructed to take into account all the evidence bearing upon disputed points in the case. *Hart v. Knapp*, 76 Conn. 135, 137, 55 Atl. 1021, 100 Am. St. Rep. 989. As hereinbefore stated in connection with the first reason of appeal, the court charged the jury upon this subject correctly and as fully as the state of the evidence and appropriate claims of the parties required.

Paragraphs 5 to 9 and 11 to 13 of the reasons of appeal, relating to the charge as given or to requests refused, raised one general question; that is, whether under the facts of the case the court performed its duty in leaving the question of contributory negligence to the jury, to be determined by them as a question of fact upon the evidence. As already stated, the plaintiff's injuries were received while he was riding on the running board of the defendant railway company's car. The court correctly stated the law upon the question of the plaintiff's negligence when, in substance, it said: Now, what was the duty of the plaintiff? It was his duty also to use reasonable care; that is, that degree of care which the reasonably prudent person would use under the same circumstances. It was care in proportion to the danger, and, as you know, greater care is required under the rule in dangerous situations than in situations that do not furnish such elements of danger. The law cannot say that, because the man was standing on the running board of the car, under all circumstances that would be contributory negligence. That is a question of fact for the jury to determine in a given case. It is obvious that standing on a running board of a car is more dangerous than when seated in the car. Hence, while the standard of due care remains the same, what will be due care will be more in the one case, in the dangerous situation, than in the other. A greater degree of care must be exercised from one in such a position to avoid injury to himself and to avoid injury from teams or other vehicles in close proximity to the car upon which he stands. It appears that the testimony and claims of counsel were conflicting in regard to the speed, location, and control of the truck when the accident happened. These and other important facts upon the trial were in dispute. This court has not the evidence of the circumstances surrounding the accident. We have not the means of determining whether the court below erred upon this subject, unless we are prepared to hold that a person standing upon the running board of a trolley car would, under all circumstances, be guilty of contributory negligence. Such a proposition would manifestly be unsound.

There was conflicting evidence whether the car had passed the truck, or the truck was in advance of the car, when the accident happened. The court, in closing its remarks upon the assumption that the car had passed the truck when the plaintiff's injuries occur-

red, properly said: "Assuming that you find the man on the running board of the car. The car is moving. The van comes up behind and moves faster, and in its movements it comes so close to this man upon the running board that it injures him. What possible fault is it of that motorman at the front of the car, in the operating of his car that caused that injury? Then, I say that the verdict should be for the railway company." The remarks of the judge upon this subject referred to in the Smedley Company's tenth assignment of error were apparently occasioned by two or three obscure questions propounded by a juror, when the judge was discussing this branch of the case.

It is urged in the fifteenth assignment of error that the court mistook the law in failing to make the proper distinctions in the charge, in respect to the relative duty to the plaintiff on the part of the defendant, the Consolidated Company, who had accepted him as a passenger, and the Smedley Company, who had no special duty to him. From an examination of the record it appears that the trial judge instructed the jury fully and correctly as to the duty of the plaintiff, the driver of the truck, the degree of care which the railway company should exercise toward its passengers, and the manner in which these different duties should be performed. He called the attention of the jury to the application of these principles to the facts claimed to have been established by the evidence in such a manner that it is apparent that the duty which each party owed to the other could not have been misunderstood by the jury.

The last reason of appeal questions a decision made by the court below upon a demurrer. The complaint was not demurrable because it was alleged that the plaintiff voluntarily placed himself upon the running board of a trolley car. This cause of demurrer has already been considered in connection with the exception to the charge.

Paragraphs 2 and 3 of the demurrer question the sufficiency of the complaint because it is alleged that the car of the railway company was run at a dangerous rate of speed and negligently managed by the motorman. This was essential in an action against two defendants in which it was alleged that the negligence of the servants of these parties jointly caused the plaintiff's injuries.

There is no ground for the claim that there is no allegation in the complaint showing that the servant of the Smedley Company was not in the exercise of ordinary care.

The third and fourteenth reasons of appeal were not pursued in the defendant's brief, and involve no questions which call for discussion.

There is no error. The other Judges con-

(81 Conn. 539)

NEW HAVEN TRUST CO. v. CAMP et al.
(Supreme Court of Errors of Connecticut. Jan. 22, 1909.)

1. DEEDS (§ 47*)—ATTESTATION—SUFFICIENCY.

A deed, executed and delivered in New York in 1857, was insufficient to convey any interest in land in Connecticut, where it was attested by only one witness.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 107; Dec. Dig. § 47.*]

2. ACKNOWLEDGMENT (§ 57*)—PLACE OF DELIVERY—EVIDENCE.

The attestation clause to a deed, acknowledged before a magistrate in New York, reciting that the deed was sealed and delivered in his presence, was prima facie evidence that the deed was delivered in New York.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 264; Dec. Dig. § 57; Evidence, Cent. Dig. § 1572.]

3. DEEDS (§ 91*)—LAW GOVERNING—PRESUMPTIONS.

It will be presumed that the parties to a deed to land in Connecticut had in mind the law of New York as that which would govern, where they resided in New York, and the deed was sufficiently attested under that law of that state, but insufficiently under the Connecticut law.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 229; Dec. Dig. § 91.*]

4. DEEDS (§ 91*)—LAWS GOVERNING.

Where a deed covering Connecticut land, executed and delivered in New York between parties residing there, does not expressly show what should be the governing law, it must be determined under the established principles of private international law; the question prima facie at least being, not what the parties in fact intended, but what would necessarily have been the intention of sensible persons in their position, if their attention had been directed to contingencies, which escaped their notice.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 229; Dec. Dig. § 91.*]

5. CONTRACTS (§ 144*)—LAWS GOVERNING.

Under the established principles of private international law, the proper law of contracts executed in one state between parties residing there, respecting subject-matter in another state, so far as the contractual obligations of the parties to which are concerned, is that by which they may justly be presumed to have meant to bind themselves.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 724-727; Dec. Dig. § 144.*]

6. DEEDS (§ 91*)—LAWS GOVERNING.

The effect of the choice by parties to a deed of land in Connecticut to execute it in New York, and to establish their domicile there, is a matter of law; and, though it cannot make the conveyance pass title under the law of Connecticut, it could make it establish the relation between the parties respecting the land, out of which, through subsequent events, important rights respecting it might arise.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 229; Dec. Dig. § 91.*]

7. DEEDS (§ 91*)—CONSTRUCTION—PRESUMPTIONS.

There being nothing in a deed to Connecticut land, executed and delivered in New York between the parties residing there, to rebut the presumption that they had in mind the law of New York as governing the deed, and the laws being such that the grantee would take an ab-

solute fee, it will be presumed that the parties intended that she should have such estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 229; Dec. Dig. § 91.*]

8. ADVERSE POSSESSION (§ 106*)—TITLE ACQUIRED.

If a decedent held adverse possession of land for 50 years under a deed, she acquired absolute title thereto, which passed to her executors and trustees under her will.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 604-623; Dec. Dig. § 106.*]

9. ADVERSE POSSESSION (§ 85*)—EVIDENCE—GIFTS.

In an action involving the proceeds of land bought by decedent for his daughter as a gift to her, conveyed to her under a defective deed two years after she took possession, and held by her adversely for 50 years, evidence tending to show that the transaction amounted to a present and executed gift was material.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 85.*]

10. ADVERSE POSSESSION (§ 64*)—PAROL GIFTS.

Possession of land under a parol gift is adverse as against the donor, and if continued for 15 years, establishes a title as against him and all claiming under him.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 358-364; Dec. Dig. § 64.*]

11. ADVERSE POSSESSION (§ 85*)—EVIDENCE—DEEDS.

While a deed to grantor's daughter was void for insufficient attestation, the fact that it was made is relevant, in an action involving the proceeds of the land, to show that the daughter entered under a claim of title in herself, and not in subordination to that in fact held by her father; the terms of the deed being important as showing the nature of the possession held by the daughter before and after its date.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 85.*]

12. ADVERSE POSSESSION (§ 85*)—EVIDENCE.

In an action involving the proceeds of land conveyed by decedent to his daughter under a void deed, and held adversely by her, evidence that she never saw or read the deed or knew of its terms, that decedent did not claim the land, and that the daughter continued to occupy it under a claim of right as owner, was admissible.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 85.*]

13. DEEDS (§ 91*)—CONSTRUCTION—LAW GOVERNING.

The effect of a deed must be determined by the law of the state or country where the land is situated, but what the parties at the time of its execution understood to be its effect is to be determined by the law they had in mind as governing its construction and operation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 229; Dec. Dig. § 91.*]

Appeal from Superior Court, New Haven County; Milton A. Shumway, Judge.

Action of interpleader by the New Haven Trust Company against Theodore C. Camp, executor, and others. From the judgment, Caroline W. Baldwin's executors appeal. Reversed, and new trial granted.

Henry Stoddard and George M. Gunn, for appellant. Henry C. White and Leonard M. Daggett, for appellee.

BALDWIN, C. J. In 1855, at the request of Caroline W. Suydam, wife of Ferdinand Suydam of New York, and one of several children of Stephen Whitney of New York, her father, who was then 78 years of age, bought a country place named "Ivy Nook," situated partly in Hamden and partly in New Haven, Conn., for and as a present or gift to her. He paid \$11,000 for it, and had the deed, which was dated May 19, 1855, made to himself. Her husband was at this time insolvent, and, to secure the property against him and his creditors, her father did not convey it to her till 1857, when he and his wife, described as parties of the first part, executed a conveyance of it, in which Mrs. Suydam was described as the party of the second part. This he gave to her, or to an agent, who received it in her behalf. The deed was dated August 4, 1857, and executed in New York. The consideration stated in it was "natural love and affection" and \$1. The operative words of grant were "do grant, bargain, sell, alien, remise, release, convey and confirm, unto the said party of the second part, to her sole and separate use during her natural life and free and clear from the debts or control of her present or any future husband," and embraced "all the estate, right, title, interest, dower, right of dower, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to" Ivy Nook; habendum "unto the said party of the second part, to her sole and separate use during her natural life and free and clear from the debts or control of her present or any future husband; giving and granting to the said Caroline full power to convey or dispose of the said premises in fee simple by deed, will, or otherwise." This conveyance was recorded in the Hamden and New Haven land records in May, 1860, after Mr. Whitney's death, which occurred in the preceding February. Mr. Suydam applied for a discharge in insolvency in December, 1857, but did not receive it until after Mr. Whitney's death.

There was but a single attesting witness to the deed, namely the magistrate, before whom it was acknowledged in New York city; and the attestation clause stated that it was sealed and delivered in his presence. There were two certificates of acknowledgment, made in New York two days after the date of the deed. One followed the New York form, and was signed by him as a commissioner of deeds of New York; the other followed the Connecticut form, and was signed by him as a commissioner to take the acknowledgment of deeds appointed by this state. Having but a single witness, the deed was, at the date of its delivery, ineffective to convey any interest in land in Connecticut. Comp. St. 1854, tit. 29, c. 1, p. 631, § 8. Farrell Foundry v. Dart,

26 Conn. 376, 381. An act entitled "An act to confirm certain deeds" took effect on June 16, 1858, providing that all deeds of Connecticut real estate, which had been executed in any other state according to its law, with only one attesting witness, but were in all other respects executed according to our laws, should be valid as against the grantor and all persons subsequently acquiring an interest under him with notice. Pub. Acts 1858, p. 46, c. 64. A later statute, passed in 1864, made all deeds of Connecticut lands which had been, or should be, executed and acknowledged in any other state, in conformity with its laws relative to lands therein situated, "valid to all intents and purposes," with a saving in favor of any title previously "acquired in good faith by any creditor of or purchaser from the grantor in any deed or conveyance, defectively executed, or from his heirs or devisees." Pub. Acts 1864, p. 19, c. 4. On May 19, 1855, Mr. Whitney gave Mrs. Suydam, and she took, exclusive possession and occupation of Ivy Nook as her own, and soon afterwards, and prior to August 4, 1857, she commenced to make improvements and changes in the house and grounds. This exclusive possession she held till her death in November, 1905, when it passed to the executors and trustees under her will. They sold the place for over \$50,000, and the fund was deposited, by agreement of all parties in interest, with the plaintiff, to be disposed of as a proper court might order. She survived Mr. Suydam for many years, and at her death was the widow of one Nathan A. Baldwin.

The attestation clause was *prima facie* proof that the deed of August 4, 1857, was delivered in New York, and there was no evidence to the contrary. At that time dower could only be claimed under Connecticut law in lands of which the husband died possessed in his own right. In view of the execution and delivery, under such circumstances, of such a conveyance in the state of New York, where a deed with a single witness was sufficient to convey lands therein situated, a presumption arises *ut res magis valeat quam pereat*; that the parties, at the time, had in mind the law of New York as that which would govern the meaning and effect of the instrument in question. They could hardly have supposed that they were executing on the one side, and accepting on the other, a conveyance which conveyed nothing. *Pritchard v. Norton*, 106 U. S. 124, 137, 1 Sup. Ct. 102, 27 L. Ed. 104.

Nothing is expressly stated in the instrument itself as to what should be the governing law. It must therefore be determined under the established principles of private international law. By these the proper law of every contract under such circumstances, so far as the contractual obligations of the parties to each other are concerned, is that by which they may justly be presumed to have meant to bind themselves. The ques-

tion, *prima facie* at least, is not what they did in fact intend, but what would naturally have been the intention of sensible persons in the position occupied by Mr. and Mrs. Whitney, on the one part, and Mrs. Suydam, on the other, if their attention had been directed to contingencies which escaped their notice. Dicey on the Conflict of Laws, Moore's Ed. 563-566. Only thus can uniformity and certainty of construction be secured. The parties to the deed now in question chose to execute it in New York. They had also chosen to establish their domicile there. The effect of these choices is a matter of law. Minor on the Conflict of Laws, p. 378, note. It could not make the conveyance avail to pass title under the law of Connecticut. It could make it avail to establish a relation between the parties with respect to the land, out of which, by force of subsequent events, important rights in respect to it might arise. See Dicey on the Conflict of Laws, Moore's Ed. 770; Félix. *Traité du Droit International Privé*, 1, § 96. The presumption that the language employed in the deed to Mrs. Suydam was used by the parties in the sense attributed to it alike by the common *lex domicilii* and the *lex loci celebrationis* is not rebutted by anything in the record.

By the laws of New York, as they existed in August, 1857, the deed to Mrs. Suydam, had it been of land in that state, would have given her an absolute fee. There was therefore a presumption, under the rules of private international law, that, at the date of the conveyance, Mr. Whitney and Mrs. Suydam understood its terms to be such as to invest her with an absolute estate in fee simple. The superior court apparently did not take this presumption into consideration. No allusion was made to it in the finding, or to the absence of two attesting witnesses to the deed. The record, however, states that upon the trial the executors of Mrs. Baldwin's will offered evidence tending to prove that her father, in making the purchase of Ivy Nook, intended to make a gift of it to her, and that she in entering into possession intended to take it as a gift; but the court ruled that evidence of these facts was not admissible to vary the legal effect of the deed of August 4, 1857. It was one of the claims of the executors, who were trustees of her residuary estate, that she took adverse possession of the property on May 19, 1855, and maintained it till her death. If she did, she acquired an absolute title, which passed to them. Whether she did was therefore an important question in the cause.

In the judgment file it is stated that the court held that (1) the deed of 1857 conveyed a life estate only, with a power of disposition annexed; (2) this power was never exercised; (3) upon the death of the life tenant the executor and trustee of the residuary estate under her father's will became the absolute owner of Ivy Nook; and (4) "the oth-

er facts and circumstances in evidence, concerning which there was little or no controversy, do not and should not affect the general conclusion." Among the "facts and circumstances," of which there was some evidence, and to which this reference was made in the judgment file, are these: That she held possession under a claim of right, as owner; that her father, who was worth at the time of his death about \$4,000,000, and had long owned large landed properties, kept an account of the separate items of his real estate upon his books, but did not enter Ivy Nook as one of them; that she probably never personally had or saw the deed of 1857; that it did not appear that she ever knew of the particular terms in which it was expressed; and that after the death of her father and of Mr. Suydam it was found in the office of the estate of Mr. Whitney, where both his papers and those of Mr. Suydam were kept. It is evident from the interlocutory ruling above mentioned, and the terms of the judgment file, that the superior court regarded evidence of such a nature as immaterial, because, in its opinion, the case must turn on the proper construction of the deed of 1857, and the effect of that could not be varied by parol. It was made, however, to one who had already been in the actual and exclusive possession of the granted premises for more than two years, and whose representatives claimed that this possession was adverse in its character. The finding and the paragraphs marked "proven" in the draft finding filed by the appellants show, as above stated, that Ivy Nook was bought for and as a gift to Mrs. Suydam, and that she was put by her father in immediate and exclusive possession of it as her own. Any evidence tending to prove that the transaction amounted to a present and executed gift was therefore material to the issues on trial.

Possession of land taken under a parol gift is adverse as against the donor, and if continued for 15 years establishes a title as against him, and all claiming under him. *Clark v. Gilbert*, 39 Conn. 94, 97. While the gift, regarded as a conveyance of title, was void, that it was made is relevant to show that the donee entered under a claim of title in herself, and not in subordination to that in fact held by the donor. *Comins v. Comins*, 21 Conn. 413, 417. The executor and trustee under the will of Stephen Whitney was right in claiming that the terms of the deed of 1857 were of importance as ascertaining the nature of the possession held by the grantee, both before and after its date. But it was not necessarily conclusive. *Searles v. De Ladson*, 81 Conn. 133, 136, 70 Atl. 589. If her possession was taken originally under an absolute gift, and under a claim (however unfounded) of absolute ownership in herself, it was certainly not impossible that her con-

tinuing in possession after the delivery of the deed of 1857, which as a conveyance of the legal title was absolutely void, was understood by her to be equally adverse in character. To show such an understanding on her part evidence that she never saw or read that deed, or knew of its terms, that her father never included Ivy Nook in the number of his possessions, and that she continued to occupy it under a claim of right, as owner was relevant and material. *Turner v. Baldwin*, 44 Conn. 121.

The effect of an instrument purporting to pass title to real estate must be determined by the law of the state or country in which this real estate is situated. But what the parties to the instrument, at the time of its execution understood to be its effect (whenever that may become important) is to be determined by the law, whatever it was, which they then had in mind as governing its construction and operation. See *Clarke's Appeal*, 70 Conn. 195, 218, 39 Atl. 155.

As already stated, the superior court overlooked one important means of ascertaining from the proofs before it the understanding of the parties to the deed of 1857, and there must therefore be a new trial.

The appellants have pursued the remedy given by Gen. St. 1902, § 797, for a correction of the finding, and ask that it may be corrected by adding certain paragraphs from their draft finding. We do not pass upon this request, since the record, as it stands, is sufficient to sustain the appeal, and a new trial must be ordered, upon which parol evidence of the conduct of the parties to the deed of 1857, whether before or after its delivery, shall not be regarded as necessarily explained and controlled by what may be the legal effect of that conveyance under the laws of Connecticut.

There is error, and a new trial is ordered. The other Judges concurred.

(81 Conn. 592)

ENSWORTH et al. v. NATIONAL LIFE ASS'N.

(Supreme Court of Errors of Connecticut. Jan. 27, 1909.)

1. COURTS (§ 99*) — PREVIOUS DECISION IN SAME CASE—LAW OF CASE.

Where, in stockholders' proceedings to dissolve a stock insurance corporation, the court gave notice of hearing to creditors, policy holders, and death claimants, who had an opportunity to intervene and object to dissolution, but failed to do so, a judgment of dissolution was final after the expiration of the time to appeal against all parties as to that question, and cannot be objected to on appeal from an order discharging the receiver.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 340; Dec. Dig. § 99.*]

2. INSURANCE (§ 43*)—STOCK COMPANIES—INSOLVENCY—ASSESSMENTS.

Where the only purpose of paying assessments on policies in a stock insurance company would have been to continue the policies in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

force, the receiver of the corporation, after its dissolution, was not bound to levy assessments to cover a period subsequent to dissolution which terminated the company's ability to insure.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 43.*]

3. INSURANCE (§ 43*)—STOCK COMPANIES—DISSOLUTION—ASSESSMENTS.

Premiums and assessments sent to a stock insurance company, after its dissolution, by stockholders ignorant of the fact that it had been dissolved, were properly ordered returned, as having been paid by mistake and without consideration.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 51-53; Dec. Dig. § 43.*]

4. INSURANCE (§ 43*)—STOCK COMPANIES—DISSOLUTION—UNEARNED PREMIUMS.

Where, by dissolution of a stock insurance company, it became unable to earn full premiums, which it would have received, and thereby forfeited its policies, policy holders were entitled to the allowance of claims, for the premiums unearned, in the dissolution proceedings.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 43.*]

5. INSURANCE (§ 51*)—STOCK INSURANCE COMPANIES—DISSOLUTION—CLAIMS—PRESENTATION—TIME.

Since the court could extend the time for presentation of claims against a stock insurance company in dissolution proceedings, an allowance of claims will be presumed, in the absence of a finding to the contrary, to constitute an adjudication that they were seasonably presented.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 51.*]

6. INSURANCE (§ 43*)—STOCK INSURANCE COMPANIES—DISSOLUTION—UNEARNED PREMIUMS—RETURN.

In the absence of a finding as to the cost of ascertaining and paying policy holders' claims for unearned premiums on the dissolution of the insurance company, or that such cost would exceed the amount of the premiums, it was no objection to an order directing return of such unearned premiums that the cost would exceed the amount thereof.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 43.*]

Appeal from Superior Court, Hartford County; Howard J. Curtis, Judge.

Action by Lester L. Ensworth and others for a judicial dissolution of the National Life Association, a corporation. Orders were passed dissolving the corporation and appointing a receiver to wind up its affairs, after which claims were allowed, and a final order for a division of assets and discharge of the receiver was entered, from which certain creditors appeal. Affirmed.

Henry G. Newton, for appellants. Charles E. Gross, for appellee.

THAYER, J. Upon the complaint, dated June 30, 1899, of Lester L. Ensworth and others representing themselves to be stockholders of the National Life Association, a corporation chartered by the General Assembly of the state as an insurance association, and located in Hartford, the superior court on July 7, 1899, after due notice of the time of hearing the complaint, and after a hearing

had upon it, passed an order dissolving the corporation, and upon the same day passed an order appointing Frederick A. Betts receiver of the funds, estate, and assets of the corporation, with power to demand, receive, sue for, and recover the same, wherever found, in his own name as receiver. Since that date the court, through its receiver, has been winding up the affairs of the corporation as provided by statute until August 24, 1908, when a final order was passed that, upon the payment of certain expenses of the receivership and a dividend of between 7 and 8 per cent. to all creditors who had proved their claims, the receiver should be discharged from all further liability on account of the receivership. The complaint upon which the superior court acted alleged that the corporation was solvent and had sufficient assets to pay all of its liabilities, and that it was for the interest of all the stockholders that it should wind up its affairs. The court, in its judgment dissolving the corporation and appointing the receiver, found these allegations to be true. The assets upon winding up its affairs proved insufficient to pay the liabilities in full.

It appears from an application for instructions made to the court by the receiver, but does not otherwise appear in the record, that the corporation in its life insurance business issued life insurance policies upon what is known as the "assessment plan." Some policies were issued upon the single premium plan, and others upon a plan called the "natural premium plan," requiring quarterly, monthly, or bimonthly payments. In the case of all the policies a portion of the premium was a fixed sum, and the other portion, oftentimes the greater portion, was fixed and determined from time to time by the corporation according to the amount of the death losses under the provisions of the policy, and the payment thereof became due upon and in accordance with the provisions of the assessments so made at fixed periods, and notices of which were sent out to the policy holders by mail. All of the policies provided for their continuation only in case that the premiums or assessments so made by the corporation should be paid on or before the date specified in such notices. Certain of the policies provided that, in case the mortuary fund in any class at any time should not be sufficient to meet the death losses which should occur in that class of policy, assessments to meet such losses should be made upon the holders of policies of that class. The corporation maintained no reserve fund, and no mortuary fund set apart for the payment of these claims.

On the 30th day of June, 1899, and just previous to the filing of the complaint in the superior court, some one of the officials of the corporation sent out a large number of assessments to its policy holders. After his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

appointment and qualifications, said receiver, through remittances sent to the corporation in response to the notices, received premiums and assessments amounting in the whole to several thousand dollars. Said premiums and assessments were paid by the policy holders in ignorance that a receiver had been appointed and that the corporation had been dissolved, and were made for the purpose of continuing said policies. There existed valid death claims against the corporation at the time of its dissolution.

The court did not order, and, so far as appears, was not requested to order, the receiver to make any assessment for death claims, and he made none. The court allowed to living policy holders dividends upon claims for unearned premiums from the date of the order of dissolution.

The appellants, who are death claimants, assign error on the part of the court (1) in dissolving the corporation, (2) in not ordering the receiver to make an assessment for death claims and send out notices of such assessment, (3) in ordering the return of the premiums and assessments received after the company had been dissolved, (4) in ordering a dividend to be paid on claims for unearned premiums to living policy holders who at the time of the commencement of the action were liable to assessments for death claims to a larger amount than the unearned premium and assessment, (5) in ordering a dividend to be paid on claims for unearned premiums to living policy holders when such claims were not presented by the policy holders in accordance with the order of the court, (6) in ordering dividends to be paid on claims for unearned premiums when the amount of dividend would be less than the cost of ascertaining and paying it, and (7) in ordering a dividend to be paid on unearned premiums when the unpaid assessments laid prior to the dissolution of the corporation exceeded such unearned premiums.

The proceeding for the dissolution of the corporation was a statutory one brought by certain of its stockholders against it, asking that it be dissolved and its affairs wound up. The court gave notice of the proceeding and of the time of hearing to its creditors and policy holders before proceeding to act upon the complaint. The present death claimants then had an opportunity, had they seen fit, to intervene and object to the dissolution. They failed to do this, and the court proceeded to a hearing and rendered its judgment. That judgment was final between the parties, and the time within which they or these creditors could take an appeal from that judgment has long since expired. The claimants are therefore precluded from now raising the question attempted to be raised by the first-mentioned assignment.

The claimants say that the corporation should have laid and collected an assessment for all death claims before a receiver was applied for, and that, had this been done, if

the assessments had been paid the assets of the corporation would have been increased to the extent of the payments made, and if the assessments had not been paid the policies would have been forfeited and no claim thereon could have been made for unearned premiums; and they say that, the corporation having failed to lay the assessments, the court should have ordered the receiver to lay them. It is unnecessary to inquire why the corporation failed to do this. It may be that its relations to the insurance department of the state rendered it impolitic. An attempt by the court to do it would have been futile. The policy holders were under no legal obligation to pay the assessments on their policies to the corporation if laid. They were not situated like policy holders in mutual companies, who are legally bound to pay death-claim assessments. Their only purpose in paying assessments on policies in this corporation would be to continue their policies in force; that is, to continue the company's obligation to insure them. When the corporation was dissolved, its ability to insure the policy holder ceased. The receiver was not appointed to continue its business, but to receive its assets, pay its creditors, and wind up its affairs. An assessment paid to him, therefore, would be without consideration, and without legal obligation on the part of the policy holder to pay it. The court, therefore, could not properly order the receiver to make the assessments, and the claimants have no ground for complaint in its failure to do so.

For the same reason, the premiums and assessments which were sent to the corporation after its dissolution by policy holders ignorant of the fact that it had been dissolved and was no longer able to insure them were properly ordered to be returned as having been paid by mistake and without consideration.

The remaining reasons of appeal relate to the allowance of dividends upon claims for unearned premiums. These were proper claims against the corporation. By its dissolution it became unable to earn the full premium which it had received, and thereby forfeited the policy. The policy holders who had paid the premiums were therefore entitled to recover the amount of premium unearned by the corporation. There is nothing in the finding showing that any assessment against any of these policy holders had been legally laid prior to its dissolution. It appears in the receiver's application for instructions already alluded to that in June prior to its dissolution the insurance department of the state had forbidden the corporation from sending out any more assessments. But, as already stated, if there had been such assessments, the policy holders were not bound to pay them. And, if they neglected to pay them because the corporation was defunct and could not earn them, the question would be whether they thereby forfeited

their right to the unearned premium, and not the one which is raised by the fourth and seventh reasons of appeal, which assumes that a claim for the assessment could be set off against the claim for the unearned premium. The court correctly held upon the facts that there was no liability for assessments which prevented the allowance in full of the claims for unearned premiums.

The fifth reason of appeal assumes that some of the claims were not presented in time. There is nothing in the finding which shows that these claims were not presented within the time limited by the court for the presentation of claims. But if they were not presented within that time, the court had power to extend the time for their presentation. As it has allowed the claims, it will be presumed, in the absence of any finding to the contrary, that the claims were seasonably presented.

The sixth reason, without any finding as to the cost of ascertaining and paying the claims for unearned premiums, or that such cost will exceed the amount of the premium, assumes that such will be the fact. No question of law is properly presented for our consideration by this reason of appeal.

There is no error. The other Judges concurred.

(81 Conn. 534)

Appeal of ALLYN.

(Supreme Court of Errors of Connecticut. Jan. 22, 1908.)

1. INTOXICATING LIQUORS (§ 6*)—REGULATION—LICENSE SYSTEM—LEGISLATIVE AUTHORITY.

The preamble of the Constitution, reciting that the people acknowledge the good providence of God in having permitted them to enjoy a free government, does not, in view of the history of the legislation on the subject, deprive the General Assembly of the power to license the sale of intoxicating liquors, even on the theory that God is recognized by the Constitution as the author of the government, that the Bible is the Word of God, and prohibits the use of intoxicants as a beverage, wherefore the state cannot permit their sale.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 6.*]

2. CONSTITUTIONAL LAW (§ 50*)—LEGISLATIVE POWER.

The legislative power vested in the General Assembly by Const. art. 3, § 1, vesting the legislative power of the state in the General Assembly, covers the whole field of legislation, except as limited by the state or federal Constitutions.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 48, 49; Dec. Dig. § 50.*]

3. CONSTITUTIONAL LAW (§ 50*)—LEGISLATIVE POWER.

Const. U. S. art. 4, § 3, providing that the United States shall guaranty to every state in the Union a republican form of government, impliedly binds Connecticut to maintain a republican form of government, and the legislative power of the General Assembly of the state is such as is consistent with a republican form of government, and, while there are fundamental principles of morality and justice which no Legisla-

ture is at liberty to disregard, the court will not impute the disregard of such principles except in the clearest case.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 50.*]

4. CONSTITUTIONAL LAW (§ 287*)—"DUE PROCESS OF LAW."

The "due process of law," in the fourteenth amendment of the federal Constitution, refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all civil and political institutions, but does not forbid the enactment by the General Assembly of a general liquor license law; the liquor business being a subject of prohibition or regulation.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 831; Dec. Dig. § 287.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2227-2258; vol. 8, p. 7644.]

5. INTOXICATING LIQUORS (§ 1*)—REGULATIONS—VALIDITY.

At common law the liquor business was a lawful business open to any one, and the statutes regulating the licensing of the business merely restrict the common-law right.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 1.*]

6. CONSTITUTIONAL LAW (§ 81*)—"POLICE POWER."

The term "police power" means the general power of governing its people and dominions belonging to every sovereignty.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 148; Dec. Dig. § 81.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5424, 5438; vol. 8, p. 7758.]

7. INTOXICATING LIQUORS (§ 15*)—REGULATION OF TRAFFIC.

Under the power of the state to properly restrict a business dangerous, if unregulated, to public morals or security, by the requirement of license fees, a state statute imposing a license fee is valid, whether the fee is required by way of regulation or for purposes of revenue, and hence Gen. St. 1902, cc. 157, 158, regulating and licensing the sale of intoxicating liquors, is valid whether the statute is a revenue measure, or whether the license fee is required by way of regulation only.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 17, 18; Dec. Dig. § 15.*]

Appeal from Superior Court, Fairfield County; Silas A. Robinson, Judge.

Charles B. Allyn, a taxpayer, appealed to the superior court of Fairfield county from a decision of the county commissioners thereof granting a license to an individual for the sale of intoxicating liquors. There was a judgment pro forma affirming the decision of the commissioners, and the said Allyn appeals. Affirmed.

Thomas C. Coughlin and Frank L. Wilder. for appellant. Homer S. Cummings, for appellee.

BALDWIN, O. J. The sole ground of the appeal to this court is that the license law (Gen. St. 1902, cc. 157, 158) is void. The claim is that the sale of intoxicating liquors to be drunk as a beverage at the place of sale is so destructive to the public health

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and so inherently immoral that no law upholding it can be valid either under the Constitution of this state or of the United States. The appellant first contends: That, as the people of Connecticut, in the preamble of their Constitution, gratefully acknowledge "the good providence of God, in having permitted them to enjoy a free government," this is a recognition of God as the source of that government; that the Bible contains the "Word of God;" that it condemns the use and sale of intoxicating liquors as a beverage; and therefore that the state cannot permit it on any terms.

There was a time in the early history of this commonwealth when the Bible was, "in the defect of a law in any particular case," a rule of political government. Col. Rec. of Conn. I, 509. But even then it was never considered to contain any absolute prohibition of such a business as that for which the license now in question was granted. As early as 1643 it was provided by the colonial laws that no person or persons should sell wine or "strong water in any place within these liberties, without license from the particular court or any two magistrates." Col. Rec. of Conn. I, 100. Cf. Id., 154. Our Code of 1650 (Col. Rec. I, 533), under the title of "Inkeepers," recited that: "Forasmuch as there is a necessary use of howses of common intertainment in every commonwealth, and of such as retalle wine, beare and victuals, yet because there are so many abuses of that lawfull libberty, both by persons interteining and persons interteined, there is also need of strct lawes and rules to regulate such an employment." Legislation of a similar character appears in subsequent revisions of the statutes, down to the date of the adoption of our Constitution. St. 1715, p. 123; Rev. St. 1808, p. 640, tit. 158, c. 1; Sess. Laws 1810, p. 33, c. 7. It had been one of the permanent features of that free government, for the enjoyment of which the people expressed in that instrument, in the language quoted, their gratitude to the good providence of God. In the face of this long history of dealing with the use and sale of intoxicating liquors as a beverage, to be drunk at the place where they are purchased, it is idle to claim that the framers of the Constitution understood or intended that anything contained in it should be regarded as prohibiting altogether the licensing of such a business. *Minor v. Happersett*, 21 Wall. 162, 175, 22 L. Ed. 627. Our Constitution (article 3, § 1) vests "the legislative power of this state" in the General Assembly. That power covers the whole field of legitimate legislation, except so far as limitations are to be found in other provisions of this Constitution or in that of the United States. The latter provides (article 4, § 4) that the "United States shall guarantee to every state in this Union a republican form of government." Connecticut is therefore impliedly bound forever to maintain such a form of government. She

put her legislative power in the hands of the General Assembly. She put only, because she could put only, such power of that nature as was consistent with a republican form of government. *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162; *Welch v. Wadsworth*, 30 Conn. 149, 155, 79 Am. Dec. 239. In constitutional republics, as was observed by Chief Justice Chase in a case where arguments somewhat resembling those now made at our bar were advanced, "there are, undoubtedly, fundamental principles of morality and justice which no Legislature is at liberty to disregard; but it is equally undoubted that no court, except in the clearest case, can properly impute the disregard of those principles to the Legislature." *License Tax Cases*, 5 Wall. 462, 469, 18 L. Ed. 497; *Loan Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.

The General Assembly of Connecticut, under the fourteenth amendment to the Constitution of the United States, can deprive no one of life, liberty, or property without due process of law. Any precise and exhaustive definition of the phrase "due process of law" has been sedulously avoided by the Supreme Court of the United States. *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616. It has, however, been repeatedly declared to refer not merely to forms of legal proceedings, but to "that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure." *Hurtado v. California*, 110 U. S. 516, 527, 535, 4 Sup. Ct. 111, 120, 28 L. Ed. 232. It therefore embraces such a matter as taxation by a state of personal property having a situs in territory beyond its borders. *Union Transit Co. v. Kentucky*, 199 U. S. 194, 202, 211, 26 Sup. Ct. 30, 50 L. Ed. 150. It forbids arbitrary interference with any man's liberty of contract. *Adair v. United States*, 208 U. S. 161, 174, 175, 28 Sup. Ct. 277, 52 L. Ed. 436. But however broad the scope that has been given to the guaranty of due process of law by such decisions as those to which reference has been made, that there is nothing unrepubli- can, nor beyond the legitimate sphere of legislative power, in the maintenance of such a system as that long established here for governmental licenses to sell intoxicating liquors, is plain from the fact, of which judicial notice must be taken, that most free governments have, at all periods of time, made that business a subject, not of prohibition, but of regulation. Either mode of treatment is equally legitimate. *State v. Brennan's Liquors*, 25 Conn. 278, 238; *Crowley v. Christensen*, 137 U. S. 88, 91, 11 Sup. Ct. 13, 34 L. Ed. 620. At common law it was a business lawful and open

to any man. Our statutes do not enlarge, but restrict, this right. *Sopher v. State*, 169 Ind. 177, 81 N. E. 912, 14 L. R. A. (N. S.) 172.

Finally, it is argued that the statute is essentially a revenue measure, though ostensibly in the interest of public policy. The term "police power" has, at bottom, no other meaning than the general power of governing its people and dominions belonging to every sovereignty. *McKeon v. New York, New Haven & Hartford R. R. Co.*, 75 Conn. 343, 347, 58 Atl. 656, 61 L. R. A. 730. The state may properly restrict a business dangerous, if unregulated, to public morals or security, by the requirement of large license fees. *State v. Conlon*, 65 Conn. 478, 484, 33 Atl. 519, 31 L. R. A. 55, 48 Am. St. Rep. 227. It is only important to distinguish between licenses issued by way of regulation and licenses issued for purposes of revenue in the case of municipal corporations, acting under legislative authority. The question then is: For what object was the authority given by the Legislature? Such an inquiry is irrelevant in testing the validity of a statute of the state.

There is no error. The other Judges concurred.

(29 R. I. 396)

PERRIER v. DUNN WORSTED MILLS.

(Supreme Court of Rhode Island. Feb. 1, 1909.)

1. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—EMERGENCY—NEGLIGENCE.

Where by reason of a breakdown in a worsted mill there was an accumulation of rolls of cloth on the floor in a space usually free for passage to and from a machine, and plaintiff, being directed by his overseer to make haste, while walking along the passage in some manner caught his foot in a leader, causing an injury, the master was not free from negligence as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1010; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—ASSUMED RISK.

Where plaintiff, a pressing machine tender in a worsted mill, was ordered to make haste with the work on a machine, and while carrying a roll of cloth through a passageway, which had been obstructed by other cloth because of a breakdown of one of the machines, his foot became entangled in a leader and was injured, plaintiff did not assume the risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1069; Dec. Dig. § 288.*]

3. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, a cloth pressing machine operator, was ordered by the foreman to hurry the work on the machine, and in endeavoring to comply his foot became caught in a cloth leader and was injured, because a passageway between the machines had become clogged with rolls of cloth, plaintiff was not negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1089; Dec. Dig. § 289.*]

Exceptions from Superior Court, Providence and Bristol Counties; William H. Sweetland, Presiding Justice.

Action by Alphonse Perrier against the Dunn Worsted Mills. A demurrer to plaintiff's declaration was sustained, and plaintiff brings exceptions. Sustained.

Plaintiff was employed in defendant's mills as a pressing machine tender. It was necessary to pile in a passageway adjacent to the machine a larger roll or rolls of cloth than usual, owing to one of the machines being out of order. Plaintiff was injured by his foot catching or becoming entangled in a "leader," so called, while engaged in carrying a roll of cloth through the passageway in the performance of his duty as tender in obedience to an order to hurry made by his superior. The declaration alleged that plaintiff and his co-employees were fully absorbed in the work, and in consequence of haste had to sew the roll which they were carrying to the roll which already had been run through the machine, and had barely sufficient time in which to do the work; that before they could sew the rolls together they had to hastily carry the second roll between the machine and a pile of rolls, a distance of about eight feet.

Thomas P. Corcoran and James M. Gillrain, for plaintiff. Gardner, Pirce & Thornley and Fred A. Otis (William W. Moss, of counsel), for defendant.

PARKHURST, J. This case is before this court upon exception to the decision of the superior court sustaining a demurrer to the amended declaration; the said decision holding in substance that the plaintiff knew of the condition of the passageway and of the loose piece of cloth upon the floor, and must have known of the danger incident to this condition of the passageway, and that the averments of the amended declaration do not show such a case of emergency as would excuse forgetfulness on the part of the plaintiff or the neglect of due care for his own safety.

We are of the opinion that the averments of the declaration, if sustained by adequate proof, would make out such a case of emergency as would entitle the plaintiff to go to the jury on the questions of assumed risk and contributory negligence. There are averments of the breaking down of one of two pressing machines and of the consequent accumulation of an unusual number of rolls of cloth on the floor, in a space usually free for passage to and from the machines; of the piling of these rolls of cloth in this space upon a loose piece of cloth, called a "leader," by the plaintiff, and another employé under the express orders of the overseer, so that the passage between the pile of rolls and the dewing machine was so narrow that a roll of cloth carried through the space grazed

the pile of rolls on one side and the dewing machine on the other; that the plaintiff and his assistant were expressly ordered by the overseer "to hurry along the work on said machine, as the output from the room had fallen behind because of the breaking down of one of the pressing machines;" and such further and particular allegations as to show on the face of the declaration an emergency resulting from the breaking down of a machine, and bringing about abnormal conditions under which the plaintiff was required to work hurriedly, under the express orders of his superior, and by reason of which hurry the injuries occurred. In view of all the allegations of the declaration, we cannot determine as a matter of law either that there was no negligence on the part of the defendant or that the plaintiff as a matter of law either assumed the risk or was guilty of contributory negligence. We are not satisfied as a matter of law that, under all the circumstances alleged, it was obvious to the plaintiff that he was incurring any danger to himself in obeying the orders given him to hurry the work along and in doing as he was obliged to do in order to get the roll of cloth to the machine. This court has heretofore recognized as compatible with the statement of an emergency averments in a declaration showing that the plaintiff was obliged to do certain work hurriedly under the orders of his foreman, and that by reason of such hurried work so ordered the plaintiff was injured, and overruled a demurrer to the declaration, thereby requiring the case to be submitted to a jury on the facts. See *Mayott v. Norcross Bros.*, Dem. No. 427, rescript filed May 11, 1901. See, also, *Mayott v. Norcross Bros.*, 24 R. I. 187, 192, 193, 52 Atl. 894, where it appears that the evidence placed before the jury was held not to prove any emergency, such as the declaration set forth.

The questions whether an employe has assumed the risk, or has been guilty of contributory negligence, in a case where he is required to do his work in haste, either under orders of his superior or by reason of the exigency of his position or because of an emergency, and where his whole energy and attention are absorbed in his work, or whether he may be excused from the degree of care ordinarily required, or for temporary forgetfulness of a risk previously known to him, or of a risk which he might under other circumstances have remembered or appreciated, have been generally held to be questions for the jury upon all the facts of the particular case. See *Kane v. Northern Central R. Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 389; *Stackman v. Chicago & N. W. R. Co.*, 80 Wis. 428, 50 N. W. 404; *St. Louis, etc., R. Co. v. Higgins*, 53 Ark. 458, 14 S. W. 653; *Lee v. Woolsey*, 109 Pa. 124; *Pullman Co. v. Geller*, 107 S. W. 271, 32 Ky. Law Rep.

884; *Magone v. Portland Mfg. Co. (Or.)* 93 Pac. 450; *San Antonio & A. P. Ry. Co. v. Stevens*, 37 Tex. Civ. App. 80, 83 S. W. 235; *Illinois Central R. Co. v. Keebler (Ky.)* 84 S. W. 1167.

The plaintiff's exception to the decision of the superior court sustaining the defendant's demurrer is sustained, and the case is remitted to the superior court, with direction to overrule said demurrer and for further proceedings.

ANDERTON v. BOARD OF ASSESSORS OF TAXES OF CITY OF PAWTUCKET.

(Supreme Court of Rhode Island. Feb. 5, 1909.)

1. TAXATION (§ 469*)—BOARD OF ASSESSORS—INCREASE IN VALUATION.

The increase in valuation of farm land for taxation by the board of assessors is not rendered illegal by the fact that no improvements were made on the land and that its condition was unaltered.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 838; Dec. Dig. § 469.*]

2. TAXATION (§ 469*)—INCREASE IN VALUATION—STATEMENTS—NOTICES—VALIDITY.

An increase in the valuation of property for taxation is not rendered illegal by the fact that a notice under Gen. Laws 1896, c. 46, § 6, to persons to bring in sworn statements of their taxable property, made the time for bringing in statements include, contrary to law, days prior to the assessment, where the objecting property owner made no statement at any time and was not prejudiced by the notice.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 838; Dec. Dig. § 469.*]

Petition by Annie Anderton against the Board of Assessors of Taxes of the City of Pawtucket for certiorari to review a tax assessment. Petition denied and dismissed.

Hugh J. Carroll, for petitioner. Edward W. Blodgett, for respondent.

PER CURIAM. The eight causes of error assigned by the petitioner in support of her petition for certiorari are without foundation.

The first and second causes are based upon the erroneous ideas that the land had been platted into house lots and that the assessors regarded said land for taxation purposes as so many house lots.

The third cause is based upon the claim that the assessors assumed that farm land platted on paper is more valuable than if the same had not been platted. The claim is not supported by the evidence.

The fourth and fifth causes set out that the board of assessors kept no records of their acts and proceedings in making the assessment of taxes in the city of Pawtucket for the year 1908. The evidence discloses the fact that some records were kept.

The sixth assignment of error is without merit. The fact that the petitioner has not improved or altered the condition of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

land does not prove that it is improperly taxed.

The seventh statement of error, that the said board was never properly organized, is contrary to the fact, and the eighth cause of error is without merit. While the notice is not to be commended, for the reason that it makes the time for bringing in statements, under Gen. Laws 1896, c. 46, § 6, include days prior to the day of assessment, a provision clearly illegal and void (*Matteson v. Warwick & Coventry Water Co.*, 28 R. I. 570, 68 Atl. 577), as well as days after said assessment, as required by law, it does not appear that the petitioner, who did not bring in any statement at any time, was either misled or deceived thereby.

For the reasons aforesaid, the petitioner is without remedy in this proceeding.

The petition is denied and dismissed.

(29 R. I. 611)

In re OPINION OF SUPREME COURT.

(Supreme Court of Rhode Island. Feb. 4, 1909.)

1. CONSTITUTIONAL LAW (§ 7*)—PUBLICATION AND SUBMISSION OF AMENDMENTS.

The General Assembly of the state has constitutional power to provide that an approved proposition of the preceding General Assembly containing proposed separate amendments concerning entirely distinct subjects and relating to distinct articles be published and submitted to the electors as separate proposed amendments to the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 3; Dec. Dig. § 7.*]

2. CONSTITUTIONAL LAW (§ 7*)—PUBLICATION AND SUBMISSION OF AMENDMENTS.

Const. art. 13, after providing how the General Assembly may propose constitutional amendments, and for the printing and publication of such propositions, declares that "the same shall be published and submitted to the electors in the mode provided in the act of approval." *Held*, that the General Assembly which approves amendments, and not the one proposing them, has the sole right to determine whether such amendments shall be published and submitted to the electors singly or together.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 3; Dec. Dig. § 7.*]

3. CONSTITUTIONAL LAW (§ 7*)—PUBLICATION AND SUBMISSION OF AMENDMENTS.

When separate constitutional amendments are proposed in a single resolution, the succeeding General Assembly, which has power to divide them in its publication and submission to the electors, must state them separately in the same form in the act of approval as they were as constituent parts of the resolution proposing them together.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 3; Dec. Dig. § 7.*]

4. CONSTITUTIONAL LAW (§ 7*)—PUBLICATION AND SUBMISSION OF AMENDMENTS.

If proposed constitutional amendments are submitted to the electors as a whole, without separation by an act of approval, a concluding section, intended to indicate their effect, but not clearly doing so, should be redrafted for that purpose.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 3; Dec. Dig. § 7.*]

5. CONSTITUTIONAL LAW (§ 7*)—PUBLICATION AND SUBMISSION OF AMENDMENTS.

The concluding section of a resolution of the General Assembly proposing constitutional amendments provided that the amendment should take the place of certain sections of certain articles of the Constitution, which sections and other constitutional provisions inconsistent therewith were thereby annulled, but it did not clearly indicate the effect of the previous sections. *Held*, that this did not prevent the approval or publication and submission to the electors separately of the several amendments contained therein, because such section was not in itself an integral and necessary part of either of the preceding sections, which would be just as effective if the annulment clause only appeared in the concluding section.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 3; Dec. Dig. § 7.*]

6. CONSTITUTIONAL LAW (§ 7*)—RESOLUTION PROPOSING AMENDMENTS—CONCLUDING SECTION—OPERATION AND EFFECT.

Such concluding section must be held to be intended to indicate the effect of the proposed amendments annulling certain portions of the Constitution, and, though it may not do so clearly and satisfactorily, does not vitiate the preceding sections.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 3; Dec. Dig. § 7.*]

7. CONSTITUTIONAL LAW (§ 7*)—PUBLICATION AND SUBMISSION OF AMENDMENTS.

Provisions of such concluding section should be separated and form a part, respectively, as they may apply, of the separate acts providing for the publication and submission to the electors of the several amendments which the General Assembly may separate, and, on approval, publish and submit separately to the people.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 3; Dec. Dig. § 7.*]

Opinion of the Supreme Court pursuant to a resolution of inquiry by the Senate of the General Assembly relating to the approval and submission of proposed constitutional amendments.

To the Honorable the Senate of the State of Rhode Island and Providence Plantations:

We received from your honors on the 29th day of January, 1909, a resolution requesting our written opinion upon certain questions of law, in the following form, to wit:

"State of Rhode Island and Providence Plantations.

"In Senate of the General Assembly.

"January Session, A. D. 1909.

"Resolution

"Requesting the Written Opinion of the Honorable Judges of the Supreme Court upon the Division for Submission Separately to the Electors of Certain Amendments to the Constitution of the State Proposed in a Resolution Passed at the January Session, A. D. 1908, of the General Assembly.

"Whereas, at the January session, A. D. 1908, of the General Assembly of this state the following 'Resolution Proposing Amend-

ments to the Constitution of the State' was duly adopted:

"Resolved, a majority of all the members elected to each house of the General Assembly voting therefor, that the following amendments to the Constitution of the state be proposed to the qualified electors of the state, in accordance with the provisions of article XIII of the Constitution, for their adoption, to be denominated article XIII of amendments:

"Article XIII.

"Section 1. Every bill, resolution, or vote (except such as relate to adjournment, the organization or conduct of either or both houses of the General Assembly, and resolutions proposing amendment to the Constitution) which shall have passed both houses of the General Assembly shall be presented to the Governor.

"If he approve it he shall sign it, and thereupon it shall become operative, but if he does not approve it he shall return it, accompanied by his objections in writing, to the house in which it originated, which shall enter his objections in full upon its journal and proceed to reconsider it. If, after such reconsideration, three-fifths of the members present and voting in that house shall vote to pass the measure, it shall be sent, with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by three-fifths of the members present and voting in that house, it shall become operative in the same manner as if the Governor had approved it, but in such cases the votes of both houses shall be determined by ayes and nays and the names of the members voting for and against the measure shall be entered upon the journal of each house respectively. If the measure shall not be returned by the Governor within six (6) days (Sundays excepted) after it shall have been presented to him, the same shall become operative unless the General Assembly, by adjournment, prevents its return, in which case it shall become operative unless transmitted by the Governor to the Secretary of State, with his disapproval in writing, within ten days after such adjournment.

"Sec. 2. The Lieutenant Governor shall preside in the Senate and in grand committee. The presiding officer of the Senate and grand committee shall have a right to vote in case of equal division, but not otherwise.

"Sec. 3. If, by reason of death, resignation, absence, or other cause, the Lieutenant Governor is not present, to preside in the Senate, the Senate shall elect one of their own numbers to preside during such absence or vacancy; and until such election is made by the Senate, the Secretary of State shall preside. The presiding officer of the Senate shall preside in grand committee and in joint assembly.

"Sec. 4. The House of Representatives shall never exceed one hundred members,

and shall be constituted on the basis of population, always allowing one representative for a fraction exceeding half the ratio; but each town and city shall always be entitled to at least one member; and no town or city shall have more than one-fourth of the whole number of members. The General Assembly may, after any new census taken by the authority of the United States or this state, reapportion the representation in conformity with the foregoing provisions. As soon as this amendment goes into effect, the General Assembly shall divide each town and city into as many districts as it is entitled to representatives, and after each census or as occasion may require, the General Assembly may so divide each town and city, and one representative shall be elected from each district by the qualified electors thereof. Such districts shall be as nearly equal in population and as compact in territory as possible.

"Sec. 5. This amendment shall take, in the Constitution of the state, the place of sections 2 and 3 of article VI, "Of the Senate," and of section 1 of article V, "Of the House of Representatives," which said sections and all other provisions of the Constitution inconsistent herewith are hereby annulled."

"Resolved, that the honorable judges of the Supreme Court be and they hereby are respectfully requested to give to the Senate their written opinion upon the following questions of law:

"First. Has the General Assembly at its present session the constitutional power, in approving the proposition made in the above resolution passed at the January session, A. D. 1908, of the General Assembly of the state, to provide that such proposition, containing separate amendments, be published and submitted to the electors as separate proposed amendments to the Constitution?

"Second. Under the provisions of article XIII of the Constitution of the state, does the General Assembly proposing amendments to the Constitution of the state properly control the mode in which the proposed amendments shall be published and submitted to the electors of the state, or does the succeeding General Assembly approving any amendments have the sole right to determine the mode in which such amendments shall be published and submitted to the electors, whether singly or together?

"Third. When amendments to the Constitution of the state are proposed in a single resolution, is it necessary that the separate amendments combined in the resolution proposing them, if the succeeding General Assembly has the constitutional power to divide them in its publication and submission to the electors, be stated separately in the same form in the act of approval as they were as constituent parts of the resolution proposing them together?

"Fourth. Has section 5 in the above resolution proposing amendments to the Constitu-

tion of the state any effect to prevent the approval or publication and submission to the electors separately of the several amendments contained in the above resolution; or does said section 5 indicate the effect of the several proposed amendments in annulling certain portions of the existing Constitution, and if it be in the power of the present General Assembly to separate said proposed amendments and upon approval publish and submit them separately to the people, should the provisions of said section 5 be separated and form a part respectively, as they may apply, of the separate acts providing for the publication and submission to the electors of the several amendments?"

We answer question "First" in the affirmative. The resolution passed by the last General Assembly, as above set forth, proposing "the following amendments to the Constitution of the state," by the use of the plural form, recognizes these as separate matters of amendment, as also they are in fact shown to be upon a mere reading of them. "Section 1" relates solely to the veto power proposed to be conferred upon the Governor, and provides the limitations upon and methods of the exercise of such power. It is an entirely new subject in the Constitution of the state (no veto power having heretofore existed), and bears no relation to the subsequent sections setting forth other proposed amendments. If "Section 1" be finally approved by the electors in accordance with the provisions of "Article XIII," it becomes a part of the Constitution, and naturally falls into place therein as a part of "Article VII, Of the Executive Power." Sections 2 and 3 relate to the powers and duties of the Lieutenant Governor as presiding officer of the Senate and grand committee, etc., proposing to substitute him as such presiding officer in place of the Governor, and providing who shall preside in case the Lieutenant Governor is not present, and, if finally approved by the electors, naturally takes in the Constitution the place of section 2 and section 3 of "Article VI, Of the Senate." Section 4 proposes to fix the number of members in the House of Representatives and to provide for their distribution among the towns and cities, and for dividing the towns and cities into districts, and, if finally approved by the electors, naturally takes in the Constitution the place of section 1 of "Article V, Of the House of Representatives." It thus appears that these proposed amendments concern three entirely distinct subjects, and relate to three distinct articles of the Constitution; and it is entirely appropriate and within the constitutional power of the General Assembly at its present session, if it approve said proposition, to provide that such proposition containing separate amendments be published and submitted to the electors as separate proposed amendments to the Constitution,

as will more fully appear in discussing the next question.

Question "Second" divides itself into two inquiries: (1) "Does the General Assembly proposing amendments to the Constitution of the state properly control the mode in which the proposed amendments shall be published and submitted to the electors of the state?" (2) "Or does the succeeding General Assembly approving any amendments have the sole right to determine the mode in which such amendments shall be published and submitted to the electors, whether singly or together?" To the first inquiry we answer in the negative; to the second we answer in the affirmative. Article XIII of the Constitution, after providing how the General Assembly "may propose amendments to this Constitution," also further provides for publication of such propositions in the newspapers, for sending by the Secretary of State printed copies thereof to town and city clerks, for insertion thereof in the warrants calling the next annual town and ward meetings, for the reading of said propositions, etc., by said clerks to the electors assembled before the election of senators and representatives shall be had, and then concludes as follows: "If a majority of all the members elected to each house, at said annual meeting, shall approve any proposition thus made, the same shall be published and submitted to the electors in the mode provided in the act of approval, and, if then approved by three-fifths of the electors of the state present and voting thereon in town and ward meetings, it shall become a part of the Constitution of the state." It therefore becomes plain that the sole function of the former General Assembly was to "propose amendments," so that they might be published in the manner set forth for the information of the electors, so that the electors might be fully advised before the succeeding election what amendments were proposed and might govern themselves accordingly in voting for the members of the succeeding General Assembly. It is also equally plain that the succeeding General Assembly has the power to approve or disapprove the proposed amendments, or any of them, and, if it approve, then "the same shall be published and submitted to the electors in the mode provided in the act of approval."

The use of the broad term "mode" in the last-quoted sentence in our opinion was intended to give and does give to the succeeding General Assembly the fullest scope in determining by its act of approval whether the proposed amendments, or any of them, shall be submitted to the electors singly or together. Precedent for such action is not wanting, for it appears in Rhode Island Acts, Resolves, and Reports, January, 1854, p. 276, that the General Assembly passed a resolution (in form single) proposing as amendments to the Constitution of this state nine separate and distinct articles relating to sev-

eral distinct and separate matters; that in May, 1854, a committee was appointed by joint resolution to report upon these proposed amendments, "and also to report upon the manner in which the same shall be presented to the people," etc., and that this committee reported an act, etc. See R. I. Acts, Resolves, and Reports, June, 1854, p. 16. It also appears (Id., June, 1854, pp. 17, 18) that by its act of approval the General Assembly approved only five of the original nine amendments proposed by the previous General Assembly; that it provided for submission of the proposed amendments to the electors at special meetings in November, 1854; that in section 4 of the act (Id. p. 18) it provided that the Secretary of State should "cause fifty thousand of each of said propositions of amendment to be printed upon separate ballots with the word 'approve' upon the same, and a like number of each with the word 'reject' upon the same," and should cause the same to be distributed, etc.; and in section 5 of the act, provided that "the said propositions shall be voted upon by the electors separately," etc. And it is to be noted that only three of these proposed amendments were approved by a sufficient number of the electors, and now appear as "Articles of Amendments Adopted November, 1854"—article I, article II, and article III; the numbering being changed to indicate the order in which the amendments finally adopted appear in the amendments to the Constitution. We find, also, a very instructive and well-considered case in *Trustees v. Molver*, 72 N. C. 76, where the Supreme Court of North Carolina, considering the provisions of the Constitution of that state, substantially similar to ours relating to amendments, came to substantially the same conclusion that we have reached as to the power of the succeeding General Assembly to submit to the people separately proposed amendments to the Constitution which had been proposed by the previous Assembly in the form of a single bill. The original bill contained 17 proposed amendments. After a new election the next General Assembly rejected 9 and adopted 8 of these amendments, which had all been previously incorporated and adopted in one bill, but incorporated each of the amendments adopted in a separate bill, and in that form submitted them to the vote of the people, who approved of each amendment.

Question "Third" is answered in the affirmative. The several sections numbered 1, 2, 3, 4, if separated, so that section 1 by itself, sections 2 and 3 together, and section 4 by itself, shall be published and submitted to the electors as three separate and distinct propositions of amendment, should still appear in the same form of words as they were in the original resolution. They are the identical amendments proposed to the qualified electors of the state by the resolution of the previous General Assembly, published in the newspapers, inserted in the warrants or

notices issued for warning town and ward meetings, and read to the electors assembled, in accordance with the provisions of article XIII of the Constitution, and if separated by the act of approval of the present General Assembly for the purpose of separate submission to the electors, they must still be stated in the same form as originally stated. The words and figures, convenient as a matter of form for indicating the numbers of sections, or such Roman numerals as may be convenient, according to customary usage, to indicate the serial number of the particular amendment, are not of the substance of the proposed amendments, and such changes therein as may be deemed convenient or necessary would not interfere with the separation, or make the legal significance of the proposed amendments different in any sense. It would be merely a matter of convenient and customary enumeration.

Question "Fourth" subdivides into three inquiries: (1) "Has section 5 in the above resolution proposing amendments to the Constitution of the state any effect to prevent the approval or publication and submission to the electors separately of the several amendments contained in the above resolution?" As to this first inquiry we answer in the negative. The original resolution would have been just as effective without section 5 as with it. The section as it stands is not clearly and carefully drawn, because, as before indicated, section 1, relating to the veto power, would, if finally adopted by the electors, become a part of "Article VII, Of the Executive Power," by way of addition; section 2 and section 3, if finally adopted by the electors, take the place of section 2 and section 3, respectively, of "Article VI, Of the Senate"; and section 4, if finally adopted by the electors, takes the place of section 1, of "Article V, Of the House of Representatives." If the proposed amendments should be submitted to the electors as a whole, without separation, by an act of approval of this present General Assembly, section 5 should be redrafted, so as to clearly indicate the effect of the previous sections as above set forth. But it in no way prevents the approval or publication and submission thereof separately, because it is not in itself an integral and necessary part of either of the preceding sections, inasmuch as it would be just as effective if the annullment clause only appeared in section 5.

This leads us to the second inquiry, viz.: (2) "Or does said section 5 indicate the effect of the several proposed amendments in annulling certain portions of the existing Constitution?" To this we answer that it was so intended, but that it does not do so quite clearly and satisfactorily, although it is evident that its meaning is sufficiently obvious, so as not to vitiate the preceding sections.

This leads us to the third inquiry, viz.: (3) "And if it be in the power of the present General Assembly to separate said proposed

amendments and upon approval publish and submit them separately to the people, should the provisions of said section 5 be separated and form a part, respectively, as they may apply, of the separate acts providing for the publication and submission to the electors of the several amendments?" This inquiry is answered in the affirmative, for obvious reasons which have been fully set forth in the answers to the previous questions.

EDWARD CHURCH DUBOIS.
JOHN TAGGARD BLODGETT.
CLARKE H. JOHNSON.
C. FRANK PARKHURST.
WILLIAM H. SWEETLAND.

(29 R. I. 399)

STEVENS & CO. v. STILES.

(Supreme Court of Rhode Island. Feb. 4, 1909.)

1. INJUNCTION (§ 56*) — DISCLOSING TRADE SECRETS.

One acquiring knowledge of his employer's trade secrets, under an agreement that, in consideration of the employment, he will not divulge them, and one acquiring such knowledge under a contract of employment implying an agreement not to disclose them, will be enjoined from disclosing them.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 110; Dec. Dig. § 56.*]

2. INJUNCTION (§ 56*) — DISCLOSING TRADE SECRETS.

An employé of one engaged in the business of examining eyes of persons, by expert opticians, prescribing, manufacturing, and selling eyeglasses, who examined patrons of the employer, prescribed glasses, and who had access to the employer's records, and who, as a part of his duties, made a record of cases showing the names and addresses of patrons and the particular sort of lenses required by them, will be enjoined from using, after the termination of his employment, the names and addresses of patrons copied by him from the records, though the only names copied were those of patrons he personally examined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 110; Dec. Dig. § 56.*]

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Suit by Stevens & Company against Ned C. Stiles. From a decree granting a preliminary injunction, defendant appeals. Appeal dismissed, decree affirmed, and cause remanded.

Mendell W. Crane, for appellant. John I. Devlin, for appellee.

JOHNSON, J. This is an appeal from the decision of the superior court granting a preliminary injunction. The complainant, a corporation, carried on, under the name of "Villers Company, The Modern Optical Shop," the business of examining the eyes of persons, by expert opticians, and prescribing, manufacturing, and selling eyeglasses. The respondent was employed by the complainant, at its place of business, to examine the eyes of customers and patrons

of said complainant, prescribe glasses, etc. He had access to the books and records of the complainant, and, as a part of his duties, made a record of cases, showing the names and addresses of patrons, and the particular sort of lenses required by such patrons. It was alleged that the respondent surreptitiously, fraudulently, and without the knowledge of the complainant copied the names of a great number of such patrons, with their post office addresses, from such records, and, after leaving the employ of the complainant, sent circular letters to persons whose names and addresses he had thus acquired, soliciting their patronage, and that the business of the complainant suffered thereby. On hearing upon the prayer of the complainant for a preliminary injunction, the court below found, as a matter of fact, that the respondent did surreptitiously copy the names and addresses of the complainant's customers from the records of the complainant, and had made use of such list of names and addresses in addressing circulars to the complainant's customers. The court said upon this point: "We are of the opinion that the surreptitious copying of the names and addresses of the complainant's customers from its records is a violation of confidence against which equity can enjoin, and that equity can enjoin against the use of such lists so unfairly obtained. It is true that equity will not enjoin against an employé carrying away such skill and intelligence as he can carry in his head, other than trade secrets. This would not permit him to copy the records of his employer for future use." A decree was entered September 26, 1908, "that the respondent, Ned C. Stiles, and his agents and servants, be, and they hereby are, enjoined and restrained, until the further order of this court, from using the names and addresses of the complainant's customers, which he copied from the records of the complainant, from soliciting the patronage of such customers whose names he thus obtained, and from divulging the names and addresses of said customers of the complainant to any one else." From this decree the respondent appealed.

Counsel for the respondent makes no question that equity will restrain the disclosure of confidential communications, trade secrets, and the contents of private papers. But he urges that in the case at bar the relations of the parties were not confidential; that there was no agreement that respondent, upon severing his relations with the complainant company, should not enter into competition with it; that the only names copied from complainant's lists were those of customers he personally examined; and that to copy and use such a list of names is not a breach of trust, or a breach of confidence. As to the argument that the relations of the parties were not confidential, we do not un-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

derstand that the fact of agency is denied. It is admitted that the respondent was in the employ of the complainant in its store, examining the eyes of patrons, prescribing glasses, and making records of the cases examined and treated, as also of prescriptions which came to the store from physicians outside. We do not see how such relations can be considered as other than confidential. As to the absence of an agreement not to enter into competition with the complainant, it is sufficient to say that the decree does not enjoin such action on the part of the respondent. Particular stress is laid upon the claim that the only names copied from complainant's lists were those of customers whom the respondent personally examined, and it is argued that to copy and use such a list of names is not a breach of trust or a breach of confidence. The argument does not commend itself to us. It is elementary that what is done by the agent in the course of his employment is in the legal sense done by the master himself. The respondent could have no more right to copy records made by himself, while acting for the complainant, than he would have to copy any other records of the complainant to which he had access.

In *Lamb v. Evans*, L. R. (1893) 1 Ch. 218 (1892), the plaintiff was the proprietor and publisher of a trade directory entitled "The International Guide to British and Foreign Merchants and Manufacturers." It had a continental section, which contained a list of continental traders who desired to advertise in this book. These advertisements were arranged under special headings, denoting the nature of the business, which were arranged alphabetically. Each heading was given in English, French, German, and Spanish, and under it the names of the traders who came within it were alphabetically arranged. In some cases only their names and addresses were given; in others more elaborate advertisements were furnished. The headings were prepared by the plaintiff, or by persons employed and paid by him. Each of the defendants Evans was employed by the plaintiff to canvass for advertisements in a certain district on the continent. In each case the plaintiff agreed to employ the canvasser exclusively in that district, and the canvasser agreed to work therein for the plaintiff exclusively. Each was remunerated by a large commission on the amount received by him for advertisements, and agreed to furnish all blocks and translations relating to his canvass free of charge. The blocks, however, were generally furnished by the advertisers, and handed over for the purpose of printing the advertisements. After the engagement of the defendants Evans came to an end, they entered into the service of a rival publication, and assisted in adding thereto a "continental section." The plaintiff brought his action against the defendants Evans and the publisher of the

rival directory. The defendants were enjoined "from using blocks or materials obtained by the defendants E. A. Evans and T. H. A. Evans, or either of them, while in the employment of the plaintiff, and for the purposes of his said work, or any copies thereof, for the purposes of any work other than the said work of the plaintiff." The decree was affirmed on appeal, only being modified so as to permit the publishing of copies at the request, or by the direction, of the advertisers to whom the blocks belonged. Lindley, L. J. (page 226), says: "What right has any agent to use materials obtained by him in the course of his employment, and for his employer, against the interest of that employer? I am not aware that he has any such right. Such a use is contrary to the relation which exists between principal and agent. It is contrary to the good faith of the employment, and good faith underlies the whole of an agent's obligations to his principal. No case, unless it be the one which I will notice presently, can, I believe, be found which is contrary to the general principle upon which this injunction is framed, viz., that an agent has no right to employ, as against his principal, materials which that agent has obtained only for his principal and in the course of his agency. They are the property of the principal. The principal has in my judgment such an interest in them as entitles him to restrain the agent from the use of them except for the purpose for which they were got. It is said that *Reuter's Telegram Company v. Byron*, 43 L. R. (Ch.) 661, before Sir G. Jessel, is opposed to this. If that case went on the ground that the Master of the Rolls was not satisfied that the case was plain enough for him to grant an interlocutory injunction, there is nothing more to be said about it; but, if the decision goes further than that, I think that undoubtedly the principle was applied there more narrowly than it ought to have been." Bowen, L. J. (page 231), says: "You must look at the whole transaction, and make up your mind what the parties must have intended, if the transaction is to have any businesslike efficacy at all. If you see that it could not have been intended by the parties that the agent should be allowed to deal in the way he is proposing to do, with materials obtained in the course of his agency, then the law will imply that it was part of the bargain that he should not do so. It is said by Mr. Farwell that it must have been intended that the confidential fetter imposed upon the use of these documents should terminate as soon as the book was published for which they were being compiled, and he urges that otherwise we should be importing questions of copyright into the discussion of this branch of the case. On the contrary, it is by insisting on that view that he imports the idea of copyright into this part of the case. The point we are now considering has nothing to do with it.

It is perfectly true that you must look at the whole transaction to see what the documents and materials had been collected for; but that would by no means sufficiently protect the employer if the agent was to be left free to do what he liked with the materials the moment the volume was published. That argument, it seems to me, cannot prevail." Kay, L. J. (pages 234, 235), says: "The illustrations given in argument show that there might be some material collected by the defendants while they were the plaintiff's agents, and for the purposes of his book, which material could be legally used for the new book. The argument was put most forcibly, as I followed it, in this form: Why should they not retain these notebooks in their hands, having now left the plaintiff's employ and use them in order to find out the persons abroad with whom they had formerly entered into engagements, and to obtain from those advertisers authority to put advertisements of theirs into a rival publication to be published as a rival of the plaintiff's book? The answer is a very simple one. All those materials were obtained while you, the defendants, were acting as the plaintiff's agents, while you were in that confidential relation to him, and for the purpose for which he employed and paid you, viz., of compiling this book of the plaintiff; and therefore to allow you to use any of those materials for your own purposes would be allowing you to use them for a purpose for which they were not compiled; you, while you compiled them, being in the position of the plaintiff's agent, and there being a confidential relation between you and the plaintiff."

In the earlier case of *Morison v. Moat*, 9 Hare, 241 (1851), an injunction was granted to restrain the use of a secret in the compounding of a medicine not patented, and to restrain the sale of such medicine by a defendant, who acquired a knowledge of the secret in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence. Vice Chancellor Turner said (page 255 of 9 Hare): "The subsidiary ground, brought forward by the bill, of the defendant's selling his medicines under the original name and description was relied upon rather in support of the case of breach of faith and of contract than as a separate and distinct ground for the interference of the court. Upon that part of the case it is sufficient, therefore, to observe, that there might be difficulty in maintaining it, at all events, until the plaintiffs should have established their right at law. The true question is whether, under the circumstances of this case, the court ought to interpose by injunction, upon the ground of breach of faith or of contract. That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases

it has been referred to property, in others to contract, and in others again it has been treated as founded upon trust or confidence—meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred—but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it." The decree was affirmed on appeal. 21 L. J. (N. S.) Ch. 248. See, also, *Yovatt v. Winyard*, 1 J. & W. 394 (1820), where Lord Eldon, upon the express ground of breach of trust and confidence, granted an injunction to restrain the defendant, who had been the plaintiff's assistant in his business, from using or communicating recipes which he had surreptitiously copied while in the plaintiff's service. In *Abernethy v. Hutchinson*, 3 L. J. Ch. (O. S.) 209 (1824) 1 H. & T. 28, the question again came before Lord Eldon. In this case Mr. Abernethy had filed a bill to restrain the publication of lectures delivered by him at St. Bartholomew's Hospital, which had been taken down by some one present when they were delivered. The injunction was granted upon the ground of breach of confidence. In *Prince Albert v. Strange*, 1 Mac. & G. 25 (1849), Lord Cottenham said: "This case by no means depends solely upon the question of property, for a breach of trust, confidence, or contract would of itself entitle the plaintiff to an injunction."

Robb v. Green (in the Queen's Bench Division, 1895) 64 L. J. (N. S.) 593, is a case on all fours with the case at bar. The defendant, being employed by the plaintiff as manager of his business, as a dealer in pheasants and pheasants' eggs, and having confidential access to his master's books for the purposes of his business, copied from the plaintiff's order book the names and addresses of the plaintiff's customers, with a view to using them to facilitate his canvass for their custom after he had left the plaintiff's service, and had set up a business on his own account, and did so use them. It was held, on the authority of the cases cited, supra, that the defendant had committed a breach of his implied promise that he would not abuse his master's confidence in matters appertaining to his service, and that he was liable in damages for any loss caused to the plaintiff by reason of such breach, and judgment was entered for damages, "and for the injunction as prayed, namely, that the defendant may be ordered to deliver up to the plaintiff, to be destroyed, the list of the names and addresses of the plaintiff's customers and their keepers, copied or extracted by the defendant from the plaintiff's books, and all copies or extracts of or from such list now in his possession or under his control, and that the defendant be restrained from making use of

the information obtained by him by copying or extracting such names and addresses." This case furnished another opportunity for a review of the cases considered supra, and for the use by the court of some very lucid and vigorous language in passing upon the defendant's claim that in copying from the plaintiff's order book while in his employ the names and addresses of the plaintiff's customers, with a view to using them to facilitate his own canvass for their custom after he had left the plaintiff's employ and set up a business on his own account, and in so using them, he had done only that which he had a right to do. Thus Hawkins, J. (page 597): "As to the third contention, I have a very decided opinion that, in the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on the servant that he shall perform his duty, especially in these essential respects, namely, that he shall honestly and faithfully serve his master, that he shall not abuse his confidence in matters appertaining to his service, and that he shall, by all reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service. It would be monstrous to suppose that a servant would be absolved from the observance of these essential elements to good service unless they were in terms specially provided for in the contract." And again (page 599), speaking of the argument of defendant's counsel: "Having gone thus far, they are compelled, in order to justify the conduct of the defendant, to contend that a servant might in his master's service, having confidential access to his master's books for the purposes of his business, copy, as in this case, the names and addresses of his master's customers with a view to use them to facilitate his canvass for their custom, as soon as he should see fit, after the termination of his service; in short, to canvass with the aid of stolen material, without which, having regard to the wide extent over which the customers were spread, practically he could not canvass at all. I confess this seems to me a startling proposition, and to it I do not assent." The decision was affirmed on appeal. See, also, *Helmore v. Smith*, 56 L. J. Rep. Chanc. 145 (1886), *Tuck & Sons v. Priester*, 56 L. J. Rep. Q. B. 553 (1887), *Polard v. Photographic Company*, 59 L. J. Rep. Chanc. 251 (1888), *Merryweather v. Moore*, 61 L. J. Chanc. 505 (1892), and *Louis v. Smellie*, 73 L. T. Rep. 226 (1895).

The same doctrine prevails in this country. Judge Story, after speaking of the prevention by injunction of the use of names, marks, letters, or other indicia of a tradesman, by which to pass off goods to purchasers as the manufacture of that tradesman when they are not so, states the doctrine broadly, as follows: "Upon similar grounds of irreparable mischief courts of

equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment. And it matters not in such cases whether the secrets be secrets of trade or secrets of title, or any other secrets of the party important to his interests." 2 Story, Eq. Jur. § 952. In 1 High on Injunctions, § 19, it is thus stated: "The disclosure of secrets which have come to one's knowledge during the course of a confidential employment will be restrained by injunction. And where a confidential relationship has existed, out of which one of the parties has derived information or secrets concerning the other, equity fastens an obligation upon his conscience not to divulge such knowledge, and enforces the obligation, when necessary, by injunction. Thus persons who, in the capacity of attorneys, agents, or in other confidential relations, have obtained the custody of books and documents of their principals, or have come into possession of secrets relating to their affairs, will be restrained from making them public." See, also, 5 Pomeroy's Eq. Jur. § 267. In *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664, there was a contract not to disclose secrets as to machinery. The court, Gray, J., says (page 461 of 98 Mass.): "A secret of trade or manufacture does not lose its character by being confidentially disclosed to agents or servants, without whose assistance it could not be made of any value. Even if, as is argued in support of the demurrer, the process is liable to be inspected by the assessor of internal revenue or other public officer, the owner is not the less entitled to protection against those who in, or with knowledge of, violation of contract and breach of confidence undertake to disclose it or to reap the benefit of it." He also quotes, with approval, the statement of the doctrine by Judge Story, supra, and also the language of Lord Cranworth in the opinion in *Morison v. Moat*, on appeal: "The principles that were argued in this case are principles really not to be called in controversy. There is no doubt whatever that, where a party who has a secret in a trade employs persons under contract, express or implied, or under duty express or implied, those persons cannot gain the knowledge of that secret and then set it up against their employer." 21 L. J. (N. S.) Ch. 248. In *Loven v. People*, 158 Ill. 159, 42 N. E. 82, the bill alleged, *inter alia*, that Loven fraudulently, and without the knowledge or consent of his employers, copied the names of a great number of their customers, together with post office addresses, by means of his duties as correspondent, from the books kept by his employers. A decree was entered enjoining Loven "from in any manner corresponding with complainant's agents or customers, or soliciting them to buy defendant's medicines of any kind, or divulging the names of complainant's cus-

tomers and agents, or any of the secrets of the business, or interfering therewith."

Upon the authorities considered, it is clear, not only that equity will restrain defendants from disclosing secrets pertaining to plaintiff's business, where the knowledge of such secrets has been acquired while in the employ of the plaintiff, under an agreement that, in consideration of the employment, they would not divulge such secrets, but also that in such case it is not necessary that there should be an express covenant upon the part of the defendant not to disclose the secrets of the plaintiff's business, if such agreement may fairly be implied from the circumstances of the case and the relation of the parties. See, also, *Stone v. Goss*, 65 N. J. Eq. 756, 55 Atl. 736, 63 L. R. A. 344, 103 Am. St. Rep. 794; *Westervelt v. Nat. Paper Co.*, 154 Ind. 673, 57 N. E. 552; *Eastman Kodak Co. v. Reichenbach*, 79 Hun, 183, 29 N. Y. Supp. 1143.

Our conclusion is that the doctrine that equity will restrain as well from breach of trust or confidence arising from the confidential relation of employer and employé as from breach of express contract is clearly established by the authorities, and is in accordance with sound reason.

The preliminary injunction was properly granted. The appeal is dismissed, the decree below is affirmed, and the cause is remanded to the superior court for further proceedings.

(29 R. I. 410)

GREENOUGH, Atty. Gen., v. BOARD OF POLICE COM'RS OF CITY OF PROVIDENCE.

(Supreme Court of Rhode Island. Feb. 8, 1909.)

1. STATUTES (§ 184*)—CONSTRUCTION—GENERAL RULES.

A construction which will defeat the evident purpose of a statute will not be adopted.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 262; Dec. Dig. § 184.*]

2. INTOXICATING LIQUORS (§ 46½*)—LICENSES—RESTRICTIONS AS TO NUMBER—SPECIAL CLUB LICENSES.

Special Club licenses issued to clubs and associations under the authority of Act May 5, 1905 (Pub. Laws 1905, p. 192, c. 1235), for the purpose of permitting them to use their buildings for selling liquors to their members only, cannot reasonably be classed as included in those issued under Gen. Laws 1896, c. 102, as amended by Act May 22, 1908 (Pub. Laws 1908, p. 206, c. 1583), regulating the sale of liquors to the public generally, and are not subject to the provisions in section 1 of chapter 1583, limiting the number of licenses to one for each 500 inhabitants, the purposes and subject-matters of chapter 102 and of chapter 1235 being materially different, and the fact that druggists' licenses issued under section 53 of chapter 102, as amended by Act April 14, 1905 (Pub. Laws 1905, p. 162, c. 1223) § 2, are excepted from said provision of chapter 1583, does not show a legislative intent to include club li-

censes in the number of licenses to be granted, the exception being unnecessary.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 46½.*]

Petition by William B. Greenough, Attorney General, for a writ of certiorari against the Board of Police Commissioners of the City of Providence. Dismissed.

Nathan W. Littlefield and Chester W. Barrows, for petitioner. Albert A. Baker, Henry C. Cram, and Elmer S. Chace, for respondents.

DUBOIS, C. J. This is a petition for a writ of certiorari brought by the Attorney General on the relation of certain persons named therein and in behalf of the inhabitants of the city of Providence, in this state, against the persons constituting the board of police commissioners for said city of Providence, and represents: "That as such commissioners (they) are duly authorized by law to grant licenses for the sale of spirituous and intoxicating liquors within said city of Providence, by virtue of and in conformity with the statutes made and provided in such cases, namely, chapter 102 of the General Laws of Rhode Island, section 2, as amended by chapter 543 of the Public Laws of Rhode Island passed at the January session, A. D. 1898, chapter 1235 of said laws passed at the May session A. D. 1905, chapter 1355 of said Laws passed at the January session, A. D. 1906. That by and under the provisions of said chapter 1583 of the Public Laws it is provided that the number of licenses granted (not including druggists' liquor licenses) shall not exceed in the several cities and towns of the state one for each 500 inhabitants as determined by the last census taken under the authority of the United States or the state of Rhode Island. That the population of the state of Rhode Island as shown by the last census taken by the said state, and which is the last census taken in said state, and which shows the largest number of inhabitants of the city of Providence of any census taken therein, as 198,635. That the number of licenses as determined by said census on the basis of one for each 500 inhabitants of said city is 397, and that said board of commissioners under and by virtue of said statute had authority and jurisdiction to grant and issue licenses for the sale of spirituous and intoxicating liquors to the number of 397, and no more. That the said board of commissioners on, to wit, the 16th day of December, A. D. 1908, granted to John Dwyer a license for the sale of spirituous and intoxicating liquors at, to wit, No. 294 Tockwotten street, in said city of Providence, and that prior to the granting of said license said board of police commissioners had already granted and issued to various parties licenses for the sale of such liquors to the number of 397, and more, and that, when said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date; & Reporter Indexes

board granted said license to John Dwyer, it was acting beyond its authority and without any jurisdiction in the premises, and that its act in granting said license was null and void, and said license was illegal and invalid, all which acts and doings appear upon the records of said board of police commissioners relative to the granting of such licenses. That this petitioner is informed and believes that said board of commissioners claims to have acted within the scope of its authority and in conformity with the law in granting said licenses on the ground that, in determining the number of persons entitled to such licenses under the provisions of said chapter 1583, licenses granted to clubs are not to be counted nor reckoned as licenses for the sale of spirituous and intoxicating liquors under said chapter, and that, unless such licenses are included in the number of licenses granted by said commissioners in said city of Providence, they had not when they issued said license to said John Dwyer exceeded the number of 397. Whereas, your petitioner avers and insists that licenses for the sale of such liquors granted to clubs are and should be included in the number of licenses which may be issued by said license commissioners under the terms of said statute, and they say that said license to John Dwyer and all other licenses granted and issued by said commissioners in excess of the number of 397, including club licenses, are invalid and void, and they pray that a writ of certiorari may issue out of this honorable court directed to said William H. Luther, Harold J. Gross, and Walter A. Presbrey, directing and commanding them to appear and to produce their records of licenses for the sale of spirituous and intoxicating liquors granted and issued by them on or after the 1st day of December, A. D. 1908, before this honorable court, and if it shall appear by said records that a license was granted and issued as aforesaid by said board of commissioners to said John Dwyer, and that other licenses have been issued by said commissioners in excess of the number of 397, including licenses granted and issued by them to clubs, that such action and record of said board in excess of its authority be quashed, and said board of commissioners be directed to revoke and recall all such licenses granted in excess of and since and after the granting of 397 licenses as aforesaid."

This raises the following question for our determination: Are special club licenses issued under Pub. Laws, c. 1235, p. 192, passed May 5, 1905, subject to the provision of Pub. Laws, c. 1583, p. 206, § 1, passed May 22, 1908, which reads as follows: "The number of licenses granted (not including druggists' liquor licenses) shall not exceed, in the several cities and towns of the state, one for each five hundred inhabitants as determined by the last census taken under the authority of the United States or the state of Rhode Island." Pub. Laws, c. 1235,

p. 192, passed May 5, 1905, is entitled "An act in addition to chapter 92 of the General Laws, entitled 'Of the Suppression of Certain Nuisances,'" and reads as follows:

"Section 1. All buildings, places, or tenements located within any town or city granting liquor licenses under the provisions of chapter 102 of the General Laws used by any club or other association, whether incorporated or not, for the purpose of selling, distributing, or dispensing intoxicating liquors to its members or others, shall be deemed to be common nuisances; and whoever keeps or maintains, or assists in keeping or maintaining, such a common nuisance, shall be sentenced to pay a fine of not less than one hundred dollars nor more than one thousand dollars, and all costs of prosecution and conviction: Provided, that in any city or town in which liquor licenses are issued, as provided in chapter 102 of the General Laws, the licensing board may on application therefor, and payment of a license fee of twenty-five dollars, grant or refuse to grant to any club or association a special club license authorizing the selling, distributing, and dispensing of intoxicating liquors by said club, or association to its members only, and only upon the premises occupied by it and to be specified and described in said license; which license shall expire at the same time as other licenses granted under the provisions of chapter 102 of the General Laws, and may be revoked at any time by licensing board. Upon the conviction of any incorporated club or association or any officer, member, agent, or employee thereof under the provisions of this act, the charter of such club or association shall become null and void.

"Sec. 2. This act shall take effect upon the first day of June, A. D. 1905."

Sections 1, 3, and 4, c. 1583, Pub. Laws, passed May 22, 1908, entitled "An act in amendment of and in addition to chapter 102 of the General Laws, entitled 'Of the Suppression of Intemperance,'" read as follows:

"Section 1. Section 2 of chapter 102 of the General Laws of Rhode Island, as amended by section 1 of chapter 543 of the Public Laws of Rhode Island, passed at the January session, A. D. 1898, and by chapter 1355 of the Public Laws of Rhode Island, passed at the January session, A. D. 1906, is hereby amended to read as follows:

"Sec. 2. The town councils of the several towns, and the boards of commissioners as hereinafter provided, may grant or refuse to grant licenses to such citizens resident within this state, for the manufacture or sale of pure spirituous and intoxicating liquors within the limits of such town or city, as they may deem proper: Provided, that the number of licenses granted (not including druggists' liquor licenses) shall not exceed, in the several cities and towns of the state, one for each five hundred inhabitants as determined by the last census taken under the authority of the United States or the

state of Rhode Island. Whenever any license for the sale of spirituous or intoxicating liquors shall be granted, the same shall be granted to expire on the first day of December next succeeding the granting of the same, unless revoked as is hereinafter provided, and such citizen resident may obtain at any time, in the discretion of the persons authorized to grant licenses, a license to expire on the first day of December next succeeding the granting of the same, and pay therefor a price which shall be in proportion to the length of time which the said license so granted shall continue in force bears to the price of a license for a year; but no license granted under the provisions of this chapter shall authorize any person to sell any spirituous and intoxicating liquors on Sunday, or on any election day, or on Labor Day, or on Christmas Day, except in licensed taverns when served with foot to guests, or to any woman, except as hereinafter provided, or to sell or deliver, or to suffer to be sold or delivered, to any minor, either for his own use, the use of his parents, or of any other person, or to sell to any intoxicated person or to any person of notoriously intemperate habits, or to sell or furnish intoxicating liquors to any person on a passbook or order on a store, or to receive from any person any goods, wares, merchandise, or provisions in exchange for liquors, or to allow any minor or woman to drink any intoxicating liquors upon the premises, except in licensed taverns or in licensed victualing houses, or to allow any minor or woman to sell or serve intoxicating liquors except in licensed taverns or in licensed victualing houses. The word "tavern" as used in said chapter 102 of the General Laws, and in any acts in amendment thereof or in addition thereto, shall be construed to mean houses where the principal business is the furnishing of food and sleeping accommodations. The word "victualing house" as used in said chapter 102 of the General Laws, and in any acts in amendment thereof or in addition thereto, shall be construed to mean houses or places where the principal business is the furnishing of food. Before granting a license to any person under the provisions of said chapter, said council or board shall give notice by advertisement for at least two weeks in some newspaper published in the city or town where the applicant proposes to carry on business, or if there be no newspaper published in said city or town, then in some newspaper published in the county in which such town is located, of the name of the applicant for said license, and the particular location for which the license is requested; and shall give opportunity for remonstrants to be heard before them as to the granting thereof, and no license shall be granted under the said chapter to authorize the sale of any such liquors at any building or place where the owners of the greater part of the land within two hundred feet of such building or place shall file, with

the board having jurisdiction to grant licenses, their objection to the granting of such license; nor shall any license be granted for the sale of such liquors in any building or place, except taverns that are licensed on the date of the passage of this act, within two hundred feet, measured by any public traveled way, of the premises of any public or parochial school. Before any license shall be issued under the provisions of this chapter, the person applying therefor shall give bond to the city or town treasurer in the penal sum of one thousand dollars, with at least two sureties satisfactory to said council or board, which sureties shall be residents of this state, or a surety company authorized to do business in this state, as surety, which bond shall be conditioned that the person licensed will not violate or suffer to be violated on any premises under his control any of the provisions of this chapter or of chapters 92 or 281 of the General Laws of the state of Rhode Island, and for the payment of all costs and damages incurred by any violation of either of said chapters, and he shall also pay for such license to the town or city treasurer the sum hereinafter named, three-fourths thereof for the use of such town or city, and one-fourth to be paid over by the town or city treasurer to the general treasurer for the use of the state.'

* * *

"Sec. 3. Section 6 is hereby amended so as to read as follows:

"Sec. 6. The fees for licenses shall be as follows:

"(I) For a license to manufacture or sell at wholesale, not to be drunk on the premises, pure spirituous, intoxicating and malt liquors, not less than seven hundred dollars nor more than fifteen hundred dollars.

"(II) For a license to sell pure spirituous, intoxicating and malt liquors at retail only, for all cities and towns having over fifteen thousand inhabitants, not less than four hundred dollars, nor more than one thousand dollars; and for all other towns not less than three hundred dollars, nor more than seven hundred and fifty dollars.

"A license to manufacture pure liquors shall carry with it the right of sale at wholesale at his manufactory by the manufacturer of all pure liquors manufactured by him. The sale of liquors in less quantities than two gallons shall constitute a sale by retail, and the sale by the quantity of two gallons or in larger quantities shall constitute a sale by wholesale.'

"Sec. 4. This act shall take effect on and after the first day of December, A. D. 1908, and all acts and parts of acts inconsistent herewith are hereby repealed."

It becomes apparent from a consideration of the foregoing statutes that there are substantial differences between special club licenses and licenses for the manufacture or sale of pure spirituous and intoxicating liquors. In the absence of statutory enact-

ment to that effect, it is not to be presumed that the Legislature intended that special club licenses to be issued under the provisions of said chapter 1235 should be subject to the provisions of said chapter 1583, if such presumption involves incompatibility, incongruity, or manifest repugnancy. Both chapter 1235 and Gen. Laws, c. 102, as amended, relate to licenses for the sale of liquor, but the former has reference only to special club licenses, while the latter refers, not only to licenses for the manufacture and sale of liquor, but also to druggists' liquor licenses. The special club license may be issued to any club or association irrespective of the citizenship or alienage of its members, while licenses for the manufacture and sale of liquor may only be granted to citizens resident within this state, and druggists' liquor licenses may be granted to such persons being residents in this state as are by law authorized to retail, compound, and dispense medicines and poisons. The former authorizes the selling, distributing, and dispensing of intoxicating liquors by said club or association to its members only without restriction as to the purity of the liquor so sold, distributed, or dispensed, while the latter permits the manufacture and sale of pure spirituous and intoxicating liquors. It is to be observed, however, that Gen. Laws, c. 151, "Of the Assay of Liquors," does forbid the sale and keeping for sale of impure or adulterated liquors with a penalty for such violation, and also makes provision for the seizure and forfeiture of impure and adulterated liquors.

The evident purpose of the proviso in Pub. Laws, c. 1583, § 1, is to fix a limit to the number of competitors who may engage in the liquor business—those who may compete for the trade of the public. And presumably it was deemed by the Legislature to be a sufficient supply for a reasonable public demand to make provision that out of the number of distillers, brewers, wholesale liquor dealers, and saloon keepers who might apply for a license not more than one should be granted for each 500 of the inhabitants of any city or town wherein liquor lawfully may be sold. There is no similarity whatever between a club and a distillery or brewery or a wholesale dealer in intoxicating liquors. The difference between a saloon and a clubhouse is the difference between a public and a private house. The former may be entered by any person, irrespective of race, creed, color, or previous condition of servitude. The latter may be entered only by its members and their guests, or by the agents and servants of the club in the course of their employment. The openly avowed purpose of the saloon keeper is to obtain patronage and increase his business, and he courts publicity almost to the verge of notoriety.

On the other hand, the best clubs are very exclusive, of limited membership, and usually

with a large list of persons awaiting admission. While it is possible that a club might be incorporated for the sole purpose of selling, distributing, and dispensing intoxicating liquors to its members, it is highly improbable that corporations would often be formed for that purpose. Clubs are generally constituted for social culture, and sometimes for scientific, artistic, and social purposes. The sale, distribution, and dispensing of intoxicating liquors to the members of a club is merely an incident in, and not the main purpose of, its existence. Many of them serve food, but that is not the object for which they were incorporated. Many of them supply pool and billiard tables for the use of their members, but that fact does not require them to take out licenses for the keeping of the same or render them liable to the penalties provided in Gen. Laws, c. 104, § 10, for keeping the same without license, unless they are kept "for public use or profit within this state." So some clubs have bowling alleys and might have shooting galleries for the exercise and entertainment of their members without license under existing statutes so long as they were kept for private use, and not for public use and profit. A club may be considered in the light of a large family united, not indeed by ties of blood, but by a community of interest, intellectual, and social, and in the case of unincorporated associations by community of goods.

The fee for a special club license is fixed at \$25, irrespective of the membership of the club, and the license fee goes into the treasury of the city or town which grants the same. There is no provision of law by which the state is entitled to any portion thereof. License fees, under chapter 1583, range from \$300 to \$1,000, whereof three-fourths are for the use of the city or town and one-fourth is for the use of the state. If special club licenses can only be granted in the proportion of one for each 500 inhabitants as hereinbefore stated, it would be within the bounds of possibility that none but special club licenses might be issued in the city of Providence, in which case 397 clubs would exhaust the licensing power of the commissioners, in which event the sum of \$9,925 would inure to the benefit of the city treasury and none of it to the state, while the general public outside of club membership would be cut off from its source of supply. It is a well-known fact that club membership may have very little to do with the population of the place wherein the clubs are located. For example, the town of East Providence has become the home of several well-known clubs, among which may be mentioned the Squantum Association, the Pomham Club, the Agawam Hunt Club, and the Wampanoisset Country Club. It is quite likely that these clubs have a membership exceeding 1,000 persons, and it is very unlikely that 3 per cent. of their members are residents of the town.

The object of Pub. Laws, c. 1235, p. 192,

passed May 5, 1906, appears to be to give to such towns and cities as may be willing to acquire revenue from intoxicating liquors the opportunity to increase the same by the addition of license fees for grants of special club licenses issued to clubs or associations for the purpose of permitting them to use the buildings, places, or tenements occupied by them within such town or city for the purpose of selling, distributing, or dispensing intoxicating liquors to their members and upon their premises. This is well termed a special club license, for it does not authorize competition for business with public liquor dealers and only authorizes sales, etc., to its members upon its premises. The statute itself is entitled "An act in addition to chapter 92 of the General Laws entitled 'Of the Suppression of Certain Nuisances,'" and was intentionally made so for it creates a new class of nuisances, viz., buildings, places, or tenements in towns and cities wherein liquor licenses are granted, used by clubs or associations for the purpose of selling, etc., intoxicating liquors to their members or others. That the Legislature did not intend it to be an amendment of or in addition to Gen. Laws, c. 102, appears clearly from its title and also from the fact that, while said chapter 102 is mentioned three times therein, the references thereto are not of such a character as to suggest the idea that special club licenses are to be covered by the provisions of said chapter 102. The first reference describes the cities and towns wherein the newly deemed nuisances are located. The second reference to said chapter provides that in cities and towns where liquor licenses are issued special club licenses may be issued, and the third reference provides that special club licenses shall expire at the same time as other licenses granted under the provisions of Gen. Laws, c. 102, and may be revoked at any time by the licensing board.

As the liquor licenses granted under the provisions of Gen. Laws, c. 102, and its amendments, confer upon the licensees therein named authority to compete for the patronage of the public, the Legislature has wisely provided for the safeguarding of the public by prescribing the conditions upon which the licenses may be granted and enjoyed, and also by providing penalties for the violation of the same. Thus it is made necessary to publish notice of applications for licenses in order that any person may remonstrate against the granting of the licenses, or any of them, if he sees fit. And each applicant is required to give bond with satisfactory sureties in the sum of \$1,000, with condition not to violate any of the provisions of Gen. Laws, cc. 92, 102, 281 ("Of Offences against Chastity, Morality, and Decency"). Nor shall any license be granted for the sale of such liquors in any building or place, except taverns, already licensed within 200 feet of the premises of any public or parochial school, nor where the owners of

the greater part of the land within 200 feet of such building or place shall file with the board having jurisdiction to grant licenses their objection to the granting of such license. All of these provisions are appropriate in connection with the granting of licenses for the manufacture and sale of liquor to the public, which licenses can be revoked under the provisions of said chapter 102, § 12, which reads as follows: "Sec. 12. If any licensed person shall be convicted of the violation of any of the provisions of this chapter, his bond shall be put in suit by the town or city treasurer of the town or city where such bond is given, and by due process of law the penal sum thereof be recovered for the use of such town or city. If any such licensed person shall permit the house or place where he is licensed to sell liquors under the provisions of this chapter, to become disorderly, so as to annoy and disturb the persons inhabiting or residing in the neighborhood thereof, or shall permit any gambling or unlawful gaming to be carried on therein, or shall permit any of the laws of the state to be violated therein, in addition to any penalties which may be prescribed by statute for such offenses, he may be summoned before the said council or commissioners, when he and the witnesses for and against him may be heard; and if it shall be made to appear to the satisfaction of said council or commissioners, that such licensed person has violated any of the provisions of this chapter, then said council or commissioners shall revoke his license, and such licensed person shall cease to have any authority thereunder, and shall thereafter be disqualified for holding any of the licenses provided for herein in the state for the period of five years"—while the special club licenses can be revoked, without notice or hearing, at any time by the licensing board.

The penalties under the two statutes are different. The penalties under chapter 102 are for selling without a license in case of a first offense \$20, costs, and imprisonment for 10 days, and in case of a second conviction, \$50, costs, and imprisonment for three months, and, in case of a third or subsequent conviction, \$100, costs, and imprisonment for not less than three nor more than six months, and for keeping or suffering to be kept on his premises \$20 and imprisonment for 10 days. The penalty for keeping or maintaining a club nuisance is not less than \$100 nor more than \$1,000, costs, and the nullification of the charter of the club. Other penalties are prescribed under said chapter 102 for violation of various provisions of said chapter.

The scope of the application of said chapter 102 and of said chapter 1235 are different. The club premises used for such sales are made nuisances only in such towns or cities as grant liquor licenses and during the time they continue to grant them pursuant to said

chapter 102, while said chapter 102 applies to all the cities and towns of the state.

The subject-matters are largely different. Said chapter 102, as above quoted, contains many provisions inconsistent with the maintenance of or licensing of clubs and to make clubs subject to the numerous provisions of said chapter 102 would practically nullify said chapter 1235, and prevent the issuing of club licenses. The building, place, or tenement maintained by a club or association for the use of its members and guests is essentially a private place; and some clubs, to a greater or less extent, furnish food and drink and not infrequently sleeping accommodations for their members and guests. A fully equipped club is available as a home for its members, and in some cases is the only place of residence or home of some of its members. It is not a tavern or a victualing house in any legal sense, as taverns and victualing houses are public places, and are required to be licensed and regulated as such, while clubs are not. Said chapter 102 prohibits sales of spirituous liquors on Sunday, election day, Labor Day, and Christmas Day, except in licensed taverns when served with food to guests, and prohibits women and minors drinking the same upon the licensed premises except in licensed taverns or victualing houses. Therefore what would be lawful in a tavern or victualing house would by the construction claimed in favor of the petition be unlawful in a club used to some extent for the same purposes. Section 5 of said chapter 102 provides that "no license shall be issued for the sale of intoxicating liquors in any place, except licensed taverns, where a dwelling house, or a place used as a dwelling house, is connected therewith from within such licensed place; and no license shall be granted for the sale of intoxicating liquors in any place, except licensed taverns, to which an entrance shall be allowed other than directly from a public traveled way."

At times it has been found convenient to lease or purchase a commodious dwelling house for use as a clubhouse, and the same has been used for dwelling house purposes by members, guests, and to some extent by employes; and the house usually and necessarily has an entrance or entrances other than directly from a public traveled way. These conditions existed in the case of the leading clubs of the state at the time of the enactment of said chapter 1235, and still continue. Furthermore, the premises of most, if not all, other clubs are not confined to the ground floor, so that the entrances thereto are not directly from a public traveled way. It is difficult to imagine that the General Assembly intended that the more opulent clubs could not obtain licenses for the sale of liquors in their clubhouses, while allowing licenses for clubs of lesser scope, and that only clubs located on the ground floor of a building and in a part of the build-

ing opening directly upon a public traveled way could be licensed.

Prior to the passage of said chapter 1235, in May, 1905, this court held in *McAloon v. License Commissioners*, 22 R. I. 191, 193, 46 Atl. 1047, 1048 (1900), referring to said section 5, that, "if the place in question did not conform to these requirements, the board had no jurisdiction to grant a license. Its action was void." We also held in *State v. Conley*, 22 R. I. 397, 401, 48 Atl. 200, 201 (1901) that an entrance requiring a circuitous or crooked route from the highway to the licensed place was an entrance other than directly from a public traveled way, saying: "The clause of the statute under consideration is commonly known as 'the back-door law.' Its intent is to promote the observance of the laws relating to liquor saloons, and to prevent the violation thereof by requiring that entrance to such saloons be under direct public observance from the highway." As to the claim that section 5 prohibited only entrances through other rooms or buildings, we said (pages 402, 403, of 22 R. I., page 201, 48 Atl.): "We are of the opinion that the statute includes in its prohibition such entrances also, but that it cannot be limited to prohibit such entrances only. As prohibiting entrances through other rooms, buildings, etc., which may have doors successively in a straight line from the street, the language of the statute must be given a secondary meaning—as immediately for directly. A secondary meaning may be included with, but should not be preferred to or exclude, a primary meaning." And we quoted with approval the words of Morton, C. J., in *Commonwealth v. Ferden*, 141 Mass. 28, 6 N. E. 239, as follows: "The purpose of the Legislature manifested in this and other provisions of the statute was that the premises licensed and the entrances to them should be open and exposed to view from the public streets." Further, section 62 of said chapter 102 provides that "every person licensed to sell intoxicating liquors shall cause to be removed on his licensed premises all obstructions of whatever kind that may prevent a clear view of the interior of the same from the outside thereof, by the passer-by, through the window, during the entire day of each Sunday." In said case of *State v. Conley*, 22 R. I. 401, 48 Atl. 201, we referred to this section as the "screen law," saying: "This section does not expressly provide that the view shall be from the highway, but it implies as much, since the public ordinarily would have no right to pass by saloon windows not opening on a highway."

In the passage of said chapter 1235 the General Assembly presumably legislated in view of the construction placed by this court upon said chapter 102 and the power to grant licenses thereunder, and it is not to be presumed that the Legislature intends to permit something to be done by one statute the doing of which it prohibits by another separate

statute while both of said statutes are co-existent. Under the ordinary well-settled rules of construction of statutes no construction will be adopted which will defeat the evident purpose of a statute. As we said in *State v. Drowne*, 20 R. I. 302, 306, 38 Atl. 978, 979: "We are bound to construe a statute in the most beneficial way which its language will permit, in order to prevent inconsistency or injustice," and "such construction will be adopted as shall appear most reasonable, and best suited to accomplish the objects of the statute, and that a construction which leads to an absurdity will be avoided if possible." Not only is the substance of said chapter 102 materially different from that of said chapter 1235, as might be expected, as the one regards the licensing of a private club or association, and the other contemplates the licensing and regulating of intoxicating liquors to the public generally, but also the terms of said chapter 102 in numerous provisions expressly limit its operation to licenses granted under the provisions of said chapter 102. For instance, in section 2 thereof, as amended by said chapter 1583, the following words are used: "But no license granted under the provisions of this chapter shall authorize any person to sell"; "before granting a license to any person under the provisions of said chapter"; "before any license shall be issued under the provisions of this chapter." In section 4, as amended, the following words: "for the sale of intoxicating liquors pursuant to this chapter"; "no license under the provisions of this chapter shall be granted"; "then licenses under the provision of this chapter shall be granted." Special club licenses are issued under the authority of said chapter 1235, and cannot be issued under said chapter 102 by reason of the numerous differences hereinbefore specified, and cannot reasonably be classed as included in the licenses issued under said chapter 102. Said chapter 1235 is complete in itself in every essential particular. It contains the prohibition, the penalties for its violation, and the power to license and to revoke the license. It does not contain numerous regulations as to the conduct of clubs having such licenses. This would not be expected in the case of a private club or association.

As to the contention of the petitioner "that, if the General Assembly had intended to limit the operation of chapter 1583 to the statute and amendments thereof recited in section 1, they would not have felt it necessary, and it would not have been necessary, for them to refer to druggists' liquor licenses in order to except them from the number of licenses to be granted under said last mentioned statute," it is sufficient to observe that the exception, viz., "not including druggists' liquor licenses," was evidently inserted in the section out of abundant caution. There does

not appear to be any necessity for its insertion. While druggists may be citizens, the law does not require that they shall be. The provisions of the statute relating to this subject are contained in Pub. Laws, c. 1223, p. 162, § 2, passed April 14, 1905, which reads as follows:

"Sec. 2. Section 53 of chapter 102 of the General Laws of Rhode Island is hereby amended so as to read as follows:

" 'Sec. 53. The town councils of the several towns and the boards of license commissioners provided for in this chapter may grant or refuse to grant licenses to be known as druggists' liquor licenses, to such persons, being residents of this state, as are by law authorized to retail, compound, and dispense medicines and poisons, for the sale of pure, spirituous, and intoxicating liquors in quantities not to exceed one pint, or in an original package containing not more than one quart, for medicinal purposes only, and not to be drunk on the premises of the seller. Such licenses may be granted at any time and shall expire on the first day of May next succeeding the granting of the same. The fee for such license shall be twenty-five dollars, and such license shall be subject to the provisions of section eleven of this chapter, and shall state that the liquors are to be sold for medicinal purposes only, and not to be drunk upon the premises.' "

It thus appears that they must be "persons, being residents of this state," and it further appears by reference to Gen. Laws 1896, c. 152, "Of Medicines and Poisons," that such persons must apply for examination and registration, etc., from which it follows that natural, and not artificial, persons, are intended. Moreover, the statute applies to all the cities and towns of the state, and is not limited to such as permit intoxicating liquors to be sold therein. Furthermore, while it is true that said chapter 1223 is not an amendment of section 2, c. 102, Gen. Laws, it is in terms an amendment of that chapter.

The foregoing consideration of the subject leads us to the conclusion that a construction which would make said chapter 1235 subject to the provisions of said chapter 1583 would be destructive of the legislative intent as the same is expressed in the aforesaid statutes. For these reasons, the question presented must be answered in the negative.

The prayer of the petition for a writ of certiorari is therefore denied and dismissed.

(82 Vt. 12)

PEMBER v. BURTON.

(Supreme Court of Vermont. Rutland. Jan. 18, 1909.)

DEEDS (§ 196*)—UNDUE INFLUENCE—DEED TO CHILD.

The relation of parent and child raises no presumption of undue influence in a conveyance by the parent to the child, but is evidence

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to be weighed in connection with the other facts and circumstances against the child, and the person attacking the conveyance must show, independent of any presumption, that undue influence was exercised.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 587; Dec. Dig. § 198.*]

Munson, J., dissenting.

Appeal in Chancery, Rutland County; Alfred A. Hall, Chancellor.

Bill by E. R. Pember, administrator of the estate of Sarah A. Burton, deceased, against George H. Burton. Decree for complainant, and defendant appeals. Reversed and remanded, with mandate to dismiss the bill.

This is a bill in chancery to set aside a deed of land from the intestate to her son, the defendant, and the transfer to him of a savings bank deposit book, on the ground of mental incapacity and undue influence.

The intestate's husband died in January, 1902, leaving to her his entire estate. In March, 1902, she made her will, whereby she gave George, the defendant, a farm worth \$3,000 and \$1,000 to his wife, a few small legacies to their children and grandchildren, and the rest of her estate to George and her son Charles equally. Charles is a traveling salesman, has a wife but no children, and lives in the village of Wells. George is a farmer, and lived on his father's farm in Wells at the time of his father's death, but subsequently moved into the village of Wells, and later, in April, 1903, moved with his family to the home place in the village where his mother lived, and from that time she was a member of his family. She was 75 years old when her husband died, had chronic Bright's disease, and a shock in 1900 thought to have been occasioned by the disease. She never afterwards fully recovered her speech, and was always thereafter more or less crippled in her limbs, and unable to walk without a cane, and part of the time not at all. The lameness, however, was said to have been caused largely by rheumatism, and might not have been due to the shock. Physically she was much broken before her husband died, and never recovered her health, though she was better at times. The shock rendered her unconscious, but this condition passed away, and her mind, though somewhat weakened, was generally fairly good for one of her age until the spring of 1905, though during that period her mind was clouded at times and her memory somewhat impaired. She was occasionally melancholy, and now and then wandering and flighty in mind. During all this time disease and advancing years were doing their work, and in the spring of 1905 she had another and more serious shock, following which she took her bed, and steadily declined until she died in December of that year. During the time George lived with his mother the relations between him and Charles and their families were some-

what strained. George became the head of the family in his mother's house, and Charles felt that he was not welcome there, for which he had some ground, and therefore he saw less of his mother than he otherwise would, though he lived but a few rods away, and his mother occasionally visited him at his house. She grieved somewhat over this estrangement, and mourned that she saw less of Charles than of George. The bystanders and the witnesses of the deed sought to be set aside testified that at the time of its execution she was in a sound and normal condition of mind, and there was no evidence to the contrary except that covering the period after her shock in 1900, which tended to show that her mind was impaired generally. Nothing occurred on the immediate occasion of the execution of said deed to excite suspicion, and the master finds, subject to the above statement about the impairment of her mind, that at the time she made the deed she was in a normal condition of mind, and comprehended the force and effect of it.

As to the transfer of the savings bank book, there was no specific evidence the master says on which he could make any finding as to her condition of mind at the time of the transfer other than the general condition of mind above stated. There was no evidence directly tending to show that George or his family had ever made any statement, nor that the intestate had ever said anything, indicating that direct request had been made to her, nor direct influence used upon her, to influence her in either of said transactions; and the master says that, if undue influence is found, it must be as a conclusion of fact from the circumstances he reports. He then goes on to say that before and at the time of said transactions the intestate was a part of George's family, and relied upon him to manage and attend to her affairs; that her relations with him and his family were cordial, and that all the evidence tended to show that she was treated by him and his family with kindness and consideration; that as head of the family he was her protector, confident, and adviser; that his wife was conscientious in her attentions, cheerful in disposition, and perhaps somewhat insinuating in manner; that undoubtedly a prejudice existed in the family against Charles, and, whether it was used against him with the intestate or not, no doubt she felt his absence as compared with George; that she was old, weak, and feeble, and the opportunity open, and the relations opportune, for George and his family to exercise influence against Charles; that it is impossible to get into the bosom of that family and ascertain exactly what took place there, and equally difficult to lay bare the facts, and learn what influences, if any, were operating upon the mind of the intestate; that those having the best opportunity to observe were divided; that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

one is impressed by the progressive movement of the property from the intestate to George, namely, that within a few weeks after the death of her husband she made a will, giving the farm, worth \$3,000, to George and \$1,000 to his wife, and \$300 or \$400 to their children and grandchildren; that subsequently, in the same year, she conveyed the farm to him outright, thereby giving him the immediate possession and use of it; that in the spring of the next year George went to live with his mother, and took possession of the homestead; that the next year she gave him the deed in question, thereby adding \$1,500 to \$2,000 to his share of his father's estate; that later, in the same year, she transferred to him the bank book, evidencing a deposit with interest of \$1,345, thus giving him and his family from \$8,900 to \$7,400, which, with half of the remainder, would make \$8,700 or \$9,200 out of an estate of about \$11,000.

The defendant claimed that the conveyance and the transfer were made pursuant to his father's request, and in consideration of his mother's support; but the master does not find that to be so. The master says that if, in the circumstances, the burden is on George to show that he did not exercise undue influence, he has not shown it; but if, on the other hand, the burden is on the orator independent of any presumption to show affirmatively that such influence was exercised, he has not established that fact. But the master, referring to certain recent decisions of this court, goes on to say that he understands the rule therein laid down to be that, when a conveyance or a bequest is made to one standing in a confidential relation to the grantor or to the testator, the burden is on the party claiming under such conveyance or will to remove the suspicion cast upon such transaction by reason of such confidential relation, and that, when a third person has the affirmative of the issue, this presumption becomes evidence to be weighed in his behalf in connection with all the other evidence in the case. He then goes on further to say that, applying this rule, he finds that George stood in a confidential relation to his mother, and was her adviser and guide; that an undue proportion of the estate was transferred to him by his mother while he so acted and such relation existed; that he had not removed the suspicion or the presumption that the law cast upon him in these transactions; and that, giving the orator the benefit of that presumption in connection with the other evidence, he finds that the intestate was unduly influenced by George and his family to make the conveyance and the transfer in question.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Butler & Moloney, for appellant. E. O. Farrar and Lawrence & Lawrence, for appellee.

ROWELL, C. J. It may be that the law would presume undue influence in this case

if the relation of parent and child had not existed; and the question is whether the existence of that relation makes any difference. Transactions between parent and child may proceed upon arrangements between them for the settlement of property or of their rights in property in which they are interested. In such cases the law regards the transactions with favor, and does not minutely weigh the considerations on either side. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction. But it is said that, on principles of natural justice and considerations important to the interests to society growing out of the relation of the parties, the law examines, scrutinizes, weighs in golden scales, and holds prima facie void transactions of bounty from child to parent so soon after majority that the child may probably not have been entirely free from parental influence therein. This is the doctrine of many of the cases, but some hold otherwise. Thus in *Jenkins v. Pye*, 12 Pét. 241, 9 L. Ed. 1070, the federal Supreme Court refused to adopt that doctrine, and said that the interest of the child is abundantly protected by keeping a watchful eye over the transaction, to see that no undue influence was brought to bear upon it. But it is very generally held that no presumption of undue influence arises from the relation merely in respect of gifts and voluntary conveyances without consideration from parent to child, though some children are thereby favored, to the exclusion of others, and though the beneficiary is the adviser of the parent, and had the control and management of his affairs. 29 Am. & Eng. Ency. Law (2d Ed.) 132, 133.

Mr. Pomeroy says that when the parent is old, infirm, or otherwise in a condition of dependence upon his child, and the child occupies a corresponding relation of authority, conveyances conferring benefits upon the child may be set aside, but that cases of this kind plainly turn on the exercise of actual undue influence, and not on any presumption of invalidity, for a gift from parent to child is certainly not presumed to be invalid. 2 Pom. Eq. § 962. Mr. Bispham says that it has been held that in cases where the benefit moves from parent to child there is no burden resting upon the child to explain the gift nor to show the fairness of the contract, and that this would seem to be entirely correct, though it need scarcely be added that any attempt at misrepresentation or overreaching would render the gift or contract voidable. Bisp. Eq. § 235. It is said in *Oliphant v. Liversidge*, 142 Ill. 100, 170, 30 N. E. 334, that the presumption of fraud does not arise from the fact that the grantor is the father of the grantee; that in the case of a gift from a child to a parent undue influence may be inferred from the relation, but never when the gift is from the parent to the child. It is said in *Mat-*

ter of Will of Martin, 98 N. Y. 193, 197, that something more must be shown than the relation of parent and child and an opportunity for unfair dealing; that there must be evidence that the parent was imposed upon or overcome by the practices of the child to the benefit of the latter before the burden of proof can be shifted. In *Wessell v. Rathjohn*, 89 N. C. 377, 45 Am. Rep. 696, it was claimed that when the relation of father and child exists, and the child becomes the beneficiary under a deed from the father, the deed will be looked upon with great suspicion, and if it is not found to be upon adequate consideration, and the mental condition of the father is such from debility as to make him easily subject to improper and undue influence, and the beneficiary has opportunity and position to exercise such influence and control, the deed will be set aside, although no actual fraud or undue influence is shown. The court said that there might be cases where a parent conveys property to his child in which the presumption of fact is so strongly adverse to the child that the deed ought to be found against, unless the child proves that it was fairly and honestly made; but that in such a case there must be evidence tending to show, not simply that there might have been but that there was, *mala fides*; that the relation of parent and child, as to presumption of fraud and the burden of proof to rebut the same in business transactions between them, does not stand on the same footing as the relation of trustee and cestui que trust, guardian and ward, attorney and client, and the like, but belongs to a different class of relations, in which the presumption is not so strong, and does not arise under the same circumstances.

Sausley v. Jackson, 16 Tex. 579, was a suit to set aside a voluntary deed of gift of slaves from parent to child. The court said that an act or a contract by which a benefit is conferred by a child upon a parent will be set aside if there are any circumstances showing that it had been induced by undue influence of parental authority, and that it was a vexed question whether the mere existence of the relation did not itself make the transaction *prima facie* void; but that that doctrine seems now to be repudiated by the courts of this country, and has been modified in England, and that it is clear that that rule was never applied, unqualifiedly nor qualifiedly, to deeds of gift from parent to child, but that the reverse of that principle has always been sustained, and such deeds looked upon with favor and with favorable presumptions. In *Teegarden v. Lewis*, 145 Ind. 98, 113, 40 N. E. 1047, 44 N. E. 9, the finding was that Deer, the intestate, when old, weak, and childish, and while making his home with the appellants, his son-in-law and daughter, and depending on them for his home and personal care and attention, and on his son-in-law to go with him and assist

him in transacting all of his business, made to them a gift of a considerable sum of money. There was no finding that he was subject to nor easily influenced by their persuasion, nor that they exercised any persuasion to obtain the gift, nor did it appear that at the time of the making of the gift he had no other property, nor that by making it he dealt unjustly nor unequally with his other children; and the question was whether the relation existing and the infirmities of Deer enforced the presumption of undue influence, and cast the burden upon the recipients of the bounty to show the absence of such influence. Counsel for the appellants urged a distinction between cases in which the ordinary fiduciary relation exists and those in which the relation of parent and child exists. The court said that many of the cases recognize that distinction, though some of those cited involved transactions between parent and child and the distinction was neither considered nor observed, but the ordinary rule was applied. The court recognized and applied the distinction contended for, and said that, if there was any strength in the exception to the general rule, it was indispensable that some element of positive fraud should be found, and that there was no such finding in that case. *Slayback v. Witt*, 151 Ind. 376, 50 N. E. 389, was an action by the children and grandchildren of William Slayback, Sr., and Anna Slayback, deceased, against David Slayback, a son of the decedents to set aside a deed of gift of a farm from his mother to him, on the ground of unsoundness of mind of the grantor, want of consideration, undue influence, and nondelivery. The deed was set aside below, and partition ordered. It appeared that all of the children of the decedents had married and left home and were doing for themselves, except David, the appellant, who never married, but remained at home with his parents, and took care of them as long as they lived. On the death of the father, his estate was divided among his heirs and his widow, who took the home farm, which was the land in question. Long before and at the time of the father's death, his family consisted of himself and wife and David. After his death, David and his mother lived together on the farm. David was kind and attentive to his parents, and especially so to his mother after his father's death. She was old and infirm when the deed was made, and her mind was weak, but not unsound. The court said that, if the deed was to be set aside, it must be on the ground that it was procured by the undue influence of David, and that there was no evidence of such influence unless the fact was required by law to be presumed from the condition and situation of the parties to the deed and the circumstances surrounding the transaction. Counsel for the appellees contended that undue influence must be presumed in the circumstances; that if the relation of parent and child had not existed,

there being no valuable consideration for the deed, the uniform current of authority everywhere would require the presumption of undue influence and the setting aside of the deed, unless the presumption was rebutted by affirmative proof. But the court said that the line of cases cited was not applicable to the case, because of the relationship of the parties to the deed, that it was true that some of the cases cited sanctioned the contention that the rule was applicable to the case, but that the great weight of modern authority is the other way, and judgment was reversed on the strength of *Teegarden v. Lewis*, above cited, because there was no evidence of actual undue influence, and because in such cases no presumption of undue influence arises.

Mackall v. Mackall, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84, was a bill to set aside a deed of land from father to son on the ground of undue influence. It appeared that for 20 years the father and mother had been separated, and that this son had remained with the father, taking his part, and assisting him in his business, and that the other children had gone with the mother, and taken her part in the family difficulties. The court said that influence gained by kindness and affection will not be regarded as undue if no imposition nor fraud is practiced, even though it induces the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made; that, right or wrong, it is to be expected that a parent will favor the child who stands by him, and give his property to such child rather than to the others; that, to defeat a conveyance made in such circumstances, something more than the natural influence arising from such relationship must be shown; that imposition, fraud, importunity, duress, or something of that kind must appear, otherwise, the disposition of property that accords with the natural inclination of the human heart must be sustained. *Towson v. Moore*, 173 U. S. 17, 19 Sup. Ct. 332, 43 L. Ed. 597, was a bill in equity by children of Leonidas Campbell, son of William Campbell, against the two daughters of William Campbell and their husbands, Moore and Russell, who were also executors of the wills of William Campbell and Mary Campbell, his widow and residuary devisee and legatee, to set aside a gift by her to their two daughters of certain Government bonds as having been obtained from her by the undue influence of themselves and their husbands. It appeared that after the death of her husband Moore was the business agent of the mother, who resided alternately with one or the other of her two daughters, living on affectionate and confidential terms with them and their husbands, and that at the time of the gift and her death she was at the house of her daughter Mrs. Moore. The plaintiffs

contended that the burden of proof was upon the donees to show the validity of the gift. But the court held otherwise, and said that the principles established by its decisions are that in case of a gift from child to parent the circumstances attending it should be carefully scrutinized in order to ascertain whether there had been undue influence in obtaining it, but that it could not be deemed *prima facie* void, that the presumption is in favor of its validity, and that, in order to set it aside, the court must be satisfied that it was not the voluntary act of the donor, and that the same rule as to burden of proof applies with equal if not greater force to the case of a gift from parent to child, even if the effect of the gift is to confer upon a child with whom the parent makes his home and is in peculiarly close relations a larger share of the parent's estate than will be received by other children.

Lockwood v. Lockwood, 80 Conn. 513, 69 Atl. 8, was an application by Alice Lockwood and others for the probate of her mother's will. It was claimed by the contestants that certain clauses of the will by which a larger portion of the testatrix's property was given to her daughters Alice and Emily than was given to her other children, were procured by the undue influence of Alice and Emily, and especially by Alice, and the jury so found, and the decree of the probate court as to those clauses was set aside. The testatrix's husband died in 1878, leaving nine children. At the time the will was made in 1901, Emily, Alice, Irving, and Ada, all unmarried, lived at home with their mother. The rest of the children were married and away for themselves. The contestants introduced the testimony of several witnesses, one of whom was the judge of probate, who testified that he drew the will from instructions given to him by the testatrix at two or three interviews, at which times Alice came with her mother and was present when the interviews took place. The other witness testified to things from which the contestants claimed that the jury should infer, in connection with the testimony of the judge of probate, that at the time the will was executed the testatrix was not only physically weakened by sickness, but that the natural vigor of her mind was so impaired that she has less power to resist the persuasion of influence; that Alice and Emily had acquired a controlling influence over her; that Alice's relation to her was one of special trust and confidence; and that Alice and Emily did, in fact, by the exercise of influence over her, constrain her to insert in her will the objectionable clauses against her wishes. There was no direct testimony as to the actual exercise of any influence in procuring the discriminating provisions of the will, except that of Emily, who testified to her relations with her mother, and that she took no part in the making of the will; and that of Alice, that she did not attempt to in-

fluence her mother; and that of the judge of probate, that at the interviews named by him he saw nothing indicating the exercise of undue influence. The court charged that if the evidence indicated that the relation of Alice to her mother was one of trust and confidence, and that she had benefited by her acts in that relation, then it was incumbent on the proponents to show that she acted fairly, and took no advantage of her position to induce the making of the will in her favor. The nature of the relation of special trust and confidence referred to, and of the evidence from which its existence might be inferred, was stated to the jury to be that there was testimony tending to show that Alice was for a number of years entrusted with a key to a box in the vault of a New York safe deposit company in which her mother's securities were kept, and so had access to those securities at all times; that she cut the coupons and collected the money for her mother; that she was in the habit of receiving checks from her mother payable to herself, and of collecting the money on them for her mother; and that she assumed to advise her mother as to indorsement of notes, and advised her in affairs generally. The court said that the charge, in effect, instructed the jury that the relation of confidence that existed between Alice and her mother raised a presumption which, unless overcome by rebutting evidence, established the fact of undue influence, and cast upon the proponents the burden of satisfying the jury that no such influence was exercised. The court said that there is a broad distinction between the effect of a confidential relation of a legatee to the testator as suggestive of undue influence when the legatee is a stranger and when he is a child; that in the case of a child both the relation of confidence and some participation in the estate are natural, which cannot be said of a stranger as a general proposition. The court adopted and applied its language in Dale's Appeal, 57 Conn. 127, 17 Atl. 757, where it said that though the mother and the son dwelt together in the same house, and every opportunity was open to him to exercise influence over his mother, still as matter of law the burden remained with the contestant, and it was for him to prove that the son abused the confidence of the mother, or that his superior mind so dominated her that, unable to resist, she surrendered her judgment and will to him, and that this the contestant was not required to do by direct evidence, but was permitted to do wholly upon inferences drawn merely from the opportunity for coercion by threats or inducement by flattery, which was error.

The court said that the failure in the case before it of the court below to impress upon the jury in any effective way the distinction between the possible probative effect of a re-

lation of trust and confidence existing between the testatrix and a stranger and the same relation existing between the testatrix and her daughter, a member of her household, was, in the circumstances, harmful error. This is precisely the error the master made in this case, for he adopted and acted upon the rule applicable only to the relation of attorney and client, guardian and ward, and the like, and thereby failed to distinguish the difference in possible probative effect between such relations and confidential relations between parent and child. The former relations in practical effect, as said in the Lockwood Case, change a permissible inference of fact in the case of a child to a necessary presumption of fact in the case of an attorney or a guardian; or, in other words, change such permissible inference of fact from one that might, as matter of reasoning, show undue influence, to one that certainly, as matter of law, is prima facie proof of such influence. The master saying that he could not find undue influence without applying the rule he did, which was wrong, his finding cannot stand; and, as the orator seeks to recover on no other ground, the case must go against him.

Decree reversed and cause remanded, with mandate to dismiss the bill with costs in this court, and with or without costs below, as may be there determined.

MUNSON, J., concedes that the authorities are as stated, but questions the soundness of the reasoning on which the rule changing the burden is held inapplicable as between children, regardless of circumstances, and therefore withholds concurrence.

(33 Vt. 37)

STATE v. STANLEY.

(Supreme Court of Vermont. Franklin. Jan. 18, 1909.)

1. CRIMINAL LAW (§ 1030*)—APPEAL—OBJECTIONS—TRIAL COURT—NECESSITY.

Where an action is tried in the county court on a motion to dismiss an information, neither party objecting to the propriety of the use to which the motion to dismiss was put, the propriety of the use of such motion will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2619; Dec. Dig. § 1030.*]

2. STATUTES (§ 225½*)—CONSTRUCTION—STATUTE—PARI MATERIA.

Where one statute confers a limited jurisdiction over offenses generally and another a larger jurisdiction as to certain specified ones, the latter must ordinarily be given effect according to its terms, and the two will stand together, one as the law of the general subject and the other as the law of the particular offense.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 305; Dec. Dig. § 225½.*]

3. CRIMINAL LAW (§ 90*)—JURISDICTION—JUSTICES OF THE PEACE.

V. S. 6002 gives county courts and justices concurrent jurisdiction of offenses under the preceding sections of the chapter, relating to cruelty to animals. Section 1926 gives justices juris-

*For other cases see same topic and section NUMBER in Dec. & Am. Digt. 1907 to date, & Reporter Indexes

diction of prosecutions where the punishment is by fine not exceeding \$10, and the same authority in other causes where jurisdiction is given them, although the punishment is by fine exceeding \$10. Section 1940 authorizes a justice to cause one charged with a crime exceeding his jurisdiction to be apprehended and committed to jail or bound over for trial before the county court. Section 5048 gives justices certain concurrent jurisdiction with the county court with a limitation excluding imprisonment. *Held*, that justices and county courts have full concurrent jurisdiction of prosecutions punishable by imprisonment as well as by fines over which, by explicit language of the statutes, they have been given such jurisdiction, though section 1926 makes no reference to punishment by imprisonment, and though imprisonment is excluded by the limitation of section 5048.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 129; Dec. Dig. § 90.*]

4. CRIMINAL LAW (§ 207*)—PRELIMINARY PROCEEDINGS—HOLDING ACCUSED TO ANSWER—AUTHORITY OF THE JUSTICE OF THE PEACE.

Under V. S. 1940, authorizing a justice to cause one charged with a crime exceeding his jurisdiction to be apprehended and committed to jail or bound over for trial by the county court, a justice has no authority to hold for the action of the county court a defendant in a prosecution before him over which he has full concurrent jurisdiction with the county court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 207.*]

5. CRIMINAL LAW (§ 176*)—FORMER JEOPARDY—FAILURE OF COURT TO EXERCISE JURISDICTION.

The failure of a justice to exercise his jurisdiction in a prosecution over which he had concurrent jurisdiction with the county court did not make the inquiry before him a bar to subsequent proceedings in the county court by information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. § 176.*]

6. CRIMINAL LAW (§ 627*)—JURISDICTION—MODE OF ACQUIRING—SERVICE OF INFORMATION—WAIVER OF OBJECTIONS—APPEARANCE.

Where a defendant in a criminal prosecution appears by attorney, it is immaterial whether or not the information was served on him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1408; Dec. Dig. § 627.*]

Exceptions from Franklin County Court; Willard W. Miles, Judge.

Henry I. Stanley was informed against for cruelty to animals. From a judgment overruling defendant's motion to dismiss the information, defendant excepted. Affirmed, and cause remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

F. S. Tupper, State's Atty., for the State.
P. H. Coleman, for defendant.

MUNSON, J. This is an information under section 4993 of chapter 217 of the Vermont Statutes, entitled "Cruelty to Animals." The respondent moves to dismiss the information because of proceedings before a justice on complaint of the state's attorney for the same offense, in which the justice bound him over instead of disposing of the case, and also because there was no service

of the information. The record of the binding over on complaint is presented as a part of the files in the case by a reference in the bill of exceptions. No point was made in the county court, and none has been made here, as to the propriety of this use of a motion to dismiss; and we dispose of the case without reference to that question, following the course taken in *Squires v. Squires*, 53 Vt. 208, 38 Am. Rep. 608. See also, *State v. Intoxicating Liquors*, 44 Vt. 208, 216. Section 5002 of this chapter gives county courts and justices concurrent jurisdiction of offenses under the preceding sections of the chapter. V. S. 1926, gives justices jurisdiction to try and determine criminal prosecutions where the punishment is by fine not exceeding \$10, and the same authority in other criminal causes where jurisdiction is given them, although the punishment is by fine exceeding \$10. By V. S. 1940, a justice may cause one charged with a crime exceeding his jurisdiction to try to be apprehended and committed to jail or bound over for trial by the county court. Where one statute confers a limited jurisdiction over offenses generally, and another a larger jurisdiction as to certain specified offenses, the latter must ordinarily be given effect according to its terms. The two will stand together—one as the law of the general subject, the other as the law of the particular offense. *Bish. St. Cr. § 128.*

But the state contends that the second clause of V. S. 1926, relating to cases where jurisdiction is specially given, shows that the penalty of imprisonment was not contemplated, and would treat this as limiting the jurisdiction conferred by V. S. 5002, to the imposition of the enlarged fine. The state also refers to V. S. 5048, which gives justices certain concurrent jurisdiction with a limitation which excludes imprisonment, as indicative of a legislative policy inconsistent with any other view. The fact remains, however, that the Legislature has here given the same jurisdiction to county courts and justices by explicit language, and we see no ground upon which the court can recognize an enlarged jurisdiction as regards the fine and deny it as regards the imprisonment. So the justice had full concurrent jurisdiction, and, this being so, he had no authority to hold the respondent for the action of the county court. But it does not follow that the information filed in that court by the state's attorney is to be dismissed on his motion. The right of the state's attorney to proceed against him before the grand jury or by information did not depend upon the existence or status of a complaint. The failure of the justice to exercise his jurisdiction did not make the inquiry had before him a bar to subsequent proceedings.

The docket shows a general appearance

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by attorney. So the respondent is in court for all purposes, and the question of service is immaterial.

Judgment affirmed and cause remanded.

(81 Vt. 530)

DURKEE et al. v. CITY OF BARRE.

(Supreme Court of Vermont. Washington.

Jan. 16, 1909.)

1. CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS OF LAW—MUNICIPAL IMPROVEMENTS—ASSESSMENTS.

Laws 1906, p. 265, No. 256, providing that where a street has been paved and the city council shall by resolution decide that such improvement, when made, was for the public good and convenience and necessity of individuals, the council may order an assessment on notice, does not deprive persons liable to assessment of property without due process of law, because empowering the council to decide on the question of public good and convenience and necessity of individuals, without opportunity to such persons to be heard thereon; no assessment of property or question of special benefits being involved in such decision by the council.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 290.*]

2. MUNICIPAL CORPORATIONS (§ 455*)—STREET IMPROVEMENTS—ASSESSMENTS—NOTICE.

Laws 1906, p. 265, No. 256, which provides that the city council after deciding that a prior paving of a street, when made, was for the public good and convenience and necessity of individuals, may direct the street commissioners to assess not to exceed half of the cost of the improvement on the abutting property, "and in the same manner according to special benefits per front footage as is provided above for assessments on a petition * * * or on a resolution * * * to make any improvements of like nature," does not authorize the commissioners to make assessments without notice; the provisions referred to as specifying the method of procedure on petition or resolution expressly providing that the assessments shall be on 12 days' notice of the time and place of hearing to the parties interested.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 455.*]

3. CONSTITUTIONAL LAW (§ 137*) — IMPAIRMENT OF OBLIGATION OF CONTRACT—ASSESSMENTS FOR PUBLIC IMPROVEMENTS.

Whether Acts 1906, p. 265, No. 256, authorizing special assessments for benefits inuring to abutting property for paving already done, be a curative act, or new and original, it involves only the principles of taxation, and so does not impair the obligation of contracts, even though some of the improvement when made was unauthorized by the resolution therefor, the city having afterwards adopted it and paid therefor.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 137.*]

4. CONSTITUTIONAL LAW (§ 93*) — VESTED RIGHTS—ASSESSMENTS FOR PUBLIC IMPROVEMENTS.

Nor does such act take away vested rights.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 93.*]

5. MUNICIPAL CORPORATIONS (§ 500*) — ASSESSMENTS FOR STREET IMPROVEMENTS — PLEADING.

The bill, complaining of the assessment of abutting property for paving of a street, alleging that the commissioners found the amount of frontage specially benefited to be certain

number of feet, and therefore adjudged each foot thereof to be specially benefited \$3.4963, and assessed said lands and buildings abutting on the street on each piece of property according to frontage as follows, and thereupon assessed orator D. on a frontage of 20 feet, making her assessment \$69.73, and giving with the same particularity the frontage and assessment of each of the other orators—is, in effect, that the assessment was made on the lands of orators according to the special benefits per front footage as found by the commissioners, as is further shown by the allegation that many pieces of abutting land with buildings thereon were not assessed, as was known to the commissioners; the implication from the allegations being that said lands not assessed were not found by the commissioners to have been specially benefited by the improvements.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 500.*]

6. MUNICIPAL CORPORATIONS (§ 469*)—STREET IMPROVEMENTS—ASSESSMENTS—"FRAUD."

Equal assessments per front foot, of abutting property for special benefits received from the paving of a street, when, as known by the commissioners, some of the lots were deeper, and had more valuable improvements on them than others, and the imposition of no assessments against some lots, do not show that the assessments are necessarily unjust and unequal, and therefore fraudulent.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1114; Dec. Dig. § 469.*]

7. MUNICIPAL CORPORATIONS (§ 438*)—STREET IMPROVEMENTS—"SPECIAL BENEFITS."

Special benefits for which assessments may be made are such peculiar benefits as the owner of land receives from local improvements over and above the ordinary benefits which he receives as one of the community.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 438.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6569, 6570.]

Appeal in Chancery, Washington County; Alfred A. Hall, Chancellor.

Suit by Mary J. Durkee and others against the City of Barre. From a judgment overruling a demurrer to the bill, defendant appeals. Reversed and remanded, with directions to dismiss.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

J. Ward Carver and John W. Gordon, for appellant. Richard A. Hoar and Martin & Sargent, for appellees.

WATSON, J. The bill alleges that on the 6th day of April, 1903, without petition from the landowners abutting Main street, in the city of Barre, and without notice to, or any hearing of, or right to be heard by, the orators, a resolution was passed by the board of aldermen of that city, purporting to be an act of the city council, signed by the president of the board of aldermen and approved by the mayor, as follows: "Resolved by the city council of the city of Barre, now in session, as follows: That whereas the public good, and the convenience and necessity of individuals demand that North Main street should be paved from the National Bank

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

northerly to Summer street, therefore, the street commissioners are hereby authorized and instructed to cause as much of said portion of North Main street to be paved, as the funds at their disposal will allow." Under the provisions of the city charter this resolution was, as its purport is alleged to be, an act of the city council. See *Blanchard v. City of Barre*, 77 Vt. 420, 60 Atl. 970. Such resolution being duly passed deciding that the public good and the convenience and necessity of individuals demanded that the portion of North Main street therein specified be paved, the city council had jurisdiction to order and direct the street commissioners, as by the resolution they were ordered and directed, to cause such paving to be done. *Blanchard v. City of Barre*. It is further alleged in the bill that under this resolution that part of Main street opposite the respective lots of the orators was excavated, graded, a heavy concrete foundation laid thereupon, paved, guttered, and drained; that this work was done by the street commissioners and paid for out of the funds indicated in the resolution—that is, funds set aside by the city council for the purpose of improving, maintaining, and repairing the streets in the city—and that the orators and their predecessors in title have paid all the highway taxes assessed against them for such purpose.

An amendment to the city charter was subsequently obtained (Laws 1906, p. 269, No. 256), by which it is provided: "That in case at any time within six years prior to the passage of this act, any street, lane or alley in said city or any portion of any such street, lane or alley has been drained, graded, paved or macadamized, curbed and guttered or that any such improvements have been made and the city council shall by resolution duly passed decide that such improvements when made were for the public good and convenience and necessity of individuals; the city council may order and direct the street commissioners to assess not to exceed one-half of the total cost and expense of such improvements upon all the lands and buildings abutting upon or adjacent to the street, lane or alley or part thereof that has been improved as above specified within six years prior to the passage of this act, and in the same manner according to special benefits per front footage as is provided above for assessments upon a petition in writing presented to the city council, signed by the owner or owners of two-thirds of the frontage of any street, lane or alley in the city, or upon a resolution duly passed by the city council to make any improvements of like nature, as above specified." After the charter was thus amended, the city council passed a resolution as follows: "Resolved by the city council of the city of Barre, now in session, as follows: That whereas, a portion of North Main street extending from its beginning at the intersec-

tion of Prospect street near the Universalist Church and the city hall in said city, was in the year 1903, drained, graded, paved, curbed, guttered in a northerly direction to a point opposite the Miles Granite Building so called, situated on said Main street, and that said draining, grading, * * * was done by the city of Barre within six years, * * * now, therefore, the city council of the city of Barre hereby decides that said improvements of the draining, grading, paving, curbing and guttering, * * * when made as aforesaid in the year 1903, were for the public good, and the convenience and necessity of individuals, * * * and further that the city council does hereby order and direct the street commissioners of the said city of Barre, on due notice of the time and place of hearing, to assess not to exceed one-half of the total costs and expenses of said improvements * * * upon all the lands and buildings abutting upon and adjacent to, said portion from South Main street, according to the special benefits per front footage." It is contended, in effect, that, since the right to make the improvements of 1903 was based on the public good and the convenience and necessity of individuals, the provisions of the charter giving such right are in conflict with the due process of law clause of the fourteenth amendment to the federal Constitution, as the owners of the frontage likely to be assessed for a portion of the expense thereof for special benefits were afforded no opportunity to be heard on the question of making the improvements; that so far as the charter, as amended by the act of 1906, confers upon the city council the power to determine that such improvements already made were for the public good and the convenience and necessity of individuals when made without any provision of law giving such owners a chance to be heard thereon, it is invalid for the same reason. Do the provisions of the charter authorizing the determination of these two questions without notice to abutting landowners deprive them of due process of law? Our attention is called to the doctrine laid down in *Stearns v. City of Barre*, 73 Vt. 281, 50 Atl. 1086, 58 L. R. A. 240, 87 Am. St. Rep. 721. There the city undertook to take water rights under the power of eminent domain, and it was held that the property owners had a constitutional right to notice and hearing on the question of necessity. But the provision of the state Constitution there invoked has no application where, as in the case at hand, no property was directly taken nor sought to be so taken, and the proceedings by the municipality were wholly in the exercise of the right of taxation. *Allen v. Drew*, 44 Vt. 174. In the steps taken up to and including the finding by the city council respecting the public character and the convenience and necessity of the improvements of 1903, as authorized by the amended charter, no as-

assessment of property was involved, nor was the question of special benefits to the abutting landowners. Hence prior notice to such landowners was not required by due process of law. In *Voight v. Detroit*, 184 U. S. 115, 22 Sup. Ct. 337, 46 L. Ed. 459, it was contended that the plaintiff was deprived of his property without due process of law, because the statute made no provision for notice to property owners of a time and place of hearing upon either the question of fixing a taxing district or the question of the amount of the award to be spread thereon. The statute did provide for notice and hearing in relation to the proportion each piece of property should bear of the whole cost of the improvement. Ruling against this contention, the court, by Mr. Justice McKenna, said it would be difficult to find any provision fairer than this in purpose and which so essentially satisfied every requirement of due process of law; that the property owner was given an efficient opportunity to be heard to test the legality of the charge upon him, with which alone he was concerned, and of which he alone could complain; and that the legality of the charge necessarily involved the legality of all which preceded it and of which it was the consequence. The case of *Goodrich v. Detroit*, 184 U. S. 432, 22 Sup. Ct. 397, 46 L. Ed. 627, involved the question of taking property for a public street, that of fixing the district benefited by the opening of the street, and the validity of assessments on other property for benefits resulting thereto. It was there argued that the owners of the property liable to be assessed for the benefits were just as much interested in the question as to the necessity of making the improvements and the amount of compensation as were the owners of the land to be taken for the improvements, and that the same reason for notice existed in the one case as in the other. It was said, Mr. Justice Brown delivering the opinion of the court, that the law is too well settled to be disturbed that the interest of neighboring property owners who may thereafter be assessed for the benefits to their property accruing from opening a street is too remote and indeterminate to require notice to them of the taking of lands for such improvement, in which they have no direct interest; and hence it has been held that it is only those whose property is proposed to be taken for a public improvement that due process of law requires shall have prior notice. The same doctrine was acted upon in the recent case of *Londoner v. Denver*, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103. In that case the charter gave the city council authority to determine conclusively that the improvements were duly ordered by the board of public works after due notice and a proper petition. In the exercise of this authority, the city council in the ordinance directing the improvements to be made adjudged in

effect that a proper petition had been filed. The only question relating thereto before the court was whether the charter provision authorizing such a finding without notice to the landowners denied to them due process of law. Thereon the court, by Mr. Justice Moody, said: "We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work, did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded." *Matter of Zborowski*, 68 N. Y. 88.

It is further said in argument that the provisions of the charter purport to authorize the street commissioners to assess the abutting landowners and make the assessment a lien on their property without notice to them, and that consequently such provisions are invalid. But we think this argument is based upon a misconception of the proper construction of the charter, which in this respect reads: "The city council may order and direct the street commissioners to assess not to exceed one-half of the total cost and expense of such improvements upon all the lands and buildings abutting upon and adjacent to the street, * * * and in the same manner according to special benefits per front footage as is provided above for assessments upon a petition in writing presented to the city council signed by the owners of two-thirds of the frontage of any street, * * * or upon a resolution duly passed by the city council to make any improvements of like nature as above specified." The provisions there referred to as specifying the method of procedure on petition presented or resolution passed expressly provide that the assessments shall be made on 12 days' notice of the time and place of hearing to the parties interested. In other words, the law requires such notice to them, gives them a right to a hearing, and an opportunity to be heard. Certainly nothing more is essential to constitute due process of law. *Bartlett v. Wilson*, 59 Vt. 23, 8 Atl. 321; *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; *Fallbrook Irrig. District v. Bradley*, 184 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Londoner v. Denver*, noticed above.

Our attention is called to the fact that in this respect the act of 1906 does not purport to be curative in character, but "new and original," having intended retrospective operation, by reason whereof it is contended that obligations of contracts are impaired and vested rights taken away. But this contention is unsound. Assuming, without deciding,

that the improvements made were in excess of those called for by the resolution of April 6, 1903, such excess was but an irregularity, and the improvements as a whole could be and were subsequently adopted by the municipality in paying therefor, and by procuring, as is alleged, the act in amendment of the charter, on its application to the Legislature "for permission to assess the abutting landowners on said street in a sum not to exceed one-half of the total costs of" the improvements thus made. No principle of contract was involved between the municipality and the owners of the lands assessed; and, be the amendatory act in the respect named curative or "new and original," legislative power was legitimately exercised in authorizing special assessments for benefits inuring to abutting property from local improvements already made. In *Seattle v. Kelleher*, 195 U. S. 351, 25 Sup. Ct. 44, 49 L. Ed. 232, when the improvement (grading street) in question was ordered, by the city charter a part thereof consisting of planking was to be paid for out of the general taxes, and the other elements by special assessment, according to the assessed value of abutting property. After the work was done, a new charter was adopted, under which the assessment was to be by the front foot, and for the costs of the improvement. One ground of argument was that the planking could not be included in the assessment, since at the time the work was ordered and done the law in force did not authorize a charge for planking upon the abutting property. In disposing of this part of the case the court, by Mr. Justice Holmes, said that, if the planking was not authorized under the word "sidewalks," the city had done or adopted the work, and at the end it was there at the city's expense; that the principles of taxation are not those of contract, and that a special assessment may be levied upon an executed consideration—that is to say, for public work already done—; that the charge of planking on the general taxes was not a contract with the landowners, and did not prevent a special assessment being authorized for it later; and that, whether it be a reassessment or a new assessment, the Legislature could authorize it. Another decision showing in principle that no vested rights were involved is *Bellows v. Weeks*, 41 Vt. 590.

It is further urged that the assessment in question was made by the commissioners according to the frontage without reference to the special benefits to the different properties, and without regard to the great difference in value of the property assessed as belonging to the respective owners, and disregarding the facts that some of the abutting property was much more improved by way of buildings erected thereon than the lands of the several orators, and that some of the lots contain two or three times the square feet contained in the lands of the respective ora-

tors. Yet the bill alleges that the commissioners held meetings and found the amount of frontage specially benefited by said draining, grading, etc., to be 1,590.738 feet, and therefore adjudged each foot of said 1,590.738 feet to be especially benefited to the extent of \$3.4963, "and they did assess said lands and buildings abutting on said North Main street upon each individual piece of property according to frontage as follows: * * * Which assessment does not exceed one-half the cost of said improvement, and thereupon assessed your orator, Mary Jane Durkee, on a frontage of twenty feet, making your orator Mary Jane Durkee's assessment '\$69.73,' etc.—giving with the same particularity the frontage and assessment of each one of the other orators. We construe the allegations as in effect that the assessment was made upon the respective lands of the several orators, according to the special benefits per front footage, as found by the commissioners. That this is the force intended by the pleader is obvious from the further allegation that a great many pieces of land with buildings thereon and adjacent to said street were not assessed for the purpose of paying the costs of said improvements, and that these facts were well known to the commissioners. This allegation, taken in connection with allegations showing the assessment made, impliedly is that the several pieces of land there referred to were not found by the commissioners to have been specially benefited by the improvements. *Sowles v. Village of St. Albans*, 71 Vt. 418, 45 Atl. 1050. Unless thus benefited, no assessment could be made thereon. This appears from the case to which reference was last made, and also from *Barnes v. Dyer*, 56 Vt. 469.

After alleging somewhat more specifically regarding the differences in size, shape, and value of the abutting pieces of property, also in improvements by way of buildings thereon, and that, notwithstanding the records show that the different properties were all equally benefited so much per front foot, some of the abutting landowners were more especially benefited than others; it is alleged that the "street commissioners, in the way and manner aforesaid, have knowingly and fraudulently adjudged that all of said lots and buildings thereon abutting said street were of the same value, and were especially benefited all alike as to front footage, for that the said street commissioners then and there well knew that a great many of said lots were deeper than others of them, and were more valuable, and that the buildings and blocks of divers kinds of wood, brick, and granite on the several abutting lots were different in size, containing many more stories than others, and worth many more thousand dollars than other blocks and buildings, and that the benefits to the granite and brick blocks, worth from \$30,000 to \$40,000, were greater than the benefits to the

wooden buildings worth from \$12,000 to \$15,000." It will be observed that on the face of the bill the only allegation which can be claimed as directly charging fraud is a conclusion drawn from the facts stated respecting the uniform assessment per front foot of the several abutting properties in view of the alleged differences among them in size, depth, improvements by way of buildings, and value. The question, then, is: Do equal assessments per front foot for special benefits received, when such differences are, by the board making the assessments, known to exist, show that they must necessarily be unjust and unequal, and amount to that which a court of equity holds to be fraud? In *Beaumont v. Wilkes-Barre*, 142 Pa. 198, 21 Atl. 888, it was held that the fact that the abutting lots differ somewhat in depth and value does not of itself render the assessment void because of inequality. See, also, *Terry v. Hartford*, 39 Conn. 236. In *Witman v. Reading*, 169 Pa. 375, 32 Atl. 576, the assessment per front foot along the line of a sewer for benefits was in question. The court below held the assessment illegal, basing it mainly if not exclusively on the difference in value per front foot of the several properties. In reversing the judgment the court of last resort said properties in the same general situation are presumed to get the same general benefit from a common improvement, and as this benefit is assessed on property abutting on the line of the improvement, it is presumed to be fairly measured by the foot frontage on that line, though values may be and usually are very different, and dependent on other circumstances, such as depth of the lots, the buildings erected thereon, the use to which they are put, and their proximity to business centers; that value undoubtedly is one element to be considered but not controlling. In *Peters v. Newark*, 31 N. J. Law, 360, one objection to the assessment for benefits received by opening a new street was, that the commissioners adopted an erroneous principle in estimating all the property assessed, as if it were unimproved, whereas some of it was, in fact, improved by having valuable buildings thereon. The court said it was not satisfied that in this the commissioners were wrong; that the advantage an owner of property acquires by the opening of a new street in a city must be mainly if not wholly the advanced value of the land; that the buildings on it would cost very nearly or quite the same without as with the improvements; and that the action of the commissioners in this regard was believed to have been in accordance with the common practice in like cases, which in itself was no slight reason for supposing it to be correct. In *State v. Passaic*, 37 N. J. Law, 65, the city charter required the commissioners to assess the cost of improvements "upon the lands fronting on said im-

provement, in proportion to the benefit to be received by each lot or parcel thereof." One ground for setting aside the assessment made was "that in every case the assessment is in proportion to the number of lineal feet fronting on the avenue." The court said that on the evidence "it may well be an equal benefit to every landowner upon the line of the street," and refused to set them aside. See, also, *Dooling v. Ocean City*, 67 N. J. Law, 215, 50 Atl. 621; *People v. Mayor*, 63 N. Y. 291.

In *O'Reilley v. Kingston*, 114 N. Y. 439, 21 N. E. 1004, the action was brought to set aside and adjudge void an assessment made on lands of the plaintiff for paving a certain avenue in defendant city. Objection was made to the assessment on the ground that it was apportioned among the owners of the lots fronting upon the avenue in proportion to the frontage of each lot; some of the lots being vacant and others occupied by valuable buildings. By the city charter the land to be assessed was that bordering on or touching the street improved, and it was the duty of the assessors to determine the benefits derived by the owners of such land. It was held that in thus determining the benefits the assessors acted judicially, and that their judgment could not be reviewed unless they acted upon an erroneous principle in making the assessments; that the conclusion reached by them that the tax should be apportioned among the owners of the real estate bordering on the street according to the number of feet front owned by each individual was not necessarily an erroneous principle, if it was the assessors' judgment that each owner was benefited in that proportion, and, on the other hand, it might be the most just and equitable of any that could be adopted. In *Hoffeld v. Buffalo*, 130 N. Y. 387, 29 N. E. 747, the plaintiff sought in equity to have an assessment of his land for benefits received by way of improvements in extending a certain street adjudged void, and its collection restrained. The assessors in finally determining the amount to be assessed for the benefits upon each of the pieces of land assessed fixed the amounts without regard to the value of the buildings or other improvements on the respective parcels, for the reason that they determined that the amount of benefits was not affected by the improvements. On the plaintiff's land and some other of the lands assessed there were buildings, while other lots within the assessment were vacant. The assessors did not fail to consider the improvements on the lands, determined that the amount of benefits was not affected thereby, and assessed the several lots without regard to the buildings thereon. The assessment on the plaintiff's land was found to be disproportionately large. It was held that the assessors in thus making their estimate of the benefits did not proceed in violation of any rule of law, and that it was in harmony

with the views upon which the case of *O'Reilly v. Kingston* was determined; that, so far as appeared, the excess in the assessment on plaintiff's property might have been the result of mere error in judgment of the assessors; and that the assessment did not seem to have been illegal in the sense requisite to the support of an action for relief against it. In *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, it is said: "The expense of such work may be charged against parties specially benefited and be made a lien upon their property. All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received. Absolute equality in imposing them may not be reached. Only an approximation to it may be attainable. If no direct and insidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that to some extent inequalities may arise." See, also, *Allen v. Drew* and *Seattle v. Keller*, before cited.

Without further reference to decided cases on this question, sure it is that the statement of facts contained in the bill upon which the orators rely as showing fraud in the making of the assessment do not in law carry such an inference, and consequently they do not warrant the characterization there given to the acts of the commissioners in this behalf. Special benefits are such peculiar benefits as the owner of land receives from local improvements over and above the ordinary benefits which he receives as one of the community. The averred differences among the abutting properties were, with the other circumstances, matters for consideration by the commissioners in imposing the tax, and the fact that a uniform sum per front foot was imposed against several of the owners of frontage, and against other such owners no imposition was made, does not in itself show a failure by the commissioners to comply with the resolution from which they derived their authority to act, nor that approximate equality was not attained.

It is unnecessary to consider when or under what circumstances equity will grant relief against such assessments on the ground of fraud. Suffice it that from the facts alleged fraud will not be inferred, and we cannot say that substantial justice was not done. The question of misjoinder of the orators is also presented, but not considered. The disposition made of the other questions leaves the bill without anything upon which to stand.

Decree reversed, demurrer sustained, bill adjudged insufficient, and cause remanded, with directions that the bill be dismissed with costs to the defendant in this court. Let the costs below be there determined.

(21 Vt. 545)
LAZELLE et al. v. CITY OF BARRE
(Supreme Court of Vermont. Washington.
Jan. 16, 1909.)

CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS—MUNICIPAL IMPROVEMENTS—ASSESSMENTS.

Laws 1906, p. 265, No. 256, providing that when a city council decides that an improvement of a street already made, when made, was for the public good and convenience and necessity of individuals, it may order an assessment on notice for special benefits from the improvement, is not objectionable because leaving the jurisdictional facts to the final determination of the council; no property being taken nor assessment made or necessitated.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 871; Dec. Dig. § 290.*]

Appeal in Chancery, Washington County; Alfred A. Hall, Chancellor.

Suit by W. E. Lazelle and others against the City of Barre. From a judgment overruling a demurrer to the bill, defendant appeals. Reversed and remanded, with directions to dismiss.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

J. Ward Carver and John W. Gordon, for appellant. Hoar, Martin & Sargent, for appellees.

ROWELL, C. J. This is a bill in chancery to enjoin the enforcement of certain assessments on abutting property made in 1907 for street improvements made in 1903. The bill is demurred to. The improvements were unauthorized when made and paid for by the city, because the city council delegated the street commissioners to find the necessary jurisdictional facts instead of finding them itself, as the charter required. *Blanchard v. City of Barre*, 77 Vt. 420, 60 Atl. 970. But the bill alleges that the charter was amended by No. 256, p. 265, Acts 1906, which provided that if at any time within six years prior to the passage of the act any street, lane, or alley in the city or any portion of any such street, lane, or alley had been drained, graded, paved, or macadamized, curbed, and guttered, or any such improvements had been made, and the city council should, by resolution duly passed, decide that such improvements when made were for the public good and convenience and necessity of individuals, it might order and direct the street commissioners to assess not to exceed one-half of the total cost and expense of such improvements upon all the lands and buildings abutting upon or adjacent to the street, lane, or alley, or part thereof that had been improved as therein specified within six years prior to the passage of the act, and in the same manner according to special benefits per front footage as is therein provided for assessments on petition in writing to the council, signed by the owner or owners of two-thirds of the frontage of any street, lane, or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

alley in the city, or on a resolution duly passed by the council, to make any improvements of like nature, as therein specified.

The bill further alleges that on February 8, 1907, the council, without notice to the orators, or giving them an opportunity to be heard, acting under said amendment, which gave no right of appeal, resolved and decided that said improvements were for the public good and the convenience and necessity of individuals, and that the public good and the convenience and necessity of individuals required the same to be made as they were made; and that thereupon and thereby the council ordered and directed the street commissioners, on due notice of the time and place of hearing as provided by said amendment, to assess not to exceed one-half of the total cost and expense of said improvements upon all lands and buildings abutting upon and adjacent to that portion of the street that had been improved as stated in the resolution within six years prior to the passage of said amendment, according to the special benefit per front footage that had accrued from said improvements to the lands and buildings abutting upon and adjacent to said portion of said street; and that the street commissioners were also thereby directed to make up a statement of all assessments of said improvements, particularly describing the lands and the buildings assessed upon due notice and hearing of the abutters, and cause the same to be recorded in the city clerk's office.

The bill then goes on to allege that the street commissioners, acting under the instructions contained in said resolution of the council, on notice to the orators, held a meeting on April 8, 1907, for hearing all parties who had been notified, on the question of what portion of the expense of draining, grading, paving, curbing, and guttering the part of Main street in question should be assessed on abutting land and buildings according to special benefits and frontage, and that subsequently said commissioners found and adjudged that each foot of frontage of the lands and buildings of the orators was specially benefited to the extent of \$2.99694, and thereupon assessed said land and buildings at that sum for each front foot, and this is the assessment complained of. But the specific grounds of complaint alleged need not be stated. It is sufficient to summarize them as they are in the orators' brief, namely, that the assessment was made according to frontage without reference to the special benefits to the different properties and the amount each owner was specially benefited, and without regard to the great difference in value of the property assessed as belonging to the respective orators,

and in disregard of the fact that some of the abutting property is much more improved than the orators' by way of buildings erected thereon and some of the lots contain two or three times the square feet contained in the lands of the respective orators, and that the lands and buildings of the orators were assessed on the basis of a mathematical calculation at a uniform sum per front foot.

It is objected that said amendment is unconstitutional and void, for that it impairs the obligation of contracts and takes away vested rights, attempts to take property without due process of law, and leaves to the final determination of the city council the question of jurisdictional facts, although it makes that a judicial question. But none of these objections are tenable. In *Durkee v. City of Barre* (just decided) 71 Atl. 819, in which the validity of this amendment was called in question in these very respects, it is held that no principle of contract was involved between the city and the owners of lands assessed for improving another part of this same street, and that legislative power was legitimately exercised in authorizing special assessments for benefits inuring to abutting property from local improvements already made. As to due process of law, it is held in that case that that constitutional provision has no application, for no land was taken nor sought to be taken, but that the proceedings were wholly in the exercise of the right of taxation, and that the steps taken up to and including the finding by the city council respecting the public character and the convenience and necessity of the improvements of 1903 involved no assessment of property nor any question of special benefits to abutting landowners, and that, therefore, notice to such landowners was not required by due process of law. As to leaving the jurisdictional facts to the final determination of the city council, that may well be done, for here also no property is taken nor assessment made or necessitated. For answer to the objections to the validity of the assessment in question, we refer to the *Durkee Case*, where the subject is fully considered, and the assessment there, which was essentially like the assessment here, held valid. And for answer to the claim of fraud on the part of the street commissioners reference is also made to that case, in which the allegations of fraud were essentially the same as here, and were held insufficient to show fraud.

Pro forma decree reversed, demurrer sustained, bill adjudged insufficient, and cause remanded with mandate to dismiss the bill with costs in this court, and with or without costs below as may be there determined.

(82 Vt. 5)

CITY OF BURLINGTON v. CENTRAL VERMONT RY. CO. et al.(Supreme Court of Vermont. General Term.
Jan. 16, 1909.)**1. MUNICIPAL CORPORATIONS (§ 54*) — PURPOSE OF CREATION.**

Cities and towns are created to perform such governmental functions as the state may, for convenience, devolve upon them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 142; Dec. Dig. § 54.*]

2. WHARVES (§ 5*)—POWERS—CONSTRUCTION OF WHARVES.

The state, in the absence of constitutional inhibition, can build or aid others in building wharves for public use and in aid of trade or commerce.

[Ed. Note.—For other cases, see *Wharves*, Dec. Dig. § 5.*]

3. CONSTITUTIONAL LAW (§ 50*)—LEGISLATURE—POWERS.

The Legislature's power is practically absolute, except for constitutional limitations.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 48, 49; Dec. Dig. § 50.*]

4. MUNICIPAL CORPORATIONS (§ 70*)—CONSTRUCTION OF WHARVES.

The state can authorize cities and towns bordering on navigable waters to build, maintain, and operate public wharves.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 70.*]

5. CONSTITUTIONAL LAW (§ 68*)—POWERS OF GOVERNMENT—TAXATION.

Bill of Rights, art. 9, prohibiting the raising of a tax unless the purpose of the tax appears to the Legislature to be of more service to the community than the money would be if not collected, means that the purpose must be a public one; but what is a public purpose within that meaning is a question for the Legislature, as to which it has a large discretion, which courts can control only, if at all, in very exceptional cases.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 125-127; Dec. Dig. § 68.*]

6. MUNICIPAL CORPORATIONS (§ 274*)—STATUTES.

The provisions of Acts 1906, p. 356, No. 262, authorizing the city of Burlington to construct and maintain a public wharf and to borrow money for the purpose are valid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 729; Dec. Dig. § 274.*]

7. CONSTITUTIONAL LAW (§ 281*)—DUE PROCESS—EMINENT DOMAIN.

Acts 1906, p. 356, No. 262, authorizing the city of Burlington to condemn land for a public wharf; authorizing the city council to determine the question of public convenience and necessity of its proposed action, and to award damages for the property taken; and allowing an appeal by any person dissatisfied with the award—is not unconstitutional as denying due process of law, though defendants had to institute the proceedings for appeal at their own expense.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 880; Dec. Dig. § 281.*]

Exceptions from Chittenden County Court; Seneca Haseltine, Judge.

Condemnation proceedings by the City of Burlington against the Central Vermont Railway Company and others. From a judgment refusing to dismiss the proceedings, defendants bring exceptions. Affirmed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

J. H. Macomber, City Atty., and R. E. Brown, for plaintiff. C. W. Witters and H. H. Powers, for defendants.

ROWELL, C. J. This is an appeal from proceedings by the city of Burlington to acquire by the right of eminent domain certain lands and premises on the shore of Lake Champlain belonging to the defendants, for the purpose of a public wharf. The proceedings are under No. 262, p. 356, Acts of 1906, which purports to authorize the city, as the convenience of the inhabitants and the public good may require, to construct and maintain upon the shores of said lake within the limits of said city, or in the waters of said lake adjacent thereto, a public wharf, and to keep the approaches thereof at all times in a proper and safe condition for the landing, loading, and unloading of boats and vessels, subject to the Constitution of the United States and the laws made in pursuance thereof regulating commerce, and to the admiralty jurisdiction of the federal courts.

For the purpose aforesaid, the act further purports to authorize the city by its council, among other ways, to acquire and take by the right of eminent domain any lands necessary for such purpose, and provides that, when the council has occasion to exercise that right, it shall appoint a time for examining the premises and hearing the parties interested, and give them reasonable notice of the time when and the place where it will consider the question of public convenience and necessity of its proposed action, and the claims of the respective parties for damages; and that, if after such examination and hearing the council adjudges that the convenience of the inhabitants and the public good require a public wharf and the taking of land therefor, it shall so award, and shall also award each party owning or interested in property so taken and used the amount of damages to which it adjudges him entitled, and cause its award to be filed in the office of the city clerk, and recorded in the land records thereof.

The act further provides that any person dissatisfied with the award of the council may appeal therefrom to the county court of the county for a rehearing as to the necessity and convenience of the proposed action of the council, and the taking of land or other property therefor, and the damages awarded, and that such proceedings shall be had in said court as are provided by law for the assessment of damages for land taken for highways; but that nothing in the proceedings shall prevent the council from entering upon such lands and constructing and maintaining such wharf after its award is made, and the amount thereof tendered as provided, when the appeal is upon the question of damages only.

Before any action is taken by the council

under the act, a meeting of the voters is to be called, to see if the city will vote to procure, by construction or otherwise, and maintain, a public wharf in accordance with the act; and if it does so vote, then the council is to carry the vote into effect, and may borrow money therefor on the credit of the city.

The defendants moved to dismiss the proceedings, for that, among other things not now insisted upon, the city has no lawful right to build, maintain, and operate a public wharf, and become a public wharfinger; and for that said act is invalid and void because it purports to confer upon the city the primary right to determine the necessity for such wharf, the extent of the taking, and the damages to the landowners, and consequently is not due process of law.

First, as to the right of the city. The defendants concede that a municipality may be authorized by law to construct and operate a private wharf; that it may provide any proper facilities for loading and unloading goods, like coal for its schools, public buildings, etc., as an individual might do; but say that to enter upon any public business is foreign to the purpose for which it was created; that municipalities are created and organized for certain governmental ends that meet the demands of their inhabitants in their everyday life, but not for the purpose of undertaking a public business whereby they enter into competition with the world at large, and incur liabilities and earn revenue like individuals; that, if the city of Burlington can take on the character of a public wharfinger, it can build and operate a line of steamboats, and become a common carrier, or build and operate a railroad, or, in short, assume any public character outside the primary purpose of its charter, and wholly foreign to the purpose of its organization.

But it cannot be said that the construction of public wharves by cities and towns bordering on navigable waters is beyond, and wholly foreign to, the purposes for which they are created; for all cities and towns are created for the purpose of performing such governmental functions as the state may for convenience devolve upon them. It cannot be doubted that the state itself, in the absence of constitutional inhibition, can build, or aid others in building, wharves for public use and in aid of trade and commerce; and it is equally clear that, whatever the state can do in this behalf, it can delegate to a municipality to do, with proper limits, for the law is, by all the cases, that, except where there are constitutional limits upon the Legislature, it is practically absolute. *Cooley, Const. Llm. (6th Ed.) 200 et seq.* This doctrine has often been announced by this court, and was acted upon in *Bennington v. Park*, 50 Vt. 178, where it was held that the Legislature could authorize a town to bond itself to aid in the building of a railroad out of the state. It is there said that, if towns are empowered by the Legislature to aid in

the construction of railroads and to levy taxes for that purpose, they are acting in that behalf merely as the agents or appointees of the state, exercising a power of taxation conferred upon them by the state—a power which, in the very nature of things, could not be delegated by a depositary not having it. It is further said that if such works are so far of public benefit and advantage that the state, in answering the ends for which it exists, can provide them as instrumentalities for promoting the prosperity and the development of the resources of its people, it may commission any of its municipalities to aid them when they are thought to be of special local benefit to them; that to deny this because the license empowers the municipality to go outside the purpose of its creation would be to deny that the state may adopt proper means for promoting the prosperity of its people; that power in towns to grant aid to railroads exists by legislative grant; that power in the Legislature to grant comes from the people, who, by establishing government, have appointed a trustee to administer the trust of making available to them all the prosperity and growth that sovereign states may rightfully aspire to; and that thus the people have consented in advance that this power may be exercised.

But under article 9 of our Bill of Rights, no law can be made to raise a tax unless the purpose for which it is raised appears evident to the Legislature to be of more service to the community than the money would be if not collected. This means that the purpose for which the tax is raised must be a public purpose. But what is a public purpose within that meaning is a question for the Legislature to decide, and concerning which it has a large discretion, which the courts can control only, if at all, in very exceptional cases; and this is not such a case. *Cooley, Const. Llm. (6th Ed.) 153.* These principles are applicable and controlling here, and therefore it must be held that the act in question, if otherwise valid, confers upon the city the authority claimed.

Second, as to the validity of the act in respect of the manner of taking. The defendants claim that it is invalid in this regard, for that it makes the city a judge in its own case, and does not afford the landowners interested that due process of law guaranteed by the Constitution; that it confers upon the city the right to determine the necessity for taking the land, the extent of the taking, and the damages to be paid therefor, with no right of appeal from its action, and compels the party injured to institute original proceedings at his own expense to obtain relief; that the hearing provided for in the act is not before a disinterested tribunal, and that the landowner is never entitled thereunder to a disinterested tribunal until he institutes original proceedings; and that this burden confronts him from the first question to the final question of damages, and that therefore

the recent case of *Stearns v. City of Barre*, 78 Vt. 281, 50 Atl. 1088, 58 L. R. A. 240, 87 Am. St. Rep. 721, seems to demonstrate the invalidity of the act.

But it is incorrect to say that there is no appeal from the action of the city, for the statute expressly provides for an appeal therefrom to the county court on every question involved therein. Hence the case is entirely unlike *Stearns v. City of Barre*, for there the statute left the extent of the taking to the final determination of the officers of the city making the condemnation, and for that reason, and that alone, it was in that respect held invalid. But here the statute leaves nothing to the final determination of the officers of the city making the condemnation, but gives a right on appeal to a rehearing before an impartial tribunal on every question in which the defendants are interested, and provides an adequate way in which that right can be exercised to the fullest extent in the regular course of procedure in such cases in the courts of justice. This is the due process of law guaranteed by the Constitution. *State v. Stimpson*, 78 Vt. 124, 62 Atl. 14, 1 L. R. A. (N. S.) 1153.

And it makes no difference that the defendants had to institute original proceedings at their own expense in order to appeal, for that is but a reasonable regulation of the mode of exercising the right, and not a denial nor an infringement of the right. It is like *In re Marron*, 60 Vt. 199, 12 Atl. 523, where we held that the statute requiring a respondent who appeals from the judgment of a justice in a criminal case to procure copies of appeal at his own expense if he would enter his appeal in the county court, where alone he can have a trial by a common-law jury of 12 men, is a reasonable regulation, not infringing the constitutional right of trial by jury.

Judgment affirmed, and cause remanded.

(83 Vt. 55)

**BARRE GRANITE & QUARRY CO. v.
FRASER.**

(Supreme Court of Vermont. Washington.
Jan. 21, 1909.)

1. NOVATION (§ 3*)—NATURE AND REQUISITES.

It is essential to a complete novation that the original debtor be discharged from his liability to his original creditor by contracting a new obligation in favor of the new creditor, by the order of the original.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. § 8; Dec. Dig. § 3.*]

2. NOVATION (§ 1*)—NONNEGOTIABLE CHOSE IN ACTION—ASSIGNMENT AS SECURITY—PERSONS ENTITLED TO SUE.

A third person contracted with defendant to manufacture certain monuments at a fixed price, and such person assigned the contract to plaintiff, to secure it for stock and material furnished for their construction. Plaintiff notified defendant of the assignment, which he acknowledged by letter, with a note, stating that payment would be made to plaintiff, and also suggesting that when shipment was made, the invoice should be sent by the original contractor,

indorsed in favor of plaintiff. Plaintiff replied that if the original contractor failed to indorse the invoice in plaintiff's favor, the latter would expect defendant to remit to it just the same. After a part performance and part payment, defendant canceled the contract for monuments remaining to be done, and plaintiff assigned the contract and the amount due thereon. *Held*, that the transaction was an assignment of a nonnegotiable chose in action as security for a debt, and not a novation entitling plaintiff to sue in assumpsit for the unpaid price of a monument forwarded to defendant.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. § 1; Dec. Dig. § 1.*]

Exceptions from Washington County Court; Alfred A. Hall, Judge.

Action by the Barre Granite & Quarry Company against Alexander Fraser, on a contract by defendant for the purchase of monuments to be manufactured by plaintiff's assignor. There was a judgment for plaintiff, and defendant excepts. Reversed, and judgment rendered for defendant.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

M. M. Gordon and John W. Gordon, for plaintiff. Richard A. Hoar, for defendant.

TYLER, J. It appears by the exceptions that in August, 1905, the defendant, Fraser, a wholesale dealer in granite in Mansfield, Ohio, made a written contract with one Jordan, who did business in Barre, in this state, under the name of the Sterling Granite Company, for the manufacture of 10 monuments at \$100 apiece; that Jordan the next November assigned the contract to the plaintiff, the Barre Granite & Quarry Company, to secure it for stock and material furnished him for the construction of the monuments; that the plaintiff thereupon gave the defendant written notice of the assignment, which he acknowledged. In his letter to the plaintiff acknowledging notice he said: "Your favor of the 5th inst. is at hand inclosing two contracts one for #12766 and one for 10 stock monsts. ordered Aug. 10th, which contracts have been assigned to you by the Sterling Granite Co. We have made a note on same that payment for these jobs when shipped shall be made to you, but we have also suggested to the Sterling Granite Co., whom we are writing by this mail, that when they make shipment they send their invoice in the regular way indorsed over in your favor. If they will carry out this suggestion it will simplify matters greatly and conform to our regular system. There is one point however that is not clear and on which we wish you would advise us, and that is, is the Sterling Granite Co. going to complete these orders or will they be built elsewhere? It makes no difference to us who ships the work or whom we pay for it so long as we receive what we order. We return herewith the contracts mentioned above." To this letter the plaintiff replied that the work would be cut by the Sterling Granite Com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pany according to the original contract, unless it should become embarrassed in some way, in which case the plaintiff would probably see that the work was completed elsewhere. It further said: "Your suggestion to invoice is alright, but should the Sterling Granite Company fail to indorse the invoice over in our favor we shall expect you to make remittance to us just the same." The correspondence shows that there were delays in the execution of the contract; that two monuments were finally completed and forwarded to the defendant by the Sterling Granite Company; that one was paid for by the defendant; that the other is the one now in controversy; that the defendant canceled the contract for the remaining eight; that in March, 1906, the plaintiff assigned the contract, and the amount due upon it, to Chas. H. More & Co.

The only question is whether there was a novation of parties so that the plaintiff was entitled to maintain this action of general assumpsit in its own name against the defendant to recover the price of the monument. It is essential to a complete novation that the original debtor be discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor, by the order of the original creditor. *Heaton v. Angler*, 7 N. H. 397, 28 Am. Dec. 353, illustrates the rule. In that case H. sold a wagon to A., who sold it to C., who promised to pay A. the price that A. had promised to pay, and H. agreed to take C. as his debtor. Held, that the agreement discharged A. from the debt, and that H. might recover the price of C. *Tatlock v. Harris*, 3 D. & E. 180, is cited in the opinion, where Buller, J., said: Suppose A. owes B. £100, and B. owes C. the same sum, and the three agree among them that A. shall pay C. that sum, B.'s debt is extinguished, and C. may recover the sum of A. In *Hard v. Burton*, 62 Vt. 814, 20 Atl. 269, the court quoted from Justinian, Inst. Lib. III, tit. 19, pl. 8, where he says that novation takes place only when the contracting parties expressly disclose that their object in making the new contract is to extinguish the old contract; that otherwise the old contract remains in force. Our own cases are in accordance with this rule. In *Bacon v. Bates*, 53 Vt. 30, W. and W., by a written order directed the defendant to pay the plaintiff whatever sum might be found due them on settlement. The defendant accepted the order by writing his name across it. Held, that upon the plaintiff receiving and presenting the order to the defendant and his accepting it there was a novation, and that the plaintiff might maintain an action upon the order in his own name. *Trow v. Braley*, 56 Vt. 560; *Hard v. Burton*, supra. See, also, *Studebaker Bros. Mfg. Co. v. Endom*, 51 La. Ann. 1263, 26 South. 90, 72 Am. St. Rep. 489, and notes. Is the present case within the rule? Clear-

ly it is not. The transaction was in law an assignment of a nonnegotiable chose in action as collateral security for the payment of a debt, and was not a novation.

The trial court erred in holding that the plaintiff could maintain the action in its name.

Judgment reversed, and judgment for the defendant to recover his costs.

(81 Vt. 523)

FINDLAY v. LONGE.

(Supreme Court of Vermont. Washington.
Jan. 14, 1909.)

1. MORTGAGES (§ 201*)—DUTY OF MORTGAGEE—FORECLOSURE—INSURANCE.

A mortgagee owes no duty to the mortgagor to secure an insurance company's consent to a foreclosure in order that a policy, providing that foreclosure proceedings without consent of the insurance company should avoid it, should not have such effect.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 201.*]

2. JUSTICES OF THE PEACE (§ 128*)—JUDGMENT—EQUITABLE RELIEF.

A court of equity will not interfere with the final judgment of a justice, nor with the results which followed the execution and sale thereunder, where the judgment debtor with knowledge of the precise situation took no steps to secure relief in those proceedings.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 405; Dec. Dig. § 128.*]

3. MORTGAGES (§ 497*)—FORECLOSURE DECREE—RES JUDICATA.

A mortgage foreclosure decree was res judicata against claims which the mortgagor might have set up against the mortgagee in such proceedings to reduce the amount of the mortgagee's claim, but failed to do.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1473; Dec. Dig. § 497.*]

4. MORTGAGES (§ 608*)—PAYMENT AFTER EXPIRATION OF TIME FOR REDEMPTION.

Receiving the whole or part of a mortgage debt, directly or indirectly, after the time for redemption has expired is of itself sufficient to let the mortgagor in to redeem.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 608.*]

5. MORTGAGES (§ 616*)—FORECLOSURE—BILL TO REDEEM.

Where, in a suit to redeem from mortgage foreclosure, the bill did not allege that certain pasturing on the land by the mortgagee, and the harvesting of certain hay, rendered complainant unable to meet the payment due, under the decree, on April 25, 1902, nor that the mortgagee was unwilling to have the value of the pasturage and hay applied to such payment, nor that the harvesting was tortiously done, but merely that complainant had sued the mortgagee in trover on account of the harvesting, the bill was insufficient.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1833; Dec. Dig. § 616.*]

Appeal from Chancery Court, Washington County; John H. Watson, Chancellor.

Action by Alexander Findlay against Lewis Longe. From a chancery decree sustaining a demurrer to the bill and dismissing the same, complainant appeals. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, and HASELTON, JJ.

Edward H. Deavitt, for appellant. J. P. Lamson, for appellee.

HASELTON, J. This cause was heard upon demurrer to the bill. On hearing the demurrer was sustained, the bill was adjudged insufficient, and the same was dismissed. The orator appealed.

By the allegations of the bill it is made to appear that April 25, 1898, for the sum of \$500, the defendant sold and conveyed to the orator a farm in Marshfield, on which were three barns and no other buildings; that no cash payment was made, but that full purchase price was embraced in a note given by the orator to the defendant, and secured by a mortgage on the farm; that by the terms of the note the orator was to pay the first year's interest at the end of one year, the second year's interest at the end of two years, and that at the end of the third year he was to make his first payment on the principal of the note, such payment being \$150; that the interest payment of \$30, due at the end of one year—that is April 25, 1899—was not paid; that thereupon, May 10, 1899, the defendant brought a petition for foreclosure, which was entered at the September term, 1899, of the court of chancery; that the orator appeared in said foreclosure suit by C. E. Woodard, Jr., solicitor; that the bill of foreclosure was taken as confessed, and that a decree of foreclosure was duly entered and enrolled; that by the terms of the decree the same was to become absolute unless the orator made a payment of interest and costs on or before September 7, 1900, another payment of interest on or before April 25, 1901, a payment which included a substantial part of the principal debt on or before April 25, 1902, and other payments thereafter which it is immaterial to specify; that September 6, 1900, the orator paid \$58.01, the amount of the first payment under the decree, and that April 22, 1901, the orator paid \$32.12, the amount of the second payment under the decree; that the third payment under the decree was to be \$180, with some interest, which payment was required to be made by April 25, 1902; that before the decree became absolute by the nonpayment of the installment last mentioned, this bill was brought returnable at the September term, 1902, of the court of chancery. There was in the deed given by the defendant to the orator a provision that the latter should pay the taxes for the then current year, 1898. The bill avers that the defendant fraudulently procured the town clerk of Marshfield to insert this provision; that the provision was contrary to the agreement of the parties, and that the orator was, for a long time after the transaction of the sale and mortgage, ignorant of the fact that there was such a provision in the deed. The bill does not state for how long a time the orator was so ignorant. It appears from the bill that the taxes for the year 1898 were something less than \$11, that the defendant paid these, and

that on March 3, 1899, he brought a suit against the orator for the amount of such taxes making the suit returnable before a justice of the peace March 22, 1899. The bill alleges that on this writ there was attached, by the defendant's direction, personal property of the value of more than \$200, being, as the defendant knew, all the personal property of the orator. The bill sets out that the parties appeared before the justice on the return day; that the case was continued to March 28, 1899, at which time the justice rendered judgment against the orator for \$10.65 damages and \$6.43 costs; that the taking out of execution was delayed, and that the costs of proceedings thereunder were purposely and willfully enhanced by the direction of the defendant, so that the costs of sale on the execution amounted to \$34; that the proceedings in respect to the justice suit referred to were instituted and carried on as they were; that an excessive attachment was made, and that costs were enhanced with the design and effect of preventing the orator from making his first interest payment of \$30, which was due April 25, 1899, and that on May 10th following the defendant brought his petition for foreclosure, and had the same served on the orator.

It appears that thereafter, before the term of court to which the foreclosure suit was returnable, the barns referred to, and the produce therein, all of which was insured for \$475, were entirely destroyed by fire; that a provision of the insurance policy provided that it should be void if foreclosure proceedings were commenced without the written consent thereto of the company indorsed on the policy; that this foreclosure was commenced without such indorsement of consent, and without such consent, and that so, as the orator has since been advised, there was no insurance money to go to anybody. See *Findlay v. Insurance Co.*, 74 Vt. 211, 52 Atl. 429, 93 Am. St. Rep. 885, a case brought upon the policy in question, and referred to in the orator's bill. The bill avers that the commencement by the defendant of foreclosure proceedings without the consent of the insurance company was a fraud upon the orator.

Reference has now been made to the claimed grounds of relief existing when the decree of foreclosure was passed. The specific prayers of the bill relevant to the recitals thus far made are that the foreclosure decree of 1899 be vacated and set aside; that the orator's deed, taken April 25, 1898, be reformed, so that the provision that the orator pay the taxes for 1898 be excluded; that the defendant be required to account for the property sold under execution, on the judgment obtained against the orator for the amount of said taxes and costs; and that the amount of the mortgage debt be reduced \$475, with some interest, because of the action of defendant in commencing foreclosure proceedings as he did. The bill gives no reason why the claims so far referred to were

not made in the foreclosure proceedings, except to say that through, "some misunderstanding" between the orator and his solicitor, no answer was filed and the bill confessed. No hint is given in the bill of the nature of the "misunderstanding," and the allegation with reference thereto goes for nothing as a ground for opening the decree and considering defenses available then, if ever. Indeed the brief of the orator expressly says that the statement as to the "misunderstanding" is not relied on as a basis for opening the decree; but, if on any ground the decree could be opened, the matters considered would not avail the orator. A mortgagee owes no duty to a mortgagor in respect to securing an insurance company's consent to a foreclosure. As to the prayer for a reformation of the orator's deed by striking out the clause imposing upon the orator the obligation to pay the taxes for 1898, and as to the prayer dependent thereon, it is enough to say that a court of equity will not in the circumstances interfere with the final judgment of the justice, nor with the results which followed in the way of execution and sale thereunder. The orator does not claim that throughout those proceedings he was ignorant of the precise situation, and he must be content. *St. Johnsbury v. Bagley*, 48 Vt. 75; *Brown v. Lamphear*, 35 Vt. 252.

The bill avers that the orator has been in continuous possession of the farm from the time of its purchase by him to the bringing of this bill, but that during the year 1900 the defendant pastured certain cattle and horses on the farm, and that no account has been had with reference thereto. There is nothing in the bill inconsistent with the supposition that the defendant merely hired the orator to pasture the cattle and horses, and no claim that the defendant has not been at all times ready to account. The bill alleges that in July, 1900, the defendant entered upon the premises and cut and harvested hay which the orator had contracted to sell standing for \$100, intending to apply said sum on the mortgage debt, that so the defendant deprived the orator of the benefit accruing under said contract, and that the orator has commenced an action of trespass for his damages sustained by the action of the defendant in cutting and harvesting the hay as aforesaid. The allegations as to the cutting of hay, like those to the pasturing of stock, are extremely vague. Whatever was done, was done before the decree expired.

The first payment under the decree was to be made on or before September 7, 1900, and consisted of costs and interest amounting to \$58.01. This the orator paid on the next to the last day allowed for payment. The second installment under the decree consisted of interest, with interest thereon, and was to be paid on or before April 25, 1901. This was paid three days before the expiration of the

time limited, and amounted to \$80.12. The receiving of the whole or part of the mortgage debt, either directly or indirectly, after the time for redemption has expired is of itself sufficient to let in the mortgagor to redeem. *Converse v. Cook*, 8 Vt. 164, 169; *Smalley v. Hickok*, 12 Vt. 153, 163; *Gilson v. Whitney*, 51 Vt. 552. But what was done here, whatever it may have been, with regard to pasturing and harvesting was done while the decree was running, and the effect to be given to those things must be determined by equitable considerations of a general character. *Pierson v. Claves*, 15 Vt. 93; *Hyde v. Hyde*, 50 Vt. 301. The bill does not allege that the pasturing and harvesting rendered the orator unable to meet the payment of \$180 to be made by April 25, 1902, nor that the defendant was unwilling to have their value applied to such payment. The bill does not allege that the harvesting was tortiously done, but merely alleges that the orator has seen fit to sue the defendant in trover on account of the harvesting. In addition to the prayers of the bill already referred to the orator prays for a general accounting, and for permission to redeem on payment by him of such a sum, if any, as on the accounting may be found to remain due on the mortgage in question, and accompanies this prayer with an offer to pay such sum. General relief such as may be appropriate to the case is asked. From the bill it appears that the orator has been in possession of the farm in question about four years; that he has paid nothing on the purchase price; that the defendant, under the decree of foreclosure, gets back the land which he sold, without the buildings which were thereon at the time of the sale, and that no technical rule or general principle of equity entitles the orator to any relief under his bill without reference to the way in which it is framed or to the character of the relief sought.

Decree affirmed and cause remanded.

(82 Vt. 64)

TAFT v. TAFT.

(Supreme Court of Vermont. General Term Feb. 3, 1909.)

1. NEW TRIAL (§ 147*)—PETITION—REQUISITES—PETITIONER'S AFFIDAVIT—AFFIDAVIT OF ATTORNEY.

A petition for a new trial for surprise and newly discovered evidence must be accompanied by the affidavit of the petitioner as required by the Supreme Court rule, and must also, in general, be supported by the affidavit of petitioner's attorney.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 303-305; Dec. Dig. § 147.*]

2. NEW TRIAL (§ 152*)—APPLICATION—MOTION TO DISMISS—AMENDMENT.

A motion to dismiss a petition for a new trial because not accompanied by petitioner's affidavit nor supported by that of his attorney is in the nature of a plea in abatement, after

the filing of which petitioner is not entitled to leave to amend the petition.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 152.*]

Action between Russell W. Taft and Winona B. Taft. On motion to dismiss a petition for a new trial. Motion granted.

V. A. Bullard, for plaintiff. C. G. Austin & Sons, for defendant.

ROWELL, C. J. This is a petition for a new trial on the ground of surprise and newly discovered evidence. The petition moves to dismiss, for that, among other things, the petition is not accompanied with the affidavit of the petitioner, nor supported by the affidavit of his attorney. That the petition must be accompanied with the affidavit of the petitioner is required by a standing rule of this court, and said in *Bradish v. State*, 35 Vt. 452, and that it must, as a general rule, be supported by the affidavit of the petitioner's attorney, is held in *Reynolds v. Hassam*, 80 Vt. 501, 68 Atl. 645, and nothing appears to take the case out of that rule.

The petitioner moves for leave to amend; but the motion on the ground stated is in the nature of a plea in abatement, and goes only to impeach the petition as a process for the purpose of abating it, and not to its sufficiency as a pleading. *Alexander v. School District*, 62 Vt. 273, 19 Atl. 995; *Marsh v. Graves*, 68 Vt. 400, 35 Atl. 335. It is not, therefore, amendable, for statutory requisites in respect of the process itself cannot be supplied in that way. This is the result of the cases in this state as said in *Stevens v. Hewitt*, 30 Vt. 262, referring to *Bowman v. Stowell*, 21 Vt. 309, where the general power of the court to allow amendments was pretty fully considered, and that result reached. This rule is well exemplified by the cases. Thus in *Pollard v. Wilder*, 17 Vt. 48, which was debt for a penalty, the magistrate signing the writ minuted thereon the time when it was exhibited to him instead of the time when it was signed by him, as the statute requir-

ed, and the writ was held defective on motion to dismiss, and the defect not amendable; but the motion was overruled, nevertheless, because, being in the nature of a plea in abatement, the objection was waived by not being seasonably taken.

So in *State v. Perkins*, 58 Vt. 722, 5 Atl. 894, it was held that the want of such a minute, though no part of the complaint itself, was a substantive defect, fatal to the proceedings, it being seasonably taken advantage of, and that the court was bound to dismiss the complaint. *Brighton v. Kilsey*, 77 Vt. 258, 59 Atl. 833, which was case for a penalty, is to the same effect. So a writ requiring a recognizance is abatable without one. *Sisco v. Hurlburt*, 17 Vt. 118. As the statute requires the judges of the Supreme Court to make all necessary rules for orderly practice therein, the rule above mentioned, made pursuant thereto, has in a proper sense the force of law; and, although the court can alter or abrogate it, yet, while it stands, it is binding, and cannot properly be dispensed with to suit the circumstances of a particular case, but must be applied to all cases that come within it. This is expressly so held in *Thompson v. Hatch*, 3 Pick. (Mass.) 512, and in *Rio Grande Co. v. Gildersleeve*, 174 U. S. 608, 19 Sup. Ct. 761, 43 L. Ed. 1103. In *Nye v. Daniels*, 75 Vt. 81, 53 Atl. 150, it was held that a postmaster could not be compelled to testify whether a certain registered letter was sent through his office, because a postal regulation then in force forbade him to furnish the information, which regulation, it was held, had the force of law, as it was made pursuant to a statute authorizing the head of each department to prescribe regulations for the government of his department and the conduct of its officers and clerks, etc. The same thing is held in *State v. Peet*, 80 Vt. 449, 68 Atl. 661, 14 L. R. A. (N. S.) 677, in respect of a regulation made by the Secretary of Agriculture under the authority of an act of Congress.

Motion sustained, and petition dismissed, with costs.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(83 Vt. 59)

DEMERITT v. PARKER.(Supreme Court of Vermont. Washington.
Jan. 29, 1909.)**1. ADVERSE POSSESSION (§ 12*)—ACTS CONSTITUTING—CLAIM OF RIGHT.**

Acts on land, such as cutting trees for rails, for firewood and the like, do not constitute adverse possession of such land where the acts are not done on the land as owner or under claim of right.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 387-389; Dec. Dig. § 12.*]

2. REFERENCE (§ 99*)—REPORT—FINDINGS—CONSTRUCTION.

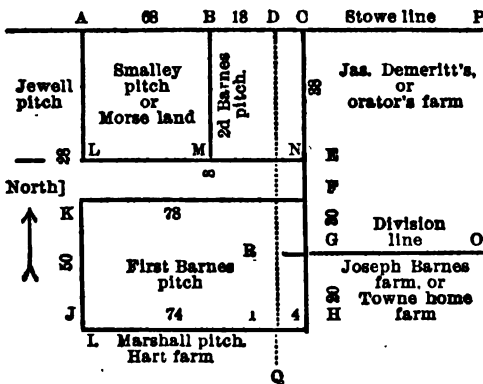
A finding of a referee in a suit to enjoin trespass on land that complainant had no title to the disputed land, and did not acquire the same by adverse possession, though in terms applicable to the whole land in dispute, must be construed not to apply to a strip of land of which the other findings showed that complainant did have adverse possession.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 99.*]

Appeal in Chancery, Washington County; John W. Rowell, Chancellor.

Bill by James Demeritt against John A. Parker to enjoin trespass on land. From a decree dismissing the bill, orator appeals. Reversed, and cause remanded, with directions.

The following is the sketch referred to in the opinion (the figures indicate rods):



The land in question consists of the two "Barnes Pitches" indicated on the above sketch, and the strip eight rods wide, bounded on the north by the "Smalley Pitch" and on the south by the "First Barnes Pitch." The defendant claimed title to this land under a quitclaim deed thereof dated February 21, 1900, from Martha A. Towne, who is the daughter of Joseph Barnes, and who then occupied the whole "Joseph Barnes farm."

Argued before TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

E. F. Palmer and J. H. Senter, for appellant. Geo. W. Wing, for appellee.

HASELTON, J. This was a bill in chancery brought by the orator to enjoin the de-

fendant from committing trespasses upon a tract of woodland of about 32 acres in area situated in Waterbury. The orator claimed to own and have possession of the land in question as a part of the orator's home farm of which the orator was, and since 1850 had been, the owner and possessor. The case was heard on pleadings and report of a special master with supplemental reports; and the orator's exceptions thereto. On hearing the exceptions were overruled, and the bill was dismissed, with costs. The orator appealed.

The orator bought his home farm above referred to of William Lampher in 1850 when it was conveyed to him. The master finds that at the time of the conveyance the land in dispute was "measured and appraised by two persons selected by the orator and Lampher," and that the orator paid Lampher therefor, and that "the orator supposed that Lampher's deed conveyed to him" the land in dispute. However, Lampher's deed did not cover the land in dispute, and the orator showed no title by deed to the land in question. The finding that the orator bought and paid for the land in dispute stands as a part of the report, although in closing his second supplementary report the master says: "The more the evidence is considered the more I am inclined to think that, if I have made a mistake in any of my findings, it is in the finding that the orator ever bought, measured, and paid for the disputed land." The orator had at several times done acts upon the disputed land. He had cut trees for rails, for firewood, for building material, and for pump logs, and he or his grantor had done other acts upon the disputed land which in view of the findings need not be enumerated, for the master finds in his supplemental reports that the orator did not do these acts on the disputed land as owner or under a claim of right. The orator, then, had no title by adverse possession to any land to which the findings last referred to are applicable. The findings are in terms applicable to all the land in dispute, but a certain four-rod strip of land must, we think, be treated as excepted by the master from the operation of these findings in view of other findings in the report hereinafter referred to. A part of the land in dispute abuts upon the west line of the Demeritt farm, and the master finds that this original west line is indicated by marked trees; but he finds that on the south side of the Demeritt farm, and between that and the farm of one Barnes, a predecessor in title of the defendant, there was a fence which ran west about four rods beyond the line indicated by the marked trees to a point designated as "R" on a sketch referred to by the master (which sketch the reporter is requested to make a part of the statement of the case), and the master finds that for 50 years at least the owners of the Barnes

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

farm have had an open, undisputed, and exclusive use and possession of the land west of a line drawn through the point "R," and substantially at a right angle to the division fence and parallel with the marked tree line, and that during the same time Demeritt had a like open, undisputed, and exclusive use and possession of the land east of the line so drawn through the point designated as "R."

In 1852 Demeritt and Barnes executed a fence agreement as to the division of the fence referred to, and proceeded to divide the fence in accordance therewith. By this agreement, and by what was done under it, the point "R" was recognized as the southwest corner of Demeritt's land. The point "R" was generally spoken of by the witnesses as the southwest corner of the orator's farm. The line above referred to running through "R" at right angles to the fence is called by the master the "occupation line." Indeed, in one part of the report the master designates the point "R" as the southwest corner of the orator's land, and the report shows facts which afford ample basis for the master's designation of "R" as such southwest corner. In 1827 or shortly thereafter Barnes built a fence running southwesterly from the point "R" to a ledge. This was not a divisional fence, and its course during its existence was not always the same, but it was maintained from the time it was built down to about 1870 with "R" as its starting point, and the observance of this starting point was a recognition of the significance of the point "R." So far west as that point, Demeritt and his grantor on the one hand, and Barnes on the other, appear from the report to have understood that their lands ran together. The "occupation line" running north from the point "R" was never marked by any fence, but no dispute as to the land arose until shortly after the defendant, in 1900, took a quitclaim deed of the lands in dispute. At one time two ash trees stood near the "occupation line," one a little west of the other. About 11 years before the filing of the master's report, Demeritt sold the easterly tree, and about the same time Mrs. Towne, a grantor of the defendant, sold the westerly tree. The master finds that in 1852 Demeritt did not claim to own west of the "occupation line," and that Barnes had the right to understand that he did not. From the circumstances of the sale of the ash tree by Demeritt the master finds that "the orator did not on this occasion claim" to own west of said "occupation line," and that he understood that Mrs. Towne, the successor of Joseph Barnes, claimed to own west of this line. Most of the reasons given by the master for the general finding that the orator did not do as owner the acts which he did upon the disputed land indicate that such finding applies only to the land west of the "oc-

cupation line." The master is satisfied that, among other things, "the orator would never have agreed to divide the whole fence between him and Barnes, and only divide to the point marked 'R' on the plan; * * * that he would never have signed and executed the divisional agreement, in which he declares that his southwest corner was at 'R'; * * * that his own brother and sister-in-law would not have understood, as they testified, that the orator's land ran no further west than the divisional fence on the line marked 'R O' on the plan of the original report; that one of his principal witnesses, Mr. Smith, would not have understood the same thing * * * if the orator had been claiming to own the land and to be doing the acts as owner."

What acts are referred to above? Very clearly acts on the land further west than the "occupation line" running north through the point marked "R." With regard to the acts of the orator done upon the disputed land, speaking generally, the master states that it is rather difficult to determine whether the orator did the acts by permission or as a trespasser or by way of a mixed occupation with Barnes and his successor, and the master does not undertake to determine how this was. Clearly the above statement of the master was not meant to apply to the strip of land of which, as the master finds, the orator had had for half a century the exclusive possession and use. In view of the findings that the orator bought and paid for the disputed land, of other findings already referred to, and of all the findings of the master, it is considered that the report contains, in effect, a finding that the orator occupied as owner and under a claim of right that portion of the land paid for by him of which for 50 years he had the "open, undisputed, and exclusive use and possession." The southwest corner of the orator's land is, then, the west end of the division fence referred to, the point designated by the master as "R," and his west line is not the marked tree line, but a line parallel to it about four rods west thereof, running northerly from the west end of the division fence referred to.

As to the rest, the greater part of the disputed land, the report shows neither title nor color of title nor possession nor right of possession in the orator. It is therefore unnecessary in this proceeding to consider the title of the defendant thereto. The orator excepted to some findings of the master and to his failure to find in one respect, but with the report construed as it is in this opinion these exceptions are considered to be either groundless or immaterial.

Decree reversed and cause remanded. Let a decree be rendered consonant with the views herein expressed.

(83 Vt. 68)

CROSBY v. BOUCHARD.(Supreme Court of Vermont. Franklin.
Feb. 3, 1909.)**1. FRAUDS, STATUTE OF (§ 113*)—SALE OF PERSONALTY—MEMORANDUM—SUFFICIENCY.**

Though, in a bargain for the sale of hay, it was not necessary to stipulate the time of delivery, yet, having been stipulated therein, it became a material part thereof, and, where it was not stated with substantial accuracy in the memorandum of the bargain, the memorandum was without effect.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 239; Dec. Dig. § 113.*]

2. PLEADING (§ 85*)—DECLARATION—SURPLUSAGE.

Though, in special assumpsit, it is not necessary that the declaration set out the memorandum of the bargain, yet, it having been brought forward therein, it thereby becomes a material part thereof, and cannot be rejected as surplusage, where it shows that the declaration is bad in substance.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 76; Dec. Dig. § 35.*]

3. PLEADING (§ 34*)—CONSTRUCTION AGAINST PLEADER.

Plaintiff, in special assumpsit, having set out the memorandum of the contract of sale of hay in his declaration and relied upon it alone to validate the contract, it will not be taken that any other requirement of the statute of frauds was complied with, nor that the contract itself was in writing; the presumption being that plaintiff has stated his case as favorably to himself as possible.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 66; Dec. Dig. § 34.*]

Exceptions from Franklin County Court.

Special assumpsit by A. G. Crosby against Arthur Bouchard. Judgment for plaintiff, and defendant excepts. Reversed and remanded.

Argued before ROWELL, C. J., MUNSON, WATSON, and HASELTON, JJ.

D. W. Steele, for plaintiff. E. A. Ayers, for defendant.

ROWELL, C. J. This is special assumpsit for not delivering hay bargained and sold for more than \$40. It does not appear whether the bargain itself, as distinguished from the memorandum of it, was in writing or not. The declaration alleges that the defendant agreed to press and bale the hay, and deliver it on the cars at Highgate "at any time the plaintiff was ready to take the same and should request after the same was pressed and baled ready to be drawn to the cars, for which the defendant was to receive \$10.50 per ton, with payment to be made at the place of delivery." The declaration then sets out the tenor of a memorandum of the bargain, made in writing and signed by the defendant, by which it appears that the hay was "to be taken when ready to draw to cars by Adams and Bouchard." The sufficiency of the declaration is challenged by demurrer both as to substance and form. As to substance, it is objected that

the memorandum therein set out falsifies the contract alleged, in that the time of delivery stated in the memorandum is materially different from the time of delivery stipulated in the contract alleged, the latter making the time of delivery dependent upon the plaintiff's readiness and request after the hay was pressed and baled ready to be drawn, while the former says nothing about the plaintiff's readiness and request, but makes the time of delivery dependent upon the readiness of the hay to be drawn, regardless of the plaintiff's readiness and request. This is a material difference; and, although it was not necessary to stipulate the time of delivery in the contract as without it the law would imply a reasonable time, yet, having been stipulated therein, it became a material part thereof, and therefore should have been stated with substantial accuracy in the memorandum, and, as it was not, the memorandum has no effect as a memorandum of the contract alleged. *Browne, Frauds* (4th Ed.) § 371a. And, although it was not necessary to say anything about the memorandum in the declaration, yet, it having been brought forward therein as it was, it thereby became a material part thereof, and cannot be rejected as surplusage, for it shows that the declaration is bad in substance, inasmuch as no contract for the sale of goods, wares, or merchandise for the price of \$40 or more is valid, though proved by oral testimony without objection, unless the requirements of the statute are complied with. *Strong v. Dodds*, 47 Vt. 348. And the plaintiff having seen fit to bring forward the memorandum in his declaration, and therein to rely upon it alone to validate the contract declared upon, it will not be taken that any other requirement of the statute was complied with, nor that the contract itself was in writing, for nothing will be assumed in favor of the plaintiff; the presumption being that he has stated his case as favorably to himself as possible.

Judgment reversed, demurrer sustained, declaration adjudged insufficient in substance, and cause remanded.

(83 Vt. 40)

HOWE v. HOWARD.(Supreme Court of Vermont. Windsor. Jan.
18, 1909.)**MONEY RECEIVED (§ 18*)—EVIDENCE.**

Where defendant received the proceeds of the sale of his land and of his and plaintiff's personalty, and it appeared that, while the value of each item of property was agreed on, the price paid was less than the aggregate of the items, and defendant showed that the price at which the property was sold was not the price with which plaintiff was to be credited, defendant, in an action by plaintiff for the share of the proceeds, was entitled to show the value of his personal property included in the sale.

[Ed. Note.—For other cases, see *Money Received*, Dec. Dig. § 18.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Exceptions from Windsor County Court; George M. Powers, Judge.

Action by Rufus Howe against Silas W. Howard. Defendant pleaded non assumpsit, accord and satisfaction, payment, and declaration in offset. There was a verdict and judgment for plaintiff, and defendant excepts. Reversed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Wallace Batchelder and John G. Sargent, for plaintiff. March M. Wilson, for defendant.

MUNSON, J. While plaintiff was in possession of defendant's farm under a contract of purchase, and owned the personal property on it, the two entered into an arrangement under which the defendant sold the farm and some of the personal property to a third party, and received the entire proceeds of the sale. In making this sale the defendant put in certain personal property of his own, and evidence of the value of this property was excluded as immaterial. The correctness of this ruling is the only question presented.

The exceptions state that the evidence of the plaintiff tended to show that the personal property belonging to the plaintiff was sold at prices agreed upon by the plaintiff, the defendant, and the purchaser, and that the evidence of the defendant tended to show that the price at which this property was sold was not the price with which the plaintiff was to be credited. The exceptions also state that defendant's evidence tended to show that the personal property he contributed to the sale was to be taken into account in his settlement with the plaintiff, and it appears that he claimed on the trial that the value of this property was to be considered in determining his interest in the proceeds of the sale. The exceptions contain, in addition to the statement, the entire evidence relating to the terms on which the plaintiff's personal property was sold. It appears from this that there was evidence tending to show that the farm and the personal property that went with it, both of the plaintiff and the defendant, were sold for a lump sum; that, while each item of property was called of a certain value, the purchase price of the whole was less than the amount of the sums thus agreed upon.

It is argued for the plaintiff that the statements contained in the exceptions, when construed in the light of the testimony submitted in connection with them, fail to show that the offered testimony was material; but we are unable to adopt this view. It seems clear that the defendant's evidence tended to show that he was entitled to be allowed for the personal property he put into the sale; that the amount of the allowance was not deter-

mined by any agreement; and that a valuation of the property was essential as the basis of an adjustment on the defendant's theory.

Judgment reversed and cause remanded.

(82 Vt. 42)

PLACE v. GRAND TRUNK RY. CO. IN CANADA.

(Supreme Court of Vermont. Essex. Jan. 21, 1909.)

1. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—ADMISSIBILITY OF EVIDENCE—CAUSE OF ACCIDENT.

Where a servant claimed that the engine by which he was injured ran in on a switch because of a bent switch point which the evidence tended to show might have diverted the engine to that track, though the switch was set for another track, testimony was admissible that a day or two after the accident a bent switch point was taken from such switch or from another switch, though the witness could not state from which switch the point was taken; no accident having occurred at the other switch.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 918; Dec. Dig. § 270.*]

2. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—ADMISSIBILITY OF EVIDENCE—CONDITIONS AFTER INJURY.

The admission of the evidence did not violate the rule that evidence of repairs after the accident is inadmissible to show negligence; its purpose here being to show the cause of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 918; Dec. Dig. § 270.*]

3. MASTER AND SERVANT (§ 285*)—INJURIES—ACTIONS—JURY QUESTION—CAUSE OF ACCIDENT.

In a servant's action for injuries sustained by an engine running in on a track other than that for which the switch was usually set and striking cars between which plaintiff was working, whether the engine ran in on the wrong switch because the switch was set for that track or because the switch point was bent held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.*]

4. NEGLIGENCE (§ 181*)—ADMISSIBILITY OF EVIDENCE—REPAIRS AFTER ACCIDENT.

As a general rule, evidence of repairs made after the accident is not admissible to show antecedent negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 255, 256; Dec. Dig. § 131.*]

5. MASTER AND SERVANT (§ 177*)—FELLOW SERVANTS—INCOMPETENCY OF FELLOW SERVANT—MASTER'S NEGLIGENCE.

A servant cannot recover for injuries caused by the negligence of a fellow servant, unless the latter was incompetent, and the master knew, or should have known, that fact.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 852; Dec. Dig. § 177.*]

6. MASTER AND SERVANT (§ 287*)—INJURIES TO SERVANT—COMPETENCY OF FELLOW SERVANT—QUESTION FOR JURY.

In a servant's action for injuries caused by an engine running in on the wrong switch and striking cars while plaintiff was between them, where plaintiff claimed the engineer would have discovered he was on the wrong track if he had not been deaf, whether the engineer was incom-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

petent, and, if so, whether the company knew or should have known it, *held* for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 287.*]

7. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—ADMISSIBILITY OF EVIDENCE.

In a servant's action for injuries caused by an engine running in on the wrong switch, and striking cars between which plaintiff was working, where defendant claimed that the engine ran in on that track because the switch had been changed, plaintiff could prove that the switch was not locked at the time, and that the yard switches were usually locked and that one had been until within a year, as tending to show negligence in not locking the switch.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 925; Dec. Dig. § 270.*]

8. TRIAL (§ 178*)—DIRECTION OF VERDICT—HEARING.

On motion for the direction of a verdict in a servant's action on the ground of contributory negligence, the evidence should be considered in the light most favorable to plaintiff, and, if there was evidence tending to show that he was exercising the care of a prudent man under the circumstances, the motion could not be granted.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 401-403; Dec. Dig. § 178.*]

9. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

If the evidence to show contributory negligence justifies opposing inferences, the question is for the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 277; Dec. Dig. § 136.*]

10. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In a servant's action for injuries sustained by a switch engine striking cars while plaintiff was climbing through them, whether plaintiff ought to have known of the danger and was negligent in climbing between the cars under the circumstances *Acid* a jury question.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 289.*]

11. MASTER AND SERVANT (§ 296*)—INJURIES TO SERVANT—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER.

In a servant's action for injuries sustained by an engine striking cars while plaintiff was climbing between them, an instruction that, to find for plaintiff, the jury must find the existence of one of the acts of negligence charged, and that plaintiff was not himself negligent, and did not know the danger, was defective for not calling the jury's attention to plaintiff's situation and instructing that he was chargeable with knowledge of the danger that, in the exercise of the care of a prudent man, he might have obtained, as well as with his actual knowledge thereof.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 296.*]

12. TRIAL (§ 194*)—INSTRUCTIONS—INVASION OF PROVINCE OF JURY.

In a servant's action for injuries sustained by an engine striking cars while plaintiff was climbing between them, where the evidence made it a jury question whether he was negligent in going between them, an instruction that it is the duty of an ordinarily prudent man to look for moving engines before going between cars in a railroad yard, and the failure to do so is negligence, was properly refused, as being in effect a motion for a verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 439-456; Dec. Dig. § 194.*]

Exceptions from Essex County Court; Willard W. Miles, Judge.

Action by Stephen Place against the Grand Trunk Railway Company in Canada. Judgment for plaintiff, and defendant excepts. Reversed and remanded.

See, also, 80 Vt. 196, 67 Atl. 545.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Herbert W. Blake, for plaintiff. L. L. Hight and H. B. Amey, for defendant.

TYLER, J. The record shows that 15 exceptions were taken by the defendant to the admission of evidence of which Nos. 3, 9, 10, 14, and 15 are waived. Nos. 1 and 2 are not insisted upon in the brief. Nos. 4, 5, 6, 7, 11, and 12 relate to the switch, and are considered under one head in the brief. Exceptions were also taken to the charge as given by the court and to his omission to charge. The location of the tracks in the defendant's railroad yard at Island Pond is fully stated in the opinion in *Place v. Grand Trunk Ry. Co.*, 80 Vt. 196, 67 Atl. 545. The northerly track, No. 1, was the boiler house track, and it and No. 2, called in the trial the "ash pit track," were connected by a split switch. No. 3 also led to the ash pit which was situated between the coal chute and the boiler house. No. 5 led past the coal chute, and No. 6 went upon it. There was a split switch in No. 3, about 10 feet south of the other switch. These were the only split switches in that part of the yard. An engine was being backed to the west on track No. 1, and Boulet, the hostler in charge, intended to go upon the ash pit track No. 2, supposing that the switch was set for that track, but the engine continued upon track No. 1 and struck the first of a string of four or five coal cars that stood there, knocked them along the track, and caused the collision by which the plaintiff was injured; both feet being badly crushed. The hostler was hard of hearing. The switch was equipped with a switch target, which, the defendant's evidence tended to show, was set in a manner that indicated that the switch was placed to let the engine upon track No. 1. The hostler did not look to see how the switch target was placed as he approached it with his engine. It was his duty to observe the position of the target, and, if he had looked, he could have seen it, and, if it was set wrong, have avoided the collision. The switch stand was not then equipped with a lock, though it had been till within six months or a year of the accident, and it was the defendant's custom to have locks upon similar switches in the yard.

The defendant's evidence tended to show that the engine took track No. 1 because the switch had been turned and was open for that track. It admitted that the accident was caused by the negligence of Bou-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

let, and one ground of defense was that it was not responsible for the act of the plaintiff's fellow servant. The plaintiff claimed that the negligence was the defendant's, and he introduced evidence from which he contended that, if the switch was set for the ash pit track, yet, if the points to the switch rails were bent or broken, the engine might have gone upon track No. 1, though the switch was closed to that track. The defendant claimed that there was no evidence sufficiently definite to tend in any manner to prove that a bent or broken switch point existed at the time of the accident, and certainly none to identify it as the one in track No. 2.

1. The exceptions state that there was no evidence tending to show that the switch point was bent or broken, unless the testimony of certain witnesses tended to show it, which must be considered.

Martin Gleeson, a competent expert witness, testified that, in his opinion, if the switch was set for the ash pit track, and the point of the switch was bent or broken, the engine would be as likely to go in on the boiler house track as on the ash pit track; that, if several cars were passing along, some would be likely to take one track and some the other.

Perry, the defendant's yard foreman, testified that he placed four or five coal cars on track No. 1 the forenoon of the accident; that there was one car on that track before; that the track would hold only five or six cars; that about 8 o'clock that morning, after setting the cars on there, he turned the switch for the ash pit track for which it was most commonly set, though the other track was sometimes used two or three times a day for storing coal cars; that the ash pit track was used 10 or 12 times a day, and engines went to the ash pit to be cleared of ashes; that he had no knowledge of the switch being changed that morning before the accident; that sectionmen were at work around there, but no one had authority to change it.

Boulet testified, in substance, as before stated.

Moore, a fireman, testified that he was on the engine with Boulet at the time of the accident; that he turned the switch for the ash pit track after the accident, and that the engine then passed over it; that the switch rails and points were in good condition, not bent nor broken; that sectionmen were working around there that forenoon on the switches, but he could not say what ones; that he saw no one turn the switch, and saw no one go on that track after Perry placed the coal cars on track No. 1.

Aldrich, a brakeman, testified that he and a fellow workman were passing along tracks Nos. 1 and 2 a day or two after the accident, and saw sectionmen at work upon one of the ash pit switches, but he could not say which one; that they had taken up an old

rail which had a bent or broken switch point and placed it on a car.

Dennis Gleeson, a car repairer, was with Aldrich, and testified, as he did, that he saw men take a bent switch rail from one of the two switches, but he could not say which one.

The defendant's evidence tended to show that the switch rail at this switch was not bent nor out of repair.

The defendant excepted to the introduction of all the evidence relating to a broken switch rail, and, after its admission, moved to have it struck from the record, which motion was denied and the defendant excepted. It also excepted to the submission by the court to the jury of the question whether, upon the evidence, the plaintiff had made out his claim that there was a bent switch point in the switch in controversy. The defendant's contention is that the evidence did not point to the switch in question, and that the jury were obliged to "guess" which switch it was that the workmen were repairing.

This evidence was introduced by the plaintiff as a part of his opening case as tending to establish the essential fact of the defendant's negligence. It was, in brief, that the engine went wrong, the plaintiff claiming for one cause, the defendant another. The plaintiff's evidence tended to show that, if a switch rail point was bent or broken, that might have been the cause, although the switch was set for the ash pit track. A bent or broken switch rail was taken from one of the two switches a day or two after the accident, but the witnesses could not say which one. No accident had occurred at switch No. 3. In these circumstances the evidence was admissible. The defendant's claim about the collision may have been more probable than the plaintiff's, but the plaintiff's evidence tended to show that it happened by reason of an imperfect rail. Therefore it became a question for the jury to decide.

2. It is the general rule that evidence of repairs made after an accident has occurred is incompetent to show antecedent negligence on the part of a railroad company. *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. Rep. 303; *Shlinners v. Proprietors of Locks & Canals*, 154 Mass. 168, 28 N. E. 10, 12 L. R. A. 554, 26 Am. St. Rep. 226; *Dale v. Lack. & W. R. Co.*, 73 N. Y. 468; *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405. But this rule does not apply to the present case. Here an accident had happened, and the question was: Which of the two causes which the evidence tended to show existed was the more likely to have produced it? However clear it may have seemed to counsel or even to the court that it was caused by a misplaced switch, there was evidence tending to show another cause, so that it was the duty

of the court to submit the question to the jury.

3. The plaintiff could not recover if the accident happened through the negligence of his fellow servant Boulet, unless he was incompetent, and the defendant knew or ought to have known of his incompetency. The plaintiff claimed that Boulet was deaf, and that his deafness would be likely to prevent his hearing the clicking sound caused by the engine in going over a switch. Boulet testified that he did not hear the click when the engine went over the switch, and that the first thing that apprised him that he was on the wrong track was the click of the wheel later as it passed over the frog; that he then looked up, and saw where he was going. If he had heard the switch click, he might have been forewarned and stopped his engine in time to avoid the collision. The defendant's evidence was that Boulet had been in its employ several years; that his deafness did not disqualify him for the performance of his duty, and that he was a competent hostler. Whether upon all the evidence he was competent, and whether, if incompetent, the defendant knew it or ought to have known it, were questions of fact for the jury to decide.

4. It was clearly competent for the plaintiff to prove that there was no lock upon this switch, that until within a year it had been kept locked, and that locks were commonly used by the defendant upon similar switches in that yard. Upon the defendant's theory of the cause of the accident, the jury might have inferred that a lock would have prevented a misplacement of the switch. It was held in *Carrow v. Barre R. Co.*, 74 Vt. 176, 52 Atl. 537, which was an action for injuries received at a grade crossing, that evidence that there was no flagman at the crossing was admissible as a part of the surrounding circumstances, although the defendant was not bound to keep a flagman there. See *Smith v. C. V. R. Co.*, 80 Vt. 208, 67 Atl. 535.

5. When the plaintiff received the injury complained of he had been in the defendant's employment seven days shoveling coal, most of the time at the coal chute, loading tenders with coal. He had worked for the defendant in the railroad yard, shoveling snow, 10½ days at one time and 3 or 4 days at another time, the last time about a week before he began shoveling coal, and the other about a week before that. When he shoveled snow, he worked upon all the tracks in the Island Pond yard, and helped clear out the switches. This seems to have been all of his experience in working about railroads, engines, and freight cars. He had been a farmer except three years, when he had worked in a print mill. He was 57 years old, 5 feet 4 inches in height, and for anything that appeared a man of ordinary intelligence.

On the morning of February 2, 1906, the

plaintiff went, by direction of the defendant's foreman, White, from the coal chute, a distance of 75 to 100 feet, to the boiler house, to assist in unloading a coal car that stood on track No. 1, called the boiler house track. To reach that building, he went north, crossing tracks Nos. 5, 4, 3, 2, and 1. The car to be unloaded stood near the building—some witnesses said from 12 to 18 inches, others from 18 to 26 inches. The east end of the building and the east end of the car were about on a line. A string of four or five loaded coal cars was standing on track No. 1; the one at the west end then being three or four feet from the car that was to be unloaded. It appeared that this space had generally been kept open, sometimes 15 feet wide, so that the defendant's workmen could pass through as they had occasion to go to the boiler house. It was also used by them in wheeling cinders from the boiler house.

On this occasion the plaintiff and a fellow workman, Boin, passed through this space between the cars, entered the building by a door at its east end, which was the usual place of entrance, opened the windows through which the coal was to be shoveled, and then went out and climbed upon the car at its east end. The plaintiff unloaded the west end and Boin the east end. When it was unloaded, Boin got down over the east end, and went into the boiler house. The plaintiff took his pick and shovel and walked in the car to its east end to go down where he went up. He set his tools down inside the car, climbed up to the platform or shelf, reached back and got his tools, and threw them over upon the ground, and began to descend towards the space between the cars. The plaintiff described the accident as follows: " * * * When I was climbing down, I put my foot on the draw iron to reach down to get onto the brake beam with the other foot to step down, and, just as I had got my foot placed, the engine came along and collided with three or four cars that were in front and shoved them up onto the one that I was getting off from." Further on he testified: "When I got over onto the platform, the shelf, I turned then to step down. * * * Had my right hand on the brake rod and the other hold of the handle at the end of the car. * * * One foot was placed on the draw iron, and the other one I don't know exactly where it was." He testified that he was attempting to put it onto the brake beam, which he said was a foot and a half below the platform and went in under it eight or ten inches—under the end of the car. In answer to questions he testified that the brake rod was pretty near the center of the end of the car, " * * * right on the side of the draw iron"; that what he took hold of was the handle fastened on the end of the car, sometimes called the grab iron; that this handle "was on the end of the car right down close to the side";

that the grab iron was placed horizontally on the car; that he placed his right foot on the drawbar, and was attempting to place the other on the brake beam so as to step down; that he did not know that there was a spring in the drawbar that allowed it to shut in or pull out. He further testified that he had no notice or knowledge that cars were likely to shunt on that track. On cross-examination the plaintiff testified that he knew that track No. 1 was used for the storage of coal cars; that he saw this string of cars on the track when he went to work that morning; that no others were placed there while he was there at work; that in climbing upon the car from the passageway he put his foot upon the brake beam and his knee up on the shelf, and did not use the drawhead. Upon being recalled, the plaintiff testified that he had no knowledge that the point of the split switch was bent or broken, and that he had no knowledge that it had no lock upon it; that, if any cars had been placed upon the track while he was upon the car he should have known it by the noise, and that a switchman would have been there motioning; that the coal upon some of the cars was piled up higher than the body of the car so as to obstruct his view in that direction; also, that in getting down from the car he looked for a stirrup and found none.

The defendant's evidence tended to show that there were stirrups and handles on all four corners of the car and in perfect condition. Except as a convenience to himself in sooner reaching the passage, there was no apparent reason why the plaintiff should not have got down at the southwest corner of the car and walked along the south side of it to the passage. It is not clear that he could have got down on the north side and reached the door by going between the car and the building, as the space was narrow. The plaintiff admitted on cross-examination that he had observed the movement of cars and engines upon the tracks in the vicinity, the method of coupling cars and engines, and the liability of freight cars to be knocked along the track when struck by an engine, and knew that the drawheads were liable to come together with a strong impact. The morning of the accident was bright and clear. The plaintiff's car stood at the west end of the track, so that danger could only come from the other direction, yet for convenience in descending he turned his back to the east. He denied seeing the engine upon that track, and his evidence tended to show that coal was loaded so high upon some of the cars that were standing there that he could not have seen an engine coming down the boiler house track.

At the close of all the evidence, the defendant moved for the direction of a verdict upon the ground of the plaintiff's contributory negligence. In deciding this motion, it

was the duty of the court to consider the evidence in the light most favorable to the plaintiff. If there was evidence tending to show that he was in the exercise of the care and prudence of a prudent man under like circumstances, the motion could not be granted. *Boyden, Adm'r, v. Fitchburg Ry. Co.*, 72 Vt. 89, 47 Atl. 409, and cases cited in the opinion. This has long been the settled rule of law. The plaintiff's experience in working upon and about engines and freight cars; the fact that the passage was generally kept open and that the plaintiff was attempting to reach it when he was descending from the car; that this was the most direct and the usual way to reach the building which his duty required him to enter to close the windows; that the string of coal cars had stood there two hours or more, with no engine attached and with no warning or sign that they were about to move; the time it would take him to descend—were all matters for the consideration of the jury. If the coal was piled so high upon some of the coal cars that he could not have seen the approaching engine as he turned his face to the west to facilitate the act of getting down, it could not be held as matter of law that that act was negligent. Whether he could have seen it was a controverted question. If he had seen or could have seen it when it was east of the switch, it was for the jury to say whether he should have watched it and discovered which track it took at the switch; no warning or signal being given to him. Engines were constantly going to the ash pit to be cleaned. They went less frequently into track No. 1. If he could have seen the switch, the evidence does not make it clear that he could have told which track the engine had taken. The circumstances attending the accidental passing of the engine onto the boiler house track were somewhat different from what they were when an engine was sent there to remove a coal car.

The rule was correctly stated in *Place v. Grand Trunk R. Co.*, 80 Vt. 196, 67 Atl. 545: " * * * If there are opposing inferences to be drawn from the evidence bearing upon the question of contributory negligence, * * * that question must be submitted to the jury." See cases cited in the opinion. It cannot be held as a matter of law that, in the circumstances of the case, the plaintiff had or was chargeable with such knowledge of danger that he was guilty of contributory negligence in attempting to descend from the car. It was for the jury to say whether he reasonably ought to have known of the danger attending the act. Our cases upon this point are so numerous, and several are so recent, that it is not necessary to restate them. The leading ones were cited in the opinion in this case when it was here before. This case is unlike *Latrempouille v. B. & R. Ry. Co.*, 63

Vt. 336, 22 Atl. 656, where the plaintiff was an experienced car inspector, and knew, when he went under the car to repair it, the danger of cars being shunted against his car. No one connected with defendant company knew of that danger better than he did. The case is also unlike the Magoon Case. The motion to direct a verdict was properly denied.

6. The defendant contends that there was error in the charge in omitting full instructions upon the subject of contributory negligence. The court carefully pointed out to the jury the three claims made by the plaintiff of the defendant's negligence—the want of a lock upon the switch, a switch rail out of repair, and the hostler's incompetency—that, to entitle the plaintiff to recover, they must find one or more of these claims sustained; that the negligence found was the proximate cause of the accident; that the plaintiff was not guilty of contributory negligence; and that he did not know of the danger. In the discussion of each of these claims of negligence, the instruction was that, if the jury found them or either of them made out, the plaintiff was entitled to recover unless he knew of the danger, omitting the usual instruction, "or he ought to have known and comprehended it." It was manifestly an important question of fact for the jury to decide whether or not the plaintiff was guilty of contributory negligence in descending from the car in the manner testified to by him, yet the court gave the jury no specific instruction upon this branch of the case. The charge must be held inadequate, in that the attention of the jury was not called to the situation in which the plaintiff placed himself and to the degree of care and prudence that he was bound to exercise in view of the danger. He was chargeable with knowledge of the danger that in the exercise of the care of a prudent man he might have obtained as well as with the knowledge that he actually possessed, and the jury should have been so instructed to enable them to determine whether or not the plaintiff was guilty of contributory negligence. Without such instruction, they might well have understood that the plaintiff was chargeable only with knowledge of the danger that he saw, and not with knowledge of the danger that he might have seen by the exercise of the requisite degree of care.

7. The sixth request to charge was: "That the duty to look about for moving engines and cars before putting himself between two cars in a railroad yard in such a way that he would be crushed if the cars came together is the duty of any ordinarily prudent man, and a failure to so look is negligence as a matter of law." This was in effect a motion for a verdict, and has already been considered.

Judgment reversed, and cause remanded.

WILLIAMS v. SMITH.

(Supreme Court of Rhode Island. Feb. 12, 1909.)

EXCEPTIONS, BILL OF (§ 48*)—NOTICE OF FILING AND HEARING.

Where plaintiff's attorney, on learning that the bill of exceptions and transcript of evidence had been filed, and prior to the allowance of the exceptions, sent the judge who presided at the trial a letter containing every objection to the allowance of the bill of exceptions that he now relies on, the judge, who considered and acted on such matters, was justified in believing that plaintiff desired no further or other hearing on the allowance of the exceptions, so that there is no merit in her motion to dismiss the bill of exceptions for want of notice of the filing thereof, or for lack of notice of the hearing thereof, under superior court rule No. 31.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 48.*]

Exceptions from Superior Court, Providence and Bristol Counties; Darius Baker, Judge.

Action by Hope T. Williams against Clarence A. Smith. Plaintiff moves to dismiss defendant's bill of exceptions. Denied.

See, also, 68 Atl. 306.

James Harris and Irving Champlin, for plaintiff. Marquis D. L. Mowry and Louis L. Angell, for defendant.

PER CURIAM. There is no merit in the plaintiff's motion to dismiss the defendant's bill of exceptions for want of notice of the filing thereof, or for lack of notice of the hearing thereon, under the provisions of rule No. 31 of the superior court. The evidence discloses the fact that the plaintiff's attorney, after ascertaining that the bill of exceptions and transcript of evidence had been filed, and prior to the time of the allowance of the exceptions, sent a letter to the judge who presided at the trial of the case, containing every objection to the allowance of the bill of exceptions that he now relies upon and has set out in his petition to establish the truth of said exceptions. It also appears that the judge considered and acted upon the same. In the circumstances we are of the opinion that the judge was justified in believing that the plaintiff did not desire any further or other hearing on the allowance of the exceptions.

Therefore the motion to dismiss must be denied.

(222 Pa. 395)

LYTTLE v. DENNY.

(Supreme Court of Pennsylvania. Jan. 4, 1906.)

1. INNKEEPERS (§ 10*)—INJURY TO GUEST—NEGLIGENCE.

Where the top of a folding bed in a hotel falls down upon a guest lying upon the bed, the burden of proof is on the innkeeper to show that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the accident happened from no want of care on his part.

[Ed. Note.—For other cases, see Innkeepers, Dec. Dig. § 10.*]

2. INNKEEPERS (§ 10*)—INJURY TO GUEST—NEGLIGENCE.

Where a guest in a hotel is injured by the falling of the top of a folding bed, it is evidence, in the absence of explanation by the innkeeper, that the injury was caused by his negligence.

[Ed. Note.—For other cases, see Innkeepers, Dec. Dig. § 10.*]

3. DEPOSITIONS (§ 88*)—EXCLUSION.

Depositions are properly excluded, where, though the rules of court provide for taking depositions of ancient, infirm, and going witnesses, it is not shown that the witnesses whose depositions were taken were within such classes, or that their presence in court might not be obtained.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 88.*]

Appeal from Court of Common Pleas, Cambria County.

Action by A. C. Lyttle against J. B. Denny. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas H. Greevy, J. C. Davies, and E. G. Brotherlin, for appellant. M. D. Kittell and H. H. Myers, for appellee.

POTTER, J. From the history of this case it appears that in May, 1903, the plaintiff was a guest at the hotel of the defendant in Johnstown, Pa. In the room which was assigned to him there was an old-style folding bed, with a wardrobe in the back, and so arranged that the bed portion would fold up so as to leave the bed in an upright position when not in use. The top of the bed was heavy, weighing about 300 pounds. The plaintiff occupied the bed during the night, and early the next morning, as he was about to rise, the top or upright portion of the bed fell forward upon him, crushing his head down upon his breast and inflicting severe injury. To recover damages for the injury thus caused the plaintiff brought this suit against the proprietor of the hotel. Upon the trial at the conclusion of plaintiff's testimony, the court entered judgment of compulsory nonsuit, and from the refusal to strike it off the plaintiff has appealed.

The main question raised is as to the liability of an innkeeper to his guests. We find the general rule of law in this respect is thus stated in Beale on Innkeepers and Hotels, §§ 162, 163: "The innkeeper is bound to provide reasonably safe premises. * * * Both in original safety of construction and in maintenance the premises must be such as reasonably to secure the safety of the guest. So the innkeeper has been held liable for injury to the guest by the ceiling falling upon him,

owing to its defective condition; by the elevator falling with him, after having been negligently inspected, although the innkeeper himself had employed a proper inspector, and was not personally negligent; by the breaking of a defective railing, by reason of which the guest fell into an area; and by the guest falling off an unguarded stairway." The authorities are in substantial agreement that while the duty of an innkeeper requires him to take reasonable care of the persons of his guests, he is not to be regarded as an insurer of their safety. His liability has sometimes been declared to be similar to that of a common carrier, but the better opinion seems to be that the degree of care required of an innkeeper is not so great as that which is imposed upon those who carry passengers for hire. In discussing this question in *Clancy v. Barker*, 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653, Judge Sanborn says: "While there are many loose statements in the books to the effect that the liability of common carriers to their passengers and the liability of innkeepers to their guests are similar, and while that proposition may be conceded, it is certain that the limits of these liabilities are by no means the same. A railroad company is liable to its passengers for a failure to exercise the utmost care in the preparation of its road and the operation of its engines and trains upon it, because the swift movement of its passenger trains is always fraught with extraordinary danger, which it requires extraordinary care to avert. But an innkeeper's liability for the condition and operation of his hotel is limited to the failure to exercise ordinary care, because his is an ordinary occupation, fraught with no extraordinary danger." It may be assumed, then, that the duty imposed by law upon an innkeeper requires him to furnish safe premises to his guests, and to provide necessary articles of furniture, which may be used by them in the ordinary and reasonable way without danger. Did the defendant, then, in this case, use such reasonable care in the discharge of this duty to the plaintiff who was his guest? The testimony introduced showed the fact and manner of the accident, but stopped short of pointing out the exact defect in the bed which caused it to fall down upon and entrap the plaintiff. The trial judge thought it was incumbent upon the plaintiff to show in detail just what was wrong with the bed, and the reason for its falling; and, because this did not appear from the testimony offered by the plaintiff, judgment of nonsuit was entered. We do not agree with his view in this respect. Bearing in mind the duty of the innkeeper to guard with reasonable care the safety of his guests, proof of the happening of such an extraordinary accident casts the burden of explanation at once upon the defendant. The accident was so far out of the usual course that no fair

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

inference can arise that it could have resulted from anything less than negligence upon the part of the management of the hotel. Beds do not usually operate as spring traps to close upon and catch the confiding guest. Yet the bed furnished by the defendant to the plaintiff in this case proved to be just such a dangerous trap. Without any apparent cause the heavy head fell forward and down over the plaintiff while he was quietly lying upon the bed, and injured him severely. This could not have occurred had the bed been in proper condition for use. We think the facts bring the case within the rule laid down in *Scott v. London, etc., Docks Co.*, 3 Hurlst. & C. 596, and often applied by this court, as in *Delabunt v. United Tel., etc., Co.*, 215 Pa. 241, 64 Atl. 515, 114 Am. St. Rep. 958, where the principle is stated as follows (page 248 of 215 Pa., page 517 of 64 Atl. [114 Am. St. Rep. 958]): "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." The circumstances under which this accident occurred were certainly such as to call for full explanation by the defendant. The facts indicate a lack of reasonable care upon his part, and it is for him to show why he should be relieved from liability.

Counsel for appellant also complain of the exclusion of certain depositions which were offered in evidence. But it appears that no rule of the lower court authorized the taking of the depositions of the witnesses in question, and they were therefore properly excluded. The rules of the Cambria county court provide for taking the depositions of ancient, infirm, and going witnesses, but it was not shown that these witnesses were within this classification, or that their presence in court might not be obtained.

The first, second, and third assignments are overruled, but as we deem the facts shown sufficient to take the case to the jury upon the question of the defendant's negligence, the fourth assignment of error is sustained, and the judgment is reversed with a procedendo.

(222 Pa. 439)

HAUPT et al. v. UNGER et al.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. VENDOR AND PURCHASER (§ 22*)—CONTRACT OF SALE—SUFFICIENCY OF DESCRIPTION.

An agreement for the sale of "all of the property of U., deceased, in C. township, together with the H. and B. additions, including buildings and schoolhouse, and all the other buildings located on the lands, with the appurtenances thereto, including the coal and minerals of every de-

scription," is a sufficient description of the property to be conveyed.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 22.*]

2. HUSBAND AND WIFE (§ 133*)—WIFE'S SEPARATE ESTATE—TITLE IN HUSBAND'S NAME—EVIDENCE.

In a suit by a vendee to compel the conveyance of real estate which the vendee claims the vendor purchased as his agent, evidence held insufficient to show that the property was purchased for the vendor's wife with her money, the title being taken in her husband's name for her instead of for himself.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 133.*]

Appeal from Court of Common Pleas, Cambria County.

Bill by Herman Haupt and George B. Stineman against David E. Unger and Catherine M. Unger. From a decree dismissing the bill, plaintiffs appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas H. Murray, James P. O'Laughlin, and Hazard A. Murray, for appellants. J. Norman Martin and F. P. Martin, for appellees.

BROWN, J. Nothing could be clearer than that one of these appellees, aided by the other, his wife, has most unconscionably attempted to avoid performance of his agreement with the appellants, and he would succeed but for the decree that has awaited him here since we heard this appeal. On February 23, 1901, David E. Unger, of Croyle township, Cambria county, this state, entered into an agreement, in writing, with the appellants, the material portion of which is as follows: "For and in consideration of the sum of twenty-five (\$25) dollars in hand paid, the receipt of which is hereby acknowledged, and for other valuable considerations hereinafter mentioned, said David E. Unger of the first part agrees to option until April 1, 1901, to George B. Stineman and Herman Haupt of the second part as above mentioned, all of the properties of E. J. Unger, deceased, in Croyle township, together with the Heise and Bertenet additions, including buildings and schoolhouse, and all of the other buildings located on the lands, with the appurtenances thereto, including the coal and minerals of every description, in fee and sell the same in its entirety, making a good and sufficient deed to the said parties of the second part, as their interests may appear, for the sum or price of seventeen thousand five hundred dollars (\$17,500), in payment as follows: Eleven thousand dollars on April 1, 1901, and the balance on April 1, 1902. It is further understood and agreed by all parties to this contract that should the parties of the second part fail to make the first payment of April 1, 1901, then this agreement is null and void

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and not binding upon any of the parties to same." It may be here noted that the lands are described with sufficient certainty. *Ross v. Baker*, 72 Pa. 186; *Ranney v. Byers*, 219 Pa. 332, 68 Atl. 971.

On February 23, 1901, Unger was not the owner of the lands which he agreed to convey to the appellants. They belonged to his aunt, Annie C. Unger, having been devised to her by her husband, Elias J. Unger. Immediately after his execution of the agreement to sell the lands to the appellants for \$17,000, Unger called to see his aunt in the city of Pittsburgh for the purpose of purchasing them from her, evidently that he might be able to carry out his agreement with Haupt and Stineman. With his good faith to her we are not concerned, but the uncontradicted evidence is that he said to her he was unwilling to pay more than \$12,000, but finally agreed to pay \$14,000, and she executed an agreement to convey the lands to him at that price. Immediately afterwards, on February 27th, he reported to the appellants that he had purchased the properties from his aunt, and at his request there was substituted for the agreement of February 21st, one executed March 9, 1901, in which the properties are said to contain 216 acres, more or less, and the time for the conveyance of the properties was extended from April 1, 1901, to October 1, 1901, when the first payment of \$9,000 was to be made. The balance was made payable on October 1, 1902. In asking for the extension of the time of the conveyance of the properties from April 1, 1901, to October 1, 1901, Unger said that he did so because his aunt wished him to remain on the farm during the summer of 1901.

On April 1, 1901, Annie C. Unger, in compliance with her agreement with David E. Unger, executed and delivered a deed to him for the properties in controversy, which was recorded on the 16th day of the same month. A distant finding of fact by the court below is that Unger purchased from his aunt "as agent of Herman Haupt and George B. Stineman." At the time he entered into the agreement with her he paid her \$25, which was the amount of hand money that had been paid to him by Haupt and Stineman. It is true that in its opinion dismissing the bill the court below wandered from its finding that Unger had purchased as agent for Haupt and Stineman, but, as that fact was properly found, it ought to have been consistently followed.

On October 1, 1901, the appellants made a legal tender to Unger, in the presence of his wife, of the sum of \$9,000, as required by the option of March 9, 1901, for their purchase of the land. This is another unequivocal finding of the court below. The tender was refused, and Unger declined to execute the deed, but not for the reason set up in his answer for trying to repudiate his agreement with the appellants. Not a word was said either by him or his wife at the time of the

tender indicating that she claimed to be the owner of the properties. What she then said to him was: "Don't you dare to sign your name to anything; you know what you have been told." Another finding of the court is that on October 1, 1902, the appellants went to New Castle, where Unger then resided, prepared to make him a legal tender of the balance required to be paid under the option; that in their effort to make said tender they made two visits to the residence of Unger, and, not finding him there, sought him diligently in and about New Castle for the purpose of making the tender, but were unable to locate him, and that the tender was not actually made was not due to any fault on the part of the appellants. Not one of the foregoing facts is contradicted either by Unger or his wife. It is not without significance that he was not called as a witness either in his own behalf or in support of her story. It may be that shame over his bad faith kept him quiet at the hearing.

To avoid conveying to the appellants what Unger has agreed to convey to them, and which he purchased as their agent, the story of the wife is that the land was purchased for her, and her husband holds title to it for her as trustee. She had actual knowledge on October 1, 1901, if not before, that he had agreed to sell the land to the appellants, and before that time—on September 20, 1901—she had constructive notice of this agreement of her husband, for his option to the appellants was on that day recorded in the office of the recorder of deeds for Cambria county. With this knowledge she took a deed from him on September 29, 1902—just a year after the time he was to have made title to the appellants. Of course all this cannot affect her title, if, as a matter of fact, her husband, on April 1, 1901, actually purchased the properties for her and paid for them with moneys belonging to her; but in this controversy between her and his vendees, in which they ask that he be compelled to convey to them lands in accordance with his agreement, which he purchased as their agent, and the title to which he took in his own name, the testimony must be clear, precise, convincing, and satisfactory that he took the title for her instead of for himself or them, and that she received from other sources than her husband the moneys with which she paid for the properties. *Olinger v. Shultz*, 183 Pa. 469, 38 Atl. 1024; *Dumbach v. Bishop*, 183 Pa. 602, 39 Atl. 38. Unger paid his aunt \$5,000 when he took the deed from her on April 1, 1901, and secured the balance of the purchase money by a mortgage. The payment of \$5,000 included four bonds, which Catherine M. Unger, the appellee, testified were her property, having been purchased out of her separate funds. The uncontradicted testimony of George C. Wilson, a most reputable member of the Allegheny county bar, is that he had, several years before, purchased these bonds for David E. Unger, her husband, and that after

they were purchased he frequently cut off the coupons due on them and deposited the same to the credit of David E. Unger in the National Bank of Commerce of Pittsburg. Catherine M. Unger testified that she had received \$3,000 from her father and \$500 from a brother, and that this money was used for the purchase of the bonds which her husband turned over to his aunt in part payment of the purchase money of the property. On cross-examination, however, she was compelled to admit that she had spent about \$300 in furnishing her house, and had bought 5 or 6 horses, varying in price from \$75 to \$150; that she had bought 10 cows, varying in price from \$25 to \$50; that she had bought a wagon for \$100; that she had loaned a sister \$1,000; that she had loaned a brother \$300, and had bought two lots in Johnstown, paying for them \$600. She also bought a piano. She further admitted that in 1901 her sister must have owed her part of the loan of \$1,000, and that she did not know when her brother paid her back. If she did get \$3,000 from her father and \$500 from her brother, there was not enough left of these moneys, according to her own testimony, to purchase the bonds. We can recall no case in which a married woman's claim to property taken by her husband in his own name was sustained on such flimsy testimony as was submitted here. The chancellor ought not to have entertained it for a moment.

The decree of the court below is reversed, and the bill is reinstated, and it is ordered, adjudged, and decreed that the deed from David E. Unger to Catherine M. Unger, dated September 29, 1902, and recorded in the office for the recording of deeds in and for Cambria county in Deed Book, vol. 147, p. 194, be delivered by the said Catherine M. Unger to the recorder of deeds of the said county, to be by him canceled, with a proper note of the cancellation entered by him in the said deed book; and it is further ordered, adjudged and decreed that David E. Unger convey to Herman Haupt and George B. Stine-man, the appellants, the lands fully mentioned and described in the deed of Annie C. Unger to him, executed April 1, 1901, as prayed for in the second prayer of the bill; the costs below and on this appeal to be paid by the appellees.

(222 Pa. 390)

DIGNAN v. ALTOONA COAL & COKE CO.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. MINES AND MINERALS (§ 122*)—GRANT OF COAL LAND—SUPPORT OF SURFACE.

Where the coal underlying a tract of land is conveyed, in the absence of waiver the grantor is entitled to have the surface reasonably supported by the coal stratum granted.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 243; Dec. Dig. § 122.*]

2. MINES AND MINERALS (§ 122*)—GRANT OF COAL—RIGHT TO SURFACE SUPPORT.

Where plaintiff granted "all the coal or other minerals lying or being in, upon or under" certain land, it did not deprive him of the right to surface support, nor was such right waived by a provision that all the mining rights and privileges are to be used without liability for damages from the use thereof.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 243; Dec. Dig. § 122.*]

3. MINES AND MINERALS (§ 122*)—DEED TO UNDERLYING COAL—CONSTRUCTION.

Where a deed of the underlying coal gives the grantee a right to sink air shafts, erect buildings for pumping stations, etc., and provides that such mining operations shall not interfere with the surface of the land, the surface rights not expressly granted, including sufficient support, are reserved.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 243; Dec. Dig. § 122.*]

Appeal from Court of Common Pleas, Cambria County.

Action by Mary Dignan against the Altoona Coal & Coke Company. Judgment for plaintiff, and defendant appeals. Affirmed.

It appeared that on January 28, 1887, Mary Dignan granted to the defendant's predecessor in title, for the sum of \$2,500, certain coal in Gallitzin township. The material portions of the grant were as follows:

"All the coal and other minerals, lying or being in, upon or under all that certain piece or parcel of land situate in the township of Gallitzin, county of Cambria and state of Pennsylvania, bounded and described as follows, to-wit: Beginning at a post, thence south sixty-five degrees east ninety-one perches to a post, being a corner of the land of Henry Bendon, thence along the line of said land north thirty-four degrees east one hundred and sixty-one perches, thence north sixty-five degrees west eighty-nine perches to a post, thence south thirty-four degrees west one hundred and eighty perches to the place of beginning. Containing one hundred and six acres more or less. Being the same premises which James McHugh and Susan C. McHugh by their deed bearing date the eighth day of June, A. D. 1861, and recorded in the office for recording deeds, etc., in and for said county of Cambria in Record Book vol. 18, page 326, etc., sold and conveyed to the above named grantor. And the said party of the second part is hereby granted the full and exclusive privilege, right and liberty of entering at will upon said land and searching for, quarrying and mining, raising, delivering, taking and carrying away said coal and other minerals, such mining operations however are not to interfere with the surface of said land, which the said party of the first part reserves and is not conveyed by these presents, excepting the right, privilege and liberty which is hereby granted to the said party of the second part of sinking a shaft on said premises for an air passage or opening into such mines as may be opened

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and used thereon, also the right and privilege of sinking a shaft for the purpose of pumping out and up such water as may interfere with the mining operations upon said land with the privilege of erecting thereon such building or buildings as may be necessary and incident to said pumping of water from said mines, the air and water passages referred to above are not to be erected or opened within two hundred yards of the house and barn on the premises herein described; the said party of the second part to have free ingress, egress and regress through and underneath said premises for the purpose of mining, removing, shipping and transporting said coal and other minerals; and all of the said rights, liberties and privileges to be used and exercised without any liability for damages arising or resulting from the use and exercise of the same as aforesaid, and possession is hereby given to the party of the second part, his heirs, executors, administrators or assigns for the purpose above recited."

The defendant presented the following point: "That under the deed from Mary Dignan to David McCoy, dated January 28, 1887, conveying to said McCoy all the coal and other minerals in and under the piece or parcel of land therein described, together with the mining rights and privileges therein mentioned, and set forth in plaintiff's statement in this case, and being the same deed offered in evidence by the plaintiff, the defendant is released from 'any liability for damages arising or resulting from the use and exercise' of the rights and privileges therein mentioned, and is thereby released from any liability for damages arising from the mining and removal of all the coal under said land, including the pillars. And the plaintiff is not entitled to recover in this action for loss of water or injury to the surface of his land caused by the mining and removal of the pillars, and the verdict of the jury must be for the defendant. Answer: Refused."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

David L. Krebs, M. D. Kittell, and Philip N. Shettig, for appellant. P. J. Little, for appellee.

ELKIN, J. In Pennsylvania the rule has always been that, in a grant of all the coal underlying a tract of land, the grantor, in the absence of an express waiver, or, which is the same thing, the use of words which by necessary implication mean a waiver, is entitled to have his surface reasonably supported by the coal stratum granted. This rule has never been departed from, and as late as *Weaver v. Berwind-White Coal Mining Company*, 216 Pa. 195, 65 Atl. 545, was reasserted and followed. Nor do we understand this rule to be questioned by the learned counsel for appellant; but it is contended

that the words of the grant in the present case are such as by necessary implication must be construed to mean a waiver of surface support. The grant is for "all the coal and other minerals lying or being in, upon, or under" the tract of land described in the deed of conveyance. It has been uniformly held that the grant of all the coal does not affect the rule which imposes the servitude of surface support upon underlying strata. We can discover no words in the present grant sufficient to modify or change the general rule.

It is further argued that the language used in the grant of mining rights, and privileges is broad enough to waive the right of surface support. In answer, it may be stated that the words of the grant relating to mining rights are of the same general import as those ordinarily used in conveyances of coal and other minerals. The words of the grant relied on to support this contention are "all these said rights, liberties and privileges to be used and exercised without any liability for damages arising and resulting from the use and exercise of the same as aforesaid." It is argued that, in addition to the grant of all the coal, there is an express release of damages arising and resulting from the use and exercise of the mining rights to the extent of releasing any damage that may result to the surface by failure to give it sufficient support. Clearly this was not the intent of the parties. The release of damages in the covenant relied on refers to the proper exercise of the mining rights and privileges in the development and operation of the mines, and has no bearing upon or relation to the rule of law requiring surface support. Nor can we agree that *Scranton v. Phillips*, 94 Pa. 15, *Madden v. Lehigh Valley Coal Company*, 212 Pa. 63, 61 Atl. 559, and *Miles v. Pennsylvania Coal Company*, 217 Pa. 449, 66 Atl. 764, relied on by appellant, are authority for a different doctrine. In each of these cases the grant contained either a release of damages for injury to the surface by the removal of all the coal, or provided for the execution of a full and unconditional release and discharge from any liability for damages to the surface. The principle of surface support was recognized in each case, but it was held to have no application because the parties themselves had covenanted for a different rule by waiving the right, which they not only could do, but did in those cases. In the case at bar there is nothing to indicate an intention to waive surface support, and it has always been held that this absolute right is not to be taken away by implication from language which does not necessarily import such a result. Indeed, the present grant contains what amounts to a reservation of the right to surface support, because the grantor in express terms enumerates what surface privileges are to be enjoyed by the grantee, such as sinking air shafts, erecting buildings for a

pumping station, and then provides that "such mining operations however are not to interfere with the surface of said land." All of which indicate an intention to reserve all surface rights, including sufficient support, not expressly granted.

The only material question involved in this appeal is that which affects the appellee's right to surface support, and we agree with the learned trial judge in the construction of the deed of conveyance in this respect.

Judgment affirmed.

(222 Pa. 400)

SIPE v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. APPEAL AND ERROR (§ 722*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error to the refusal of a motion to set aside plaintiff's statement because the summons was in assumpsit and the statement in trespass will not be reviewed, where it fails to set forth the language of the motion or the order of the court, and does not show any exception taken.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 722.*]

2. APPEAL AND ERROR (§ 688*)—REVIEW—ASSIGNMENTS OF ERROR—RECORD.

An assignment of error that the court stated in a voice that the jury could hear that a certain motion had been made for delay will not be considered, where the record fails to show that such language was used or exception taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2894-2896; Dec. Dig. § 688.*]

3. APPEAL AND ERROR (§ 722*)—REVIEW—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error to the refusal of a change of venue will not be considered where the assignment does not set out the order of the court nor the exception.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 722.*]

4. MASTER AND SERVANT (§ 315*)—NEGLIGENCE OF INDEPENDENT CONTRACTOR—LIABILITY OF MASTER.

Plaintiff sued a railroad company to recover for the deposit of debris in plaintiff's dam caused by the construction of bridges above the dam. The work had been done by an independent contractor, and the railroad had accepted the work with knowledge of the condition in which the river bed had been left. *Held*, that the fact that the work had been done by an independent contractor did not release defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1255; Dec. Dig. § 315.*]

Appeal from Court of Common Pleas, Cambria County.

Action by D. A. Sipe against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. W. Storey and John W. Kephart, for appellant. Harvey Roland and William Davis, for appellee.

POTTER, J. When this case was here before, as reported in 219 Pa. 210, 68 Atl. 705,

the judgment was reversed because of the failure to apply the proper measure of damages to the circumstances of the case. Our examination of the evidence as it then stood did not show that the plaintiff had distinguished with sufficient certainty between the damage resulting from the action of the defendant company and that which might have arisen from other causes. In order that the failure of proof in this respect might be made good, a new trial was awarded. Upon the present appeal, it is not contended that the instructions of the trial judge were incorrect as to the measure of damages, or that they did not accord with the opinion of this court upon the former appeal. In their statement of the questions involved, counsel for appellant do not refer to the measure of damages. But, if that question were properly raised, the evidence offered at the last trial, as it is collected and presented in the argument of counsel for appellee, is sufficient we think to sustain the verdict. There was ample evidence from which the jury could infer that the obstructions in the dam, of which complaint was made, resulted solely from the actions of the defendant company in connection with the construction of its bridge. Thus the witness Tully testified substantially that prior to 1901 the plaintiff's dam was clean. There was no obstruction in it. Anything that did come in passed over the dam. Nothing ever stopped there prior to 1901. Another witness, Skelly, testified that prior to 1901 the dam was clean; that he knew of no obstructions or sand bars or sediment there before that time; that there were no obstructions or sand bars at the mouth of Laurel Run; and that the fill or sediment in the dam below Laurel Run came from the fills and dumps placed by the Pennsylvania Railroad Company at the abutments and between the bridges. There was much more testimony from eight or ten other witnesses to the same effect.

We do not deem it necessary to consider in detail each of the 39 assignments of error filed by counsel for appellant. Most of them are without merit, and many of them are in disregard of the rules of this court, and are not sustained by anything contained in the record. For instance, the first assignment is to the refusal of the court below to grant a motion to set aside plaintiff's statement on the ground that the summons was in assumpsit and the statement in trespass. This motion was made and denied after the first judgment had been reversed and the record remitted from this court. This assignment fails to set forth the exact language of the motion or the order of the court, and does not show that any exception was taken or allowed. In the opinion upon the former appeal, we pointed out the fact that under the authorities over of the writ could not be had. The court could not therefore look beyond

the statement or declaration, and, if it set forth a good cause of action, there was no power to strike it off.

The second assignment reads as follows: "The court erred in stating in a voice so that it could be heard throughout the courtroom and in the presence of the jurors to try the cause that the motion to set aside the statement was not made in good faith and that it 'was made for the purpose of delay, which causes the administration of justice to be brought into disrepute.'" There is nothing upon the record to sustain this assignment. Appellant prints in its paper book an *ex parte* affidavit of its counsel setting forth the facts alleged in the assignment and excepting to them, but it does not appear that this affidavit was filed of record or the exception allowed by the court. The docket entries do not show that the affidavit was filed. In the opinion of the court below, overruling the motion for a new trial, it is said: "There is no evidence to support the allegation contained in No. 2. When the motion referred to in reason No. 1 was made, having in mind that this court had disposed of that question and that the same matter had been called to the attention of the Supreme Court on appeal, we stated to counsel for defendant that his renewing the motion at this time appeared to the court to be prompted by a desire for delay. This statement was not made upon the trial, and whether any juror heard what was said by the court we do not know, nor do we believe that he did." The record presents nothing for our consideration in connection with this specification.

The third assignment is to the refusal of the court to grant a change of venue. Neither the order of the court nor an exception thereto is set forth in the assignment. The motion was based upon the fact that certain newspaper articles had been published in the county commenting upon the case in a manner favorable to plaintiff and unfavorable to defendant. The court in its opinion said: "The motion for change of venue followed the motion referred to in reason No. 1. The arguments upon the latter motion were not made in the presence or hearing of any juror. The court withdrew with counsel to an adjoining room and there heard and denied the application, for the reason that the allegation that a fair trial could not be had before a jury in Cambria county was not sustained, and then and there counsel were informed that the permission of the court would be granted to examine any juror that counsel for defendant might desire to examine on his *voir dire*. This privilege counsel for defendant did not see fit to exercise, and the cause came up and was proceeded with the following day."

The tenth assignment quotes the ruling of the court upon one question, and gives the answer of the witness to another question, under another ruling, not assigned for error. Such inaccuracies in preparing specifications

of error entail unnecessary labor upon this court, and tend to confuse the record.

The twenty-fourth assignment of error raises a point which does not seem to have been raised upon the first trial or considered upon the former appeal, and that is as to the work of construction having been done for the defendant company by an independent contractor. We do not think that the principle of nonliability upon the part of a defendant for injury resulting from the negligence of an independent contractor has any application to this case. It seems, from the evidence that the damage to the dam did not immediately follow the construction. It apparently resulted from the gradual washing down of loose earth and debris left within reach of the flowing water. The negligence consisted in placing the loose material in or near the stream where it would in the natural course of events be washed down by the ordinary flow of the water, aggravated, no doubt, by floods or high water. In the present instance the work was entered upon and prosecuted by the defendant company under the right of eminent domain, and its agreement with the contractor retained the right of supervision in its own engineer, with power to annul and forfeit the contract at his discretion if the work was not being done to his satisfaction under the plans and specifications of the defendant company. If it were necessary to rest the case upon that point, we would be inclined to hold that the control retained by the defendant company over the manner of performing the work was so close and complete as to render it responsible. But in addition it is apparent, we think, that the injury to the dam must have resulted in great part from the gradual washing down of sediment and debris after the completion of the contract for the construction of the bridge, and the acceptance of the work by the defendant. We cannot avoid the conclusion that it accepted the results of the work by the contractor and was responsible for any injuries thereafter arising from the manner in which that work had been performed.

In *First Presbyterian Congregation v. Smith*, 163 Pa. 561, 80 Atl. 279, 26 L. R. A. 504, 43 Am. St. Rep. 808, this court, speaking through Justice Dean, said (page 576, of 163 Pa., page 281, of 80 Atl. [26 L. R. A. 504, 43 Am. St. Rep. 808]): "The Pennsylvania rule, deducible from all the cases, is that if the employer, at the time he resumes possession of the work from an independent contractor, knew or ought to have known, or from a careful examination could have known, that there was any defect in the work, he is responsible for any injury caused to a third person by defective construction." And on page 577 of 163 Pa., on page 282 of 80 Atl. (26 L. R. A. 504, 43 Am. St. Rep. 808): "Has the contractor abandoned his temporary possession, and the owner resumed his permanent one? If so, the answerabil-

ity of the contractor for breach of duty is to the owner, under his contract, not to third parties, for as to them he no longer owes any duty. He no longer stands in place of the owner, for the latter has resumed his relation to the public." And in 28 Cyc. L. & Pr. 1566, the general rule is thus stated: "A contractee may be liable for the neglect or wrongful act of the contractor or the contractor's servants, although not otherwise liable, because of his ratification of such acts. If the work is completed, the contractee is responsible for injuries thereafter resulting from its imperfect construction or dangerous condition in which he permits it to remain, especially after the contractee has accepted the work." In the present case there is no suggestion that the defendant company was not fully acquainted with the manner in which the work was performed by the contractor, and with the condition in which the bed and banks of the stream were left by him, at the completion of the work and at the time of its acceptance at his hands.

The assignments of error are all overruled, and the judgment is affirmed.

(222 Pa. 376)

WOODRUFF v. GUNTON (No. 1).

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. MINES AND MINERALS (§ 70*)—LEASE—CONSTRUCTION—INTEREST ON DEFERRED PAYMENTS.

A coal lease provided that if, because of a strike, or other cause, which the lessee could not control, continuing longer than one month, the lessee could not mine the minimum quantity of coal for the year, the rent should be proportionately abated, provided that three months' rent should be paid in any event. In an action for the rental, the lessee testified that he was prevented from mining for a certain time for causes over which he had no control. He had at another trial testified that the delay was due to a lack of funds. *Held* that, on a finding that the lessee had been delayed by lack of funds, he was properly chargeable with interest on the deferred payments.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 70.*]

2. MINES AND MINERALS (§ 70*)—COAL LEASE—CONSTRUCTION—PROFITS ON SALE OF CULM.

A mining lease provided that the lessee should pay a certain price for all coal that would pass over a screen of an eighth of an inch mesh, and that whatever should pass through should be classified as culm, and that if the lessee sold the culm, he should pay one-tenth of the net profit to the lessor. In an action to recover the profit on the culm, the lessee claimed that the entire cost for mining coal and culm was to be considered. The lessor testified that it was impossible for the lessee to prepare the royalty coal for market without producing culm, and that when it was sold, the entire price less the cost of loading it was the net profit. *Held*, that the question was for the jury.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 70.*]

Appeal from Court of Common Pleas, Sullivan County.

Action by William L. Woodruff against Walter B. Gunton. Judgment for plaintiff, and defendant appeals. *Affirmed*.

See, also, 71 Atl. 851.

At the trial the court charged in part as follows: "Now the plaintiff has called on the stand witnesses who are familiar with the process of mining anthracite coal, mining engineers, and you have heard their testimony. In substance it is that the production of culm is a necessary incident in the process of mining—that is, their testimony, in effect, is that in the mining and preparation of prepared sizes of coal you will necessarily produce culm—and the contention of the plaintiff is that, that being so, in the mining and preparation of prepared sizes this culm resulting, why they say it is a matter of no expense to the operator, to the defendant here, and that if he has had no expense in producing it, therefore when he sells it, it is all net profit, or practically so. The only item of expense which the plaintiff admits should be charged against the selling price of the culm is, as I have stated to you, that stated by Mr. Smith, to the effect that it would cost, to load the culm, after it is separated from the run of mine, about $\frac{7}{100}$ of a cent, or practically a cent a ton to load it, and the contention of the plaintiff is that that is all the expense that attends the production of culm. Now we think you understand, from what we have stated, and from the testimony of the witnesses and the comments of counsel, this position fully. If you are satisfied of the truth of that proposition, from the testimony in the case, then you will be justified in finding for the plaintiff the price received by the defendant in the sale of the culm, for all that he has thus sold, less $\frac{7}{100}$ of a cent per ton expense. I think the plaintiff in his statement has not allowed that; but, if you find that to be true you may make that allowance. Now if you are not satisfied that plaintiff's contention is correct, if you are not satisfied of the proof of his contention in this respect that culm is a necessary incident in the process of mining, but you believe the defendant's story that in the production of this culm it cost him, as he has stated to you, a certain part of a dollar to get it—I have forgotten the amount that he stated—I think the highest figure was some 70 or 80 cents—if you are satisfied from his explanation of the process of mining as it took place in this mine that this culm cost him to get it to the surface some 70 or 80 cents a ton, then that cost should be a charge against the culm account, and if he sold the culm for less than that amount, or less than it cost, there would be no net profit upon it. If you accept that theory, why the plaintiff should not recover here for any net profit on culm. You should bear in mind all the time that it is net profit to which the plaintiff is entitled. Not gross profit, but net profit. Now we leave this con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tention to you as a matter of fact. Which is the more reasonable? Which impresses you as being the true one? You will consider all the testimony and adopt that which you believe to be true, and which you believe to be supported by reason and the evidence."

Defendant presented these points: "(1) That under the terms of the lease the plaintiff is entitled to receive one-third of one-tenth of the net profit made by the defendant on culm sold by him. The amount of net profit is to be ascertained by deducting the cost of production from the price for which it was sold. If the jury believe under all the evidence in the case that the cost of mining and producing culm by the defendant equalled or exceeded the price for which it was sold, there is nothing due the plaintiff on that account. Answer: This point, gentlemen, we do not affirm, because this also asks us to decide, in a measure, questions of fact. This point requests us to say to you that the net profit is to be ascertained by deducting the cost of production from the price for which it was sold. That might include the cost of mining the coal and taking it to the surface. As to that, you will recall, there are two contentions here—one by the plaintiff that the mining of culm was a necessary incident to the process of mining run of mine coal, and that theory we have explained to you. We have also explained to you the opposing theory of the defendant, and therefore leave it to you as a question of fact. We cannot affirm this point, because it would be contradictory of our general charge. We do say to you now, in answer to this point, as we said in our general charge, that from the selling price of culm should be deducted the cost which attended the culm after it became culm, and the only evidence as to that in this case is the testimony of Mr. Smith, who stated that such expense was $\frac{87}{100}$ of a cent per ton. (2) Under the evidence in this case the plaintiff is not entitled to recover interest on the deferred payment. Answer: This point is refused."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Rodney A. Mercur, for appellant. E. J. Mullen, for appellee.

BROWN, J. On this appeal from a judgment recovered against him in an action on a coal lease the appellant raises two questions; one as to the right of the lessor to recover interest on deferred payments of royalties, and the other as to the profits realized by him on culm sold. The lease was executed March 23, 1898, and the parts of it relating to these two questions are as follows: "First. The lessee will pay to said lessors in monthly installments for so much coal as they may mine during the year 1898 at the rates hereinafter named: \$3,000.00 for the balance of 1898; \$6,000.00 for the year 1899; \$0,000.00

for each and every year thereafter until all the coal is exhausted, or this lease is determined, in monthly installments payable on the 15th day of each month for the proportion of mine rent due for the preceding month. And in consideration of the payment of said mine rent the said lessee shall be entitled to mine and move each year from the demised premises so many tons of coal of 2,240 lbs. each as multiplied by twenty-five cents per ton will be the equivalent of mine rent for such year; and for all coal mined in any year in excess hereof the said lessee shall pay at the rate of twenty-five cents per ton of 2,240 lbs. each in monthly installments as aforesaid. These prices are for all coal that will pass over a screen of an eighth of an inch mesh and all that will pass through is to be classified as culm, and for said culm that is sold the said lessee is to pay the lessors one-tenth of the net profit of said culm. The lessors at their option shall be entitled by their agents to supervise the weighing of all coal mined or shipped under this lease and at their option to have a check weighman at their expense, no charge to be made for coal consumed under the boilers or in carrying on the mining operations on said premises. Second. If by reason of a strike among the employees of the lessee or among the employees of carrying companies, or for any cause over which the lessee has no control continuing for a longer period than one month, the said lessee shall be prevented in any year from mining the quantity of coal for such year measured by the mine rent, the lessee shall be bound to mine and remove only so much coal during such year as by the use of due diligence they may be able to mine and remove and the mine rent for that year shall be abated proportionately, provided, however, that the said lessee shall in any event pay three months' rent and the release of rent shall only relate to so much of the period of any strike as extends beyond one month."

On the trial the appellant claimed that, as he was prevented from prosecuting the work of mining for a certain length of time by causes over which he had no control, he ought not to be compelled to pay interest on the deferred payments. The jury were instructed that the defense as to interest on the deferred payments must be based upon cause, or causes, for delay over which the defendant had no control, and this was submitted to them as a question of fact. This is not assigned as error, but the complaint is that the jury were not instructed that, as the only testimony offered on this branch of the case was that of the defendant, if they believed him, there should be an abatement allowed on all interest over and above the three months' rent in each year, as provided in the lease. This instruction was not asked for, and in making complaint that it was not given the fact is overlooked that the jury had before them the testimony of the appellant on a former trial, when he testified that the only

cause for his delay was "lack of funds," and that there was "no other material reason for it." The court, therefore, correctly instructed the jury that, if he had been delayed by reason of lack of money in the prosecution of his work, it was no defense.

There is no dispute as to the quantity of culm sold by the appellant. The dispute between the parties is as to what is to be taken into consideration in determining what were the net profits realized, if any, by the lessee from the sale of it within the meaning of the clause which required him to pay one-tenth thereof to the lessors. His contention is that the entire cost of mining and marketing the coal and culm is to be taken into account, and the average cost per ton for mining and marketing the entire output, the run of mine coal, which included culm, bone rock, slate, and other impurities, is the cost per ton for the culm in ascertaining whether he has realized any profit from the sale of it. The culm was sold for less than the cost of mining and marketing it on this basis, and the lessee, therefore, contends lessors are entitled to nothing for what was sold. The contention of the appellee, on the other hand, is that culm is a mere incident to the mining and preparation of the royalty coal for the market; that the coal in place does not contain culm; that it is created by the blasting of the coal in the mines, by the friction in handling and conveying the same to the breaker, and by the preparation of coal for market in the breaker; that it is impossible, with the methods now in use in mining anthracite coal, and the methods as actually used by the lessee, to mine and prepare royalty coal for the market without producing culm; that the same can be separated from the royalty coal by the screen and the breaker just before the one is loaded in the car; that the culm so separated in the breaker could be either loaded in the cars and sold, or conveyed to the bank and thrown away; that nothing should be charged for producing the culm up to the time it is separated from the royalty coal, because it had to be brought out of the mine in order to mine and handle royalty coal for the market; that the cost of handling the cars of culm when sold was less than putting it on the refuse bank and throwing it away, and therefore the amount received for the culm was net profit, as it had cost nothing to produce it. Under the testimony produced by the plaintiff the question of what was the profit on the culm became a question of fact for the jury, and was so submitted to them. Two mining engineers called by the appellee testified that they had been at the mines frequently during the progress of the appellant's mining operations, and were familiar with his methods of mining and preparing the coal for market. They further testified that the production of the culm had cost him nothing in addition to the cost of mining and preparing

the royalty coal for market up to the time it was separated from the royalty coal in the breaker, and that after such separation it cost less to sell and load it on cars than to put it on the refuse bank, that it was impossible for the defendant to mine and prepare the royalty coal for market without producing culm, and that when the culm was sold by the defendant the entire amount received for the same was net profit, as it had cost him nothing to produce it. The testimony of one of the witnesses was as follows: "Q. Did it cost Mr. Gunton anything additional to bring this culm out of the mine? A. No, sir. Q. Anything additional to the cost of the other coal? A. No, sir. Q. Why not? A. Because that is purely an incident to mining, and is never separated, and the price per car, the price that is paid the miner per car, is based on the amount of prepared sizes that that car will produce on an average." The appellant himself testified as follows: "Q. Doesn't it cost you just as much to mine royalty coal and prepare it for shipment, whether you sell the culm or whether you do not sell it? In other words, would it not be necessary to do all the work and incur all the expense in the mining and preparation of royalty coal for market whether the culm is sold or not? A. Oh, the same operation would be necessary, certainly. Q. And the same cost would be, too, whether you sold the culm or put it on the bank. It would cost just the same, wouldn't it? A. The dirt, and if there was any merchantable coal in the culm, it would cost just the same, of course. Q. If there was no merchantable coal in the culm, and if you put the culm on the bank and didn't sell it at all, your cost of mining the other coal would be just the same as though you sold that culm, wouldn't it? A. Practically; yes, sir." Whether the theory or contention of the appellee was correct was clearly a question for the jury, and they were properly instructed that if they found it to be correct, they should find in his favor for the price received by the defendant for the culm, less $\frac{87}{100}$ cents per ton expense incurred in loading it, but that, if they believed the defendant's theory or contention to be correct, there was no profit to be accounted for by him.

The assignments of error are all overruled, and the appeal is dismissed.

(222 Pa. 384.)

WOODRUFF v. GUNTON (No. 2).

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

MINES AND MINERALS (§ 70*)—COAL LEASE—MINIMUM ROYALTY—MAKING UP DEFICIENCIES.

A coal lease provided for payment of a minimum royalty, and a certain sum per ton on all coal mined in excess of the tonnage on which the minimum royalty was based. There was no provision that a deficiency in the minimum for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

one year should be made up in subsequent years from coal mined in excess of the tonnage on which such minimum royalty was based. *Held*, that the lessee could not recoup himself for the deficiency in the minimum royalty, which he has to make good in one year, by mining the deficiency in a subsequent year without paying therefor.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 193; Dec. Dig. § 70.*]

Appeal from Court of Common Pleas, Sullivan County.

Action by William L. Woodruff against Walter B. Gunton. Judgment for plaintiff for less than the amount claimed, and he appeals. Reversed. See, also, 71 Atl. 849.

The trial judge charged in part as follows: "There are three questions raised in this case—that is, on three propositions the parties do not agree—one is whether the plaintiff is entitled to recover in this case his proportion, or the one-third of the minimum royalties for the years 1898 and 1899. The plaintiff claims that that minimum royalty was not paid in those years, and that therefore he is entitled to recover his proportion. The defendant claims that although he did not pay them in those years, yet he subsequently mined coal to the extent called for by the lease, and in such quantity, and that the 25 cents royalty was calculated and paid on that, and that it was made up to the plaintiff in that way. Perhaps that is not an exact statement of it. The defendant contends rather, that he was not to pay both the minimum royalty and the royalty of 25 cents per ton, and that when he subsequently mined all that the parties provided for, and paid for it, he paid all that was contemplated by the parties to the lease. That we say, is one question. That will depend upon the construction of the lease, and therefore that question is one of law for the court. It becomes our duty to resolve that question, and your duty to accept the construction of the court upon that point. From a construction of the whole lease we have come to the conclusion that the contention of the plaintiff in this case is unwarranted. We have resolved that legal question involved against the plaintiff, and in our opinion he cannot recover both the minimum royalty and the royalty of 25 cents per ton. Therefore we instruct you that the plaintiff cannot recover for the minimum royalties claimed by him to be due for the years 1898 and 1899, and that will relieve you from the consideration of that question. If we are wrong in this construction, gentlemen, the plaintiff will have his remedy, and by appeal to a higher court can set us right and remedy the wrong, if it be a wrong, he is thereby done. The next item is amount due plaintiff October 15, 1902, on minimum royalties for 1898 and 1899, \$3,000, less royalties charged on coal mined, \$1,267.97; net amount due plaintiff, \$1,732.03. Gentlemen, under the view of the law as we understand it, and as we have already

instructed you, you cannot allow this item to the plaintiff. Gentlemen of the jury, counsel for the plaintiff, of course, prepared his statement from his own view of the law, as he had a right to do, and in that statement, as I have stated to you, was included this item of \$1,732.03. We have instructed you as a matter of law to exclude that item from the account. Counsel for plaintiff has now made a computation, which has been shown to us, of the interest on that \$1,732 item, which, added to the item of \$1,732.03, makes the amount of the item to be deducted from plaintiff's statement \$2,212.52. That you may verify, of course. These statements that are sent out with you are not binding upon you. They are furnished you as the respective contentions of the parties, and as an aid to you in passing upon their contentions. You are at liberty to use them, and, under the instructions of the court, to adopt the views set forth in these statements, as we have indicated, except that you cannot allow the plaintiff this \$1,732.03 item, nor any interest upon it."

Plaintiff presented this point: "(1) The plaintiff under the terms of the lease is entitled to one-third of the minimum royalties provided for by same, for the years 1898 and 1899, less one-third of the royalty price of coal actually mined and removed during these years. The undisputed evidence shows that the defendant paid no minimum royalties for either of these years, and that he mined and removed 15,215⁶⁶/₁₀₀ tons of coal that would pass over an eight-inch mesh during this period. Answer: This point is refused."

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

E. J. Mullen, for appellant. Rodney A. Mercur, for appellee.

BROWN, J. This is an appeal by the plaintiff from the judgment from which we have just decided the defendant had no ground of appeal. It raises the single question of the right of the appellant, as a lessor, to recover from the appellee minimum royalties for years in which he did not mine the minimum quantity of coal provided for in the lease, having, however, mined and paid for in subsequent years enough coal to make up the deficiency in the royalties for the prior years. The years for which the minimum royalties are claimed are 1898 and 1899. The trial judge was of opinion, from his "construction of the whole lease," that there could be no recovery for the minimum royalties for these years, and the jury so were instructed.

The lease is of a tract of land of 102 acres and 15 perches, for a period of 10 years from March 23, 1898, with the privilege, at the expiration of that period, of renewing for another period of 10 years. The con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sideration inducing the lessors to "demise, lease and to mine let" their land was the following covenant: "The lessee will pay to said lessors in monthly installments for so much coal as they may mine during the year 1898 at the rates hereinafter named—\$3,000.00 for the balance of 1898; \$6,000.00 for the year 1899; \$6,000.00 for each and every year thereafter until all the coal is exhausted, or this lease is determined in monthly installments payable on the 15th day of each month for the proportion of mine rent due for the preceding month. And in consideration of the payment of said mine rent the said lessee shall be entitled to mine and move each year from the demised premises so many tons of coal of 2,240 lbs. each as multiplied by twenty-five cents per ton will be the equivalent of mine rent for such year; and for all coal mined in any year in excess hereof the said lessee shall pay at the rate of twenty-five cents per ton of 2,240 lbs. each in monthly installments as aforesaid." There is not another line in the lease upon the subject of how much the lessee is to pay, how or when he is to pay, how much coal he is to mine, or when he is to mine it, and no other clause is therefore to be read in determining whether he must pay the minimum royalty provided for in the lease for 1898 and 1899 without regard to what he may have paid for excess coal mined in subsequent years. In construing the lease as to this we are confined to the portion above quoted. Though the court below spoke of its construction of the whole lease, there is nothing to be found in the remainder of it relating to the question before us.

The lessee agreed unconditionally to pay in monthly installments, on the 15th of each month, \$3,000 for the remaining portion of the year 1898, \$6,000 for 1899, and the same sum for each succeeding year. This is an agreement to pay a fixed sum at a fixed time, during a fixed period, for a certain privilege. That privilege is to occupy the land of the lessors and mine and remove therefrom, during each year of the fixed period, a certain amount of coal—12,000 tons of 2,240 lbs. during the remaining portion of the year 1898, and 24,000 tons during each of the remaining years of the lease. For all coal mined in 1898 in excess of 12,000 tons, and for all mined in any subsequent year in excess of 24,000 tons, the lessee is to pay 25 cents per ton. Whether the privilege to mine a certain amount of coal, in consideration of the payment of an annual royalty or rent, is exercised or not, the covenant of the lessee is to pay a fixed sum for the privilege. If the amount of coal which the lessee is permitted to mine in each year is not mined, there is no stipulation for a proportionate abatement of the annual royalty, nor is a privilege given to him to recoup himself, after having paid such royalty, by mining the deficiency in a subsequent year without paying therefor. Such was the privilege in the leases un-

der consideration in *Lehigh & Wilkes-Barre Coal Company v. Wright*, 177 Pa. 387, 35 Atl. 919, *Lehigh Valley Coal Company v. Everhart*, 200 Pa. 118, 55 Atl. 864, and *Pennsylvania Coal & Coke Company v. Witherow*, 215 Pa. 827, 64 Atl. 535, but the express covenant of the present lessee is that for each year, and in each year, he will pay a fixed sum, and in addition thereto 25 cents for every ton of coal mined in excess of what he is permitted to mine in consideration of the payment of the fixed sum. The payment of the royalty or rental for each year is independent of the payment in any other year, and the mining of the coal each year is independent of the mining in any other year. With the intention of the parties thus clearly expressed, it is impossible to attribute a different one to them and sustain the court below without reading into the lease a clause providing that the lessee may apply to the deficiency on the mine rent or royalty due for 1898 and 1899 the payments made in subsequent years for coal mined in excess of 24,000 tons. Counsel for appellee does not point to any clause in the lease sustaining his contention, but we are told that "this claim of the plaintiff is unconscionable." This is by no means to be conceded. The provision as to the payment of the annual royalty was inserted to insure to the lessors prompt mining by the lessee, and prompt payment for his occupation and use of the land. If by his delay in mining he is allowed to appropriate to the payment of the royalty for 1898 the royalties paid for excessive mining five years thereafter, he is depriving the lessors of the use of their money for that length of time. This he may not do in the face of his express agreement to the contrary, and we may appropriately repeat what we said in *Lehigh & Wilkes-Barre Coal Co. v. Wright*, 177 Pa. 387, 35 Atl. 919: "The owners' enjoyment of the value of their property would largely depend on receiving that value soon. If the payments, by reason of slow mining, were stretched into the future, they would receive far less than if made within a period of 2, 3 or even 5 years, and all this coal could easily be mined within that time. Both parties assumed the value of the coal in place to be 25 cents per ton, and this value defendants would have proximately got if it had been mined diligently; but if, on account of conditions of market, charges for transportation, or price of labor, it paid plaintiff better to mine very slowly, defendants would not receive nearly that value. For example, take the \$4,000 paid for the 16,000 tons mined the ninth year. If the 16,000 tons were worth 25 cents per ton at date of contract, then defendants had lost 9 years' interest, or \$2,160. Deducting this from the \$4,000 left only \$1,840, equal only to 11½ cents per ton by reason of the long-deferred payment. The hardship of the bargain by the happening of this very contingency the owners sought to guard against by two distinct methods of fixing the purchas-

ing price; one, 25 cents per ton, to be paid as mined, and this is all plaintiff would have paid if it had mined with diligence, but there was another method. If for any reason, it chose to retain possession, and not mine diligently, then defendants had provided for this by exacting a fixed annual income of \$4,000." When the appellee declares the claim of the appellant to be unconscionable, he forgets that it is based upon a contract entered into by himself, in terms so clear that but one meaning can be given to them, and as he intelligently contracted, he is bound. If he made what he now regards as a hard bargain, he cannot, in the absence of fraud, accident, or mistake in making it, ask to be relieved from it, and if he was foolish in making it, neither the legal nor chancery side of the court will shield him from the consequences of his folly. *Lehigh Valley Coal Co. v. Everhart*, 206 Pa. 118, 55 Atl. 864.

The first assignment of error is sustained and the judgment reversed, with a venire facias de novo.

(109 Md. 393)

SWARTZ v. GOTTLIEB-BAUERN-SCHMIDT-STRAUS BREW-ING CO.

(Court of Appeals of Maryland. Jan. 12, 1909.)

1. APPEAL AND ERROR (§ 255*)—ALLOWANCE OF AMENDMENTS TO PLEADINGS—REVIEW—EXCEPTIONS.

The allowance of an amendment of the declaration will not be considered where no exception was taken thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1490; Dec. Dig. § 255.*]

2. LANDLORD AND TENANT (§ 269*)—DISTRESS—PROPERTY SUBJECT TO DISTRESS.

A landlord may distrain on the goods of the tenant or subtenant, though subject to a mortgage, and he may distrain on the goods of a stranger on the premises except such as are exempt by statute.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1084-1093; Dec. Dig. § 269.*]

3. LANDLORD AND TENANT (§ 272*)—LIABILITY OF TENANT TO THIRD PERSON WHOSE GOODS ARE DISTRAINED.

A stranger whose goods are distrained by a landlord may redeem them, and sue the tenant for reimbursement, or, if the goods are sold, for their value.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1145; Dec. Dig. § 272.*]

4. CHATTEL MORTGAGES (§ 162*)—POSSESSION BY MORTGAGEE.

A subtenant, not accepted by the landlord, executed a note to a third person, payable on demand, and secured it by a chattel mortgage covering property on the leased premises, which provided that the mortgagee might take possession whenever he deemed himself insecure. The subtenant, while in default, abandoned the premises, and, pursuant to the direction of the mortgagee, delivered the keys to the premises to the tenant. Held that, as between the subtenant and the mortgagee, the latter had the right to immediate possession of the mortgaged chattels.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 162.*]

5. TROVER AND CONVERSION (§ 9*)—SUFFICIENCY OF DEMAND.

A mortgagee in a chattel mortgage given by a subtenant was entitled to the possession of the chattels on the leased premises. The subtenant abandoned the premises, and delivered the keys to the tenant. The mortgagee demanded the keys of the tenant so as to get the chattels, but the tenant refused to deliver and the goods were subsequently distrained by the landlord. Held to show such a demand by the mortgagee as to sustain trover against the tenant.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 58-83; Dec. Dig. § 9.*]

6. CHATTEL MORTGAGES (§ 170*)—ACTS CONSTITUTING CONVERSION—EVIDENCE.

A mortgagee of a subtenant's chattels located on the leased premises being entitled to possession on account of default, the subtenant abandoned the premises and the mortgagee demanded the keys of the tenant in order to get the chattels, but the tenant refused, and the goods were subsequently distrained by the landlord. The tenant had taken possession of the premises, and knew there would be a distress proceeding. Held to show a conversion of the mortgage chattels by the tenant under the rule that any wrongful interference with the owner's possession or right of possession may be a conversion.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 170.*]

7. ACTION (§ 37*)—INSTRUCTIONS—ERRONEOUS REQUESTS—RIGHT OF RECOVERY.

When prayers do not refer to the pleadings, the right to recover depends not on the form of the action nor the state of the pleadings, but solely on the case made by the proof.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 37.*]

8. TROVER AND CONVERSION (§ 44*)—MEASURE OF DAMAGES.

The measure of damages in trover is the value of the chattels at the time of conversion with legal interest thereon up to the date of the verdict.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 260; Dec. Dig. § 44.*]

9. TROVER AND CONVERSION (§ 39*)—EVIDENCE OF VALUE.

In trover evidence of the amount the goods converted brought at an auction sale in distress proceedings is as against defendant evidence of value, in the absence of any showing that the sale brought unusual prices.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 231; Dec. Dig. § 39.*]

Appeal from Baltimore City Court; Alfred S. Niles, Judge.

Action by the Gottlieb-Bauernschmidt-Straus Brewing Company against Manuel Swartz. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, THOMAS, and WORTHINGTON, JJ.

William S. Bayless and J. Marsh Matthews, for appellant. Albert E. Donaldson, for appellee.

BOYD, C. J. The appellee sued the appellant in assumpsit upon six common counts, and filed therewith an account which read: "To rent of said Manuel Swartz due and ow-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing for use and occupation of premises No. 8 E. German Street, Baltimore City, paid by distraint on the goods and chattels of said Gottlieb-Bauernschmidt-Straus Brewing Company—\$360.00." The defendant filed the general issue pleas. The plaintiff asked leave to amend the declaration by striking out the six counts, to add an additional count, and to withdraw the account and affidavit filed with the original declaration. The court granted leave to amend, and an amended declaration in trover was filed. The defendant filed the general issue plea, a jury was sworn, issue joined, and the case proceeded to trial, which resulted in a verdict for the plaintiff for \$339.93 damages. From the judgment entered on that verdict, this appeal was taken.

The defendant objected to the amendment of the declaration, but, as there was no exception taken to that action, it is unnecessary to discuss it, although we might call attention to the fact that in *Bonaparte v. Claggett*, 78 Md. 87, 27 Atl. 619, this court recognized the right of the plaintiff, who had sued in assumpsit upon the six common counts, to amend the form of action to trover, and decided that bringing the action in assumpsit did not constitute a ratification of the contract of sale which would prevent an action of trover for the value of the goods, where before judgment the plaintiff discovered that he had misconceived his remedy, and, upon an amendment allowed, changed the form of action to trover. The only exceptions in the record are to the granting of the plaintiff's second prayer, as modified, and the court's own instruction, and to the rejection of the defendant's first, second, third, fourth, sixth, and seventh prayers, and overruling the special exception to the plaintiff's second.

A somewhat full statement of the facts will be desirable in order that our conclusions on the rulings on the prayers may be properly understood. The defendant (appellant) rented from Mrs. O'Brien No. 8 East German street under two written leases. The first was for three years from November 1, 1905, and included the property known as No. 8 East German street, in the Phoenix Building, and the room under it, known as 7 Phoenix Building. The other was for three years from January 1, 1905, and included rooms 3, 5, 7, and 9, which are in the basement of the Phoenix Building, and are the rooms in which the property in question was distrained on. Swartz assigned his lease to those basement rooms to William G. Bolgiano for the remainder of the term, but the landlady, while permitting the assignment, refused to accept Bolgiano as tenant or to release Swartz from liability under his lease. On October 18, 1906, Swartz was in arrears for his rent to Mrs. O'Brien in the sum of \$400, and on that day a distress was levied on property found on the premises. The property so found was sold by the bailiff for \$361.55, and, after deducting the costs, \$285.

37 was paid to the landlady on account of rent due her. On February 17, 1906, Bolgiano had purchased from Swartz for \$500 in cash and \$150 by note the stock, license, furniture, ornaments, glassware, and other utensils then in the saloon. At the time the plaintiff owned certain other property which was on the premises. On March 7, 1906, Bolgiano gave a chattel mortgage to the plaintiff on all the property on the premises which it did not own to secure a loan of \$350. The property on account of which this suit was brought included that which the plaintiff owned, and that which was embraced in its mortgage from Bolgiano, and was the property levied on and sold under the distress proceedings. Bolgiano owed Swartz between \$300 and \$400 rent, besides the \$150 note, on October 13th or 14th (the witness was not certain as to the exact date), and he left the place before the distraint was levied. He went to the brewery, said he was sick and not able to manage the business, and offered the keys to Mr. Hamburger, who represented the plaintiff. Mr. Hamburger told him to give the keys to Swartz, and Bolgiano sent them to him. Bolgiano testified he was a monthly tenant under Swartz. He paid Swartz the \$350 which he had borrowed on the mortgage from the plaintiff. Hamburger said he demanded the keys from Swartz on several occasions after they were sent to him, so they could get in and get the goods; that Swartz promised him the keys several times, but never gave them to him; that Swartz told him on several occasions he had a prospective buyer for the place, and the last time he said he wanted to hold the keys until the following morning, as he expected to have a customer then, but Hamburger said: "The next morning when I went there to see what was going on I found the constable in charge." He said he could not state the exact date when Bolgiano offered him the keys, but it was about the middle of October; that he went to Swartz to get the keys, "I guess probably about a week or four days or something like that" after he told Bolgiano to take the keys to Swartz. He said he told Swartz he wanted the keys to get the goods out; that he could not say exactly when he called on Swartz for the keys, but said "shortly after Mr. Bolgiano gave up the place I went to see Mr. Swartz about getting the key of the place, and I made five or six requests of Mr. Swartz for that key between the time that Mr. Bolgiano closed the place up and the place was put in the hands of the bailiff." The auctioneer identified a statement, dated the 25th day of October, 1906, which he had made of the sales to the plaintiff. A bookkeeper of the plaintiff testified that he knew of the distress proceedings by seeing a notice in the papers that the goods were to be sold at public auction; that he then went to Mr. Stewart's office, and asked if he would be allowed to take out the goods; that Mr. Stewart said he would have to see

Mr. Swartz, and he made an appointment to see Mr. Stewart later, when Mr. Swartz was present. He said that was before the sale. He told Swartz he wanted to remove the property belonging to the plaintiff and that covered by the chattel mortgage, and he replied Mr. Stewart had charge of the affair. He said: "He declined to allow me to act and to act himself, and referred me to Mr. Stewart. This was all in Mr. Stewart's office. That the property of the plaintiff was not gotten out before the sale, but was sold. Witness told Mr. Swartz at the same time that he thought the easiest means would be the best, and that, if he would not permit us to take our stuff out of there, there was only one thing for us to do, and that would be to bring action for the damage we sustained by the loss in having our property sold to pay the rent, and the property was sold." The witness also testified that the plaintiff paid the auctioneer \$244.50 for purchases made by it, and said there was a cash register mentioned in the mortgage. He asked Mr. Stewart at the sale why that was not offered, and he said he had given Mr. Swartz permission to take it from the premises, but he would speak to Swartz about it. Mr. Swartz called to see him about it, but he demanded it of him, and he produced it; that the plaintiff still has it, awaiting the result of this case. The distress proceedings were taken out by Mr. Stewart, agent for the landlady. The defendant denied any knowledge of the distress proceedings until his wife saw a notice of the sale in the papers, and Mr. Stewart testified that it was not made in collusion with Swartz. There is no question in this state about the right of the landlord to distrain on the goods of a stranger on the premises, excepting such as are exempt by statute. That includes the right to distrain on the goods of a subtenant, and on those of the tenant or subtenant, although subject to a mortgage. But it is also well settled that a stranger whose goods are seized is entitled to redeem them and to be reimbursed by the lessee, or, if they are sold, he can recover the value from the lessee. *Edmunds v. Wallingford*, 14 Q. B. Div. 814; *Exall v. Partridge*, 8 T. R. 308; *O'Donnel v. Seybert*, 13 Serg. & R. (Pa.) 54; 9 Am. & Eng. Enc. of Law, 639. "A stranger whose property is sold under a distress may buy it in and recover the amount paid in an action against the tenant." *Id.* note 2, citing *Wells v. Porter*, 7 Wend. (N. Y.) 119; *Gear on Landlord and Tenant*, 151.

A great deal of the brief of the appellant is devoted to a discussion of the question whether there could be a recovery in an action of trover. There can be no doubt there was ample evidence to show that the plaintiff had the right of immediate possession at the time of the distress and sale. Most of the property in controversy belonged to the plaintiff, and the rest was included in its mortgage. It is true that the note secured

by the mortgage was payable on demand; but there was a provision in the mortgage that "if the mortgagee shall at any time feel insecure, or shall desire to take possession of the same, then the whole indebtedness shall at once become due and the said mortgagee, its successors and assigns, agents or attorneys, shall have the right to take immediate possession of said property," etc. *Bolgiano* testified that some time in the month of October he went to the brewing company "when he was in default of the payment on his chattel mortgage, and the witness was about to leave the premises." He abandoned the place, and told Mr. Hamburger "he was sick and suffering from nervousness, and was not able to manage the place, and it was no use for him holding on any longer, and here were the keys to the premises." Hamburger directed him to take the keys to Swartz, as he testified, "because in the first place he had no right to it, because he was not the owner of the property, and, knowing at the time that Swartz had a lease on the property, he was entitled to the key, and did not know how Mr. *Bolgiano* stood as to his rent with Mr. Swartz, and thought it was no more than due to Mr. Swartz to see that he got the key, and, if any arrangement satisfactory between himself and Mr. *Bolgiano* could be made, he would give him a chance." There was, therefore, a surrender of the premises by *Bolgiano* to somebody, and under the mortgage, as between *Bolgiano* and the plaintiff, the latter undoubtedly had the right of immediate possession of the property included in it. As to the other property of the plaintiff, there could be no question about its right of possession.

That there was some evidence of demand being made before the distress is equally free from doubt. The testimony of Hamburger, as shown above, was that he demanded the keys of Swartz five or six times between the time *Bolgiano* closed the place up and it was put in the hands of the bailiff. Again, he said that he told Swartz he wanted the key, so as to take the goods out if no buyer could be found, "and Mr. Swartz told me that he had a prospective buyer that he would have there at the place the next morning following. That was the last time." He demanded the key in order to get the goods out, and it is useless to argue that there was a demand for the keys, but not for the goods. There was also some evidence of conversion by Swartz. He not only did not give up the keys, but, if Hamburger is correct in his statement, the jury could very properly have inferred that he was keeping them so the property would be there to be levied on. When Hamburger went there the next morning, the place was in the charge of the bailiff. The evidence does not show where the bailiff got the keys to get in the premises, but, as Swartz had them, he must either have gotten them from him or through him, as it will not be presumed he committed a trespass in getting into

the property. Swartz said that, when Mr. Hamburger's son went for the keys, he told him he had sent them over to Mr. Stewart, and added, "That was after the distraint." Whether he meant to say he sent the keys, or what he told Mr. Hamburger's son was after the distraint, is not clear; but the jury was not obliged to accept his statement if he meant the former. He said in chief that he removed the cash register "when the sale was to take place," and on cross-examination he said he "sent a boy to the premises for the cash register on the same day that the keys were brought up by Mrs. Bolgiano. The key was sent the witness a day or two before the distraint was made—don't think it could have been longer than two days, might have been three." Mr. Stewart said he "asked Mr. Swartz a number of times to pay the rent before distraint was issued. Witness does not think he told Mr. Swartz he was going to distraint, but told him somebody had to pay the rent, as he could not let it run on that way; that he was not going to wait any longer. Will not swear that he did not tell him he was going to distraint. May have told him he was going to distraint if rent is not paid, but does not remember whether he did or not." As Mrs. O'Brien looked to Swartz for the rent, the jury might very properly have inferred that Mr. Stewart did tell him, and under all the circumstances it would be difficult to believe that Swartz did not know that there would be a distraint.

So, without further referring to the testimony, there was unquestionably some evidence tending to show that Swartz had taken possession of the premises, that demand was made on him, and that he knew there would be distress proceedings taken out, as well as some evidence from which the jury could infer that Swartz was holding the keys until they were, so that the plaintiff's goods would be seized for his rent. It is said in 1 Poe, § 522, that "any wrongful interference with the owner's possession or right of possession is in law either a conversion itself or evidence from which a previous or continuing conversion may be implied"; and again, in the same section: "In short, any one who, without authority, interferes with the rightful owner's absolute dominion over his goods, whether he do it for his own personal advantage or for the advantage of another, or through inadvertence, or under a mistake as to his own legal rights, or otherwise, may be made responsible in trover." That is said under the discussion of the form of declaration provided for in the Code, which has materially modified and changed the declaration in trover formerly in use in this state. So, if it was necessary to show that there was evidence sufficient to sustain the action of trover, there is such in this record, but there is no prayer which distinctly raises the question of pleading. None of the prayers refer to the pleadings in any way whatever, excepting the defendant's third and fourth, which do speak

of the property "mentioned in the declaration," but those prayers were defective for reasons we will state presently, even if they be said to be sufficient to call the court's attention to the pleadings. When prayers do not refer to the pleadings, "the right to recover depends, not upon the form of the action or the state of the pleadings, but solely upon the case made by the proof," as was said in *W. Va. C. R. Co. v. Fuller*, 96 Md. 652, 54 Atl. 669, 61 L. R. A. 574, and other cases.

What we have said is sufficient to show that in our judgment there was no error in rejecting the defendant's first prayer, which sought to take the case from the jury on the ground that there was no legally sufficient evidence to entitle the plaintiff to recover. The second was also properly rejected. The complaint of the plaintiff is that the defendant owed the landlady rent for which the plaintiff's property was taken under distress proceedings against him. He had not issued a distress warrant against Bolgiano, and, if he had, other questions would have arisen—such as whether he had not accepted a surrender of the premises, etc. The third prayer asked the court to instruct the jury "that there was no privity of contract or estate between the defendant and the plaintiff, and hence no duty or obligation on the part of the defendant to protect the plaintiff's goods from distress while on the premises mentioned in the evidence in the possession of the defendant's tenant," etc. Privity of contract or estate was not necessary under what we have said, and it was the defendant's duty to protect the plaintiff's goods from being taken for rent due by him. The defendant's fourth prayer was sufficiently covered by the court's instruction, but, at any rate, it was misleading with reference to "actual possession," as the jury might have thought he had to be actually on the premises at the time of the distress. The sixth prayer was also properly rejected. Without discussing it at length, the concluding part was sufficient to cause it to be rejected—that "the refusal of the defendant to deliver said key to the plaintiff, if they find such refusal, was not a taking of possession or conversion." It was evidence of conversion under the circumstances of this case as we have shown above. The seventh is clearly not in accord with the authorities as to the measure of damages, which in trover under our rule in this state is the value of the chattels at the time of conversion, with legal interest thereon up to the date of the verdict. 1 Poe, § 219, and cases cited. It follows from what we have said that the measure of damages as stated in the plaintiff's second prayer was correctly announced. The modification by the court of the prayer as offered was: "And the only evidence in this case as to value is the gross amount which said goods brought at the auction sale mentioned in the evidence." That was sufficient evidence of the value—at least, so far

as the defendant was concerned, as no evidence of their value could have been offered which would have been fairer to him. There was nothing to show that any unusual prices were received, and surely a sale under distress proceedings will not be presumed to be for more than the goods are really worth. What we have said above applies to the defendant's special exception to that prayer. The court's instruction gave the defendant the benefit of all he was entitled to. The objection urged that there was no legally sufficient evidence of some of the questions submitted in it is not only answered by what we have said above, but there was no special exception to the instruction on that ground.

It follows from what we have said that the judgment must be affirmed.

Judgment affirmed, the appellant to pay the costs above and below.

(104 Me. 264)

WEEKS v. HACKETT.

MORTON v. SAME.

(Supreme Judicial Court of Maine. June 11, 1908.)

1. TROVER AND CONVERSION (§ 16*)—TITLE TO SUPPORT ACTION.

The absolute and unqualified ownership of a chattel is not essential to enable one to maintain trover for its conversion. Either a general or special property in a plaintiff at the time of the conversion is sufficient.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 119-122; Dec. Dig. § 16.*]

2. TENANCY IN COMMON (§ 27*)—CONVERSION OF PERSONAL PROPERTY.

With respect to things so far indivisible in their nature that the share of one cannot be distinguished from that of the other, it is a well-established rule that one tenant in common cannot maintain trover against his co-tenant for the reason that the two are equally entitled to possession; but this rule does not apply to such commodities as are readily divisible by count or measure into portions absolutely alike in quality, such as grain or money.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 70-75; Dec. Dig. § 27.*]

3. FINDING LOST GOODS (§ 5*)—STATUTORY PROVISIONS—APPLICABILITY.

The rule of the common law respecting the rights and duties of the finder of lost money or goods has been variously modified by the terms and provisions of local statutes of many states, but the provisions of Rev. St. 1903, c. 100, § 10, and those following, have no reference to the law of treasure-trove.

[Ed. Note.—For other cases, see Finding Lost Goods, Dec. Dig. § 5.*]

4. FINDING LOST GOODS (§ 2*)—"TREASURE-TROVE" DEFINED.

"Treasure-trove" is a name given by the early common law to any gold or silver in coin, plate, or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground; the owner of the discovered treasure being unknown.

[Ed. Note.—For other cases, see Finding Lost Goods, Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 7, pp. 7084, 7820.]

5. FINDING LOST GOODS (§ 6*)—TREASURE-TROVE—TITLE OF FINDER.

In the absence of legislation upon the subject, the title to treasure-trove belongs to the finder as against all the world except the true owner, and ordinarily the place where it is found is immaterial.

[Ed. Note.—For other cases, see Finding Lost Goods, Dec. Dig. § 6.*]

6. FINDING LOST GOODS (§ 6*)—TREASURE-TROVE—TITLE OF OWNER OF SOIL.

The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land.

[Ed. Note.—For other cases, see Finding Lost Goods, Dec. Dig. § 6.*]

7. FINDING LOST GOODS (§ 11*)—TREASURE-TROVE—TITLE AND RIGHTS OF JOINT FINDERS.

When several persons are joint finders of treasure-trove consisting of coin, each such finder is entitled to the possession of an equal share of such coin and is charged with the duty of holding it for the true owner, if he can be ascertained, and is under obligation to exercise reasonable care to safely keep his share of it and be prepared to restore it to the true owner whenever he may appear, and is therefore authorized to maintain such action as may be necessary to retain or recover possession of such share, and, if one such joint finder having possession of all the coin refuses to surrender to the other joint finders their respective shares thereof, it is a conversion of their shares as tenants in common, and each such other joint finder may maintain an action of trover, for his share, against the co-tenant who having possession of all the coin refuses to surrender such share.

[Ed. Note.—For other cases, see Finding Lost Goods, Cent. Dig. § 10; Dec. Dig. § 11.*]

8. FINDING LOST GOODS (§ 11*)—ACTIONS—EVIDENCE—SUFFICIENCY.

In the case at bar, the plaintiffs each brought an action of trover against the defendant for the alleged conversion of their respective shares of certain silver coins contained in three metallic cans found buried in the ground. The defendant contended, among other things, that he found the coins under circumstances which made him the sole owner of them as against the plaintiffs. *Held*, that the evidence warranted the jury in finding that the discovery of the three cans should be deemed one transaction, and that the participation of the plaintiffs in the discovery of the coins was sufficient to constitute them joint finders with the defendant.

[Ed. Note.—For other cases, see Finding Lost Goods, Cent. Dig. § 10; Dec. Dig. § 11.*]

(Official.)

Exceptions from Supreme Judicial Court, Franklin County.

Separate actions of trover by Orlando Weeks and by Edwin E. Morton against Fessenden E. Hackett. Verdict for each plaintiff, and defendant excepts and moves to set aside the verdicts. Exceptions and motions overruled.

Actions of trover, one by each plaintiff brought to recover one-third in value of a certain quantity of coins of the United States and of certain foreign coins, alleged to have been found by each plaintiff jointly with the other plaintiff and with the defendant in three metallic cans buried and concealed in the soil and underneath the surface of land

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

owned by one Leonard J. Hackett in the town of New Vineyard.

Plea in each case the general issue, with the following brief statement in each case:

"(1) Defendant claims and says he is the owner of the property sued for, and that he found it under such circumstances as makes him the owner of the same as against the plaintiff.

"(2) That if the plaintiff found any part of the same, which the defendant denies, then he is a joint owner or co-tenant with the plaintiff, and that defendant holds the money in trust for the real owner or party that deposited the same in the ground.

"(3) Defendant claims by purchase of one Leonard J. Hackett, who was the owner of the land where the money was found, all the right, title, and interest of the said Leonard J. Hackett in and to the property sued for."

Tried together at the September term, 1907, Supreme Judicial Court, Franklin County. Each plaintiff recovered a verdict for \$291.20. The defendant excepted to certain rulings made by the presiding justice during the trial and also filed general motions to have the verdicts set aside.

Argued before EMERY, C. J., and WHITEHOUSE, PEABODY, SPEAR, CORNISH, and KING, JJ.

Frank W. Butler, for plaintiffs. Joseph C. Holman, for defendant.

WHITEHOUSE, J. These were actions of trover brought by each of these plaintiffs to recover one-third in value of a certain quantity of coins of the United States and of certain foreign coins, alleged to have been found by each plaintiff jointly with the other and with the defendant, Fessenden E. Hackett. It is not in controversy that the coins in question of the aggregate par value of \$1,284.67 were found contained in three metallic cans buried and concealed in the soil and underneath the surface of land owned by one Leonard J. Hackett in the town of New Vineyard, and it appears in evidence that after the coins were found, and prior to the commencement of these actions, the defendant, Fessenden E. Hackett, purchased all the right, title, and interest, if any, which Leonard J. Hackett had in and to these coins as owner of the land where they were found.

Three contentions were set up in defense:

(1) That the defendant found the coins under circumstances which made him the sole owner of them as against these plaintiffs.

(2) That if the plaintiffs participated in the finding, they are joint tenants or tenants in common with the defendant, that he is entitled to hold the coins in trust for the true owner, and that the plaintiffs, as tenants in common, cannot maintain trover against him for their respective shares.

(3) That the defendant became the sole owner of the coins by purchase from Leonard J. Hackett, the owner of the premises where they were found.

The presiding justice did not sustain the legal propositions involved in these contentions of the defendant, but instructed the jury, in substance: That gold or silver coin deposited in the soil, as this appeared to have been, becomes what is known in law as treasure-trove, the title to which does not pass with the soil, the owner of the premises where the coin was found acquired no title to it by virtue of his ownership of the land, and that the defendant consequently acquired no title by purchase from Leonard J. Hackett, that if the coin was purposely buried in the soil and forgotten, or its place of concealment remained undisclosed by reason of the death of the depositor, the finder acquired a right to the possession of it and a qualified property in it, subject to the right of the true owner when he appeared, and in that sense became a trustee for the owner, but, if several participated in the finding so as to become joint finders with equal rights, the ownership pertained to all of them, and one of them was not authorized to hold exclusive possession as against his fellows; and, finally, that since the coins were separable and divisible by weight or count, if the defendant refused to deliver to each of such tenants in common the share to which he was entitled, an action of trover would lie against the defendant for the conversion of such number or portion of the coins as rightfully belonged to each of the joint finders.

The jury returned a verdict in favor of each plaintiff for the sum of \$291.20, being one-third of the aggregate market value of the coins, and the cases come to the law court on exceptions to these instructions and on a motion to set aside the verdicts as against the law and the evidence.

1. It is the opinion of the court that the instructions given by the presiding justice were correct, and that the exceptions must be overruled.

"Treasure-trove" is a name given by the early common law to any gold or silver in coin, plate, or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground; the owner of the discovered treasure being unknown. 1 Black. 295; Cyc. vol. 19, p. 339; A. & E. of Law, vol. 28, p. 472; *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600; *Sovern v. Yorlan*, 16 Or. 269, 20 Pac. 100, 8 Am. St. Rep. 293. To what extent the doctrine of the English common law in regard to treasure-trove has been merged in this country, into the law respecting the finding of lost property, and whether in modern commercial life, the term "treasure-trove" may be held to include not only gold and silver, but the paper representatives of them, are questions not necessary to be considered here (see *Huthmacher v. Harris' Adm'rs*, 38 Pa. 499, 80 Am. Dec. 502, and *Danielson v. Roberts et al.*, 44 Or. 108, 74 Pac. 913, 65 L. R. A. 528, 102 Am. St. Rep. 627), for while it is not in controversy that the coins here in question clearly fall

within the common-law definition of "treasure-trove," the general rule is established by a substantially uniform line of decisions in the American states, with respect to both lost goods, properly so termed, and treasure-trove, that, in the absence of legislation upon the subject, the title to such property belongs to the finder as against all the world except the true owner and that ordinarily the place where it is found is immaterial. *Lawrence v. Buck*, 62 Me. 275; *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528; *Hamaker v. Blanchard*, 90 Pa. 377, 85 Am. Rep. 664; *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172; *Danielson v. Roberts*, 44 Or. 108, 74 Pac. 913, 65 L. R. A. 526, 102 Am. St. Rep. 627; *Armory v. Delamarie*, 1 Strange, 504, 1 Smith's Lead. Cases, 631; *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. 424, 21 L. J. Q. B. 75. The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land. *Reg. v. Thomas. Leigh & Cave Eng. Cr. Cases*; 28 A. & E. Enc. of Law (2d Ed.) 473. According to *Bracton lib. 3, c. 3*, as quoted in *Viner's Abridgment*: "He to whom the property is shall have treasure-trove, and if he die before it be found, his executors shall have it, for nothing accrues to the King unless when no one knows who hid that treasure." And according to *Lord Coke* (8 Inst. 132), the common law originally left treasure-trove to the person who deposited it, or, upon his omission to claim it, to the finder. 2 Kent's Com. 458. The rule of the common law respecting the rights and duties of the finder of lost money or goods has been variously modified by the terms and provisions of local statutes of many states, but the provisions of the Maine statutes (Rev. St. c. 100, § 10 et seq.) have no reference to the law of treasure-trove.

In *Danielson et al. v. Roberts et al.*, 44 Or. 108, 74 Pac. 913, 65 L. R. A. 526, 102 Am. St. Rep. 627, in which the facts were strikingly analogous to those at bar, two boys unearthed on the defendant's premises an old tin can containing gold coin of the value of \$7,000. The circumstances under which the money was discovered, the rust-eaten condition of the can in which it was contained, and the place of deposit, tended strongly to show that it had been buried for a long time, and that the owner was probably dead or unknown. It was held that the fact the money was found on the premises of the defendants in no way affected the plaintiffs' right to possession or their duty in relation to the treasure, and that they could maintain trover therefor against the defendants to whom they had been induced to deliver the money. In a well-reasoned opinion, the court say:

"Ever since the early case of *Armory v. Delamarie*, 1 Strange, 504, where it was held that the finder of a jewel might maintain trover for the conversion thereof by a wrong-

doer, the right of the finder of lost property to retain it against all persons except the true owner has been recognized. In that case a chimney sweeper's boy found a jewel and carried it to a goldsmith to ascertain what it was. The goldsmith refused to return it, and it was held that the boy might maintain trover on the ground that by the finding he had acquired such a property in the jewel as would entitle him to keep it against all persons but the rightful owner. This case has been uniformly followed in England and America, and the law upon this point is well settled. *Sovern v. Yoran*, 16 Or. 269, 20 Pac. 100, 8 Am. St. Rep. 293; 19 Am. & Eng. Ency. Law (2d Ed.) 579. But it is argued that property is lost, in the legal sense of that word, only when the possession has been casually and involuntarily parted with, and not when the owner purposely and voluntarily places or deposits it in a certain place for safe-keeping, although he may thereafter forget it, and leave it where deposited, or may die without disclosing to any one the place of deposit.

"But at the present stage of the controversy it is immaterial whether the money discovered by plaintiffs was technically lost property or treasure-trove, or, if treasure-trove, whether it belongs to the state or the finder, or should be disposed of as lost property if no owner is discovered. In either event the plaintiffs are entitled to the possession of the money as against the defendants, unless the latter can show a better title. The reason of the rule giving the finder of lost property the right to retain it against all persons except the true owner applies with equal force and reason to money found hidden or secreted in the earth as to property found on the surface."

In *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528, the plaintiff bought an old safe and soon afterwards, through his agent, left it for sale, with the defendant, who was a blacksmith. Upon examination of it soon after it was left with him the defendant found secreted between the exterior and the lining a roll of bank bills amounting to \$165. Neither the plaintiff nor the defendant knew the money was there before it was found, and the owner was unknown. The plaintiff brought suit against the defendant to recover the money, claiming that as owner of the safe he was entitled to the money by right of prior possession; but the court held that the plaintiff "never had any possession of the money except unwittingly, by having possession of the safe which contained it; that although it was originally deposited in the safe by design, it was not so deposited after the safe became the property of the plaintiff, so as to be in the protection of the safe as his safe, or so as to affect him with any responsibility for it," and it was accordingly held that the plaintiff, as finder of the money, was entitled to retain it as

against the defendant, the owner of the safe, and as against all the world except the real owner.

In *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172, the plaintiff, while engaged as an employé in the defendant's paper mill, found two \$50 bank bills, in a clean unmarked envelope, in a bale of old paper which the defendant had bought for manufacture, and delivered the bills to the defendant for the purpose of ascertaining if they were good and upon his promise to return them. The defendant refusing to return them, the plaintiff brought suit to recover their value, and the court held that she was entitled to recover, citing among other cases, *Lawrence v. Buck*, 62 Me. 275, *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528, and *Armory v. Delamirie*, 1 Strange, 505, *supra*, and stating that the place of the finding was ordinarily immaterial.

The result therefore seems unquestionable that, in the case at bar, the coins sued for belonged to the finder or finders as against all the world except the true owner, or his legal representatives, when discovered. Indeed the defendant's counsel does not seriously contend to the contrary, but, as already noted, he claims under the motion that the defendant was in fact the sole finder of the coins, and further insists under the exceptions that, in any event, these actions are not maintainable for the reason that an action of trover will not lie in favor of one tenant in common against his original co-tenant.

With respect to things so far indivisible in their nature that the share of one cannot be distinguished from that of the other, it is undoubtedly a well-established rule that one tenant in common cannot maintain trover against his co-tenant for the reason that the two are equally entitled to possession, and the one who has it cannot be guilty of conversion by retaining it; but this rule "can have no reasonable application to such commodities as are readily divisible by tale or measure into portions absolutely alike in quality, such as grain or money." *Cooley on Torts* (2d Ed.) p. 533. *Cessante ratione legis, cessat ipsa lex*. If A. and B. are tenants in common of a car load of corn, and B., denying A.'s right to any part of it, refuses to surrender his half on demand, this is deemed in law a conversion, because the commodity would be capable of exact division by weight or measure, and by refusing to surrender A.'s half B. exercised a dominion over it inconsistent with A.'s rights. As observed by the court in *Pickering v. Moore*, 67 N. H. 536, 32 Atl. 830, 31 L. R. A. 698, 68 Am. St. Rep. 695: "One is entitled to the possession of the whole in those cases only where it is necessary to his enjoyment of his moiety. Here it is not necessary. There is no more difficulty in separating one portion from another than there is in selecting A.'s marked sheep from B.'s flock. Either may make the divi-

sion. The law is not so unreasonable as to compel a resort to the courts in order to obtain a partition which either may make without expense and without danger of injustice to his co-tenant." See, also, *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 282; *Gates v. Bowers*, 169 N. Y. 14, 61 N. E. 993, 88 Am. St. Rep. 530; *German Nat. Bank v. Meadowcroft*, 95 Ill. 124, 35 Am. Rep. 137.

It is also familiar law that absolute and unqualified ownership of a chattel is not essential to enable one to maintain trover for its conversion. Either a general or special property in the plaintiff with the right of possession at the time of the conversion will be sufficient. It has been seen that, in all the cases above cited in which it has been held that the finder of lost property is entitled to retain possession of it as against all the world until the rightful owner appears, it was also held that the finder had a special or qualified property in the thing found sufficient to enable him to maintain trover for its conversion against any one except the true owner.

Upon the assumption then that the plaintiffs and the defendant were joint finders, and therefore tenants in common, of the coin contained in the cans found in the case at bar, each was entitled to possession of one-third of it and charged with the duty of holding it for the true owner if he could be ascertained. He was under obligations to exercise reasonable care to safely keep his share of it and be prepared to restore it to the true owner whenever he might appear, and was therefore authorized to maintain such action as might be necessary to entitle him to retain or recover possession of it. The coins were readily divisible into three parts by counting and weighing, but the defendant denied the plaintiffs' rights and refuses to surrender any part of the coin. This was effectually a conversion of their respective shares as tenants in common, and an action of trover was the appropriate remedy for each plaintiff.

2. Under the motion the defendant insists that he discovered the cans under circumstances that constitute him the sole finder of the coins; but, under instructions upon this point to which no exceptions were taken, the jury evidently reached the conclusion that the plaintiffs participated in the discovery so as to become joint finders with the defendant with equal rights in the property found. They awarded to each plaintiff \$291.20, and this appears to have been precisely one-third of the aggregate market value of all the coin. As it satisfactorily appears that the quantity of coin in any one can was not of the same value as that in any other, the jury must have decided that there was a joint finding by all and not a separate finding of a single can by each, and the question now is whether this conclusion of the jury was warranted by the evidence.

A mill owned by Leonard J. Hackett had

been destroyed by fire, including a small building 14 feet distant from it and a covered passageway connecting it with the mill. The plaintiffs and defendant were employed by the owner of the premises, among other things, to make an excavation about 8 feet wide for a shaftway preparatory to the erection of a new mill on the same site. At the time of the discovery of the coin, they were all engaged in digging out the gravel and small stones in the passageway connecting the old mill with the small building. It appeared in evidence that there had been some "joking" between these workmen and Mr. Sweet, a neighbor who happened to be present, with reference to a tradition that one Porter, a former owner, had buried some money on the premises; but, according to the testimony in behalf of the plaintiffs, the coin was discovered under the following circumstances: The plaintiffs and defendant were working in the trench about four or five feet from each other, when the defendant discovered the top of an old can, and asked Sweet, who was walking away, to come back, saying, "I have found it." Thereupon the plaintiff Morton commenced to dig out the stones and gravel around the can, when the defendant tried to pull it out with his hands, and said: "I can't lift it. I guess it is filled with sand." After further digging the plaintiff Morton took up the can, when the bottom dropped out, and the silver coins were seen falling from the can among the stones. The defendant exclaimed: "It is money. I wish I hadn't said anything, for there will be a row over it." While digging out more stones for the purpose of picking up the coins that fell among the stones, the plaintiff Morton discovered the second can, which was taken out by the defendant and Mr. Sweet. Morton continued to dig out the stones and gravel and soon uncovered the third can, the top of which, however, appears to have been first seen by the plaintiff Weeks. This can was removed by the defendant and the plaintiff Morton. The three cans were set in a triangular position about a foot equidistant from each other; the spaces between them being filled with stones and gravel.

The money was turned into a pall and pan and carried to the house of Leonard J. Hackett by the defendant and Mr. Sweet, where it remained from Saturday afternoon until the following Monday, when, by arrangement between the defendant and the owner of the land, the money was deposited in a national bank.

The defendant's account of the finding is materially different. He testifies that the cans were standing in a row close to each other, and that when he unearthed the first one, and before it was taken out, he discovered the other two through the openings in the stones and plainly saw the bright coins in the cans. He expressly admits, however, that "we all had hold of those cans," and it is the opinion of the court that there was

sufficient evidence to warrant the jury in accepting the plaintiffs' version of the finding, and in drawing the inference that neither the plaintiffs nor the defendant had any knowledge or belief that silver coins had been discovered until they were seen to fall through the bottom of the first can after it was taken out by the plaintiff Morton. It may also be fairly inferred from the conduct of the parties that at the time of the discovery of the coins neither the plaintiffs nor the defendant understood that the finder of money under such circumstances acquired any legal claim to it as against the owner of the soil where it was found.

The solution of the question thus raised, respecting the rights of the several parties who participated in the discovery and removal of the cans containing the coin in dispute, is necessarily attended with some practical difficulties. Other courts have encountered similar difficulties under analogous circumstances.

In *Keron v. Cashman et al.* (N. J. Eq. 1896), 33 Atl. 1055, one of several boys playing along a railroad track picked up an old stocking in which something was tied, and, after he had swung it about in play for a time, a second one of the boys snatched it, or, it having been thrown by the finder, the second boy picked it up and began striking the other boys with it. In this way it passed from one to another, and, finally, while the second boy was swinging it, it broke open, and paper money to the amount of \$775 was found therein; all then examining it together. It was held that the money belonged to all the boys in common. In the opinion the court say:

"This money within the stocking was therefore the lost property, and as to this money the first intention, idea, or 'state of mind,' as it is called in some of the authorities, arose on this discovery. As a plaything, the stocking with its contents was in the common possession of all the boys; and inasmuch as the discovery of the money resulted from the use of the stocking as a plaything, and in the course of the play, the money must be considered as being found by all of them in common.

"All of the cases agree that some intention or state of mind with reference to the lost property is an essential element to constitute a legal 'finder' of such property, and the peculiarity of the present case is that the intention or state of mind necessary to constitute the finder must relate to the lost money inclosed within a lost stocking, and not to the lost stocking itself, in the condition when first found; and, under the circumstances established by the evidence in this case, the finder of the lost stocking was not, by reason of such finding, the legal finder of the lost money within the stocking. A decree will therefore be advised dividing the money equally between the defendants."

In *Cummings v. Stone*, 13 Mich. 70, the plaintiff's tugboat, while towing a raft belonging to the defendant, slackened speed, and on starting again the tow line, which was the property of the defendant, caught and drew up an anchor and chain which were secured and put on the raft by the defendant, and it was held that the plaintiff and defendant were joint finders of the property.

In these decisions the courts appear to have been governed by those practical considerations of fairness and conceptions of common right which influence just and thoughtful men in the ordinary affairs of life and which are in harmony with the principles of equity and not discountenanced by rules of law. In reaching the conclusion that the discovery of the three cans should be deemed one transaction, and that the participation of the plaintiffs in the discovery of the cans was sufficient to constitute them joint finders with the defendant, the jury in the cases at bar appear to have been governed by the same equitable considerations, and it is the opinion of the court that the verdicts were warranted by the evidence.

Exceptions and motions overruled.

(104 Me. 285)

MOORE et al. v. ARCHER.

(Supreme Judicial Court of Maine. July 10, 1908.)

1. APPEAL AND ERROR (§ 927*)—EXCEPTIONS TO NONSUIT—REVIEW.

Upon exceptions to an order of nonsuit, the question is whether the report of the evidence contains evidence sufficient to prove all the propositions essential to the maintenance of the action. If any one of those propositions is supported by the evidence reported, the exceptions must be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 927.*]

2. APPEAL AND ERROR (§ 648*)—REPORT OF EVIDENCE—AMENDMENT.

If the report of the evidence, upon exceptions to an order of nonsuit, does not contain essential evidence actually introduced at the trial, it may be amended by the presiding justice to include such evidence; but, if the evidence was not thus actually introduced, the fact that it was omitted because of an understanding that the proposition to be proved by it was admitted, does not authorize the report to be amended to include such evidence, unless by consent.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 648.*]

3. TRESPASS (§ 43*)—EVIDENCE OF ENTRY—NECESSITY.

In an action of trespass *quare clausum*, evidence of an entry upon the locus by the defendant is essential to the maintenance of the action; and, if the plaintiff rests his case without such evidence, a nonsuit is properly ordered, though the plaintiff omitted to introduce the evidence because of a justifiable understanding that the entry was admitted. If upon such order the plaintiff elects to except to the order, instead of asking leave to reopen the case and

introduce the evidence, his exceptions must be overruled.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 43.*]

(Official.)

Exceptions from Supreme Judicial Court, Hancock County.

Action by Fred Moore and Jeremiah Hurley against Alton Archer. A nonsuit was ordered for defendant, and plaintiff excepts. Exceptions overruled.

Trespass *quare clausum fregit*, brought by the plaintiff against the defendant, alleging that the defendant, on February 12, 1908, with force and arms broke and entered the plaintiffs' close situate in Plantation No. 8, Hancock county, and then and there cut down and carried away certain wood and lumber then and there growing. Plea the general issue, with brief statement alleging as follows:

"(1) If he was cutting or doing other acts on said premises, described in plaintiffs' writ, at any time, he was so acting by authority of, and under permission from, Lynwood F. Giles.

"(2) That said Lynwood F. Giles is vested with legal title to the premises described in the writ of plaintiffs, and was so vested at and before the time alleged that the trespass was committed."

The action came on for trial at the April term, 1908, Supreme Judicial Court, Hancock county. At the conclusion of the plaintiffs' evidence the presiding justice, upon motion of the defendant, made the following order: "Nonsuit for the defendant is ordered with stipulation on his part that if the law court overrules this order, then the defendant agrees that judgment may be entered for the plaintiffs in the sum of \$10 and costs." To this order the plaintiffs excepted.

Argued before EMERY, C. J., and SAVAGE, PEABODY, CORNISH, KING, and BIRD, JJ.

D. E. Hurley, for plaintiffs. L. F. Giles, for defendant.

EMERY, C. J. This was an action of trespass *quare clausum*. The plaintiffs having put in their evidence and rested, the defendant moved for a nonsuit, and stipulated that if the law court should find that the evidence would sustain the action, it might order judgment for the plaintiffs, with damages assessed at \$10. A nonsuit was ordered, and the plaintiffs brought the case to the law court on exceptions to that order.

At the oral argument the defendant claimed that there was no evidence that he or his servants had made any entry at all upon the land described in the writ. The plaintiffs claimed that it was the understanding at the trial that the entry was admitted, and that the only question in the case was the

sufficiency of the plaintiffs' title and possession to maintain the action. The defendant, however, would not admit that such was the understanding. While from all the circumstances it does seem probable that the entry was not understood to be in dispute, yet there was no evidence of entry in the record before us. The general issue was pleaded, which put the entry directly in issue. In his brief statement, and in his admissions of record, the defendant carefully avoided admitting the entry as a fact. His willingness to have judgment go against him in case the plaintiffs' evidence showed a cause of action would seem to indicate that he reserved all points as to the sufficiency of the evidence.

But whatever the fact may be, or whatever the understanding was, the only question before us is whether the evidence shows that the order of nonsuit was erroneous. Inasmuch as that evidence fails to show the fact of entry a fact essential to the maintenance of the action, the nonsuit was rightly ordered.

If, as seems probable, the plaintiffs omitted proving the entry because of their justifiable understanding that it was and would be admitted, there seems to be no way to relieve them as the case is presented. There was a ruling on the evidence. There is no suggestion that the bill of exceptions does not present the question ruled upon fairly and fully. If the exceptions be dismissed or discharged, instead of being considered and overruled, that ruling remains in force; the nonsuit stands. The plaintiffs' only remedy would seem to be to bring a new action, and at the trial prove what is not expressly admitted on the record.

Exceptions overruled.

(75 N. H. 589)

ROBINSON v. MONADNOCK PAPER MILL.

(Supreme Court of New Hampshire. Hillsborough. Jan. 5, 1909.)

1. TRIAL (§ 120*)—ARGUMENTS OF COUNSEL—EVIDENCE TO SUSTAIN.

An inference that the suit was champertous, so as to justify the statement in argument of defendant's counsel that plaintiff's claim was a dishonest one "jobbed out" to the deputy sheriff, could not be properly drawn from evidence that plaintiff employed a deputy sheriff to prepare the case for trial, and that the deputy employed engineers, who looked to him for their pay, gave them directions as to making their surveys, and took the writ in the action to another deputy to serve.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 120.*]

2. APPEAL AND ERROR (§ 925*)—PRESUMPTION—ARGUMENT OF COUNSEL.

Where, on motion to set aside the verdict for misconduct of counsel in argument, the question whether a certain inference could properly be drawn from the evidence is transferred from the superior court to the Supreme Court, with the statement that the verdict is to be set aside unless the argument was justifiable, no

presumption that the error of counsel was corrected by the court can be indulged.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 925.*]

Transferred from Superior Court, Hillsborough County; Pike, Judge.

Action by Henry F. Robinson against the Monadnock Paper Mill. A question on a motion to set aside the verdict was transferred to the Supreme Court. Exception sustained. Verdict set aside.

Case, for flowage. Trial by jury, and verdict for the defendant. The evidence tended to show that the plaintiff employed a deputy sheriff to prepare the case for trial; that the officer employed engineers, who looked to him for their pay, gave them directions as to making their surveys, and took the writ in the action to another deputy to serve. Against the plaintiff's objection, and after warning from the court that he must take his chances, the defendant's counsel argued that the plaintiff's claim was a dishonest one, "jobbed out" to the deputy sheriff. On a motion to set aside the verdict for misconduct of counsel, the presiding justice found that the argument was intended to, and probably did, influence the jury. The question whether the inference could properly be drawn from the evidence was transferred, without ruling, by Pike, J., from the May term, 1908, of the superior court.

James F. Brennan, for plaintiff. Hamblett & Spring and Doyle & Lucier, for defendant.

PEASLEE, J. There was no evidence from which the inference that the suit was a champertous one could properly be drawn. The presumption that the error of counsel was corrected by the court (*Mitchell v. Railroad*, 68 N. H. 96, 117, 34 Atl. 674) cannot be applied here; for it not only appears in the case that the error was not corrected, but it is stated in terms that the verdict is to be set aside unless the argument was justifiable.

Exception sustained. Verdict set aside. All concurred.

(75 N. H. 166)

CITY OF MANCHESTER v. HODGE et al.

(Supreme Court of New Hampshire. Hillsborough. Jan. 5, 1909.)

PRIVATE ROADS (§ 8*)—OBSTRUCTION—RIGHTS OF ABUTTERS.

Abutting owners upon a private way can use the opposite half of the way which abuts upon a cemetery, and the legal title of which is in the city as trustee for the cemetery, for travel only, and can only use the other half for travel and other purposes not inconsistent with its reasonable free use as a way by the city in going to and from the cemetery, and an obstruction of the way will be restrained.

[Ed. Note.—For other cases, see Private Roads, Dec. Dig. § 8.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Transferred from Superior Court, Hillsborough County; Pike, Judge.

Bill by the City of Manchester against Jeremiah Hodge and another. Transferred from superior court. Case discharged.

See, also, 73 N. H. 317, 64 Atl. 23, and 74 N. H. 468, 69 Atl. 527.

Willow street is a private way, and is the westerly boundary of the plaintiffs' land and the easterly boundary of the defendants' land. The defendants are in possession of the street opposite their respective properties, have inclosed the same with fences, have built sheds thereon, and have incumbered the ground with lumber, stone, iron, and other things in great quantities. By so doing they have prevented and still prevent all travel over the street, and deprive the plaintiffs of all means of access to their cemetery over the same. In this proceeding the plaintiffs moved that the defendants be ordered to remove all obstructions thus maintained by them. The defendants claim that they have the legal right to use and occupy Willow street in the manner and to the extent above set forth. If they do not have the legal right to so use the street or any part of it, an injunction is to issue to the extent of the unlawful occupation thereof; otherwise, the plaintiffs' motion for such an order is to be denied.

George A. Wagner, David Cross, and Taggart, Tuttle, Burroughs & Wyman, for plaintiffs. Burnham, Brown, Jones & Warren, for defendants.

BINGHAM, J. The defendants, as abutting owners upon Willow street, have no right to use the half of the street adjacent to the cemetery for any purpose other than travel, and no right to use the other half of the street, except for the purpose of travel, and such other purposes as are not inconsistent or incompatible with its reasonably free use as a way by the city in going to and from the cemetery. *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Low v. Street-er*, 66 N. H. 36, 20 Atl. 247, 9 L. R. A. 271; *Ladd v. Brick Co.*, 68 N. H. 185, 37 Atl. 1041; *Jewell v. Clement*, 69 N. H. 133, 39 Atl. 582; *Tudor Ice Co. v. Cunningham*, 8 Allen (Mass.) 139; *Welch v. Wilcox*, 101 Mass. 162, 100 Am. Dec. 113; *Williams v. Clark*, 140 Mass. 238, 5 N. E. 802.

It is found that the defendants have so inclosed and incumbered the street as to prevent all travel upon it. This means, as we understand it, that the defendants not only use the half of the street adjacent to the cemetery for purposes other than travel, but so use the half adjacent to their own premises as to wholly exclude the city from its use, and is equivalent to a finding that the use made by the defendants is inconsistent with the reasonably free use of the street as

a way to the cemetery. Therefore, as the case stands, the plaintiffs' motion should be granted and an injunction issue accordingly. Case discharged. All concurred.

(75 N. H. 171)

W. P. CHAMBERLAIN CO. v. TUTTLE.

(Supreme Court of New Hampshire. Cheshire. Jan. 5, 1909.)

1. APPEAL AND ERROR (§ 267*)—PRESENTATION OF GROUNDS OF REVIEW—EXCEPTION TO JUDGMENT.

No question is presented for review, where no exception was taken to the order of judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 267.*]

2. SALES (§ 230*)—RIGHTS OF BUYER AGAINST THIRD PARTIES—CREDITORS.

Where hotel furniture was sold on Saturday afternoon, the sale being made six miles from the hotel, and the buyer did not then take possession of the property, because the carpet could not be taken up before dark, intending to take possession Monday, but nothing was done to show that title had passed, or to give notoriety to the sale, it was invalid as against creditors of the seller attaching the property before actual possession was taken, and the fact that it was more convenient for the buyer to take possession on Monday did not make delivery impossible on Saturday, so as to excuse the buyer's failure to then take possession.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 630; Dec. Dig. § 230.*]

Transferred from Superior Court, Cheshire County; Stone, Judge.

Action by the W. P. Chamberlain Company against William S. Tuttle. Order of judgment for defendant, and case transferred from the superior court. Judgment for defendant.

March 14, 1908, the defendant, sheriff of the county, duly attached upon a valid writ the property in question, which was furniture in a hotel at Marlborough, as the goods of George L. Cutting, without notice of the plaintiffs' claim. They claimed the property under a bill of sale from Cutting given the same day, but before the attachment. There was no delivery of the property to the plaintiffs, but it remained in the hotel, which was open and occupied by Cutting. The sale was made at the plaintiffs' place of business in Keene, six miles from the hotel, on Saturday afternoon. The plaintiffs did not then go to take possession of the property because there was not time enough to take up the carpets before dark, but they intended to take possession Monday morning, and so arranged with Cutting.

John E. Allen and Charles H. Hersey, for plaintiff. Joseph Madden, for defendant.

PARSONS, C. J. In the absence of an exception to the order of judgment there is no question before the court. Assuming from the transfer of the case that the plaintiff

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

excepted to the order, they take nothing by such exception. By the terms of sale the property was left in Cutting's possession until the following Monday, without anything to indicate the change of title or to give notice to the sale. Such unexplained retention of possession is a conclusive badge of fraud, which renders the sale invalid as against a subsequent purchaser or attaching creditor without notice. "It is unnecessary to cite authorities to the point that a sale of chattels is invalid as to creditors of the vendor when the property is allowed to remain in his use and possession." *Doucet v. Richardson*, 67 N. H. 186, 187, 29 Atl. 635. See cases collected in *Locke v. Brick Co.*, 73 N. H. 492-494, 63 Atl. 178. Evidence that it was more convenient to delay the delivery does not authorize a finding that delivery was impossible. If at the time of the sale manual delivery could not be made because the negotiators were at a distance from the property, the arrangement that the vendees should not go to the hotel where the vendor lived to take possession until a later date permitted the vendor to resume the actual possession with all the indicia of ownership, and to retain the use of the chattels in the meantime. "It is the open possession by the vendor as owner that works the fraud." *Corning v. Records*, 69 N. H. 390, 395, 46 Atl. 462, 465, 76 Am. St. Rep. 178. It could not be found upon the facts that the situation was such that there could be no delivery. *Ricker v. Cross*, 5 N. H. 570-572; *Corning v. Records*, supra. The parties agreed that there should be none, and this secret agreement renders the sale invalid against the subsequent attaching creditor.

Judgment for the defendant. All concurred.

(76 N. H. 131)

BUNKER v. MANCHESTER REAL ESTATE & MFG. CO.

(Supreme Court of New Hampshire. Rockingham. Dec. 1, 1908.)

1. JUDGMENT (§ 729*)—CONCLUSIVENESS.

A decree, enjoining plaintiff from cutting timber on land claimed by her under a deed which the adverse party claimed was fraudulent, without prejudice to any right to object to the levy made by such party, does not estop plaintiff to deny the validity of the deed.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 729.*]

2. FRAUDULENT CONVEYANCES (§ 113*)—SECRET TRUSTS—TRANSACTION CONSTITUTING.

Plaintiff's agreement to reconvey land on repayment of borrowed money, and in the meantime to permit the borrower's father to cut firewood on the locus, constituted a secret trust.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 365; Dec. Dig. § 113.*]

3. FRAUDULENT CONVEYANCES (§ 113*)—SECRET TRUSTS—TERMINATION.

If the secret trust, constituted by plaintiff's agreement to reconvey land on the repayment

of borrowed money, was terminated before the borrower's creditor attached the land, by plaintiff's agreement to take the land in payment of the debt, and by recording the deed, plaintiff's title is valid.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 113.*]

4. FRAUDULENT CONVEYANCES (§ 308*)—JURY QUESTIONS.

Where plaintiff claimed land sold under execution, against one to whom plaintiff agreed to reconvey on repayment of borrowed money, whether the trust in plaintiff was terminated by his agreeing to take the land in payment of the debt before the land was attached by the borrower's creditor *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 308.*]

5. FRAUDULENT CONVEYANCES (§ 291*)—EVIDENCE—INADEQUACY OF CONSIDERATION.

That land was worth \$250 more than the grantee paid for it was relevant, but not conclusive, on the issue of fraud in the conveyance.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 856; Dec. Dig. § 291.*]

6. TRESPASS (§ 27*)—DEFENSES—FRAUDULENT CONVEYANCES.

Where one suing for trespass to land claimed under a deed recorded before the land was sold under execution against her grantor, defendant claiming under the sale, the action could only be defeated by showing that plaintiff's deed was fraudulent.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 27.*]

7. FRAUDULENT CONVEYANCES (§ 286*)—EVIDENCE—KNOWLEDGE OF RECORD.

Where an action involved an issue whether plaintiff's deed, which was recorded before an execution sale to another, under which defendant claims, was fraudulent, defendant's knowledge of the record was immaterial.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 286.*]

8. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

To be reversible error evidence improperly admitted must have been both immaterial and prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

9. CORPORATIONS (§ 428*)—NOTICE TO AGENT.

Where plaintiff, in suing for trespass to land, claimed under a deed recorded before the land was sold, under execution against her grantor, under which sale defendant company claims, a declaration by plaintiff's counsel to a third person before defendant purchased that there was great risk in buying was inadmissible against defendant, if such third person was not its representative.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 428.*]

Transferred from Superior Court, Rockingham County; Chamberlin, Judge.

Action by Julia A. Bunker against the Manchester Real Estate & Manufacturing Company. Transferred on defendant's exceptions, on verdict for plaintiff. Exceptions overruled.

Trespass quare clausum. Plea, the general issue, title to the locus, and *res judicata*. Trial by jury, and verdict for the plaintiff. Transferred from the October term, 1907, of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the superior court, by Chamberlin, J. In February, 1902, the plaintiff loaned \$500 to Alice M. Bean, and took a warranty deed of the locus as security therefor. The understanding between the parties was that the plaintiff should reconvey upon payment of the loan. The plaintiff also agreed that Gilman A. Bean, father of Alice, might cut his firewood on the locus while she held it, and because of this collateral agreement she did not at that time record her deed. The plaintiff knew that Alice was in pressing need of money, but was not aware that she was insolvent. Among others, Alice was indebted to one Head, who was pressing her for payment at the time she borrowed of the plaintiff, and continued to do so until early in November, 1902, when he asked her to furnish security, and was informed that she had conveyed the locus to the plaintiff. Head then called upon the plaintiff, and learned that she claimed to own the land. November 14, 1902, Alice told the plaintiff that she would be unable to redeem. The plaintiff thereupon agreed to take the land in payment of her debt, and recorded her deed. November 25, 1902, Head sued Alice, and attached the locus as her property, the action being entered at the January term, 1903, of the superior court. Some time in January, 1903, Alice's father obtained permission from the plaintiff to cut wood on the locus, and on February 6, 1903, Head petitioned for an injunction to restrain the plaintiff and the Beans from removing any wood from the premises during the pendency of his suit against Alice, alleging, among other things, that the conveyance to the plaintiff was fraudulent as to him. On this petition the following decree was made: "The above-entitled action having been duly served, and the defendants having appeared by their counsel, but no answer having been filed, now it is ordered and decreed that the plaintiff's bill be taken as confessed, that the said defendants, and each of them, be perpetually enjoined from taking any wood or timber from the land described in the plaintiff's bill under the pretended conveyance to said Julia A. Bunker, without prejudice, however, to any rights they, or either of them, may have to object to the levy by the plaintiff on said premises." Head recovered judgment against Alice at the October term, 1903, and levied on the locus, which was sold on the execution December 2, 1903, and came by subsequent conveyances to the defendants. The plaintiff objected to the sale, and notified the purchaser that she owned the land. Subject to the defendants' exception, one of the plaintiff's counsel testified that before the defendants purchased the land he told one Mead that there was great risk in buying it. The defendants also excepted to the denial of their motion for the direction of a verdict in their favor.

Eastman, Scammon & Gardner, for plaintiff. G. K. & B. T. Bartlett, for defendant.

YOUNG, J. 1. It is unnecessary to consider the defendants' contention that the plaintiff is estopped, by the decree in the equity proceeding, to deny that her deed is fraudulent as to the defendants, for the decree itself expressly reserves to her the right to litigate the title to the locus.

2. The plaintiff's agreement to reconvey whenever Miss Bean repaid the money she borrowed, and in the meantime to permit her father to cut his firewood on the locus, constituted a secret trust (*Watkins v. Arms*, 64 N. H. 99, 6 Atl. 92); but it does not necessarily follow from the fact that the trust existed when the conveyance was made that it existed when Head attached the land. If it had ceased to exist before the land was attached, the plaintiff's title is valid. *Weeks v. Fowler*, 71 N. H. 518, 520, 53 Atl. 543; *Mandigo v. Healey*, 69 N. H. 94, 95, 45 Atl. 318; *Smyth v. Carlisle*, 17 N. H. 417, 419; *Oriental Bank v. Haskins* (Mass.) 3 Metc. 332, 340, 37 Am. Dec. 140. Whether or not the parties had terminated the trust before the land was attached is a question of fact, and was properly submitted to the jury, for it could be found that Miss Bean ceased to have any rights in the premises on November 14, 1902.

3. The fact that the jury found that the land was worth \$250 more than the plaintiff paid for it is not equivalent to a finding that the conveyance was fraudulent as to creditors. Although the inadequacy of the consideration was relevant upon the issue of fraud, it was not conclusive. *Norris v. Clark*, 72 N. H. 443, 444, 57 Atl. 334; *Eastman v. Plumer*, 46 N. H. 464, 479; *Washband v. Washband*, 27 Conn. 424; 20 Cyc. 520. The defendants, therefore, take nothing by this finding, for it is not inconsistent with the general verdict for the plaintiff.

4. If it is conceded that the defendants' exception to the evidence is broad enough to include the objection they now make to it that there is nothing to show that Mead, with whom the witness talked, was their treasurer, and that the evidence is merely an attorney's opinion of the effect of the decree in the equity proceeding, and for that reason irrelevant, it does not follow that the verdict should be disturbed. The record title to the property was in the plaintiff, and the only way the defendants could defeat her action was by showing that the deed from Miss Bean to her was fraudulent. As to that issue the defendants' knowledge of the record was immaterial, and the jury should have been so instructed at some time in the course of the trial. There can be no presumption, therefore, that the evidence produced the verdict. Consequently the error incident to its admission furnishes no sufficient reason for setting aside the verdict; for, to justify such a proceeding, it must appear that the evidence was both immaterial and prejudicial. *State v. Danforth*, 73 N. H. 215, 60 Atl. 839, 111 Am. St. Rep. 600; *Smith v. Morrill*, 71 N.

H. 409, 52 Atl. 928; *Rogers v. Kenrick*, 63 N. H. 835. This conclusion is based on the proposition that the jury found that Mead, with whom the witness talked, was the defendants' treasurer. Of course, if the jury did not find that Mead was the treasurer, they could not consider the evidence for any purpose, and would have been so instructed if the defendants had so requested.

Exceptions overruled. All concurred.

(75 N. H. 158)

**DE ROCHEMONT v. NEW YORK CENT.
& H. R. R. R.**

(Supreme Court of New Hampshire. Rockingham. Jan. 5, 1909.)

**1. ATTACHMENT (§ 49*)—PROPERTY SUBJECT TO
—FREIGHT CARS NOT IN USE.**

Freight cars of a railroad when not in actual use may be attached like other personal property, as against the objection that they are needed to enable the railroad to perform its public duty.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. § 127; Dec. Dig. § 49.*]

**2. COMMERCE (§ 48*)—STATE REGULATIONS—
INCIDENTAL INTERFERENCE WITH INTERSTATE
COMMERCE.**

The enforcement of a valid state statute will not be stayed merely because it may incidentally affect interstate commerce.

[Ed. Note.—For other cases, see *Commerce*, Dec. Dig. § 48.*]

**3. COMMERCE (§ 81*)—STATE ATTACHMENT
LAWS—RAILROAD CARS.**

Pub. St. 1901, c. 220, §§ 1, 2, making all property liable to be taken in execution, subject to attachment, and defining exempt property, is valid, and an attachment of a freight car of a railroad not in actual use does not directly affect interstate commerce.

[Ed. Note.—For other cases, see *Commerce*, Dec. Dig. § 81.*]

**4. COMMERCE (§ 81*)—ATTACHMENT OF CARS OF
FOREIGN RAILROAD.**

Rev. St. U. S. § 5258 (U. S. Comp. St. 1901, p. 3564), authorizing every railroad to carry over its road freight and property on their way from any state to another state, and to connect with roads of other states so as to form a continuous line for the transportation of the same to the place of destination, gives railroads the right to engage in interstate business, and to become jointly interested with roads in other states in interstate business originating on their lines; and a foreign railroad, contracting with a domestic railroad for the through shipment of cars, stands on the same footing as the domestic railroad, and the statute does not forbid the attachment of a car of the foreign railroad when in the state and not in actual use.

[Ed. Note.—For other cases, see *Commerce*, Dec. Dig. § 81.*]

**5. COMMERCE (§ 81*)—STATE ATTACHMENT
LAWS—RAILROAD CARS.**

The object of Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), forbidding railroads from giving preferences to persons or places, etc., is to compel railroads to carry for all on equal terms and for a fair price, without unnecessary delay, and the act is not in conflict with a state statute permitting the attachment of freight cars when not in actual use.

[Ed. Note.—For other cases, see *Commerce*, Dec. Dig. § 81.*]

Transferred from Superior Court, Rockingham County; Pike, Judge.

Action by Hetty E. De Rochemont against the New York Central & Hudson River Railroad. The question of the validity of the attachment of a car of defendant was transferred from the superior court. Case discharged.

The defendants do not own or operate a railroad in this state, and have no place of business here, but they have a contract with the Boston & Maine Railroad whereby each corporation sends its cars over the road of the other. Each pays the other for the use of a car so sent, from the time of its receipt until its return, and has a right to load it on the return journey, provided it is routed toward the point at which it was received. The car in question was loaded in the state of New York for Greenland, N. H., was unloaded as soon as it arrived at Greenland, and was attached before the Boston & Maine Railroad had time to return it to the defendants. The defendants appeared specially, and moved to dismiss (1) because of their contract with the Boston & Maine Railroad; and (2) because the car was being used in interstate business at the time of the attachment.

Samuel W. Emery, Jr., for plaintiff. John W. Kelley, for defendant.

YOUNG, J. 1. The fact that the Boston & Maine Railroad is not party to this proceeding is an answer to the defendants' first position. It will be time enough to consider whether that corporation had an interest in the car, which the sheriff was bound to respect, when it sues him for attaching the property. *Southern Ry. Co. v. Brown* (Ga.) 62 S. E. 177.

2. It was decided in *Boston, etc., R. R. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 336, that sections 1 and 2, c. 184, Rev. St. (Pub. St. 1901, c. 220, §§ 1, 2), authorized the attachment of freight cars which were not in actual use, as well as other property belonging to a railroad; that is, the mere fact that railroads are public service corporations does not render their property exempt from attachment, even though it is needed to enable them to perform their public duty. Although that case holds that freight cars may be attached when not in actual use, the question whether the attachment of such property is forbidden by the commerce clause of the federal Constitution, or by the laws Congress has enacted in pursuance of the power vested in it by that clause, was neither raised nor considered; so, even if the defendants in that action were in fact engaged in interstate commerce, the case is not decisive of the present defendants' contention that the attachment of the car in question was an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

illegal interference with it. *Wyatt v. Board of Equalization*, 74 N. H. 552, 70 Atl. 387.

Although the precise question raised by the defendants' motion to dismiss has never been considered by this court, it has been considered by the courts of Georgia, West Virginia, South Carolina, Illinois, Minnesota, and the Eighth Judicial Circuit of the United States. The Georgia court holds that such an attachment is not an illegal interference with interstate commerce. *Southern, etc., Co. v. Railroad*, 127 Ga. 626, 56 S. E. 742, 9 L. R. A. (N. S.) 853, 119 Am. St. Rep. 356. The West Virginia, South Carolina, Minnesota, and federal courts hold that it is an illegal interference with interstate commerce. *Wall v. Railway*, 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, 94 Am. St. Rep. 948; *Shore v. Railroad*, 76 S. C. 472, 57 S. E. 526; *Connerly v. Railroad*, 92 Minn. 20, 99 N. W. 365, 64 L. R. A. 624, 104 Am. St. Rep. 659; *Davis v. Railroad* (C. C.) 146 Fed. 403. The Illinois court holds that the statutes of that state do not authorize the attachment of such a car. *Michigan Central R. R. v. Railroad*, 1 Ill. App. 399. All the courts, therefore, which have considered the question, except those of Georgia and possibly California (*Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. 892, 6 L. R. A. 792, 15 Am. St. Rep. 76), hold that such attachments are void; but they do not agree as to why they are void, nor lay down any rule to determine what constitutes an interference with interstate commerce, within the meaning of the federal Constitution. The reasons the defendants urge for holding the attachment void are that it is forbidden (1) by the commerce clause of the federal Constitution; (2) by section 5258 of the Revised Statutes of the United States; and (3) by the interstate commerce act.

(1) Is this attachment forbidden by the commerce clause of the federal Constitution? Although the Supreme Court of the United States has not passed upon the precise point involved in this case, it has frequently considered the question of what constitutes an illegal interference with interstate commerce (*Galveston, etc., Ry. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031; *The Winnebago*, 205 U. S. 354, 27 Sup. Ct. 509, 51 L. Ed. 836; *Delamater v. State*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724; *Hatch v. Reardon*, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415; *Martin v. Railroad*, 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184; *New Mexico v. Railroad*, 203 U. S. 38, 27 Sup. Ct. 1, 51 L. Ed. 78; *Fopplano v. Speed*, 199 U. S. 501, 26 Sup. Ct. 138, 50 L. Ed. 288; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 25 Sup. Ct. 636, 49 L. Ed. 1059; *Fleld v. Company*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538; *Pennsylvania R. R. v. Knight*, 192 U. S. 21, 24 Sup. Ct. 202, 48 L. Ed. 325; *Pennsylvania R. R. v. Hughes*, 191 U. S. 477,

24 Sup. Ct. 132, 48 L. Ed. 268; *Wisconsin, etc., Ry. v. Powers*, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. Ed. 229; *Allen v. Company*, 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134; *Louisville, etc., R. R. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416; *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 846; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; and "the argument in each case leads to the conclusion that if the thing itself is in pursuance of a valid state law, its enforcement will not be stayed because it may incidentally affect interstate commerce" (*Southern, etc., Co. v. Railroad*, 127 Ga. 626, 56 S. E. 742, 9 L. R. A. [N. S.] 853, 119 Am. St. Rep. 356). The test, therefore, to determine whether the attachment in this case was forbidden by the commerce clause is to inquire (1) whether the statute which authorized it is a valid state law; and, if it is, (2) whether the attachment of the car was a direct interference with interstate commerce. That the statute under which the attachment was made is a valid state law, enacted to enable creditors to collect their debts, and for no other or ulterior purpose, is not questioned. Hence the attachment of the car was not forbidden by the commerce clause of the federal Constitution; for it is obvious that seizing a car when it is not in use does not directly affect either intrastate or interstate commerce.

(2) The next question is as to the effect of section 5258 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3564), on the validity of the attachment. That section provides that "every railroad company in the United States * * * is hereby authorized to carry upon and over its road * * * freight and property on their way from any state to another state, * * * and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination." As this section has been construed, it gives railroads, no matter where they are incorporated, the right to engage in interstate business in all parts of the United States, and to become jointly interested with roads in other states, in the interstate business originating on their lines. *Cincinnati, etc., Ry. v. Commission*, 162 U. S. 184, 192, 16 Sup. Ct. 700, 40 L. Ed. 935. Consequently, when the defendants made their contract with the Boston & Maine Railroad, they became jointly interested with that road in all the interstate business originating on either road, to be delivered to the other for purpose of carriage to its destination. When the defendants delivered the car in question to the Boston & Maine Railroad, they engaged in business in this state by their duly authorized agent—the Boston & Maine Railroad. There is no force, therefore, in their contention that the attachment is a direct interference with interstate commerce because it compels

them to come into a state in which they are not doing business, for the purpose of defending this suit; for they were doing business here when the car was attached, and will continue to do business here as long as their contract with the Boston & Maine Railroad remains in force. If section 5258 compelled the defendants to send cars into this state, there would be force in their contention that it must be assumed Congress did not intend to compel them to follow cars all over the United States, in the defense of actions begun by attaching them. But as has been seen, section 5258 permits, but does not compel, the sending of cars by the defendants over other roads. Consequently the presumption is that Congress intended, in case they availed themselves of the provisions of the section and sent their cars into this state, that they should stand as well as they would, and no better than they would, if they were incorporated here, or if they were the owners or lessees of the Boston & Maine Railroad. Neither does the defendants' contention that delivering freight to a connecting carrier outside this state, to be hauled into it, is not doing business here, come to anything. Even if it is sound as an abstract legal proposition, it has no application to the facts of this case. As has been seen, the defendants were jointly interested with the Boston & Maine Railroad in the safe delivery of the contents of the attached car to the consignee at Greenland. Act June 29, 1906, c. 3591, 34 Stat. 591 (U. S. Comp. St. Supp. 1907, p. 892). Consequently they were doing business here in the same way every member of a partnership does business wherever any of his partners carry on the joint enterprise. But if it be conceded that the defendants are not doing business here, it is not a greater hardship to compel them to come here to defend this suit than it would be to send the plaintiff to New York to prosecute her claim against them.

If, therefore, the attachment in this case is forbidden by section 5258, the reason for it is not because the defendants have no place of business in this state, but because they were engaged in interstate commerce, and used the car in question in that branch of their business; for, as has been seen, the section permits, but does not compel, them to engage in that traffic. *Kentucky, etc., Co. v. Railroad (C. C.)* 37 Fed. 567, 625, 2 L. R. A. 289; *Cincinnati, etc., Ry. v. Commission*, 162 U. S. 184, 192, 16 Sup. Ct. 700, 40 L. Ed. 935. Consequently there can be no presumption that Congress intended, in case the defendants accepted the provisions of the interstate commerce act, to exempt their cars from the operation of the laws of the states into which they were sent, when they would not be so exempted if they owned the roads over which the cars were sent, or if they hauled the cars over those roads with their own engines. *Western Union Tel. Co., v. Massachusetts*, 127 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790;

Ratterman v. Company, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; *Massachusetts v. Company*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 623; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 413, 23 Sup. Ct. 730, 47 L. Ed. 1116; *Central Stockyards v. Railway*, 192 U. S. 568, 24 Sup. Ct. 339, 48 L. Ed. 565.

Since this is so, the same test should be applied to determine the validity of the attachment, in so far as section 5258 is concerned, as would be applied if the car were owned by the Boston & Maine Railroad. 20 Harv. Law Rev. 319, 320. As has already been stated, that test is to inquire whether the interference is direct or merely incidental. *Maine v. Railway*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994. That this is the proper test will be apparent from an examination of any one of the different lines of cases which decide when a particular act constitutes an illegal interference with interstate commerce. Take, for example, the decisions relating to taxation. An examination of the cases shows that the test applied to determine the validity of a tax is not to inquire where the owner of the property resides or does business, but whether the tax directly affects interstate commerce; for, although states cannot legally tax such commerce (*Galveston, etc., Ry. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031), they may tax railroads as going concerns (*Maine v. Railroad*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994). Cars employed within the borders of a state may be taxed as capital employed there, notwithstanding they are used in interstate traffic, and their owners neither reside nor have places of business in the state. *New York Central R. R. v. Miller*, 202 U. S. 584, 26 Sup. Ct. 714, 50 L. Ed. 1155; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613.

(3) The attachment, therefore, created a valid lien on the car in favor of the plaintiff unless the making of such an attachment is forbidden by the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]). Sections 1, 6, 8, 9, and 10 of the act provide that it shall apply to all steam railroads engaged in interstate commerce, either over their own roads, or by virtue of the provisions of section 5258 of the Revised Statutes of the United States that railroads shall make and post rates and not change them without notice, and that one injured by a railroad's failure to comply with the provisions of the act shall have a civil remedy against the offending corporation, and also the right to enter a complaint with the interstate commerce commission. Sections 2, 3, 4, 5, and 7 forbid the railroads to which the act applies to make special rates or pooling agreements; to give preferences to either persons or places; to charge

more for a short haul than for a long haul in the same direction; or to combine to prevent the continuous carriage of goods. Sections 11 to 24 create the commission, impose its duties, and prescribe its mode of procedure. It is clear from this synopsis of the act that it was not intended to enable railroads engaged in interstate commerce to avoid payment of their just debts, but to compel them to carry for all on equal terms and for a fair price, without unnecessary delay and without giving undue preference to persons or places, and to prevent railroads which engage in the business, under the provisions of section 5258, from transshipping car load lots of freight at connecting points. *Cincinnati, etc., Ry. v. Commission*, 162 U. S. 184, 187, 16 Sup. Ct. 700, 40 L. Ed. 935.

Is the attachment of freight cars which are not in actual use forbidden by the act? In other words, is a statute which permits their attachment in conflict with the provisions of the act? It seems clear that it is not. Such a statute is not open to the objection that it tends to promote the evils at which the interstate commerce act is aimed, or that it directly, or indirectly, tends to defeat any of the purposes Congress had in view when the legislation was enacted. If our statute permitted the attachment of cars in transit, or even when they are in use, there would be some foundation for the contention that it is calculated to produce a direct interference with interstate commerce; but, as it does not permit the attachment of cars which are in use, it is not open to that objection.

Case discharged. All concurred.

(75 N. H. 172)

LANCASTER & J. ELECTRIC LIGHT CO.
v. JONES et al.

(Supreme Court of New Hampshire. Coos.
Jan. 5, 1909.)

1. DEEDS (§ 98*)—CONSTRUCTION—INTENT.

The intention of the parties to a deed to be ascertained is that expressed by the language used.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 231; Dec. Dig. § 93.*]

2. EVIDENCE (§ 461*)—PAROL EVIDENCE AFFECTING WRITINGS.

The rule that construction of a written instrument is the ascertainment of the intention of the parties, determined like a question of fact by the natural weight of competent evidence, and not by the application of arbitrary rules, does not abolish the rule that a written instrument cannot be contradicted or varied by parol evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

3. DEEDS (§ 100*)—CONSTRUCTION—SITUATION OF PARTIES.

In construing a deed, it is the duty of the court to place itself as nearly as possible in the situation of the parties when the deed was made that it may gather their intention from the

language used, viewed in the light of the surrounding circumstances.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 239; Dec. Dig. § 100.*]

4. WATERS AND WATER COURSES (§ 156*) — CONVEYANCE OF WATER RIGHTS—CONSTRUCTION.

Landowners on the north and south banks of a river each conveyed to the same grantees a portion of their lands. The deed of the owner on the north bank also contained a clause conveying all his right and interest in the river or in any land or water privilege on the south or opposite bank, and the deed of the owner on the south bank contained a like clause, substituting "north" for "south." The title so united in the common grantees came, by intermediate conveyances, which, instead of setting out a new description covering the united properties, repeated the descriptive portions of each of such deeds, to a grantee who conveyed land on the north bank of the river, the right to raise a dam to a fixed height and of flowage, all his right and interest in the river and water privileges on the south shore, and a small lot on the south shore at the end of a dam then on the premises. *Held*, that such last deed conveyed the right to the entire power furnished by the river, and not merely the power appurtenant to the north bank or one-half the power of the river.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 156.*]

5. WATERS AND WATER COURSES (§ 156*) — DAMS—HEIGHT—MEASURE.

Under the grant of a right to raise a dam not exceeding 10 feet in height at a point named or at any other point up the river, provided that the flowage should not be further up the river than would be occasioned by a dam at such point and at such height, the power obtainable is not made the measure of the right, but the flowage that would be occasioned by a dam at the point named 10 feet high.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 156.*]

6. WATERS AND WATER COURSES (§ 156*) — DAMS.

The grant of a right to raise a dam not exceeding 10 feet in height does not require a dam every point of whose crest is 10 feet above the point of the river bottom vertically beneath it, but only a dam so constructed as to produce no more flowage than such a dam.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 156.*]

7. WATERS AND WATER COURSES (§ 176*) — WATER POWER—IMPAIRMENT—DAMAGES.

Owners of a water power are entitled to damages for all injury directly and naturally resulting from a wrongful impairment thereof, but cannot recover for subsequent occurrences of which the wrongful act furnished merely the occasion upon which other causes operated to produce the injurious result.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 237-243; Dec. Dig. § 176.*]

8. WATERS AND WATER COURSES (§ 179*) — WATER POWER—IMPAIRMENT—QUESTIONS FOR JURY.

Whether raising the water at a dam above the height to which it could be lawfully held was the proximate cause of a loss of business by an upper riparian owner also having a water power is a question of fact.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 179.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

9. WATERS AND WATER COURSES (§ 179*) — WATER POWER—IMPAIRMENT—BURDEN OF PROOF.

In an action for injury to a water power, the owner of the power has the burden of showing that it is more probable than otherwise that the injury has been caused by the act of which complaint is made.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 248; Dec. Dig. § 179.*]

10. WATERS AND WATER COURSES (§ 171*) — FLOWING LANDS—DAMAGES.

Though a riparian owner has a right to a reasonable use of the stream as it flows over his land, yet, if he obstructs it so as to cause the water to flow back and flood the land of an owner above him, he is liable for the injury occasioned.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 216-222; Dec. Dig. § 171.*]

11. WATERS AND WATER COURSES (§ 178*) — WRONGFUL FLOWAGE—MEASURE OF DAMAGES.

The measure of damages for a wrongful flowage by lower riparian owners resulting in a transfer of water power developed by the upper owners' dam to the lower owners is the rental value of the power so taken, and this, though the upper owners had no occasion to use the power while the lower owners were diverting it.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 251-255; Dec. Dig. § 178;* *Damages*, Cent. Dig. §§ 276½, 282.]

12. WATERS AND WATER COURSES (§ 178*) — WATER POWER—IMPAIRMENT—EVIDENCE—ADMISSIBILITY.

Upon the question of the rental value of water power wrongfully appropriated, the income received by those appropriating it from its use is evidence, but not the measure of recovery.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 251-255; Dec. Dig. § 178;* *Damages*, Cent. Dig. §§ 276½, 282.]

Transferred from Superior Court, Coos County; Pike, Judge.

Bill by the Lancaster & Jefferson Electric Light Company against one Jones and others. Decree for plaintiff, and case transferred from the trial term. Case discharged.

Bill in equity alleging the wrongful maintenance of a dam upon Israel's river to the injury of the plaintiffs, owners upon the stream above, and asking a reformation of deeds and an assessment of damages, with a prayer for an injunction.

Edgar M. Bowker and George F. Morris, for plaintiff. Drew, Jordan & Shurtleff and Smith & Smith, for defendants.

PARSONS, C. J. The questions transferred are (1) the construction of the deeds in the defendants' chain of title as to the extent of their rights in the river, whether as riparian proprietors they own one-half, or the whole, of the power furnished by the stream at their dam, and as to the height to which they own the right to maintain the dam; and (2) the measure of damages.

December 6, 1890, Harry E. Stevens conveyed by deed of that date to Cauger &

Sullivan a tract of land on the northerly bank of Israel's river. After describing this tract by courses, distances, and monuments, the language of the deed is: "This deed giving said grantees the right to raise a dam across said river not exceeding ten feet in height at a point seventeen rods and ten links westerly of the first named bound, or at any point easterly on said land—but the flowage shall not be further up said river than would be occasioned by a dam at the aforesaid point and at the above height. Also we hereby convey to said grantees all our right, title, and interest which we may have in any way acquired in and unto said river or in and unto any water privilege on the south shore, or opposite bank or shore, of said river as far on said river as the tract above conveyed shall extend." The deed by an imperfect description as to the proper correction of which there appears to be no controversy also conveys a small lot of land on the south shore at the end of the dam then on the premises. At the date of this deed, Stevens owned on the south shore of the river a tract of land substantially opposite the main tract conveyed, title to which through sundry conveyances, starting with a later quitclaim from Stevens, is now held by the defendants. The plaintiffs, however, claim to own the riparian rights appurtenant to the land by virtue of a reservation in one of the intermediate deeds and a subsequent lease to them. The character or extent of the plaintiffs' alleged rights in the river, disassociated from the adjacent land which the defendants own, have not been presented or considered. The controversy has centered upon the deed of Stevens to Cauger & Sullivan, for the obvious reason that, if the rights in controversy passed by that deed, nothing remained in Stevens upon which his later quitclaim could operate. The plaintiffs do not in any view of their title own anything which was conveyed by the earlier warranty deed. If the plaintiffs' claim to the riparian rights is unfounded, it is equally immaterial who does own them. Hence the correct construction of the deed to Cauger & Sullivan is the decisive point in the controversy, if the interpretation finally adopted by the superior court is correct. The intention to be ascertained is that expressed by the parties by the language they used. What did they mean by the words employed? Or, to follow Wigmore's suggestion, what is the "sense" of the language? 4 Wig. Ev. § 2459; *Kendall v. Green*, 67 N. H. 557, 558, 42 Atl. 178; *Stratton v. Stratton*, 68 N. H. 582, 585, 44 Atl. 699. In the language of Judge Ladd: "The question * * * is not what the parties intended to do, but what did they do? What intention did they express in the deed?" *Pillsbury v. Elliott*, 56 N. H. 422, 425; *Gill v. Ferrin*, 71 N. H. 421, 52 Atl. 558. The often announced and applied principle

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the construction of a written document is the ascertainment of the intention of the parties, determined like a question of fact by the natural weight of competent evidence and not by the application of arbitrary rules, does not authorize the use as evidence of matter not proper for consideration in the interpretation of a writing. It does not abolish the well-established rule that a written instrument cannot be contradicted or varied by parol extraneous evidence. *Meredith, etc., Ass'n v. Drill Co.*, 66 N. H. 267, 20 Atl. 330; *Goodwin v. Goodwin*, 59 N. H. 548; *Proctor v. Gilson*, 49 N. H. 62. The oral evidence of the intention of the parties received by the court subject to exception upon the issue of reformation is as inadmissible upon the question of construction as the finding of the fact of intent. The force of the rule lies more in the refusal to be bound by the application of arbitrary rules than in the denomination of the matters proper for consideration as competent evidence, or in describing the making of the correct deduction therefrom as the weighing of evidence—language which has sometimes been misunderstood. *State v. Railroad*, 70 N. H. 421, 433, 434, 48 Atl. 1103. In ascertaining what the language meant to the parties employing it, the sense, signification to them of the terms employed, all evidence tending to put the interpreter of the words in the position of the one employing them, are an aid to the interpretation. Hence it is elementary that in construing written language "It is the duty of the court to place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention from the language used, viewed in the light of the surrounding circumstances. It will inquire into the 'actual, rightful state of the property,' for the parties are supposed to refer to the state of the property for a definition of the terms made use of in the writing." *Weed v. Woods*, 71 N. H. 581, 583, 53 Atl. 1024; *Swain v. Saltmarsh*, 54 N. H. 9, 16; *Bell v. Woodward*, 46 N. H. 315, 331. "If the language is plain and unambiguous, it cannot be contradicted by extraneous evidence, for that would be giving effect to a contract not reduced to writing. * * * That the parties meant something must be assumed. If they are English-speaking people, and use the English language to express the terms and conditions of their contract, it is safe to say, in the absence of competent evidence to the contrary, that the language of the contract must be understood to convey the ordinary and usual meaning of the English language as used in the community where the parties live." *Kendall v. Green*, 67 N. H. 557, 562, 42 Atl. 178.

It is conceded that, giving to the language of the deed the sense in which it is ordinarily employed by English-speaking people, and applying it to the situation existing at

the date of the deed, the document expresses an intention to convey all the grantor's rights in the river; and, as he owned the entire right, such right was conveyed thereby. The evidence claimed to be competent and sufficient to establish that the deed expresses a purpose to convey only the power appurtenant to the north bank, or one-half the stream is as follows: Prior to the development of the power at the defendants' dam, the land on the north bank was owned by Royal Joyslin; that on the south bank by Frederick Fiske. In April, 1864, Joyslin and Fiske each conveyed by separate deeds to the same persons as grantees a portion of their lands bordering on the river, describing the tracts by courses and distances. Joyslin's deed contained the following clause: "Also we hereby convey to said grantees all our right, title, and interest which we may, in any way, have acquired in and unto said river, or in and unto any land or water privilege on the south or opposite bank or shore of said river as far on said river as the tract above conveyed shall extend." Fiske's deed contained the clause in the same words, substituting "north" for "south." The title so united in the common grantees of Joyslin and Fiske came by sundry intermediate conveyances to Harry E. Stevens. In making these conveyances, the draftsmen of the deeds, instead of setting out a new description covering the united properties, contented themselves with repeating entire the descriptive portions of each deed from Joyslin and Fiske.

It is urged that, since neither Joyslin nor Fiske owned anything upon the opposite bank of the stream, this clause (which has been called the "quitclaim" in the discussion) conveyed nothing and meant nothing, and that, as in the subsequent deeds all rights in the river passed by the description of the land on each side, the repetitions of the "quitclaim" clauses were equally useless and ineffective; and hence it must be concluded, it is urged, that the same clause in the Stevens deed to Cauger & Sullivan conveyed nothing and meant nothing. There is no reference to the prior deeds in the deed to Cauger & Sullivan, and of the competency of the evidence there may be grave doubt; but, regardless of its competency, there can be no doubt that, as the only evidence offered, it is entirely insufficient to authorize the construction of a clause expressly conveying a right as one reserving or excepting the right. It may be true that, if Fiske and Joyslin owned neither land nor water privileges on the opposite bank, the clause added nothing to their deeds; but the clause plainly expressed a purpose to convey all the rights either owned on the opposite shore. Demonstration that neither owned anything which could pass under the clause would establish that the clause was unnecessary, but would not alter the purpose expressed by the language used, while, if the two tracts were exactly coterminous on the

river, the repetition of the clause in the subsequent deeds was equally unnecessary. The meaning of the language used would not be altered by that fact. Although the lots may be practically coterminous upon the river, the plan attached to the case indicates that they are not exactly so; and the repetition of the language made sure that all that was conveyed by Joyslin and Fiske was transferred. The form of the deeds may be inartistic, but the expressed purpose is clear.

But the argument entirely fails because it is not founded in fact. The "quitclaim" clause in the deed from Stevens to Cauger & Sullivan is not identical with the clause as used in the earlier deeds. The clause in the earlier deeds conveys the grantors' rights to the river and to any land or water privilege on the opposite bank. Stevens omitted the word "land," limiting the conveyance to water privileges. Recognizing his ownership of the land, in using the earlier description he varies it by omitting what he did not intend to convey, and in the next clause of the deed defines the amount of land he intended to convey on the south shore by the description of the small tract at the end of the dam. If it could be established from prior usage in the community that to the parties to this contract the sense of the expression conveying all of Stevens' right was a reservation of one-half of what he owned—that a conveyance of the land and rights on the opposite shore was to them in effect a reservation of all rights not legally appurtenant to the tract conveyed—it is not necessary to consider whether the effect claimed could be given to the deed. There is nothing in the evidence tending to such a conclusion. So far as the language is identical, the purpose expressed in the last deed is exactly what was expressed in the deeds of Fiske and Joyslin—the conveyance of all the rights the grantors had in the river. That one deed was without effect for lack of property upon which it could act cannot prevent the subsequent deed from conveying property within its terms. What the parties understood or believed would be the effect of the provision is immaterial. "The belief of the parties as to the effect of the deed could neither add to nor diminish its force. Deeds will take effect according to their legal import, if at all, and not according to the erroneous opinion of the parties as to what that effect may be." *Furbush v. Goodwin*, 25 N. H. 425, 456; *Reed v. Hatch*, 55 N. H. 327, 335.

The plaintiffs' real position seems to be that Stevens' purpose—"his will" (4 Wig. Ev. § 2459)—was to convey the Joyslin tract only; that by mistake in following the description in the earlier deed without attention to the changed condition an intention was expressed to convey rights which Joyslin could not convey because he did not own them. The contention is that it was not intended to express a purpose to convey the whole river,

rather than that such purpose was not expressed. If the deed were erroneous on proof of the fact upon a case-made for the purpose, the deed could be reformed; but upon the trial of this issue of fact the contention has been found to be unfounded. Whether the defendants are in a position to ask for a reformation of the deed, if the expressed intention were different from that intended to be expressed, does not appear. Hence it has been necessary to determine the controversy as to the intention actually expressed. A further consideration is to be found in the deed, tending to show that the intention expressed could not have been understood to have been limited to the right Joyslin conveyed. The deed contains a right of fowage. Joyslin could convey that right only as to his land. It is not probable Stevens conveyed and Cauger & Sullivan bought a right of fowage limited to one side of the stream impossible of exercise, unless the same right existed as to the opposite side of the stream. The absurdity of such a contract would be evidence the parties did not intend to make it. The right of fowage is given in general terms. If understood to be limited to that acquired by Joyslin's deed, express language so defining it would be necessary. It is not claimed that the fowage right is so limited; but Joyslin's deed is no more effective in conveying a right of fowage on the south shore than his deed of land and water privileges on the south shore. There was no error in the ruling of the superior court that the plaintiffs had no rights in the river as far as the defendants' land extended on the north shore, though the fact of actual purpose in the conveyance of Stevens to Cauger & Sullivan found *de bene* cannot be considered.

The remaining question of construction is as to the height of the dam. It is understood that the plaintiffs own the land upon the stream above the defendants, formerly owned by Joyslin and by Fiske; and the question is to what extent the defendants have the right to flow the same under the deeds of Joyslin and Fiske in 1864. The language defining this right is "the right to raise a dam across said river not exceeding ten feet in height" at a point named or at any point easterly—I. e., up the stream—"but the fowage shall not be further up said river than would be occasioned by a dam at the aforesaid point and at the above height." This language makes it clear that the parties were dealing with the question of fowage—not of power obtainable by the dam. The power obtainable was not made the measure of the right. Consideration of the amount obtainable has no tendency to elucidate the meaning of the contract. *Perley v. Marshall*, 57 N. H. 206. By virtue of the conveyance of the land to them, the grantees of Joyslin and Fiske had the right, so far as the owners above were concerned, to build a dam as high as they pleased on their own

land, so long as the dam did not set the water back upon the owners above; so that the only purpose of the clause as to the dam was to convey a right of flowage above the land conveyed in fee. The measure of this right is the flowage that would be occasioned by a dam at a certain spot ten feet high.

Dams are not built upon the surface of the water, but upon the river bottom. It could not have been expected that the grantees would lay the sills of the dam on the surface of the water. It is equally absurd to commence to measure the height of the dam from that surface. It is common knowledge that the foundations of a dam must in ordinary cases be built below the surface of the river bed; but as nothing below the bed of the river would be a dam, or cause the water to flow back, the dam, as a construction tending to set the water back, commences at the river bed. In this case it appears that at the point selected the river bed, as is not unusual, is at different elevations. It is common knowledge that the crest of the dam over which the water flows—the spillway—is usually horizontal. In view of common experience, it is not probable that it was understood or expected a dam would be built with every point of the crest 10 feet above the elevation of the original river bottom vertically beneath it. While such a dam might exactly conform to the language of the grant, the cost of so building it and the uselessness of such construction, as well as common practice, are sufficient evidence that that particular construction was not expected or required. A dam constructed so as to produce no more flowage than such a dam would not exceed the right of flowage conveyed. The mean elevation of the river bed in 1864 is found (65.25). It is also found that the normal flow of water was one foot in depth. A dam 10 feet in height above the mean river bed, or to an elevation of 75.25, and so constructed as to maintain above it a depth of 1 foot of water, will raise the water 10 feet, give 10 feet head, and flow the water back precisely as if the river bed were raised in conformity to its natural contour 10 feet at the place specified for the dam. It is suggested that the water will not attain such a depth on the horizontal crest of a dam as it would in the stream; but this must depend upon the length of the spillway. To allow the escape of water in time of flood it may be necessary to so construct the spillway that the normal flow will not give a depth of one foot on the dam. The dam-building right is to construct a dam 10 feet high with the water 1 foot in depth upon it—to raise the water of the stream at the point defined in mean or normal flow 10 feet or to 76.25. A dam reasonably constructed so as to do this will not exceed the flowage right granted. Whether the crest of the present dam (76.09) raises the water above this point does not appear. If it does, to the extent that it has

that effect during the mean or normal flow of the stream such excess is an invasion of the plaintiffs' rights. The superior court ruled that the defendants had the right to maintain the dam to the elevation 76.25. This is, however, the measure of the height to which they may rightfully raise the surface of the water. If, as there is some intimation in the case, the fact is that the flow of the stream is all utilized through the defendants' wheels, the maintenance of flash-boards to the height permitted in the decree will furnish no legal ground of complaint to the plaintiffs. If the plaintiffs request it, however, the decree should be amended so as to prohibit the raising of the water at its normal or mean flow by flash-boards or other means above the elevation 76.25, or sixteen one-hundredths of a foot higher than the crest of the present dam.

The plaintiffs and defendants are each engaged in furnishing electricity for lighting, and are competitors in the same territory. The defendants, by raising the water at their dam above the height to which they could lawfully hold it, obtained additional power which enabled them to do more business, and they obtained a portion of the business previously done by the plaintiffs. The plaintiffs claim as damages the value of this business lost by them and secured by the defendants. It is not clear from the case whether the raising of the water impairs the plaintiffs' power at the privilege farther up the stream, but it is found that the plaintiffs lost no business by the impairment of their power, and that the loss of business sustained by them was not "the natural and probable consequence" of the unlawful raising of the dam. The court therefore disallowed the claim for damages for loss of business.

The plaintiffs are entitled to recover of the defendants in some form of action damages for all injury directly and naturally resulting from the defendants' wrongful act; i. e., of which that act was the proximate cause. They cannot recover for subsequent occurrences of which the act furnished merely the occasion upon which other causes operated to produce the injurious result. *Precott v. Robinson*, 74 N. H. 460, 69 Atl. 522; *Challis v. Lake*, 71 N. H. 90, 96, 51 Atl. 260; *Dow v. Gas Co.*, 69 N. H. 312, 315, 316, 41 Atl. 288, 42 L. R. A. 569, 76 Am. St. Rep. 173; *Bixby v. Dunlap*, 56 N. H. 456, 462, 22 Am. Rep. 475; 6 *Thomp. Com. Neg.* § 7193, 7196; 1 *Sedg. Dam.* (8th Ed.) § 111; 1 *Suth. Dam.* (3d Ed.) § 18. The necessary connection between the wrong and the injury is stated as "the natural order of cause and effect," "its natural concomitant," "legal and natural," "direct and natural," "natural and continuous," "natural and probable," "natural and reasonable," "the natural consequence * * * and such as might have been anticipated by the exercise of reasonable prudence," or such as "naturally and reasonably could be expected to result." All these statements, how-

ever, are made as definitions of proximate cause, or perhaps more accurately as statements of the conditions under which the wrong could be found to be the proximate cause of the injury. *Gilman v. Noyes*, 57 N. H. 627; *Searle v. Parke*, 68 N. H. 311, 34 Atl. 744; *Pittsfield, etc., Co. v. Shoe Co.*, 72 N. H. 546, 548, 58 Atl. 242; *Cool. Torts*, 68-77; *Shearm. & Red. Neg.* §§ 26, 739, and authorities above cited. Whether the defendants' wrongful act was the proximate cause of the injury complained of is a question of fact. *Ela v. Cable Co.*, 71 N. H. 1, 51 Atl. 281; *Hendry v. North Hampton*, 71 N. H. 28, 51 Atl. 283; *Olney v. Railroad*, 71 N. H. 427, 52 Atl. 1097; *Hamel v. Company*, 73 N. H. 386, 62 Atl. 562.

Whether from the evidence reported and other evidence, if any, in the case it could have been found that the wrongful act of the defendants was the proximate cause of the plaintiffs' loss of business, is not the question presented. The plaintiffs had the burden of satisfying the trier of the fact that it was more probable than otherwise that the injury of which they complained was caused by the defendants' act. They have failed to sustain this burden. The evidence reported does not establish their claim as matter of law. The raising of the dam furnished the defendants with more power—put them in a position to do business which the plaintiffs were also equipped to perform. Why one lost and the other gained, why the defendants obtained business which the plaintiffs lost, instead of the plaintiffs getting business from the defendants, are questions which obviously are not answered by the mere fact that each had the necessary facilities. Whatever the cause of the plaintiffs' loss of business, such loss is not the necessary result of some other in the community offering the same article for sale.

Having denied the claim to special damages from loss of business, the superior court found that "the damage to the plaintiffs' realty by the raising of the * * * dam to an unlawful height * * * is one dollar," and entered a decree for \$1 damages. While each riparian owner has a right to a reasonable use of the stream as it flows over his land; still, if he obstructs the stream so as to cause the water to flow back and flood the land of the owner above him, he is liable to such owner for the actual injury so occasioned. If the water be raised perceptibly upon the land above, such owner may maintain an action for nominal damages, though no actual damages are proved. *Gerrish v. Company*, 30 N. H. 478; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53. The finding and decree amount to a ruling that upon the facts only nominal damages could be recovered. Exception was taken to the ruling, and the plaintiffs claim that they are entitled to substantial damages.

The power of the river, from the bottom of the defendants' raceway to the top of the

plaintiffs' dam, is owned by the two parties. The defendants by their wrongful flowing obtained and used with profit more of this power than belonged to them. The extra power so used must necessarily have been the property of the plaintiffs. If the defendants have wrongfully used to their profit the plaintiffs' property, does the law limit their liability to make compensation to nominal damages? *Reliance* has been placed upon the case of *Roberts v. Company*, 74 N. H. 217, 66 Atl. 485. In that case it was held that adjacent riparian proprietors on the opposite banks of a stream were tenants in common of the right to use the stream passing over their lands, each owning an undivided half; and that, if one tenant used more than his share of the right, he could be required to account equitably to his cotenant for the benefit received from the use of his cotenant's right. *Gage v. Gage*, 66 N. H. 282, 29 Atl. 543, 28 L. R. A. 829. While "all proprietors upon a stream, from its source to its mouth, have in a certain sense a common interest in it and a common right to the enjoyment of all its capacities" (*Lowell v. Boston*, 111 Mass. 454, 465, 15 Am. Rep. 39), the difficulty with the application of the principles of tenancy in common in the adjudication of the rights now involved is that the rights in controversy are not held in common. The defendants' right begins at elevation 76.25. There the plaintiffs' right ends. Their rights are not common, but separate in fact and by deed. It is found that the defendants did not act with malice, which is understood to mean that they acted in the exercise of their rights as they understood it; but the wrongful flowing was deliberate, intentional, and continuous. The damages in a trespass of that character "include, at least, the value of the use of the premises for the period the owner is kept out of possession." *De Camp v. Bulard*, 159 N. Y. 450, 454, 54 N. E. 26. Upon the question of the value of the use, the benefit to the defendant is evidence. Page 455 of 159 N. Y., page 26 of 54 N. E.; 4 *Suth. Dam.* § 1014. If the proper action for flowing land is case instead of trespass, there may be the same exclusion of the owner from the use of his land and the same ground for damages.

Whether the flowing diminished the power at the plaintiffs' dam is perhaps not quite clear from the case. As to this, the parties do not interpret the findings alike; but, as it is found that the plaintiffs' power was not so impaired as to prevent their doing all the business they had to do, the ruling seems to have been put upon the ground that if the plaintiffs' power was taken away they could recover nothing, if they had no occasion to use it while the defendants were using it. In an action for flowage, the measure of damages is the actual injury to the land by the overflow, or its fair rental value during the time of the flowing. *Gould, Wat. §*

214; *Baldwin v. Calkins*, 10 Wend. (N. Y.) 167; *Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626. In an early case in Massachusetts for overflowing a mill privilege which had been improved, but which was not in use or capable of use during the time of the flowing, the plaintiff was permitted to recover as damages interest upon the value of the privilege if unobstructed. *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145. In Massachusetts the demandant in a writ of entry recovering against a disseller is by statute permitted to recover in that action the "full, clear, annual value of the land," instead of being put to a separate action (*Proprietors v. Railroad*, 104 Mass. 1, 12, 6 Am. Rep. 181), while in trespass for mesne profits the plaintiff is entitled to recover from the tenant such profits as have been received from the premises. *Withington v. Corey*, 2 N. H. 115. In some form of action one who has been wrongfully excluded from his realty is entitled to compensation for the use of his property had by the wrongdoer. He is not confined to nominal damages by the return of his property without diminution in its value. The measure of damages for the permanent flowing of land is the difference between the value of the land free from and subject to the right. *Wright v. Company*, 75 N. H. 3, 70 Atl. 290. It has never been suggested that the fact that the landowner had not put and had no intention of putting the land to any beneficial use was an answer to the claim for damages; but such contention would be as reasonable as the claim that the owner cannot recover for the use of his land by a wrongdoer because during the existence of the wrong he had no occasion to put it to a beneficial use. To use the illustration in *Green Bay, etc., Co. v. Kaukauna Water Power Co.*, 112 Wis. 323, 87 N. W. 864, 62 L. R. A. 579, as well might one sued for wrongfully appropriating the use of the plaintiff's horse defend against the damages upon the ground that the plaintiff had no use for the horse. "If one deprives another person of anything of value, the loss to the latter in a legal sense is not lessened at all by the circumstance, if it exist, that he intended never to enjoy it, or to bestow it as a gratuity upon another." Page 338 of 112 Wis., page 867 of 87 N. W. (62 L. R. A. 579). The owner may prefer the property shall not be put to use. Such is his right if he considers the nonuse more valuable to him. That no use shall be made at all may be of more value to the owner than any benefit that could be obtained from use.

As no damage has been done to the realty, it is to be presumed that whatever property of the plaintiffs was flowed is now of the same value it was before; and, as the claim for damages to business has failed, the only ground upon which the plaintiffs can recover is the rental value of their property, if it has any under all the circumstances. If it has, it is immaterial whether the plaintiffs would or would not have received any income from it if it had not been overflowed. If the flowing took away part of the power developed by the dam above, the rental value of the power so taken would be more than nominal. That the owner was not using the power created by his investment in land and improvement would be no reason why one wrongfully using it should not pay the fair value of the use. *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145. Such flowing would transfer power developed by the plaintiffs' dam to the defendants, and would be as much an infringement of the plaintiffs' property right as if the defendants had directly connected their wheels with the plaintiffs' pond. For such diversion of power, one effecting it by wrong is liable for the fair rental of the power so taken. *Green Bay, etc., Co. v. Kaukauna Water Power*, 112 Wis. 323, 87 N. W. 864, 62 L. R. A. 579. There is no difference in principle whether the power is taken by drawing water from above the dam or by backing it up at the foot. What the defendants obtain in either case is the use of the plaintiffs' property; and the value of the use measures what the defendants ought to pay and the plaintiffs receive. If the flowing was a mere increase of the depth of water in an unimproved part of the stream not capable of use in connection with the plaintiffs' dam, and capable of enjoyment only through the defendants' dam, the power so produced would not be the fair measure of value. But this is not a case of first appropriation by the owner below because the limit of his right has been defined by deed for more than 40 years. The right to raise the water is of value. When that is found, the rental or income value during the time the defendants wrongfully enjoyed it can easily be found. There should be a further hearing on the question of damages, which should be assessed at the fair value of the use of the plaintiffs' right wrongfully enjoyed by the defendants. Upon this question the income received by the defendants from its use is evidence, but the amount received is not its measure.

Case discharged. All concurred.

(76 N. H. 154)

KIDD et al. v. NEW YORK SECURITY & TRUST CO. et al.

(Supreme Court of New Hampshire. Rockingham. Jan. 5, 1909.)

1. JUDGMENT (§ 713*)—MATTERS CONCLUDED—GENERAL DECREE—FRAUD.

Where there was a general decree for defendants, in a suit to set aside a transfer of assets of a corporation to one of them on the ground of fraud and conspiracy, and there was conflicting evidence upon the question of fraud, the decree includes a finding that the transfer was not the result of fraud and conspiracy on defendants' part.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 713.*]

2. EQUITY (§ 427*)—DECREE—CONFORMITY TO SPECIAL FINDING.

In an action by stockholders of a corporation to set aside a transfer of the assets of the corporation to a defendant trust company on the ground of fraud and conspiracy, a special finding that the taking of certain assets of the corporation by defendant trust company was intentionally concealed from plaintiffs by defendants until after suit was brought, to prevent plaintiffs from taking measures to prevent the consolidation of the corporation with the trust company, was not inconsistent with a general decree for defendants dismissing the suit, where it was not found that defendants were successful in carrying out their purpose, or that if plaintiffs had known of the proposed transfer, they would have taken steps to prevent consolidation.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 427.*]

3. CORPORATIONS (§ 426*) — UNAUTHORIZED ACTS OF AGENTS—RATIFICATION BY STOCKHOLDERS.

A corporation may ratify an unauthorized transaction of its agents by the unanimous acquiescence of its stockholders, as well as by a vote of the majority in a corporate meeting.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 426.*]

4. EQUITY (§ 431*)—DECREE—MATTERS CONCLUDED.

In an action by stockholders to set aside a transfer of the corporation's assets to a trust company on the ground of fraud and conspiracy, *held* that there was evidence tending to show that all the stockholders acquiesced in a provision of the contract with the trust company for the transfer, which gave a personal interest in the contract to a fellow stockholder and director who voted at the directors' meeting in favor of the contract, and whose presence was necessary to a quorum of the board, so that the fact will be taken as found; a general decree having been rendered for defendants which carries the presumption that all facts were found which were necessary to sustain it, and of which there was evidence.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 431.*]

5. EQUITY (§ 427*) — DECREE — INCONSISTENT FINDINGS.

The contract providing a yearly salary of \$6,000 for the director, reasonably intelligent men could not have understood otherwise than that he was given a personal interest in the contract, and if the conclusion that they did so understand, presumably embraced in the general decree, be inconsistent with a special finding that plaintiffs knew of the contract the month after it was authorized by the directors, but did not understand its scope, the special finding is not supported by the evidence to that extent.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 427.*]

6. EQUITY (§ 427*)—SPECIAL FINDINGS—CONSTRUCTION.

The special finding that plaintiffs knew of the contract the month after it was authorized, but did not know its scope, could not be construed to mean that they did not know that the director was receiving a special benefit thereunder, in view of another special finding that plaintiffs considered the contract advantageous to them, and expected it to be carried into effect.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 427.*]

7. APPEAL AND ERROR (§ 1097*)—REVIEW—SUBSEQUENT TRANSFERS—SCOPE OF REVIEW—QUESTIONS OF LAW DECIDED ON FORMER TRANSFER.

Parties not content with the decision of the Supreme Court on a transfer of the case should apply for a rehearing under rule 10, and they cannot have the same questions of law re-examined on a subsequent transfer, especially where equity and justice do not require it, as where, in a suit to set aside contracts on the ground of fraud and conspiracy, the grounds for re-examination are highly technical, and it is found that the contracts were not unconscionable and not procured by fraud.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

Transferred from Superior Court, Rockingham County; Peaslee, Judge.

Bill by Charles G. Kidd and others in behalf of themselves and others against the New York Security & Trust Company and others. There was a decree of dismissal, and the case was transferred from the superior court on plaintiffs' exceptions. Exceptions overruled.

Bill in equity, by the owners of all the preferred stock of the Massachusetts Construction Company, Incorporated, in behalf of themselves and all other stockholders of the corporation, to set aside a transfer of the assets of the corporation to the New York Security & Trust Company, on the ground of fraud and conspiracy, and for an accounting. The case is the same as that reported in 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574, and 74 N. H. 160, 68 Atl. 127, and the facts found and evidence reported upon the previous transfers are made a part of this case. After the case was remanded, it was reargued in the superior court upon the evidence previously reported, the decree against the trust company was set aside, a decree dismissing the bill as to all the defendants, without costs, was entered, and certain additional facts were found. The plaintiffs excepted to the decree dismissing the bill, to additional facts found, and to the refusal of the court to make certain rulings and findings specially requested by them.

Streeter & Hollis and Roger F. Sturgis, for plaintiffs. Sargent & Niles, Burnham, Brown, Jones & Warren, and Hornblower, Miller & Potter, for defendants.

BINGHAM, J. The questions presented upon the previous transfer of this case related to the validity of the decree of the su-

perior court in favor of the plaintiffs, based upon certain findings of fact and rulings of law, to the effect that the trust company's letter of January 3, 1902, was not an acceptance of the Connecticut company's proposal contained in the instrument of December 28, 1901, but a modification of it and the submission of a counter proposal which was not accepted by the Connecticut company until after December 31, 1901; that after that date the Connecticut company was a mere agency of the trust company, and incapacitated from contracting with it; that the trust company consequently stood with relation to the plaintiffs, who are preferred stockholders in the Connecticut company, as trustee, and bound to account to them as such, and not according to the instrument of December 28th. But this court, after an extended consideration of the questions, held that the rulings of the superior court, read in the light of the facts upon which they were based, were erroneous, and that the decree for the plaintiffs should be set aside; that it did not appear but that the Connecticut company was an independent agency and free from the control of the trust company down to December 31st, when its board of directors authorized its president and secretary to sign the instrument of December 28th, which they then in fact signed; that the trust company's assent was given January 3d, when its officers signed the contract; and that the proposition of the trust company contained in its letter of January 3d, relating to the high tension service, if ever legally assented to by the Connecticut company, was not a modification of the contract of December 28th, but collateral to it. The case was then sent back to the superior court for a determination of the question whether the contracts of November 12th and December 28th were procured through the fraud and conspiracy of the defendants; that being the only question raised by the pleadings and left open upon the record. This question was afterwards argued in the superior court upon the evidence originally submitted, and thereupon the trial justice set aside the former decree, entered a decree dismissing the bill as to all the defendants, and made certain findings of fact in addition to those previously reported. He did not specifically find that the contracts of November 12th and December 28th were not procured through fraud, but the general decree was in favor of the defendants; and, as there was evidence upon the question of fraud, and it was conflicting, the decree includes a finding that the contracts were not the result of fraud and conspiracy on their part. *Allen v. Association*, 72 N. H. 525, 57 Atl. 922; *Concord Coal Company v. Ferrin*, 71 N. H. 331, 51 Atl. 283, 93 Am. St. Rep. 496; *Allard v. Hamilton*, 58 N. H. 416; *Noyes v. Patrick*, 58 N. H. 618. The special finding upon which the plaintiffs lay particular stress—that "the taking of the E. H. & A. division from the Connecticut company by the trust company,

under the contract of November 12th, was intentionally concealed from the plaintiffs by the defendants until after the bill was filed, for the purpose of preventing the plaintiffs from taking measures to prevent the consolidation"—if supported by the evidence, comes to nothing; for, if such was the defendants' purpose, it is not found that they were successful in carrying it out, or that, if the plaintiffs had known of the proposed transfer, they would have taken steps to prevent consolidation. They took no action of this nature when they learned of the contract of December 28th; and the trial judge may have very properly concluded, when he made the general decree dismissing the bill, that they would have pursued the same course with reference to the contract of November 12th.

This brings us to a consideration of the plaintiffs' seventeenth request, wherein they asked the trial court to rule and find that "the contract of December 28th is not binding for lack of a qualified quorum of directors." This request was denied. The plaintiffs now contend that by the ninth clause of the contract of December 28th it appears that Lovell was to receive an annual salary of \$6,000 for two years from the trust company, for services he was to render in furthering the purposes of the traction company, which would give him a personal interest in the contract antagonistic to that of the Connecticut company, and would therefore disqualify him as a director in authorizing the contract in behalf of that company, and that the records of the directors' meeting of December 31st, at which the contract was authorized, disclose that his presence was necessary to constitute a quorum of the board, that he participated in the meeting, and voted in favor of the contract, and that it is therefore void or voidable, though capable of confirmation. *State v. Richmond*, 26 N. H. 232, 238; 1 Mor. Corp. § 524. This question was not raised upon the former transfer of the case, although the facts upon which the contention is now based were then presented by the record. Nor does it appear that Lovell's interest in the contract was urged or suggested as a reason for his disqualification as a director at the hearing before the trial judge, after the case was remanded; but, if it was, and the denial of the request was based upon a finding of fact and ruling of law, then the legal question herein insisted upon may not exist. That a corporation may ratify the unauthorized transaction of its agents by the unanimous acquiescence of its stockholders, as well as by the vote of the majority in a corporate meeting, would seem not to be open to question. 1 Mor. Corp. § 525. Consequently, if there was evidence from which it could have been found that the plaintiffs, who owned all the preferred stock, and Lovell, who owned all the common stock, acquiesced in the provision of the contract to which objection is made, or waived their right to object to it,

the fact is to be taken as found; for the general decree carries the presumption that all facts were found necessary to sustain it, and of which there was evidence. *Dusseault v. Association*, 74 N. H. 407, 68 Atl. 461, and cases above cited.

It is clear that acquiescence on the part of Lovell could have been found from the fact that he was a party to the contract and the chief beneficiary under the provision here in question. As to Kidd it appears that his counsel was shown the instrument of December 28th seven days after it was executed by the trust company; that on that date he wrote Kidd and inclosed a copy of the agreement; that he called Kidd's attention to the particular provision relating to the employment of Lovell at a salary of \$6,000 a year for two years, and congratulated him upon the prospect of his receiving "some income" from Lovell because of the salary and the probable payment of "regular dividends" * * * upon the preferred stock of the Connecticut company." And as to Whitcomb it appears that in January, 1902, he knew of the contract of December 28th, considered it advantageous to him, and expected the trust company would carry it into effect; that he became a director in the traction company at an early date, took part in the directors' meeting of that company January 21st, when the trust company's proposition for a sale to the traction company of the securities received from the Connecticut company was acted upon, and in other ways recognized the validity of the agreement. From this, and other evidence of similar import, and the fact that no objection was raised by Kidd or Whitcomb for over six years after they were fully informed about the provision giving Lovell a personal interest in the contract, it reasonably could have been concluded that they, as well as Lovell, were satisfied with, and acquiesced in, the provision. This conclusion is not inconsistent with the special finding that the plaintiffs "never assented to a sale by the trust company to the traction company"; for the sale or contract to which this finding relates is the supposed contract or sale of December 28th, as modified by the trust company's letter of January 3d, and not the contract or sale by the Connecticut company to the trust company which we are now considering. And if the finding that "the plaintiffs knew of the contract of De-

cember 28th in the following January, but did not understand its scope" is capable of being construed as inconsistent with the conclusion that they must have known that this provision gave Lovell a personal interest in the contract, the special finding is to that extent not supported by the evidence; for, as reasonably intelligent men, they could not have understood otherwise. But it seems that this finding is not to be so broadly construed, in view of the further finding that the plaintiffs "considered the contract of which they knew [the instrument of December 28th] advantageous to them, and expected the trust company to carry it into effect." As the plaintiffs considered the contract advantageous to them, and knew and acquiesced in the provision in Lovell's behalf, they cannot now avail themselves of this objection.

The only remaining question relates to the plaintiffs' request to be reheard upon the precise questions that were decided when the case was here upon the previous transfer. As to this it may be said that if the plaintiffs were not content with the former decision, they should have seasonably applied for a rehearing in accordance with the tenth rule of court. Not having done so, they are now concluded by the long-established practice of this court that questions of law once decided will not be re-examined upon a subsequent transfer, especially where equity and justice do not require it. *Bell v. Woodward*, 47 N. H. 539; *Id.*, 48 N. H. 437; *Bell v. Lamprey*, 58 N. H. 124; *Carter v. Jackson*, 58 N. H. 156; *Ashuelot R. R. v. Elliot*, 58 N. H. 451; *Plaisted v. Holmes*, 53 N. H. 620; *Preston v. Insurance Co.*, 59 N. H. 49; *Amoskeag Mfg. Co. v. Head*, 59 N. H. 332; *Weare v. Deering*, 60 N. H. 56; *Hedding v. Gallagher*, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811; *Olney v. Railroad*, 73 N. H. 85, 59 Atl. 387. The grounds upon which the plaintiffs desire a re-examination of these questions are highly technical; and, as it is found that the contracts were not unconscionable, and were not procured through fraud, justice does not require the adoption of such a course.

Plaintiffs' exceptions overruled.

PEASLEE, J., did not sit. The others concurred.

CAMPBELL v. CAMPBELL et al.

(Supreme Court of Rhode Island. Feb. 17, 1909.)

Action by Elisha J. Campbell against George E. Campbell and others. Verdict for defendant, and plaintiff petitions for new trial. Continued.

Green, Hinckley & Allen, for petitioner. James Harris and Irving Champlin, for respondents.

PER CURIAM. The first three grounds relied upon by the petitioner in support of his petition for a new trial are not sustained by a preponderance of the evidence.

Upon the fourth ground, which charges an abuse of judicial discretion on the part of the justice who presided at the trial, the court desires an affidavit from the witness Bradford Campbell, setting forth the testimony which he could properly have given in rebuttal, to be filed on or before March 1, 1909, and the case will be assigned to March 10, 1909, for further hearing upon the effect of the exclusion thereof.

WEEKS v. FLETCHER et al.

(Supreme Court of Rhode Island. Feb. 17, 1909. On Rehearing, Feb. 25, 1909.)

DAMAGES (§ 182*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

One with a life expectancy of about 16 years and an earning capacity of about \$15 a week was injured. He sustained a permanent injury to his skull, which affected his eyesight and hearing. He would never be able to do any hard work, and age would tend to aggravate the trouble. His earning capacity had been greatly reduced. *Held*, that a verdict of \$7,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-383; Dec. Dig. § 132.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Stephen P. Weeks against Charles Fletcher and others. There was a verdict for plaintiff, and defendants bring exceptions. Overruled, and cause remitted, with directions for judgment.

This was an action for personal injuries. Plaintiff, having a life expectancy of about 16 years and an earning capacity of about \$15 a week, was injured. He sustained a permanent injury to the skull. He would never be able to do any hard work, and age would tend to aggravate the trouble, which had affected both his eyesight and hearing. The trial occurred two years after the injury, and since the injury plaintiff had only averaged \$1 a week as photographer, while before he had averaged from \$8 to \$10 a week. He obtained a verdict for \$7,000.

See 29 R. I. 112, 69 Atl. 294.

Albert B. Crafts, for plaintiffs. Vincent, Boss & Barnefield and Cyrus M. Van Slyck, for defendant.

PER CURIAM. The law governing this case is contained in the opinion heretofore

rendered and reported in 29 R. I. 112, 69 Atl. 294. The declaration was sustained by proof at the trial of the case. The judge made no reversible error in his rulings or charge, and we cannot say that the damages awarded by the jury are excessive.

For these reasons the exceptions of the defendants must be overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

On Rehearing.

PER CURIAM. The defendant's application for a rehearing presents no new matter for consideration. It restates arguments that were fully presented at the hearing of the case, which have been duly appreciated. We see no reason to change our former decision. The application is therefore denied.

(82 Vt. 69)

CALDBECK v. SIMANTON.

(Supreme Court of Vermont. St. Johnsbury. Feb. 13, 1909.)

1. ARREST (§ 15*)—GROUNDS—FRAUD—CHARGE—SUFFICIENCY.

Where a declaration alleged that plaintiff bargained with defendant for the purchase of a diamond, that defendant sold him the diamond for a certain price by falsely and fraudulently warranting that it was a perfect stone, when in fact it was defective, and that defendant thereby "falsely and fraudulently deceived him," but did not allege that defendant knew that the representation was false, the action was founded on contract, since the law raises no presumption of knowledge of falsity from the mere fact that the representation was false, and service by arrest was unauthorized.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 40-43; Dec. Dig. § 15.*]

2. DISMISSAL AND NONSUIT (§ 57*)—DEFECTS IN PROCESS.

Where a writ issued as a *capias* on which defendant's body was arrested set up defendant as of a certain town in a given county of the state, this was a sufficient determination of residence for the purpose of defendant's motion to dismiss the case on the ground that the action was founded on contract.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 183; Dec. Dig. § 57.*]

Exceptions from Caledonia County Court; Willard W. Miles, Judge.

Action by George Caldbeck against Charles Simanton. Plea, the general issue. There was a trial by jury, and verdict and judgment for plaintiff. During the trial, and before plaintiff rested, defendant moved to dismiss the case because the action was founded on contract, and the writ was issued as a *capias* on which defendant's body was arrested. The motion was overruled, and defendant excepted. Judgment reversed, motion to dismiss sustained, and writ dismissed.

David E. Porter and Simonds & Searles, for plaintiff. Harland B. Howe and Herbert W. Hovey, for defendant.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

MUNSON, J. The plaintiff declares, in substance, that he bargained with the defendant for the purchase of a diamond, and that the defendant sold him the diamond for a certain price by "falsely and fraudulently warranting" it to be a perfect stone, when, in fact, it was not a perfect stone, but defective in certain respects stated, and that the defendant thereby "falsely and fraudulently deceived him." The service was by arrest, and the case stands on a motion to dismiss. The defendant argues that no scienter is alleged; that the declaration is in case for a breach of warranty; that there could be no recovery without proving the warranty; and that this conclusively determines that the action is founded on contract. No point is made distinguishing between the counts.

In 2 Chitty's Pleading, 279, there is a form for declaring in assumpsit on a warranty, and at page 679 there is one for declaring in tort on a warranty. The latter form is the one used here. The two forms were joined in one declaration in *Dean v. Cass*, 73 Vt. 314, 50 Atl. 1085, and the second was held to be in tort and improperly joined with the first. So the declaration before us may be classed, without special examination, as in form a declaration in tort. In pursuing the inquiry further it will be well to have in mind the nature of a warranty, and the history and characteristics of the remedies permitted for a breach of it. The ordinary warranty relates to the condition of the property at the time of the sale. Such a warranty, if broken at all, is broken when made. The breach consists in the fact that the property is not as it is stated to be. The warranty may be made merely as an assumption of a contract obligation, or it may be deceitfully made with a knowledge of its falsity. In either case it is made to induce the purchase. Personal actions are either for breaches of contract or for wrongs unconnected with contract; assumpsit being in the first class, and case in the second. Chitty, 97. The original action on the case, permitted in suits for which the established forms were not adapted, was not similar to the present action of assumpsit, but resembled rather the present form of a declaration in case for a tort. Chitty, 99. It was at first difficult to distinguish assumpsit from case; and the early decisions in actions on warranties were made before the boundary between the two remedies was well defined. Note to *Chandelor v. Lopus*, 1 Smith Lead. Cas. 178. The practice of declaring in tort for warranty broken originated in this early period; and the remedy then adopted continued in almost exclusive use until the middle of the eighteenth century. As late as 1778, Lord Mansfield considered an action of assumpsit for a breach of warranty so peculiar that he reserved the question of its sufficiency; and this method of declaring was then authoritatively sanctioned. *Stuart v. Wil-*

kins, 1 Doug. 17. Since then assumpsit and case have been recognized as concurrent remedies for breach of warranty. *Williamson v. Allison*, 2 East, 446; *Beeman v. Buck*, 3 Vt. 53, 21 Am. Dec. 571; 19 Enc. Pl. & Pr. 82, and cases cited.

Closely connected with the subject of warranty is that of deceit by fraudulent representations. The two grounds of liability are entirely distinct, but both may be developed by one affirmation. The evidence may make the affirmation either a deceit or a warranty, or both. The allegations of a declaration charging deceit by means of a false warranty, and of one charging a deceit independent of warranty, are in other respects substantially the same, as is indicated by the first counts of the forms in 2 Chitty, 687, 688. If the allegation of knowledge in a declaration following the first count of the first of these forms be treated as surplusage, the case becomes an action of tort for a breach of warranty. This treatment of a declaration so framed was sanctioned in *Williamson v. Allison*, before cited, and that case has since been generally followed. The recognition of assumpsit and case as concurrent remedies for breach of warranty, and the decision in *Williamson v. Allison* regarding the scienter, have led to the adoption of forms confessedly designed to enable the plaintiff to recover for a breach of warranty or for deceit, as the case might develop. A short declaration, framed in this double aspect, was used in *Beeman v. Buck*, 3 Vt. 53, 21 Am. Dec. 571; *Vail v. Strong*, 10 Vt. 457; *West v. Emery*, 17 Vt. 583, 44 Am. Dec. 356; *Goode-nough v. Snow*, 27 Vt. 720; *Pinney v. Andrus*, 41 Vt. 631. This declaration, given in full in the case first cited, avers that the defendant deceitfully sold the property by warranting it to be as described, "well knowing" it to be otherwise. The first count of the form in 2 Chitty, 687, before referred to, is a more formal declaration of the same character. This form was followed in *Harlow v. Green*, 34 Vt. 379, and was apparently the basis of the declaration in *Whitton v. Goddard*, 38 Vt. 780. The direct allegation of knowledge contained in the phrase "well knowing" or its equivalent is ordinarily employed in declarations which claim a recovery on the ground of deceit, and its absence from the declaration used here is the basis of the defendant's claim.

The plaintiff claims that a sufficient averment of knowledge is contained in the form used. The inclusion of this form under the general marginal heading of "deceit" is of little consequence, especially in view of the early history of the subject. It is not probable that Mr. Chitty considered the allegations sufficient to show knowledge; for in subsequent forms for deceitfully selling property by falsely and fraudulently warranting it the usual scienter is employed. The concluding averment that the defendant thereby falsely and fraudulently deceived the plain-

tiff cannot enlarge the effect of the matters previously alleged. If the declaration contains a "scienter," it must be—where the plaintiff claims it to be—in the allegation that the defendant "falsely and fraudulently warranted" the property. Words similar to those contained in this declaration are found in the form at page 279, which is unquestionably a declaration in assumpsit. It is there alleged that the defendant, "contriving and fraudulently intending to injure the said plaintiff, did not perform or regard his said promise and undertaking, * * * but thereby craftily and subtly deceived and defrauded the said plaintiff in this," that the property was not as warranted. But it will be noticed that the words in the two forms are used in different connections. In the assumpsit declaration the words quoted are applied to the breach of the defendant's promise, and not to the promise itself. In the declaration in tort the words "falsely and fraudulently" are applied directly to the act of warranting. This difference, however, is minimized by the fact that the undertaking is broken when assumed, so that in the first form the fraudulent intent is really laid at the time of the sale. The assumpsit form was considered in *Shepherd v. Worthing*, 1 Alken, 183, and was held to contain no substantial allegation of fraud; but it was suggested that an averment that the defendant falsely and fraudulently warranted the property might be equivalent to the required scienter. In *State v. Smith*, 63 Vt. 201, 22 Atl. 604, the court examined an indictment for perjury in which the usual words "as he then and there well knew" were omitted, and it was held that the averment that the respondent testified to the matter "willfully and corruptly" sufficiently alleged that the statement was false to his knowledge. The averment that the defendant "falsely and fraudulently" warranted the property, given its natural construction, might seem to import more than a warranty false in fact. It may be urged with some force that "fraudulently" characterizes the defendant's act, and implies a knowledge of the falsity of his statement. But the construction long given to the form, in connection with the construction of other forms pertaining to the same subject, is not to be ignored in passing upon the question.

The case of *Elbel v. Von Fell*, 64 N. J. Law, 370, 48 Atl. 1117, should be considered in this connection. There the declaration alleged that the defendants sold certain premises to the plaintiff by "falsely and fraudulently representing" that the house was new, when, in fact, it was old. The court held that this disclosed a cause of action, not for a false warranty as was claimed by the plaintiff, but for deceit, and said: "A good cause of action for deceit may be set out without a charge that the representation alleged to be false was known by defendant to be so, provided it is charged that

the false representation was fraudulently made." It will be noticed that in the second of the two forms for charging deceit before referred to (2 Chitty, 688), the first count contains an allegation that the defendant knew that the representation was false, while the second count does not contain this, but stands on the allegation that the defendant, "contriving and intending to deceive and defraud the said plaintiff in that behalf, then and there falsely and deceitfully pretended to the said plaintiff," etc. It would seem from these authorities that the words "falsely and fraudulently" as applied to a "pretense" or even to a "representation" are given an effect to which they are not entitled when applied to a warranty.

But the precise question has been adjudged in this state, although without special consideration. In *Foster v. Caldwell's Est.*, 18 Vt. 176, the declaration alleged, in substance, that the deceased sold the plaintiff a number of sheep by falsely and fraudulently warranting them to be sound when in fact they were diseased, and that the deceased deceived the plaintiff in the sale; but there was no allegation that the deceased knew the sheep were unsound. The verdict taken was in tort, and the court allowed it to be amended, after the panel was dismissed, by striking out the words "is guilty" and inserting the words "did assume and promise." In sustaining this action, it was said: "There is no allegation of a scienter in the declaration, and consequently there can be no recovery * * * for a deceit, notwithstanding the declaration is, in form, in case for a false warranty."

But the plaintiff contends, further, that no scienter is necessary, that the declaration is in tort, and that the question whether the process issues on a contract is to be determined, not by the origin of the claim, but by the form of the action. We have seen that the declaration is tort in form, and incapable of being joined with assumpsit. But it may nevertheless be process issuing on a contract within the meaning of the statutory provision. The plaintiff's argument to the contrary is based largely upon what was said by the courts soon after the recognition of assumpsit as a proper remedy placed them in the position of sustaining assumpsit and case as concurrent remedies for the breach of a purely contract obligation. It was said by Lord Ellenborough in *Williamson v. Allison*, 2 East, 446, that the warranty is the thing which deceives the buyer who relies on it, and that it is sufficient to prove the warranty broken to establish the deceit. It has sometimes been said in following this authority that the law implies deceit from the breach of the warranty. This view is clearly untenable—even when the undertaking of warranty is treated as a representation. "No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstan-

ces that the law must necessarily impute such knowledge to the party at the time when he makes it." 2 Pom. Eq. Jur. § 884. The law raises no presumption of knowledge of falsity from the mere fact that the representation was false. *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678.

The phraseology of our standard forms reflects the indefiniteness of distinction which prevailed in the formative period of the common law, and this is true to some extent of the language of commentators comparatively modern. Blackstone, writing about 1768, after speaking of the beating of another and the taking of another's goods as trespasses, proceeds: "So, also, nonperformance of promises or undertakings is a trespass upon which an action of trespass on the case in assumpsit is grounded." The subject may be briefly reviewed and further elucidated in the words of the note to *Chandelor v. Lopus*, 2 Smith's Lead. Cas. 187 (Am. Ed.) 1847, where it is said in connection with a consideration of *Williamson v. Allison* and kindred cases: "Originally actions upon breaches of warranty, as well as of all other promises, were substantially, as well as nominally, actions on the case, which went upon the ground of deceit, and set forth the undertaking of the defendant, and the consideration by which it was supported, for the purpose of establishing a fraud on his part, and a consequent legal injury to the plaintiff. But in modern times the distinction between assumpsit and case has become as well established as that between trespass and covenant, and it is not easy to see why it should be disregarded in the single instance of actions such as those we have just been considering." It may also be said that there is no plainer distinction in the law than that between breach of warranty and deceit; and the law no more implies deceit from a breach of warranty than it does from a breach of covenant for title or from the nonperformance of a contract of suretyship.

The difference between assumpsit and case as remedies for wrongs of this character was comparatively of little importance when our earliest cases upon the subject were decided. The subsequent abolishment of imprisonment for debt has introduced an element which cannot be ignored in reviewing the subject at this date. It is not necessary to consider further the construction, technicalities, and classification of the different forms employed, nor to anticipate the questions of practice that may arise in connection with their use. It is enough to say that if a plaintiff wishes to proceed by arrest, he must allege a case that entitles him to arrest. That right cannot be given by mere form or classification. The test must be the nature of the action as determined by its substance. It is said in *Beeman v. Buck*,

3 Vt. 53, 21 Am. Dec. 571, that assumpsit is supported by proof of the sale, a warranty, and the breach of it, and that nothing more is required in tort. If the declaration in tort requires the same and only the same proof as the one in assumpsit, it is manifestly a declaration in tort only in name. The declaration before us is so framed that nothing more is required. It discloses a warranty false in fact, but not false to the knowledge of the warrantor. If the plaintiff recovers upon this declaration, it will be solely by force of the contract. Proof of fraud was not pertinent to the issue presented.

Commencement by trustee process is authorized, and arrest or imprisonment is prohibited, in actions founded on contract. It is held in regard to trustee process that the form of the action governs (*Elwell v. Martin*, 32 Vt. 217), and it is argued that this holding is decisive here. It is true that we have substantially the same expression in both statutes, but it is used with reference to different subjects, and the nature of those subjects may justify, and even require, different constructions. It is the general scheme of our law that a man's property shall be held for the satisfaction of all his obligations, but that his body shall be held only for the satisfaction of obligations of a certain class. The trustee process is a method provided for reaching property held in certain forms, and whatever the scope given it by construction its operation will be in line with the general purpose of the law. The right of arrest pertains only to a limited class of obligations, and the right to exercise it in a given case must be determined by the line which separates that class from others. Any test or construction which carries the right beyond that line will be at variance with both the purpose and the letter of the law.

It is said that it does not appear that the defendant is a resident of any of the United States, and so within the exemption. But the writ sets up the defendant as of St. Johnsbury in the county of Caledonia, and this is a sufficient determination of residence for the purposes of defendant's motion.

Judgment reversed, motion to dismiss sustained, and writ dismissed.

(104 Me. 315)

PEAKS et al. v. SMITH.

(Supreme Judicial Court of Maine. Sept. 5, 1908.)¹

1. CHATTEL MORTGAGES (§ 185*)—IMPORTANCE OF RECORD—DUTY OF MORTGAGEE TO TAKE POSSESSION.

When a mortgage of personal property has been given by a mortgagor residing in an unorganized place, and no town or organized plantation adjoins such unorganized place, and therefore there is no place designated by the statute (Rev. St. 1903, c. 98, § 1) where the mortgage

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

¹ Received for publication Feb. 25, 1909.

can be lawfully recorded, the mortgagee must take and keep possession of the mortgaged property in order to preserve his rights as against attaching creditors.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 388; Dec. Dig. § 185.*]

2. CHATTEL MORTGAGES (§ 194*)—RECORD—TAKING POSSESSION.

That part of Rev. St. 1903, c. 93, § 1, relating to possession of mortgaged personal property by the mortgagee, is simply declaratory of the common law, while that part relating to record provides an equivalent for possession not previously authorized. The mortgagee is given his option either to take and keep possession or to record the mortgage. The two methods are distinct. One or the other is indispensable as against third parties, and the mortgagee must employ one method or the other to preserve his rights as against third parties, and it matters not in what section of the state the mortgagor may reside.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 428; Dec. Dig. § 194.*]

3. CHATTEL MORTGAGES (§ 194*)—FAILURE TO RECORD—RIGHTS OF MORTGAGEE—ACTIONS AGAINST THIRD PERSONS.

The plaintiffs brought an action of trover against the defendant who was sheriff of Somerset county to recover the value of certain personal property attached on a writ by one of the defendant's deputies. The plaintiffs claimed the attached property under a chattel mortgage, given to them previous to the attachment by a mortgagor who resided in an unorganized place in Somerset county when the mortgage was given. The mortgage was not recorded, as there is no town or organized plantation adjoining the place in which the mortgagor resided, and therefore no place where the mortgage could have been legally recorded. Neither did the plaintiffs ever take possession of the mortgaged property, but permitted the mortgagor to remain in possession of the same. Previous to bringing the action, the plaintiffs gave the defendant written notice of their claim and the true amount thereof as required by Rev. St. 1903, c. 83, § 45. *Held*, that the action cannot be maintained.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 319; Dec. Dig. § 194.*]

(Official.)

Report from Supreme Judicial Court, Somerset County.

Action by Joseph B. Peaks and Sylvester J. Walton against Clyde H. Smith. Case reported. Judgment for defendant.

Action of trover brought by the plaintiffs against the defendant, sheriff of Somerset county, to recover the value of certain personal property attached December 18, 1906, by a deputy of the defendant on a writ of attachment in favor of one Margaret J. Armstrong and against one Martin J. A. Munster. The record does not disclose the plea, but presumably it was the general issue.

The plaintiffs claimed title to the attached property under a chattel mortgage given to them by said Munster September 6, 1906. The mortgage was not recorded, for the reason that Munster, at the time the mortgage was given, resided in Askwith, an unorganized place in Somerset county, and which is surrounded by other unorganized places, no

town or organized plantation adjoining it, so that the statute requirement as to record could not have been complied with. Neither did the plaintiffs ever take possession of the mortgaged property, but allowed Munster to have and retain the possession of the same. After the aforesaid attachment and "at least forty-eight hours" before bringing their action against the defendant, the plaintiffs gave to the defendant written notice of their "claim and the true amount thereof" as required by Rev. St. c. 83, § 45.

At the conclusion of the testimony, the case was reported to the law court upon so much of the evidence as was legally admissible, with the stipulation that "if the action cannot be maintained, judgment to be rendered for the defendant; if the action can be maintained, the case to be remanded to nisi prius for assessment of damages."

Argued before EMERY, C. J., and SAVAGE, PEABODY, CORNISH, KING, and BIRD, JJ.

J. B. & F. C. Peaks and Walton & Walton, for plaintiffs. Merrill & Merrill, for defendant.

CORNISH, J. This is an action of trover against an officer to recover the value of personal property attached December 18, 1906, and is before the law court on report.

The plaintiffs claim title under a mortgage given to them by the debtor September 6, 1906. The validity of this mortgage as against the attaching creditor is attacked by the defendant on the ground that neither has the property been taken into possession and kept by the mortgagees, nor had the mortgage itself been recorded. The plaintiffs admit these facts but reply that there was no place where the mortgage could have been legally recorded, and therefore the action is maintainable.

Rev. St. c. 93, § 1, provides as follows: "No mortgage of personal property is valid against any other person than the parties thereto, unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded by the clerk of the city, town or plantation organized for any purpose, in which the mortgagor resides, when the mortgage is given. * * * If any mortgagor resides in an unorganized place, the mortgage shall be recorded in the oldest adjoining town or plantation organized as aforesaid, in the county."

The mortgagor resided, at the time the mortgage was given, in Askwith, which is an unorganized place in Somerset county, and is surrounded by other unorganized places. No town or organized plantation adjoins it, so that the statute requirement as to record could not have been complied with. Did this fact relieve the mortgagees from the other requirement—the taking and keeping posses-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sion of the mortgaged property? We think not.

At common law, as a general rule, to make a transfer of personal property, whether absolute or conditional, valid as against third parties, delivery was required, and, in general also, a retention of the property by the vendee. *Lanfear v. Sumner*, 17 Mass. 110, 9 Am. Dec. 119; *Goodenow v. Dunn*, 21 Me. 86. The Legislature of Massachusetts by Pub. Laws 1832, p. 460, c. 157, § 1, provided for the first time for the registration of personal mortgages, and the court in *Bullock v. Williams*, 16 Pick. 33 (1834), construed this registration, when made, to be a substitute for the taking and keeping of possession. "The plain implication of the statute is that if possession is delivered to and retained by the mortgagee, or if the mortgage is recorded pursuant to the directions of the statute, it shall be valid against other persons," says Chief Justice Shaw in that case.

The Legislature of Maine in section 1, c. 390, p. 557, Pub. Laws 1839, re-enacted the Massachusetts statute in these terms: "No mortgage of personal property hereafter made * * * shall be valid against any other person than the parties thereto unless possession of the mortgaged property be delivered to, and retained by, the mortgagee, or unless the mortgage be recorded by the clerk of the city, town or plantation where the mortgagor resides." And our court has followed the construction placed upon the same statute by the court of Massachusetts. *Smith v. Smith*, 24 Me. 555; *Morrill v. Sanford*, 49 Me. 566; *Hamlin v. Jerrard*, 72 Me. 62.

The clause of the statute relating to possession is simply declaratory of the common law, while that relating to record provides an equivalent therefor not previously authorized. The mortgagee is given his option either to take and keep possession or to record the mortgage. The two methods are distinct. One or the other is indispensable as against third parties. Impossibility of recording does not abrogate the necessity of possession any more than the impossibility of possession would annul the necessity of record. The purpose of registration was to give notice to creditors and subsequent purchasers, notice which before the statute was left to be inferred from delivery and possession (*Sawyer v. Pennell*, 19 Me. 167); and the mortgagee must employ one method or the other, it matters not in what section of the state the mortgagor may reside.

Plaintiffs rely upon *Wade v. Bessey*, 76 Me. 413, where the court held that the then existing statute requiring an assignment of wages to be recorded "in the town or plantation organized for any purpose, in which the assignor is commorant while earning such wages," did not apply to an assignor earning wages in an unorganized township. We hold the same here. If the facts do not meet the statute, the statute does not apply. But the statute throws upon the mortgagee in such

cases another duty—the common-law duty that existed before the statute was passed—while in the case of the assignor no other burden is imposed. More in point is *Grant v. Albee*, 89 Me. 299, 36 Atl. 397. The rule as to the attachment of personal property is similar to that governing mortgages. At common law, in order to perfect and preserve an attachment of chattels, it was necessary to take and retain possession and control of the property or to have the power to take immediate control. *Laughlin v. Reed*, 89 Me. 226, 36 Atl. 131. A statute, originally passed in 1840 (Rev. St. 1841, c. 114, § 39), authorized the recording of attachments of bulky personal property, and with some amendments is still in force. In 1896 the then existing statute provided that "when the attachment is made in an unincorporated place" the copy of the officer's return of attachment "shall be filed and recorded in the office of the clerk of the oldest adjoining town in the county." Rev. St. 1883, c. 81, § 26. In the case last cited personal property was sought to be attached in an unincorporated place with no town adjoining, and the officer recorded his attachment in the oldest and nearest town, but failed to keep possession of the property.

The court held that the record was not authorized, and the attachment was void. If the plaintiffs' reasoning in the case at bar is correct, the impossibility of the record rendered unnecessary the taking of possession.

It is interesting to note that the statute as to recording assignments has been amended to cover the omission existing at the time of *Wade v. Bessey*, 76 Me. 413 (1884). See Pub. Laws 1897, p. 337, c. 301; Rev. St. c. 113, § 6; Pub. Laws 1907, p. 111, c. 103.

And the statute relating to recording attachments of personal property, existing at the time of *Grant v. Albee*, 89 Me. 299, 36 Atl. 397 (1896), has been similarly amended. See Pub. Laws 1897, p. 404, c. 331; Rev. St. c. 83, § 27. Moreover, by Pub. Laws 1850, p. 155, c. 180, recording of a personal mortgage was authorized in the nearest incorporated town in case the mortgagor resided in an unorganized place, which would have met the conditions in the case at bar; but by Pub. Laws 1854, p. 114, c. 108, this was changed "to the oldest adjoining town in the county." To change it back and make it harmonious with the statute governing assignments and attachments is for the Legislature and not for the court.

The burden is on the plaintiffs to prove their right of possession of the goods attached. This they could do by proving that "possession" of the goods had been "delivered to and retained by" them as mortgagees, or that the mortgage had been duly recorded. *Citizens' National Bank v. Oldham*, 142 Mass. 379, 8 N. E. 115. The latter could not be done, the former was not done, and the entry must therefore be:

Judgment for defendant.

(104 Me. 332)

CONEY v. MALING.

(Supreme Judicial Court of Maine. Sept. 10, 1908.)

COSTS (§ 215*)—TAXATION—APPEAL FROM DECISION OF CLERK.

An appeal from the taxation of costs by a clerk of courts in vacation must be in writing.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 215.*]

(Official.)

Exceptions from Supreme Judicial Court, Sagadahoc County.

Action by Emma J. Coney against Henrietta M. Maling. Verdict for defendant. From taxation of costs in vacation by the clerk, plaintiff brings exceptions. Overruled.

Argued before WHITEHOUSE, SAVAGE, PEABODY, SPEAR, and BIRD, JJ.

Wm. T. Hall, Jr., for plaintiff. Staples & Glidden, for defendant.

SAVAGE, J. At the trial of this case at the December term, 1907, in Sagadahoc county, the verdict was for the defendant. The plaintiff's attorney did not request to be heard in costs during the term. After adjournment, the clerk taxed the costs, whereupon the plaintiff's attorney orally notified the clerk that he desired to appeal, but he filed no appeal in writing. He made no effort to have the matter heard by the justice who presided at the December term, or by any other justice in vacation. He presented the matter to the justice who presided at the following April term, who ruled that he had no jurisdiction to entertain the appeal, that it was not properly taken, and ordered it dismissed. To this ruling the plaintiff excepted.

We think the ruling was right. The plaintiff took no appeal. Giving the clerk in vacation oral notice of his desire to appeal was not sufficient. An appeal from the taxation of costs is a part of a judicial proceeding, and becomes a part of the record. From the very nature of the thing it must necessarily be evidenced by a writing. Otherwise no record of it can be made. Nor can the justice to whom an appeal in vacation is made act judicially, except upon a written appeal signed by the party or his attorney. Such a procedure is not permissible.

Exceptions overruled.

(104 Me. 276)

INHABITANTS OF BRADLEY v. PENOBSCOT CHEMICAL FIBRE CO.

(Supreme Judicial Court of Maine. June 29, 1908.)

TAXATION (§ 274*)—PLACE OF TAXATION—PROPERTY "EMPLOYED IN MECHANIC ARTS."

The plaintiff town of Bradley assessed a tax for the year 1906 on certain pulp wood belonging to the defendant. The defendant, an Old Town corporation, on April 1, 1906, owned

and operated in Old Town, on the west side of the Penobscot river, a mill for the manufacture by mechanical and chemical processes of soda pulp, from pulp wood, for sale to paper manufacturers. On the same side of the river it also had a cutting up sawmill and a piling ground. Across the river in the plaintiff town, it also had a cutting up sawmill and a piling ground. In the defendant's operations, pulp wood, out of which pulp was to be manufactured, was driven down the river in log lengths to a boom above the defendant's mill. From this boom some of the logs were let down into a boom on the Old Town side of the river, taken out and cut into four foot lengths, and used in the mill or piled on the piling ground. Other logs, for economy and convenience in operation, were let down into a boom on the Bradley side of the river, then taken out and cut into four foot lengths, and piled on the Bradley piling ground, from which it was taken across the river in the winter on the ice to the soda mill or piling ground on that side. The pulp wood which was taxed by the plaintiff town had been so cut up and piled on the Bradley ground during the season prior to April 1, 1906, and was still there on that date. It was intended for use in the soda mill in Old Town, but it had not been removed to the Old Town side during the previous winter, because the piling ground on that side was so full that it could not be received there.

Held, that the wood was not taxable, April 1, 1906, by the plaintiff town, as being "employed in the mechanic arts" in that town.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 448, 449; Dec. Dig. § 274.*]

(Official.)

Report from Supreme Judicial Court, Penobscot County.

Action of debt by the Inhabitants of Bradley against the Penobscot Chemical Fibre Company. Case reported to the law court. Judgment for defendant.

Action of debt brought by the plaintiff town against the defendant corporation to recover a tax assessed by the plaintiff town in 1906 on 6,000 cords of pulp wood belonging to the defendant corporation. Plea, the general issue. Tried at the October term, 1907, Supreme Judicial Court, Penobscot county. At the conclusion of the testimony, it was agreed that the case should be reported to the law court for determination upon so much of the evidence as was competent and legally admissible.

The case appears in the opinion.

Argued before SAVAGE, PEABODY, SPEAR, CORNISH, and KING, JJ.

Matthew Laughlin, for plaintiffs. J. F. Gould, for defendant.

SAVAGE, J. Action to recover taxes duly assessed on 6,000 cords of poplar wood in 1906.

It is not in dispute that the defendant is not an inhabitant of Bradley. It is an Old Town corporation. Nor is it disputed that it owned the pulp wood assessed, nor that the wood, on April 1, 1906, was in the plaintiff town. But the plaintiff claims that the wood was "employed in the mechanic arts"

by the defendant in Bradley at that time, and that the defendant then occupied a saw-mill, wharf, and landing place in Bradley for the purpose of such employment, and hence that the wood was taxable to it in Bradley, in accordance with Rev. St. c. 9, § 13, par. 1, which provides that "all personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where it is so employed, on the first day of each April; provided that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, shop, mill, wharf, landing place or ship yard therein for the purpose of such employment." The foregoing claims are denied by the defendant. The only question presented is whether, under the circumstances of the case, the wood was taxable to the defendant in Bradley.

The record discloses the following facts: The defendant owns and operates a mill for the manufacture, by mechanical and chemical processes, of soda pulp, sometimes called "chemical fibre pulp." The pulp is manufactured to be sold to paper manufacturers. The mill is situated on or near the west bank of the Penobscot river in that part of Old Town called "Great Works." On the same side of the river it also has a cutting up sawmill and a piling ground. On the opposite side of the river, in Bradley, it has another cutting up sawmill and another piling ground. The sawmill is equipped with a cutting up saw, a "nigger" and a splitting saw. A part of the pulp wood consumed by the defendant comes to it by rail on the Great Works side of the river, in four foot lengths. This is unloaded from the cars, and either taken directly to the pulp mill, or hauled to the piling ground, as may be convenient. The remainder of the defendant's pulp wood comes down the Penobscot river in log lengths, to a boom above the defendant's mill. There the logs are divided, having reference to the room left vacant in each boom below, at the time, and part are let down into a boom on the Great Works side of the river, from which they are taken to the cutting up mill, cut into four foot lengths, split if necessary for convenient handling, and then taken to the pulp mill for immediate use, or piled on the piling ground in Great Works. The remainder, for economy and convenience in operation, are let down into a boom on the Bradley side of the river. They are then taken to the defendant's cutting up mill in Bradley, cut into four foot lengths, and split, if necessary, and are then piled on cars and hauled by horse power, over tracks laid for that purpose, to the piling grounds in Bradley, and piled in tiers. The cutting up mill usually runs from about the 1st of June to the 1st of November. After the river freezes in the winter, the wood on the Bradley piling ground is hauled across the river on the ice, and either used

at once in the pulp mill, or piled on the Great Works piling ground, as occasion may require. The weight of the evidence is, we think, to the effect that usually all of the wood piled on the Bradley side of the river in any season has been hauled over to the Great Works side during the ensuing winter. But this was not true of every year. Some years, either because it was impracticable to get it all across the river in a winter, or because the Great Works piling ground was so full that there was no room to receive it, some of the pulp wood was left on the Bradley piling ground after the winter was ended. Such was the case with the 6,000 cords in question. It had been purchased by the defendant to be used in the manufacture of pulp in the Great Works mill. It had been taken down the river into the Bradley boom, cut up in the Bradley mill, and piled on the Bradley piling ground, where it remained on April 1, 1906, because the Great Works piling ground had been so full that the wood could not be taken over and stored there. It may be added that the defendant had no office in Bradley. It made no sales of its product in any stage of manufacture in Bradley. All sales of its manufactured product were made in Great Works, where its main office was, and all shipments were made from there.

Under these circumstances, can it be properly said that this pulp wood was "employed in the mechanic arts," in Bradley, at the time it was assessed? We think not.

That the manufacture of wood pulp from pulp wood is a mechanic art may be assumed. The questions then arise: Was this wood employed in the mechanic arts when assessed? And, if so, where? But for the cutting up process in Bradley, we think the principles declared in *Ellsworth v. Brown*, 53 Me. 519, and *Farmingdale v. Berlin Mills Co.*, 93 Me. 333, 45 Atl. 39, would lead us necessarily to hold that this wood, though still in transit from the forest to the mill, and not yet having arrived within the town in which was the mill where it was designed to reduce it to pulp, was nevertheless "employed," within the meaning of the statute, "in the mechanic arts," and was so employed in the town in which was the mill which was its ultimate destination, namely, Old Town. In *Ellsworth v. Brown*, it was held that "logs designed to be manufactured and sold in some town other than that in which their owner resides, but in which, on the 1st day of April he occupies a mill, store, or wharf, are rightfully taxable in such town, and not in the town where the owner resides, although they may not on the 1st day of April, in the year for which the tax is assessed, have actually arrived within the corporate limits of such town." In *Farmingdale v. Berlin Mills Co.*, logs which were intended by the owner for manufacture in a mill in a town other than that in which

the owner resided, and which were in transit to the mill, but which had not, on the 1st day of April, arrived in the town where the mill was situated, were held to be employed in the trade or business of that mill on that day, within the meaning and purpose of the statute, and so taxable in that town.

Upon careful consideration, the court is of opinion that the fact that these logs while in transit were taken from the river in Bradley, cut into convenient lengths for handling and use, and stored until they could be conveniently removed to the mill where they were to be converted into pulp, and so remained in Bradley until April 1, 1906, does not take them out of the rule established by the cases above cited. The wood was still in transit. No doubt the cutting up process at the mill in Bradley aided and facilitated the final reduction of the wood into pulp, and perhaps in a certain broad sense was one of the processes of the mechanic arts in which the wood was being employed. But the real process, the one to which we think the statute was intended to apply, was carried on in the mill in Great Works. It was in that mill that the wood was "employed" in the mechanic arts by reason of its being designed to be reduced to pulp there. *Farmingdale v. Berlin Co.*, *supra*. All the rest was preliminary and preparatory. The statute looks to the real employment, and not to the preparations for it.

It is claimed that the result is affected by the fact, as claimed, that the two yards, one on each side of the river, were contiguous, and that each was a part of one and the same plant. We think that matters not. If it were so, it would still be true that the ultimate destination of the wood, for employment in the mechanic arts, was the Great Works soda mill in Old Town.

Hence we conclude that this wood was not taxable by the town of Bradley.

Judgment for the defendant.

(104 Me. 253)

INHABITANTS OF WELLINGTON v. INHABITANTS OF CORINNA.

(Supreme Judicial Court of Maine. June 11, 1908.)

1. TRIAL (§ 168*)—DIRECTION OF VERDICT.

It is a well-established rule in this state that the court may properly instruct the jury to return a verdict for either party when it is apparent that a contrary verdict would not be allowed to stand.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 376; Dec. Dig. § 168.*]

2. PAUPERS (§ 39*)—SUPPORT—LOCAL AUTHORITIES LIABLE—NOTICE—SUFFICIENCY—WAIVER.

Although a pauper's notice, given by the overseers of the poor of a plaintiff town to the overseers of the poor of the defendant town, states that the pauper named therein "and wife

and children" have fallen into distress, but fails to state either the names or the number of the children, and in that respect is an insufficient compliance with the statute, yet the overseers of the poor of the defendant town, as the authorized agents of the town, may waive any objection arising from such an informality or defect in the notice; and, if they accept such notice without objection as a sufficiently definite statement of the facts, they must be deemed to have waived any objection arising from the failure of the notice to give a more definite description.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. § 173; Dec. Dig. § 89.*]

3. PAUPERS (§ 25*)—SUPPORT—LOCAL AUTHORITIES LIABLE—ESTOPPEL.

Where the overseers of the poor of a defendant town failed to return an answer within two months, as required by Rev. St. c. 27, § 40, to a pauper notice sent to them by the overseers of the poor of the plaintiff town in compliance with the provisions of section 39 of said chapter, and representing that the pauper named in the notice had a legal settlement in the defendant town, and requesting his removal, *held* that, while under the provision of the aforesaid section 40 the defendant town was estopped to deny that the settlement of the pauper was in any other than the plaintiff town, yet the defendant town was not precluded from showing that the settlement was in fact in the plaintiff town.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. § 119; Dec. Dig. § 25.*]

4. EVIDENCE (§ 83*)—PAUPERS (§ 52*)—PRE-SUMPTION OF LEGALITY—SUPPORT—LOCAL AUTHORITIES LIABLE—DE FACTO OFFICERS.

Where the record of a plaintiff town, which had brought an action against the defendant town in a pauper matter, failed to show that the overseers of the poor of the plaintiff town were elected by ballot or major vote, *held*, that such failure was not a fatal defect, it being presumed, in the absence of any evidence to the contrary, that the town proceeded in the usual and legal manner; and, even if the record were not thus to be credited, it would be sufficient for the plaintiff town to prove that the pauper supplies were furnished by a majority of the acting overseers of the poor of the plaintiff town, and that notice was given by one of the acting overseers.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.* Paupers, Cent. Dig. § 230; Dec. Dig. § 52.*]

5. PLEADING (§ 287*)—SIGNATURE—MARK OF PARTY.

Where the legality of a marriage was denied on the ground that the divorce obtained by the wife from a former husband was invalid for the reason that the libel was not signed by the wife; and it appeared that the wife was unable to write her name, and the libel was signed by mark, and that the maiden name of the wife was Mary Jane Farrar, and that her name after she married her first husband was Mary Jane Mears, and that she was represented in the libel to be Mary Jane Mears, but that her counsel inadvertently wrote her maiden name so that her signature appeared to be "Mary Jane X Farrar," instead of Mary Jane Mears, and there was evidence to show that she made the mark for the name of Mary Jane Mears, and not Mary Jane Farrar, *held*, that there was no room for doubt respecting the identity of the libellant and the person who made her mark on the libel, and that the decree of divorce was valid.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 853; Dec. Dig. § 287.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. PAUPERS (§ 20*)—SETTLEMENT.

In this state there are distinct and separate statutes concerning illegitimate children; one relating to their pauper settlement, and one relating to their right of inheritance. The statute declaring that when the parents of such children intermarry they are deemed legitimate and have the settlement of their father, applies to the pauper settlement of illegitimate children of parents who are living together in a state of adultery at the time of the birth of such children.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. § 83; Dec. Dig. § 20.*]

7. PAUPERS (§ 20*)—SETTLEMENT.

Where four children were born to parents who were living together in adultery at the time of the birth of such children, but who afterward intermarried, *held*, that under the provisions of Rev. St. c. 27, § 1, par. 3, such children are deemed legitimate, and have the pauper settlement of their father.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. § 83; Dec. Dig. § 20.*]

8. SUFFICIENCY OF EVIDENCE.

In the case at bar, *held*, that the legal evidence in the case would not support a verdict for the defendant town.

(Official.)

Exceptions from Supreme Judicial Court, Piscataquis County, at Law.

Assumpsit by the Inhabitants of Wellington against the Inhabitants of Corinna. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Action of assumpsit, brought against the defendant town to recover the expense incurred by the plaintiff town for pauper supplies furnished to one Frank M. Moody, his wife, and four minor children, and whose pauper settlement was alleged to be in the defendant town. Writ dated August 17, 1905. Plea, the general issue, with brief statement as follows:

"That the woman called Jane Moody is not the legal wife of Frank M. Moody.

"That the children called Jennie Moody, Harry Moody, Herbert Moody, and Benny Moody are not the legal children of Frank M. Moody.

"That Frank M. Moody had no legal wife and no legal children at the date of this writ in this action.

"That Frank M. Moody had no legal wife and no legal children at the time of the alleged furnishing of supplies, as set out in this writ in this action."

Tried at the February term, 1907, Supreme Judicial Court, Piscataquis county. At the conclusion of the evidence the presiding justice directed the jury to return a verdict for the plaintiff town for the amount claimed in the writ, with interest from the date of the writ, and thereupon the jury returned a verdict for the plaintiff town for \$218.83. To this ruling the defendant town excepted, and also took exceptions to the admission of certain evidence during the trial.

The case appears in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

Hudson & Hudson, for plaintiff. J. B. & F. C. Peaks and Charles W. Hayes, for defendant.

WHITEHOUSE, J. This is an action of assumpsit, brought to recover the expense incurred by the plaintiff town for pauper supplies furnished between February 21, 1904, and June 4, 1905, to Frank M. Moody, his wife, and four minor children. After the introduction of evidence was closed on both sides, the presiding judge, on motion of the plaintiff's counsel, directed the jury to return a verdict in favor of the plaintiff for the amount claimed in the writ, with interest. The jury thereupon returned a verdict for the plaintiff for \$218.83. The case comes to the law court on exceptions to this ruling, and also to the admission of certain evidence during the progress of the trial.

It is a well-established and familiar rule of procedure in this state that the court may properly instruct the jury to return a verdict for either party when it is apparent that a contrary verdict would not be allowed to stand. *Bennett v. Talbot*, 90 Me. 229, 38 Atl. 112; *Bank v. Sargent*, 85 Me. 349, 27 Atl. 192, and cases cited. In *Woodstock v. Canton*, 91 Me. 62, 39 Atl. 281, it clearly appeared from the testimony introduced by the plaintiff, which was not contradicted in any material point, that the pauper had gained a settlement in the defendant town, and the presiding justice, finding that the evidence would not authorize a verdict for the defendant, directed the jury to return a verdict for the plaintiff. In the opinion of the law court overruling the exceptions to this order the following quotation is made from *Heath v. Jaquith*, 68 Me. 433, viz.: "It would be but an idle ceremony to submit the case to the jury by instructions authorizing them to find for a party, when he has introduced no evidence which would authorize it, and when, if they find a verdict in his favor, it would be the duty of the court to set it aside because there was no evidence to support it." See, also, *Young v. Chandler*, 102 Me. 251, 66 Atl. 539.

The question, accordingly, presented for the determination of the court in the case at bar is whether the material and admissible evidence in the case afforded sufficient proof to support a verdict in favor of the defendant. If not, and it would have been the duty of the court to set aside such a verdict if it had been rendered, the ruling of the presiding justice directing a verdict for the plaintiff was obviously correct.

It was not in controversy that the supplies charged in the plaintiffs' account were actually furnished by the plaintiff town during the period above stated, and that they were

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

necessary for the relief of Frank M. Moody and his family, consisting of Mary J. Moody, who was living with him as his wife, and their four minor children named in the declaration, and that the expenditures for which the plaintiff town seeks reimbursement in this action were actually made by the town for the supplies thus furnished. It was satisfactorily established by uncontradicted evidence that the supplies in question were received and consumed in the family of Frank M. Moody, composed of the members above stated, with full knowledge, on the part of Frank M. and Mary J. Moody, that they were pauper supplies, and that the prices charged therefore were reasonable. It also appeared that two notices, dated March 28, 1904, and March 22, 1905, respectively, were seasonably given by the plaintiff town to the defendant, purporting to state the facts respecting the Moody family in question, in compliance with section 39, c. 27, Rev. St., and representing that they had a legal settlement in the defendant town, and requesting their removal.

It is admitted that no answer was returned to these notices by the overseers of the defendant town within two months, as required by section 40, c. 27, Rev. St., stating their objections to the removal; but the defendant town, besides interposing an objection to the sufficiency of the first notice, now invokes the rule of law settled in *Turner v. Brunswick*, 5 Greenl. 81, that while, under the provisions of the statute last cited, the defendant is estopped to deny that the settlement of the paupers in question is in any other than the plaintiff town of Wellington, it is not precluded from showing that it was in fact in that town. The defendant claims that there is evidence showing that pauper settlement of Frank M. Moody was in fact in the town of Wellington during the period in question. But the defendants' principal contention appears to be in accordance with the defense set up in his brief statement that, even if the settlement of Frank M. Moody himself was in the defendant town, Mary J. Moody was not his lawful wife, and had a separate settlement of her own, and the four minor children were illegitimate, and had a separate settlement derived from their mother; and, if such were the fact, it is conceded that the defendant would not be estopped to show it by reason of its failure to return an answer to the plaintiffs' notices above specified. *Glenburn v. Oldtown*, 63 Me. 582.

These objections urged by the defendants' counsel in support of the exceptions will be considered in their order, and the conclusions of the court stated without extended discussion of the testimony.

With respect to the objection to the sufficiency of the notice from the plaintiff to the defendant town, dated March 28, 1904, the statute above cited provides that overseers "shall send a written notice * * * stating the facts respecting a person chargeable

in their town, to the overseers of the town where his settlement is alleged to be, requesting them to remove him, which they may do." The statement of "facts" must contain a sufficiently definite description of the person whose distress has been relieved to enable the overseers receiving the notice, at least by reasonable inquiry, to establish the identity of the person described. *Thomaston v. Greenbush*, 98 Me. 140, 56 Atl. 621.

The notice in question of March 28, 1904, states that "Frank M. Moody and wife and children" have fallen into distress, etc. It fails to give either the names or the number of the children, and in that respect is obviously an insufficient compliance with the statute as interpreted by the court. But, as the authorized agents of the town, the overseers of the poor may waive any objection arising from such an informality or defect in the notice. *Unity v. Thorndike*, 15 Me. 182. Although the overseers of the defendant town failed to make any reply to this notice within two months, it appears that on the 4th of the following February, an answer was in fact returned by them, as follows, viz.:

"We send you herewith check for amount of the inclosed bill for medical attendance on Frank Moody. Please receipt bill and return and in regard to the bill of \$73.49 for supplies furnished said Moody and family, we will say that upon investigation it does not appear clear to us that Mrs. Moody and children are paupers of this town. It will be further investigated and what bills you have for the support of Frank Moody himself we will settle and investigate the other."

It appears from this letter, which was authorized by a majority of the overseers of the defendant town, that the notice, to which this was a reply, was accepted without objection as a sufficiently definite statement of the facts to enable the overseers to investigate the question of the liability of the defendant town for the support of the "wife and children" of Frank M. Moody. The overseers thereby admitted that "Mrs. Moody and children" were sufficiently identified to them, and they must be deemed to have waived any objection arising from the failure of the notice to give a more definite description. *York v. Penobscot*, 2 Greenl. 1; *Embden v. Augusta*, 12 Mass. 307; *Shutesbury v. Oxford*, 18 Mass. 102; *Weymouth v. Gorham*, 22 Me. 385; *Auburn v. Wilton*, 74 Me. 437.

The notice of March 22, 1905, was admitted, without objection arising from any alleged defect or informality therein, and it appears to be sufficient. It states that Frank M. Moody and his wife, Jane Moody, and their four minor children have fallen into distress, etc. Construed in connection with the information already possessed by the overseers, as disclosed by their letter of the preceding month above quoted, this no-

tice unquestionably afforded the defendant overseers all the information which they desired in regard to the Moody family at that time. *Holden v. Glenburn*, 63 Me. 579; *Woodstock v. Bethel*, 68 Me. 569.

The defendant further objected to the introduction of the notices on the ground that the record of the election in the plaintiff town, for each of the years 1904 and 1905, fails to show that the overseers of the poor were elected "by ballot" or "by major vote." The records for each of these years state that the town "voted and chose" the persons named "overseers of the poor." Sections 12 and 14 of chapter 4 also provide that overseers of the poor shall be chosen "by major vote" and "by ballot." In this case the record is silent as to the mode of choice. The town "voted and chose" the overseers of the poor. But, in the absence of any evidence to the contrary, it is to be presumed that the town proceeded in the usual and legal manner. "*Omnia præsuntur rite esse acta*." If the record is not impeached, it imports a legal choice, and the overseers are presumed to have been legally elected. *Mussey v. White*, 3 Greenl. 290; *Blanchard v. Dow*, 32 Me. 557; *Gerry v. Herrick*, 87 Me. 219, 32 Atl. 882.

But even if the record were not thus to be credited, it was sufficient for the plaintiffs to prove that the supplies were furnished by a majority of the acting overseers of the poor, and that notice was given by one of the acting overseers. *New Portland v. Kingfield*, 55 Me. 172; *Belfast v. Morrill*, 65 Me. 580.

With respect to the second proposition, it satisfactorily appears from uncontradicted testimony that from February 21, 1904, to June 4, 1905, the period during which the supplies in question were furnished, Frank M. Moody had his pauper settlement in the defendant town of Corinna, and not in the plaintiff town of Wellington. It has been seen that no written denial was returned to the overseers of the plaintiff town within two months from the receipt of either of the notices above considered; and, while the defendant was not thereby precluded from showing in defense that Moody's settlement was in fact in the plaintiff town, there is not sufficient evidence in the case to support that conclusion. He had a derivative settlement in the town of Corinna, and he never lived in any other town five consecutive years, after arriving at the age of 21 years, without receiving supplies as a pauper. In reply to a notice from the overseers of the plaintiff town dated February 10, 1900, representing that "Frank M. Moody and family" had fallen into distress, and, that their settlement was in the defendant town, a letter was returned by the overseers of Corinna, under date of February 22, 1900, saying, "We are satisfied that this town is not the place of the lawful settlement of the said Frank Moody 'family.' We own him." And it ac-

cordingly appears from exhibits in the case that the defendant town paid to the plaintiff five different bills for the support of Frank M. Moody during the years 1904 and 1905, and in the winter of 1906 paid another bill for his support to the town of Dexter. It is true that the defendant is not absolutely precluded from contesting the settlement by the acts of its overseers in furnishing or paying for supplies for the support of the pauper, or by their admissions and declarations made in their written answers to notices received, for it is not within the scope of their authority to create or change the settlement of paupers. But such payments for support, and such admissions and declarations, are important evidential facts bearing upon the question of liability. *Weld v. Farmington*, 68 Me. 301.

But as already noted, the principal controversy between the parties arose upon the defendants' contention that Mary Jane Moody, the woman who was living with Frank M. Moody when the supplies in question were furnished, and was represented in the notices to be his wife, was not in fact his lawful wife, and that the four minor children mentioned in the notices were not his legitimate children. And it is conceded that the defendant is not estopped to deny the settlement of the alleged wife and children by reason of its failure to return a written denial to the plaintiff town within two months from the receipt of their notices, unless it appears that they were the wife and children of Frank M. Moody, and that testimony tending to negative that fact was admissible. *Holden v. Glenburn*, 63 Me. 579.

Frank M. Moody, the pauper in question, was divorced from his first wife, Lillie B. Moody, in December, 1894, and November 26, 1896, married Mary Jane Mears, whose maiden name was Mary Jane Farrar, but she had a lawful husband living named John A. Mears, who was then serving a sentence of imprisonment in the state prison for 10 years for the crime of rape, and this marriage to Moody was therefore unlawful, and their children illegitimate. On the 7th of October, 1903, however, having learned presumably that under our statutes only a life sentence in state prison would dissolve the bonds of matrimony without legal process, Mary Jane Mears obtained a decree of divorce from John A. Mears, in the Supreme Judicial Court, and on the 15th of the same month was lawfully joined in marriage to Frank M. Moody. The four minor children in question were born after her supposed marriage to Moody in 1896, while John A. Mears was serving his sentence in state prison, and they were the progeny of Frank M. Moody and Mary Jane Mears, afterward Mary Jane Moody. Thereupon the plaintiff invokes paragraph 3, § 1, c. 27, Rev. St., which declares that: "Illegitimate children have the settlement of their mother at the time of their birth, but when the parents of

such children born after March 24, 1864 intermarry, they are deemed legitimate and have the settlement of their father." The language of this statute is clear and unambiguous, and it must be presumed to mean what it has so plainly expressed. When clear and unequivocal language is used which admits of only one meaning, it is not permissible to interpret what had no need of interpretation. Endlich on Interpretation of Statutes, § 4; *Davis v. Randall*, 97 Me. 36, 53 Atl. 835. The justice and humanity of the statute have been illustrated in several instances which have been brought to the attention of the court since its enactment. *Minot v. Bowdoin*, 75 Me. 206; *Gardiner v. Manchester*, 88 Me. 249, 33 Atl. 990. And there is nothing in its character and purpose or practical operation which would afford any justification for departing from the rule of literal interpretation in applying it. The obvious purpose of it was to promote the moral welfare of the people by preserving the family in its entirety, and preventing the separation of innocent children from their parents in the event of their falling into distress and needing relief under the pauper laws.

But the counsel insists that this statute is not to be construed to apply to the pauper settlement of illegitimate children of parents who were living together in a state of adultery at the time of the birth of such children, and cites *Sams v. Sams*, 85 Ky. 396, 3 S. W. 593, in support of this contention. But the question before the Kentucky court in that case involved the rights of inheritance of illegitimate children, and had no reference to their pauper settlement. The statute there construed reads as follows: "If a man having had a child by a woman, shall afterwards marry her, such child or its descendants if recognized by him before or after marriage, shall be deemed legitimate." And it was held by the court that the statute did not apply to that class of cases where a husband has violated his marriage vows and become the father of children by an adulterous intercourse with another woman during the marital relation. The reason for this conclusion is thus stated by the court: "It can scarcely be supposed that any law would have been enacted by which the children of the adulterous intercourse would be made legitimate that they might inherit, with the children of the lawful wife, equal parts of the estate. Such a statute, if so construed, would only invite the husband to desert his wife, and the woman of easy virtue to encourage the violation of his marriage vows that she might some day become his lawful wife and her children the rightful heirs of the estate."

It is unnecessary to consider whether this court would have reached the same conclusion respecting the construction of a statute manifestly designed for the protection of innocent children who were not morally re-

sponsible for the conduct of their parents. It is sufficient to note that the decision of the Kentucky court related solely to the right of inheritance of illegitimate children, and that the same considerations of public policy are not involved in the construction of a statute regulating their pauper settlement. In this state there are distinct and separate statutes concerning illegitimate children; one relating to their pauper settlement, and another relating to their rights of inheritance. See *Lyon v. Lyon*, 88 Me. 395, 34 Atl. 180. Under the provisions of the latter statute a parent may legitimize his illegitimate children without marrying the mother. "If the father of an illegitimate child adopts him into his family, or in writing acknowledges before a justice of the peace that he is the father, such child is the heir of his father."

But it may well be questioned whether the case at bar falls within the class represented by the Kentucky case. It is true that the marriage between Frank M. Moody and Mary Jane Mears November 26, 1896, took place before the divorce was obtained from John A. Mears, who was then in state prison. It appears, however, that all of the requirements of the statutes respecting the record of their intentions of marriage and its solemnization, were carefully observed. They lived together thereafter as husband and wife, and the four children in question were born after that marriage, and there is reasonable ground for the inference that they honestly believed that their first marriage was a legal one, and their children legitimate at the time of their birth.

Finally the defendant denies the legality of the second marriage of October 15, 1903, on the ground that the decree of divorce obtained by Mary Jane Mears from John A. Mears in October, 1903, was invalid for the reason alleged that the libel was not signed by her. It appears that the libelant was unable to write her name, and was obliged to make her mark. It is stated in the libel that her maiden name was Mary Jane Farrar, and counsel inadvertently wrote the name of Mary Jane Farrar instead of Mary Jane Mears, so that the signature appears thus:

her

"Mary Jane X Farrar." The libelant is represented in the libel to be Mary Jane Mears,

and her counsel was permitted to testify that in fact it was Mary Jane Mears, the person named in the libel, who made the cross in the signature, and in answer to a question by defendant's counsel he testified that she made that mark for the name of Mary Jane Mears, and not Mary Jane Farrar. There is no room for doubt respecting the identity of the libelant and the person who made her mark on the libel. The oral evidence did not contradict the record, but supported it by establishing the identity of the person who made the cross. It is pro-

vided in rule 20, § 6, c. 1, Rev. St., that "when the signature of a person is required he must write it or make his mark." The signature of Mary Jane Mears was required, and, being unable to write, she made her mark. The cross made by her hand was in lieu of the name of Mary Jane Mears. The decree of divorce was valid.

All the exceptions taken to the admission of testimony have been shown to be without merit. It clearly appears that October 15, 1903, Mary Jane Mears became the lawful wife of Frank M. Moody; and, although the four minor children in question were illegitimate at the time of their birth, yet by reason of the intermarriage of their parents Frank M. Moody and Mary Jane Moody, after the divorce of the latter from John A. Mears, these children are to be deemed legitimate under the pauper laws of this state, and have the settlement of their father in the defendant town of Corinna.

It is the opinion of the court that the legal evidence in the case would not support a verdict in favor of the defendant, and that the entry must accordingly be

Exceptions overruled.

(104 Me. 288)

STATE v. J. P. BASS PUB. CO.

(Supreme Judicial Court of Maine. July 15, 1908.)

1. STATUTES (§ 241*)—CONSTRUCTION OF PENAL STATUTE.

If a penal statute is equally susceptible of two interpretations, that should be adopted which gives the statute the effect evidently intended by the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 322; Dec. Dig. § 241.*]

2. INTOXICATING LIQUORS (§ 132*)—PUBLICATION OF ADVERTISEMENTS.

The statute (Rev. St. 1903, c. 29, § 45), forbidding the publication of advertisements of the sale or keeping for sale of intoxicating liquors, includes advertisements of intoxicating liquors sold or kept for sale without the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 141; Dec. Dig. § 132.*]

3. COMMERCE (§ 60*) — ADVERTISING LIQUOR SOLD OR KEPT FOR SALE WITHOUT THE STATE.

By the act of Congress known as the "Wilson Act" intoxicating liquors are to a great extent withdrawn from the protection of the commerce clause of the United States Constitution, and made subject to the police powers of the states. Since the act a state in the exercise of its police power may lawfully prohibit the advertising within the state of intoxicating liquors sold or kept for sale without the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 92; Dec. Dig. § 60.*]

(Official.)

Agreed Statement from Bangor Municipal Court.

The J. P. Bass Publishing Company was convicted of publishing advertisements of intoxicating liquors. Submitted on the agreed statement. Judgment for the State.

Complaint to the Bangor municipal court in the city of Bangor, for an alleged violation of the provisions of Rev. St. c. 29, § 45, and which said section reads as follows:

"Whoever advertises or gives notice of the sale or keeping for sale of intoxicating liquors, or knowingly publishes any newspaper in which such notices are given, shall be fined for such offense the sum of twenty dollars and costs, to be recovered by complaint. One-half of said fine shall be paid to the complainant and one-half to the town in which said notice is published."

The body of the complaint is as follows:

"Henry N. Pringle, of Waterville, in the county of Kennebec, on the seventeenth day of September, A. D. one thousand nine hundred and six, in behalf of said state, on oath, complains that the J. P. Bass Publishing Company, a corporation organized under the laws of Maine and doing business in said Bangor, in the county of Penobscot, is the owner and publisher of a certain newspaper called the Bangor Daily Commercial, printed and published in said Bangor; that Joseph P. Bass, M. Robert Harrigan, and Frederick H. Strickland, all of said Bangor, are the owners of all the stock of said corporation, and were the officers and directors thereof on the tenth day of August, A. D. one thousand nine hundred and six, and the said Joseph P. Bass, M. Robert Harrigan, and Frederick H. Strickland, as such officers and directors, did unlawfully and knowingly cause said newspaper to be printed and published in said Bangor, on the tenth day of August, A. D. one thousand nine hundred and six, in which said newspaper on said tenth day of said August a certain notice or advertisement of the sale and keeping for sale of intoxicating liquors was printed and published in the words and tenor following, to wit: [Here follows a fac simile of the liquor advertisement of Chas. Gallagher & Co., of Boston, Mass., printed in the said Bangor Daily Commercial August 10, 1906, stating, among other things: 'Send us \$3.00, and we will ship you in a plain sealed case, express prepaid, with no marks to show contents, four full quarts of Gilbert Club Pure Rye Whiskey. Put it to the test, and, if not satisfied, send it back. We will stand the expense—none whatever to you—and your money cheerfully refunded'], against the peace of said state, and contrary to the form of the statute in such case made and provided.

"Wherefore the said Pringle prays that the said Bass, Harrigan, and Strickland may be apprehended and held to answer to this complaint, and dealt with relative to the same, as law and justice may require."

On this complaint a warrant in due form of law was issued by said municipal court, and the defendants were duly arraigned in said municipal court, where they pleaded

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not guilty, and waived a hearing, and thereupon the judge of said municipal court adjudged them guilty, and imposed a fine of \$20 and costs on each defendant, from which judgment an appeal was taken by all the defendants to the February term, 1907, of the Supreme Judicial Court, Penobscot county.

At said February term of said Supreme Judicial Court an agreed statement of facts was filed, and the case was then reported to the law court with the following stipulation: "Judgment to be rendered by the law court as the facts and the law of the case may require."

The agreed statement of facts is as follows:

"It is agreed that at the time of said alleged offense said newspaper, the Bangor Daily Commercial, including the plant, consisting of printing presses, boiler, engine, linotype machines, cases, type, paper, and printing appliances, was owned and that said newspaper was published by the 'J. P. Bass Publishing-Company,' a corporation duly organized and existing under the laws of this state, and having a capital stock fully paid in of forty thousand dollars (\$40,000), and that said capital stock is and was all owned at the time of the commission of the alleged offense by the respondents above named, to wit, the 10th day of August, A. D. 1906, and that the notice of the sale or keeping for sale of intoxicating liquors above named and as described in the complaint and warrant was published with the knowledge of and by the direction of the said Bass, Strickland, and Harrigan.

"It is further agreed that Chas. Gallagher & Co., whose advertisement was alleged to have been published in the Bangor Daily Commercial, carried on business in the commonwealth of Massachusetts, and was legally authorized under the laws of said commonwealth to sell and keep for sale intoxicating liquors.

"It is further agreed that said advertisement was published in said Bangor Daily Commercial in pursuance of a contract made and entered into in Boston aforesaid through the advertising agency of Julius Matthews between the said Gallagher & Co. and the said Julius Matthews acting on behalf of and as agent of said J. P. Bass Publishing Company."

Note.—April 28, 1905, proceedings were instituted against the same personal defendants as in this case for an alleged violation of the provisions of the aforesaid section 45, and that case was also reported to the law court. See *State v. Bass et al.*, 101 Me. 481, 64 Atl. 884.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, PEABODY, SPEAR, and CORNISH, JJ.

H. H. Patten, Co. Atty., for the State.
F. H. Appleton and Hugh R. Chaplin, for defendant.

EMERY, C. J. Chapter 29 of the Revised Statutes, popularly known as the "Prohibitory Law," contains in section 45 the following prohibition: "Whoever advertises or gives notice of the sale or keeping for sale of intoxicating liquors, or knowingly publishes any newspaper in which such notices are given, shall be fined for such offense the sum of twenty dollars and costs to be recovered by complaint."

The defendants knowingly published August 10, 1906, at Bangor, in Penobscot county, a newspaper, the Bangor Daily Commercial, in which was given a notice and advertisement that intoxicating liquors were sold and kept for sale at 297 Congress street, in Boston, Mass., by Chas. Gallagher & Co., who were then carrying on business in Massachusetts, and were legally authorized under the laws of that commonwealth to sell and keep for sale intoxicating liquors. Their advertisement in question was published in the Bangor Daily Commercial in pursuance of a contract made in Boston, Mass., between them and an advertising agency there acting as the agent of the defendants.

The defendants claim that their act of publishing the advertisement was lawful upon two grounds: (1) That the statute is susceptible of the construction that it only prohibits notices or advertisements of liquors for sale or kept for sale within this state, and, being a penal statute, should therefore receive this strict construction; (2) that if it should be construed as prohibiting notices or advertisements of liquors for sale or kept for sale in another state where such sale and keeping for sale are lawful, as in this case, then so construed the statute is so far nullified by that clause of the Constitution of the United States, known as the "commerce clause," which confers upon Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian Tribes." Const. U. S. art. 1, § 8, par. 3.

1. In construing the statute, penal though it be, the intent and object of the Legislature in enacting it are to be ascertained and given effect if the language be fairly susceptible of such a construction. As said by the Massachusetts court per Shaw, C. J., in a criminal case (*Commonwealth v. Kimball*, 24 Pick. 366, 370): "It is unquestionably a well-settled rule of construction, applicable as well to penal statutes as to others, that, when the words are not precise and clear, such construction will be adopted as shall appear most reasonable and best suited to accomplish the objects of the statute." In a criminal case (*U. S. v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830) the court at page 396 of 6 Wall. (18 L. Ed. 830), said of the penal statute there in question: "The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and

objects of the Legislature. The rule of strict construction is not violated by permitting words to have their full meaning, or the more extended of two meanings, as the wider popular, instead of the more narrow technical one; but the words shall be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

The statute in this case is but a part of the legislation of this state upon the subject-matter of the sale and keeping for sale of intoxicating liquors, and is to be construed, so far as its language will fairly and reasonably allow, in harmony with what appears from that legislation to be the legislative policy and purpose. The selling and keeping for sale of intoxicating liquors are in themselves harmless acts. If the people purchasing such liquors used them only "for medicinal, mechanical, and manufacturing purposes," no harm would result to the people of the state; and the sale and keeping for sale of intoxicating liquors for such purposes are provided for in section 14 of chapter 29. It is common knowledge that it is the use of intoxicating liquors as a beverage that is deemed harmful, and is the mischief sought to be prevented by the legislation. The prohibition of the sale and keeping for sale of intoxicating liquors is only a means. The end sought for is the prevention or at least the diminution of the drinking of intoxicating liquors by the people of the state. The legislation upon the subject, including the statute in question, should be construed to further that end, so far as the language, without bending either way, fairly allows.

The language of the statute (section 45) is comprehensive. There are in it no words limiting the prohibition to notices or advertisements of liquors kept for sale or to be sold within this state. Read in connection with the other legislation, its evident purpose is to further the ulterior purpose of all that legislation, viz., to diminish the use of intoxicating liquors as a beverage. To effect that purpose, it must be construed as prohibiting notices and advertisements of liquors for sale or kept for sale without the state as well as within, and we think the language fully permits, if it does not require, such a construction, and we accordingly accept it as the true construction.

We are not unmindful of the rule that penal statutes are to be construed strictly. "But, though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the will of the Legislature." *U. S. v. Lacher*, 134 U. S. 632, 642, 10 Sup. Ct. 625, 33 L. Ed. 1080; *U. S. v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740, the statute provided a punishment if "any master or other officer" without justifiable cause imprisoned "any one or more of the crew," etc. The master was indicted for

imprisoning the "chief officer." It was held that, to further the purpose of the statute, the word "crew" should be held to include the "chief officer," though the rule of strict construction alone might exclude him. So in *U. S. v. Moulton*, 5 Mason, 537, Fed. Cas. No. 15,827, gold coin was held to be included in the term "personal goods" in a penal statute, though the rule of strict construction might exclude it. We think further illustration or authority unnecessary.

2. As to the second ground of defense, it may be conceded that but for the act of Congress known as the "Wilson Act" (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]), the state statute as above construed would be in conflict with the commerce clause of the United States Constitution. The Wilson act, however, goes far to remove intoxicating liquors from the protection of that clause, and to give full effect to state legislation concerning them. Decisions of United States courts upon the subject made prior to the passage of that act are now inapplicable, and need not be considered. Since the Wilson act the state may prevent the sale within its limits of intoxicating liquors in the original package, and to that end may seize them in such packages the moment they are delivered. Also, to further the welfare of its people, the state may now prohibit the solicitation within the state of orders for the purchase of liquors without the state. This seems to be settled by the recent decision of the United States Supreme Court in *Delamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724. *Delamater*, a salesman for a firm of liquor dealers in Minnesota, carried on the business in South Dakota of soliciting orders from residents of that state for the purchase of intoxicating liquors from his firm in Minnesota. The law of South Dakota imposed an annual license charge upon "the business of selling or offering for sale" intoxicating liquors within the state. The statute was admittedly a police regulation, and not a revenue measure. *Delamater* did not offer to make sale of intoxicating liquors within the state. He merely solicited orders for liquors to be sold in Minnesota, and shipped from there to the purchaser at his risk. Being prosecuted for not paying the license fee, he set up in defense the commerce clause of the United States Constitution. The United States Supreme Court, following the decision of the Supreme Court of South Dakota, held the state statute constitutional on the ground that the Wilson act authorizes a state to restrain persons from soliciting within its territory orders for the purchase of intoxicating liquors in another state to be shipped to the purchaser in his state.

Under that decision neither the Boston firm of Chas. Gallagher & Co. nor any agent for them can within the territory of this state solicit orders for the purchase of in-

toxicating liquors in Massachusetts to be shipped to the purchaser in Maine, if our statutes so forbid. Since advertising is really soliciting, it would seem to follow that they cannot lawfully advertise in this state such liquors for sale in Massachusetts, and that the publishers of newspapers within this state cannot lawfully publish such advertisement in the face of the state statute expressly forbidding it. It may be noted that in the advertisement in this case the advertisers say to the reader: "Send us \$3.00 and we will ship you in plain sealed case prepaid, with no marks to show contents, four full quarts of Gilbert Club Pure Rye Whiskey." The advertisement was in a Maine newspaper, and plainly was for orders for intoxicating liquors to be shipped to the purchaser in Maine. The case would therefore seem to be well within the rule of the decision in the case cited.

For answer to the able argument and citations of the defendants' counsel, we refer them and the profession to the opinion of the court in the *Delamater Case*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724. The Supreme Court in that case did not hold, nor do we hold in this case, that an inhabitant of a state where the sale of intoxicating liquors is prohibited may not purchase intoxicating liquors in another state and bring them into his own state for any lawful use, but we understand that court to hold, and hence we hold, that a state may prohibit an inhabitant of another state making in this state a contract for, or soliciting orders for, the sale of intoxicating liquors in any state. The question is fully discussed in the opinion with illustrations drawn from some state insurance statutes. While a state cannot prevent one of its citizens from making a contract of insurance in another state, it may forbid the making, within its own borders, insurance contracts by foreign companies or their agents. *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 107, 39 L. Ed. 297; *Commonwealth v. Nutting*, 175 Mass. 154, 55 N. E. 895, 78 Am. St. Rep. 483; *Nutting v. Massachusetts*, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324. The court there goes on to say: "The ruling thus made is particularly pertinent to the subject of intoxicating liquors and the power of the state in respect thereto. As we have seen, the right of the states to prohibit the sale of liquor within their respective jurisdictions in and by virtue of the regulation of commerce embodied in the Wilson act is absolutely applicable to liquor shipped from one state into another, after delivery, and before the sale in the original package. It follows that the authority of the states, so far as the sale of intoxicating liquors within their borders is concerned, is just as com-

plete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the states to forbid agents of nonresident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors which otherwise the citizen of the state would not have thought of making must be as complete and efficacious as is such authority in relation to contracts of insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor."

The defendants' counsel urge upon us the language of this court in its opinion in the case *Corbin v. Houlehan*, 100 Me. 246, 61 Atl. 131, 70 L. R. A. 568. The decision in that case, however, sustained the state statute as not in conflict with any provision of the United States Constitution. So far as the opinion discussed the question here involved, it must be regarded as dicta only. The question is a federal question, the decision of which rests finally with the United States Supreme Court. In view of the decision of that court and the reasons stated therefor in the case cited (*Delamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724), whatever may have been said in the opinion in *Corbin v. Houlehan*, we must now hold that the statute in question (section 45) at the time of its violation by the defendants in 1906 was not in conflict with the state or United States Constitution, but was valid and operative upon the defendants.

The defendants further urge that newspapers and magazines published in other states and containing advertisements of intoxicating liquors for sale come into this state by mail and otherwise in large quantities, and yet cannot be interfered with by the state authorities. That may be; but it does not follow that the state may not prevent such advertisements being printed in newspapers published in this state. If the state cannot wholly prevent the mischief of such advertisements by excluding from the state all newspapers containing them wherever published, it may yet prevent such increase and spread of the mischief as would result from such advertisements being printed in newspapers published within the state. It may to that extent control the conduct of printers and publishers within its own territory. Such we understand to be the logical result of the decision and reasoning in the *Delamater Case* by the court of last resort upon such questions.

It follows that the state must have judgment.

Judgment for the state.

(81 Conn. 656)

McCASKEY REGISTER CO. v. KEENA.

(Supreme Court of Errors of Connecticut. Feb. 16, 1909.)

1. APPEAL AND ERROR (§ 722*)—REASONS OF APPEAL.

While an appeal which states the reasons of appeal in the form of interrogations instead of allegations of error does not state the reasons of appeal, yet in the absence of objection they may be considered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 722.*]

2. SALES (§ 364*)—ACTION FOR PRICE—FRAUD—INSTRUCTIONS.

In an action by the seller of goods, defended on the ground of fraud, the question was whether the seller's agent fraudulently induced the buyer to sign the bill of sale without reading it by stating that the instrument, which provided that no stipulation not embraced therein would be recognized by the seller, contained stipulations which it did not contain and which the agent knew it did not contain, an instruction that fraud is a deception "deliberately" practiced on one to obtain an unfair advantage sufficiently defined fraud, though it used the word "deliberately" not contained in the ordinary definition.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 364.*]

3. TRIAL (§ 345*)—VERDICT.

Where a verdict reduced to writing, but not signed, was correctly announced to the court by the foreman, and the verdict was repeated by the court for the assent of the individual jurors, none of whom dissented, and defendant at the time raised no objection to the course pursued, he could not complain because the verdict was not signed by the foreman.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 345.*]

4. TRIAL (§ 323*)—VERDICT—FORM AND REQUIREMENTS.

A verdict should be in writing signed by the foreman so as to become a part of the file.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 323.*]

Appeal from City Court of Meriden; Frank S. Fay, Judge.

Action by the McCaskey Register Company against John A. Keena. From a judgment for plaintiff, defendant appeals. Affirmed.

Cornelius J. Danaher, for appellant. William C. Mueller, for appellee.

THAYER, J. The defendant's appeal does not properly state the reasons thereof. His so-called reasons are all stated as interrogations instead of allegations of error. All are in the same form as the first, reading as follows: "Whether the court erred in charging the jury on the question of fraud." What thus are stated as reasons of appeal might very properly have accompanied the request to the trial court for a finding as a statement of the questions of law which the defendant desired to raise. The purpose of the reasons of appeal is to assert that specific errors were committed on the trial. This the appeal does not do; but, as it indicates

the questions which the defendant desired to raise and no objection has been made to it, the questions in this instance will be considered. These relate to the correctness of the judge's definition of fraud and the legality of the verdict rendered. There was no dispute upon the trial that a cash register had been delivered to the defendant by the plaintiff, under a written bill of sale, to be paid for by installments. The defense was that the plaintiff's agent at the time of the sale, with intent to deceive and defraud the defendant, fraudulently represented to him that the register was suitable for the butter and tea business in which he was engaged; that, if it was not satisfactory in every respect to the defendant, he need not pay for it, but might return it to the plaintiff, and that the written agreement contained these provisions; that the defendant, relying upon these statements, and believing that the written agreement contained them, signed the paper without reading it; that the register was unsatisfactory, and the return of the same was tendered to the plaintiff. The only real question between the parties was as to the truth of this defense which was set up in the answer.

The court in its charge, after saying to the jury that, if the agreement was obtained by fraud, it was no contract, instructed them as follows: "Fraud vitiates all contracts. Fraud is deception practiced on one to obtain an unfair or unlawful advantage." And later, in response to a jurymen's question "What is fraud?" the court said: "It would be hard to give a definition to fit all cases. The best I can give for your guidance is Webster's: 'Fraud is a deception deliberately practiced upon one to obtain an unfair advantage.'" It is claimed that the last definition is not Webster's, in that the word "deliberately" is interpolated therein, and that neither of the definitions given is correct or adapted to the case. It is unnecessary to consider whether the definitions are sufficient for all cases which may arise. The court did not assume to give one applicable to all. It is enough if the definition was sufficient for the case in hand. The sole question of fraud between the parties was whether the plaintiff's agent had fraudulently induced the defendant to sign the paper without reading it by stating to him that it contained stipulations which it did not contain, and which the agent must have known that it did not contain. The paper not only did not contain these provisions, but it contained one, as the jury could see from the paper which was in evidence, that no promise or statement either written or verbal not embraced in the writing signed by the defendant would be recognized by the plaintiff. If, therefore, the statement was made, as claimed by the defendant, that the stip-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ulation was contained in the paper, it was necessarily deliberate deception practiced upon him to obtain his signature, and, under the charge, fraudulent. If the jury believed that the statement was made, they could not have had, under the circumstances of the case, any question as to whether it was deliberate or not. Under the instructions the jury must have found that the statement was not proven.

After the case had been submitted to the jury, and they had indicated that they were ready to report, the roll was called by the clerk, and they were asked by him if they had agreed upon a verdict. The foreman stated that they had, and that it was for the plaintiff for \$90. The court then said: "Gentlemen, you have rendered a verdict for the plaintiff to recover the sum of \$90, and the clerk will so enter it. You will listen to your verdict as recorded." The foreman at the time he announced the verdict had a paper in his hand containing the verdict for \$90, and the court, supposing that it was signed, excused the jury. Afterward it appeared that the verdict was not signed. It is claimed that, as the verdict was not signed and assented to by each of the jurors, there was no verdict. This reason of appeal would have been obviated had the usual practice in receiving verdicts, as stated in *Magoohan v. Curran*, 71 Conn. 551, 554, 42 Atl. 656, been followed. Had the written verdict been taken from the foreman, its lack of signature would have appeared, and could have been corrected. The defendant, however, raised no objection to the method adopted, and under the circumstances of this case it appears that he can have received no injury. It appears that the verdict was reduced to writing and correctly announced to the court, and that it was repeated by the court for the assent of the individual jurors. There being no dissent, they are taken to have assented to the verdict as announced by the foreman and repeated to them by the court. In *Watertown Eccl. Society's Appeal*, 46 Conn. 230, 233, where the written verdict was signed by the foreman, but was defective in improperly stating the amount of the verdict, it was held that neither giving assent to the verdict in the jury room, nor the signing of a writing there, nor the delivery of it to the clerk, absolutely bound the conscience of the juror, but it was what he assented to in open court that was the verdict in the case. And in that case, as the clerk in reading the verdict had corrected the informality in the verdict, it was held a good verdict as read by the clerk. In the present case the jurors in court assented to the statement of their verdict as it had been agreed upon in the jury room and prepared for signature. This, although informal, can be sustained as the proper verdict of the jury, without approv-

ing the method by which it was received. There should be a written verdict, signed by the foreman, to become a part of the file. The defendant, having raised no objection to the course pursued at the time, ought not to now succeed in overturning a just verdict upon an objection to the procedure of the court officials which should have been made at the time.

There is no error. The other Judges concurred.

(81 Conn. 623)

SCHLEIFENBAUM et ux. v. RUNDBAKEN.
(Supreme Court of Errors of Connecticut. Feb. 16, 1909.)

1. NEW TRIAL (§ 68*)—VERDICT AGAINST EVIDENCE—DISCRETION OF COURT.

In the matter of a new trial, the power of granting which, on the ground that the verdict is against the evidence, is vested in the trial court, and is an essential part of the jury system, the court has some discretion, but it is a legal discretion, and it should not set aside the verdict where it is apparent that there was some evidence on which the jury might reasonably reach their conclusion, and should not refuse to do so where its manifest injustice is so plain as clearly to denote that some mistake was made in applying legal principles, or as to justify suspicion that the jury or some of them were influenced by prejudice, corruption, or partiality.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 135; Dec. Dig. § 68.*]

2. NEW TRIAL (§ 71*)—GROUNDS—VERDICT ON CONFLICTING EVIDENCE.

Where there was a decided conflict in the testimony, and the weight of the evidence was a material question in determining a case, and the jury might have fairly found a verdict for plaintiffs, defendant's motion to set it aside as against the evidence was properly denied.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 71.*]

3. TRIAL (§ 140*)—CREDIBILITY OF WITNESS—WEIGHT AND EFFECT OF EVIDENCE—QUESTION FOR JURY.

It is for the jury to determine the credibility of the witnesses, and the weight and effect of their evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

4. BROKERS (§ 65*)—REAL ESTATE AGENT—DERIVING PROFITS IN VIOLATION OF CONTRACT—FORFEITURE OF COMMISSION.

A real estate broker who, in violation of his contract, derives a profit to himself, is not entitled, in an action therefor, to an allowance for his commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 50; Dec. Dig. § 65.*]

5. PRINCIPAL AND AGENT (§ 81*)—FORFEITURE OF COMPENSATION FOR SERVICES.

An agent must deal with his principal in perfect good faith, and, if he acts adversely to him or omits to disclose an interest naturally influencing his conduct in dealing with the subject of employment, it is such a fraud as to forfeit any right to compensation for services.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 213; Dec. Dig. § 81.*]

Appeal from Superior Court, Hartford County; Milton A. Shumway, Judge.

Action by Jacob Schleifenbaum and wife

against John Rundbaken for wrongfully deriving a profit to himself as a real estate broker from a sale of real estate in his hands for sale on commission. There was a judgment for plaintiffs, and defendant appeals. No error.

William F. Henney, for appellant. Joseph L. Barbour, for appellees.

RORABACK, J. The complaint, alleges, in substance, that the defendant, being a real estate broker, accepted from the plaintiffs an agency to sell for them certain real estate, which sale was effected, and that, in the performance of that agency, he was dishonest, deceiving his principals with false statements, and thereby obtained for himself \$850 which the plaintiffs are attempting to recover. The answer admitted that the plaintiffs owned the property described in the complaint, that the defendant was a real estate broker, and that the property had once been in his hands for sale on commission. The defendant denied the alleged fraud, and averred and claimed that this real estate had been withdrawn by the plaintiffs from his hands as a broker about three months before the transaction complained of. The jury returned a verdict for the plaintiffs, which the defendant moved be set aside as against the evidence. This motion was denied and judgment rendered for the plaintiffs. The denial of this motion is one of the reasons of appeal. The other assignments of error relate to the charge to the jury. "The power of granting new trials on the ground that the verdict was against the evidence is vested in the trial courts. The supervision which a judge has over the verdict is an essential part of the jury system. A court has some discretion in the matter of a new trial, but it is a legal discretion. It should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set one aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they or some of them were influenced by prejudice, corruption, or partiality." *Burr et al. v. Harty et al.*, 75 Conn. 127, 52 Atl. 724; *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226; *Loomis v. Perkins*, 70 Conn. 444, 447, 39 Atl. 797; *Howe v. Raymond*, 74 Conn. 68, 71, 49 Atl. 854.

From an examination of the evidence it is apparent that there was a decided conflict in the testimony of the witnesses, and the weight to be given the evidence must have been one of the material questions in the determination of the case. It was for the

jury to determine the credibility of the witnesses and the weight and effect of their evidence. *Occum v. Sprague Mfg. Co.*, 34 Conn. 529, 538; *Cook v. Morris*, 66 Conn. 196, 211, 33 Atl. 994; *Hogben v. Metropolitan L. I. Co.*, 69 Conn. 503, 511, 38 Atl. 214, 61 Am. St. Rep. 53; *Pigeon v. Lane*, 80 Conn. 237, 67 Atl. 886. From the evidence reported we are satisfied that the jury in the proper exercise of their powers might have fairly found a verdict for the plaintiffs.

The other exceptions relate to the charge of the court as to the measure of damages. The instructions complained of in substance are as follows: That, if the jury should find that Rundbaken was acting for the plaintiffs as their agent, then their verdict should be for the difference between what he paid the plaintiffs in New York "and the price which he received, which is \$850"; that the plaintiffs "are entitled to claim and recover from him the difference between the sum which Rundbaken paid them in New York and the sum which he received in Hartford on the following day"; that the plaintiffs "are entitled to recover from the defendant, if he has received it, the difference between the sum he paid to them and the sum he received"—the defendant contending that under these instructions the jury must have understood that in arriving at their verdict they could make no allowance to the defendant for his commission. The plaintiffs in their complaint claimed that they were entitled to the entire amount which the defendant received for the property, less the money which had already been paid them, which was conceded to be \$850. This amount the plaintiffs alleged and claimed had been dishonestly obtained by the defendant while acting as their agent in the sale of their real estate. The instructions called the attention of the jury to the case set forth in the pleadings, and were in conformity with the claims presented by the evidence. The jury by rendering a verdict for the plaintiffs have sustained their contention that the defendant had betrayed his trust by acting adversely to their interests. An agent is held to perfect good faith in his dealings with his principal, and, if he acts adversely to his employer in any part of the transaction or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of the employment, it amounts to such a fraud upon the principal as to forfeit any right to compensation for services. *Bollman v. Loomis*, 41 Conn. 583; *Weinhouse v. Oronin*, 68 Conn. 254, 36 Atl. 45; *Story on Agency*, §§ 31, 334; *Story's Eq. Jur.* § 315; *Ewell's Evans on Agency*, 268; *Dunlap's Paley on Agency*, 105, 106; *Carman v. Beach*, 63 N. Y. 97, 100.

There is no error. The other Judges concurred.

(81 Conn. 601)

FREEDMAN v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Errors of Connecticut. Feb. 16, 1909.)

1. RAILROADS (§ 351*)—ACCIDENTS AT CROSSING—INSTRUCTIONS—DISCOVERED PERIL.

The court instructed that the engineer owed no duty to travelers at a highway crossing but to ring the bell, except in exceptional cases later mentioned, but it was his duty to keep a vigilant lookout for travelers, and in another instruction stated that if decedent's peril at the crossing was known to the engineer, or should have been known, reasonable care required him to use every precaution to avoid injury, and if a reasonably prudent person would have blown the whistle or checked the train, the engineer was bound to do so. *Held*, that the first part of the instruction, considered in connection with the remainder, did not limit the engineer's duty to ringing the bell, and his duty upon discovering decedent's peril was fairly submitted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1197; Dec. Dig. § 351.*]

2. RAILROADS (§ 316*)—CROSSING ACCIDENTS—RATE OF SPEED.

When used for proper railroad purposes, trains may be run over a railroad crossing at the speed and in the manner they are usually and ordinarily run, in absence of restrictive statutes, and the company is not responsible for the necessary attendant dangers, and it was not negligence to run a train over a street crossing at the rate of from 25 to 50 miles an hour; that rate of speed being proper for railroad purposes.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1000–1008; Dec. Dig. § 316.*]

3. TRIAL (§ 356*)—VERDICT—SPECIAL INTERROGATORIES—NECESSITY OF ANSWER.

Interrogatories presented by defendant, which stated that they were to be answered if verdict went for plaintiff, need not be answered upon return of verdict for defendant.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 356.*]

4. TRIAL (§ 351*)—VERDICT—SPECIAL INTERROGATORIES—TIME FOR PRESENTING.

If plaintiff desired to submit special interrogatories, or have those answered which defendant submitted to be answered in case of verdict for plaintiff, he should have requested their submission before rendition of verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 837; Dec. Dig. § 351.*]

5. TRIAL (§ 366*)—VERDICT—SPECIAL INTERROGATORIES—FAILURE TO ANSWER—REMEDY.

When verdict was returned without answers to special interrogatories submitted, if plaintiff had a right to have them answered, he should have requested the court to order them answered, or objected to accepting the verdict without the answers. Instead of remaining silent until the jury was discharged.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 875, 876; Dec. Dig. § 366.*]

6. TRIAL (§ 368*)—SPECIAL INTERROGATORIES—OBJECTION—WAIVER.

Plaintiff, by not objecting to special interrogatories submitted by defendant, assented to their submission.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 875, 876; Dec. Dig. § 368.*]

7. TRIAL (§ 355*)—"SPECIAL INTERROGATORIES" AND FINDINGS—NATURE AND PURPOSE—"SPECIAL VERDICT."

The purpose of a "special verdict" is to furnish the basis of the judgment, while the

purpose of "special interrogatories" is to elicit facts to test the correctness of the general verdict.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 355.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6594–6596.]

8. TRIAL (§ 349*)—VERDICT—SPECIAL INTERROGATORIES—POWER OF COURT TO REQUIRE—DISCRETION OF COURT.

The power to submit special interrogatories does not depend upon statute or the consent of the parties, and their submission, is within the reasonable discretion of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 824; Dec. Dig. § 349.*]

9. TRIAL (§ 330*)—VERDICT—SEVERAL COUNTS.

Where the complaint contains several counts for distinct causes of action, it is the common practice to direct the jury, in case of verdict for plaintiff to designate upon which count it was rendered.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 330.*]

10. TRIAL (§ 352*)—VERDICT—SPECIAL INTERROGATORIES—REQUISITES.

Special interrogatories should be clear and concise; should not be so numerous as to confuse the jury; each question should require the finding of a single fact; should, when practicable, be framed so as to require a categorical answer; should not call for conclusions of law or for evidential or uncontroverted facts; and, though not wholly covering or necessarily controlling the determination of any one issue, the answer to be elicited should be pertinent to an issue, and serve to limit or explain the general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840, 841; Dec. Dig. § 352.*]

11. TRIAL (§ 350*)—SUBMISSION OF INTERROGATORIES—INDUCING VERDICT.

In an action for decedent's death at a street crossing by being struck by a train, the court submitted interrogatories, to be answered in case of verdict for plaintiff, as to whether, before the collision, some part of the approaching train was visible to one on a wagon from a point 600 feet south of the crossing; whether decedent checked his horse when close to the crossing, or 40 or 50 feet therefrom; whether he knew of the train's approach, and looked or listened for a train before he pulled up his horse; and whether he drove his horse at a trot while approaching the crossing, until he commenced to stop it. *Held*, that there was nothing in the interrogatories to induce the jury to find for defendant.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 350.*]

Appeal from Superior Court, New Haven County; George W. Wheeler, Judge.

Action by Ida Freedman, administratrix of Louis Freedman, deceased, against the New York, New Haven & Hartford Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The plaintiff's intestate, Louis Freedman, was struck and killed by a train of the defendant on its Northampton Division, at a grade crossing on Brewster street in the city of New Haven. At the place of the accident the tracks of the Northampton Division run generally north and south, and cross Brewster street, an unpaved highway extending east

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and west, at grade. There were neither gates, nor flagman, nor electric warning bell at said crossing. It did not appear that any had been ordered by the railroad commissioners. The negligence alleged was (1) the propelling of the engine over the crossing at an unlawful and dangerous rate of speed, and without blowing the whistle or sounding the bell; (2) the failure to keep a proper lookout as the engine approached the crossing; and (3) the failure to stop the engine after the defendant had an opportunity to observe the peril of Freedman. The plaintiff's intestate was about 35 years of age. For several years before the accident he had conducted a grocery business on Dixwell avenue, a few blocks from the place of the accident. At about 9 o'clock of the morning of December 11, 1906, while driving westerly in an ordinary open grocery wagon, engaged in taking orders from his customers, he approached said crossing. At the same time there was approaching the crossing from the south a special train of the defendant, consisting of an engine, tender, and caboose, running, as claimed by plaintiff, from 40 to 50, and by defendant, from 25 to 35, miles an hour, and the sound of which could be distinctly heard. Freedman commenced pulling up his horse, as claimed by the plaintiff, at some 40 or 50 feet before reaching the crossing, and, as claimed by defendant, at about 20 feet from, or nearly on, the crossing. The engine struck the team just after it had got onto the crossing. It was stated by the trial judge to the jury, as an apparently conceded fact, that Freedman knew of the approaching train some time before he pulled up his horse. Several years before this accident the railroad commissioners, upon the petition of the mayor and common council of New Haven, had made an order requiring the defendant to omit the sounding of the whistle at a point 80 rods before reaching the crossing, as required by statute, and the whistle was not blown when the train approached the crossing at this time. The plaintiff offered the testimony of witnesses that they heard no bell ring, and the defendant of several witnesses who heard it ring. It was apparently undisputed at the trial that at a point on Brewster street from 50 to 75 feet east of the track a train approaching from the south could be seen at a point from 500 to 600 feet south of the Brewster street crossing, and that the engineer first slackened the speed of the train in question and applied the emergency brake at a point about 100 feet south of the Brewster street crossing.

Of the numerous requests to charge, filed by the plaintiff in the trial court, but few are discussed in her brief. Of those so pursued only the two following need be noticed:

"If the jury find that the train that struck and killed the plaintiff's intestate was operated at such a high rate of speed for said time and place as to constitute negligence,

and that such negligence was the sole and proximate cause of the death of the plaintiff's intestate, then the verdict must be for the plaintiff."

"It was the engineer's duty, as well as the duty of all the other servants in charge of the said train, to keep a constant watch for pedestrians or vehicles at or near the crossing, and he should not run his train at a greater rate of speed than was reasonable and consistent with the customary use of the crossing by the public with safety."

In charging the jury the trial judge said:

"(1) The railroad commissioners having legally ordered the whistle dispensed with for this crossing, the defendant cannot be held liable for its compliance with this order, and its failure to blow this whistle for this crossing at the 80-rod point. The sole duty of the railroad with regard to general statutory signals was to ring its engine bell from the 80-rod point to the crossing.

"(2) The absence of a flagman at this crossing, and of a crossing signal bell, or of gates, or of any other form of protection, does not constitute a ground of negligence for which the defendant can be held liable, for the special designation by the statute of the whistle and bell signals excluded any obligation of providing other signals.

"(3) These are all, however, circumstances which should have a bearing on the general situation, and may have operated to affect the duty of the engineer to keep a lookout for travelers, and the duty of Freedman to look out for trains.

"(4) In addition to ringing or causing the bell to be rung the engineer owed no other duty, save in the case of exceptional circumstances, which will be treated of later. The engineer owed the duty of keeping a reasonable outlook, which, in that connection, meant a vigilant outlook, for travelers upon the highway at or near the crossing, so as to avoid injury to them; and, if the railroad failed to perform its duty, its liability is the same whether it saw, or might have seen, the person in time, by the exercise of reasonable care, so as to have avoided the injury.

"(5) Ordinarily the liability of a railroad cannot be found from speed alone, even though the speed be great, for negligence, as a general rule, cannot be inferred from speed alone. If the signals required by law are given, no liability to damage is attached to the railroad from the fact of the speed alone, except in certain cases, which are exceptional cases, and the speed then becomes an important element in a charge of negligence. As, for instance, if the circumstances be exceptional, and known to the railroad, or the peril of the plaintiff's intestate was known to the defendant. Doubtless in some cases, as our courts say, the company might be liable for the neglect of the engineer to slacken the speed of his train if by doing so he might have avoided a collision. As, if he was informed that a person was approaching the

crossing in such a condition, or under such circumstances, as to indicate that he was heedless of the danger signals; as, if other sounds were prevailing, as of a thunder storm, which might render the sound of the signals indistinguishable. In such cases the company might properly be charged with the consequences of the personal negligence of the engineer.

"(6) The claim is that the circumstances in evidence present an exceptional case, in that the engineer of the defendant either knew or ought to have known of the peril of the plaintiff's intestate, and might thereafter have avoided injury to Freedman had the engineer exercised reasonable care.

"(7) If you find Freedman was in peril, and the engineer knew, or ought to have known, it, then reasonable care required him to use every precaution to avoid the injury to Freedman which a reasonably prudent person, similarly situated, would use. If a reasonably prudent person would have, under these circumstances, blown the whistle or checked the speed or stopped the train, it was incumbent upon the engineer to have done this; and, if by so doing injury to Freedman would not have occurred, the defendant is liable, unless Freedman's own negligence thereafter essentially contributed to his injuries. If the doing of any of these things, or of any other things, after the engineer knew, or ought to have known, of this peril, would not have avoided the injury to Freedman, the defendant cannot be held liable for its failure to have done them."

The statements contained in the paragraphs of the charge above, marked "4," "5," "6," and "7," are among the reasons of appeal assigned.

During his charge the trial judge read and explained to the jury the following written interrogatories, which he informed the jury the defendant had submitted, and that it would be necessary for the jury to answer: "If you find the verdict for the plaintiff, you will answer the following interrogatories: (1) Before the collision was some part of an approaching train, consisting of an engine, tender, and caboose, at all times visible from a point about 600 feet south of the Brewster street crossing up to the crossing to a person on the seat of an ordinary open grocery wagon approaching from the east, and within 75 feet of the crossing? (2) Did Freedman pull up his horse when close to the track, and just before the collision? (3) Or did Freedman pull up his horse when some 40 to 60 feet from the crossing? (4) Did Freedman know of the approach of the train while he was approaching the crossing, and before he began to pull up his horse? (5) Did Freedman look for a train before he began to pull up his horse? (6) Did Freedman listen for a train before he began to pull up his horse? (7) Did Freedman, while approaching the crossing, drive his horse at a trot until he

commenced to pull him up?" The jury returned a verdict for the defendant without answering any of said interrogatories, and the plaintiff thereafter filed a motion in arrest of judgment on the grounds: "(1) Of the misconduct of the jury in failing to comply with the direction of the court to answer several certain questions, or interrogatories submitted to them by the court with the direction that the same should be answered by the jury, and returned to court when they returned their verdict in the above cause; (2) in returning their verdict for the defendant without returning the answers to several certain interrogatories submitted to them by the court to be answered in the event that they arrive at a verdict." The court denied said motion. The denial of said motion and the reading of said interrogatories to the jury, and the instructions given concerning them, are among the errors assigned in the appeal.

Walter J. Walsh, for appellant. Harry G. Day and Thomas M. Steele, for appellee.

HALL J. (after stating the facts as above). The contention of the plaintiff that the court instructed the jury, by the language of the first three lines of paragraph 4 of the charge, as above numbered, that the engineer owed no other duty to the plaintiff than to ring the bell cannot be supported. It is clear from the context that in the statement complained of the court referred to the general statutory warnings. In the same paragraph 4 the court said it was the duty of the engineer to keep a "vigilant outlook for travelers upon the highway at or near the crossing, so as to avoid injury to them," and in paragraph 7 that it was incumbent upon him to blow the whistle, or check the speed of the train, if reasonable care required it, in view of the fact that he knew, or ought to have known, of the perilous position in which Freedman was placed. Whether after he learned, or should have learned, that Freedman was in peril the engineer did all that a reasonably prudent person would have done to avoid the accident was fairly submitted to the decision of the jury.

As applicable to the facts of this case, we find no error in the charge of the court, or its refusal to charge as requested, upon the question of the rate of speed of the train as an element of negligence. To transport persons and property rapidly is the principal purpose of railroads. To require railroads to generally so reduce their speed at all grade crossings as to avoid collisions with persons who may carelessly or accidentally be upon the crossing when a train was approaching would defeat, to a great extent, the purpose of the existence of railroads. To run trains over grade crossings at a rate of speed reasonably necessary for the accomplishment of the purposes of railroads is always attended with danger. When using its

trains for proper railroad purposes it is generally the right of a railroad company, in the absence of legislative restriction, to propel them over highway crossings in the way in which they are usually and reasonably run. *Baldwin's American Railroad Law*, 408. For the dangers necessarily resulting from so propelling them over grade crossings, sanctioned by the state, the railroad company is not responsible. *Cowles v. N. Y., N. H. & H. R. Co.*, 80 Conn. 48, 54, 68 Atl. 1020, 12 L. R. A. (N. S.) 1067. For the protection to some extent of others who may have occasion to use the highways at grade crossings the state has, through its Legislature and railroad commissioners, assumed the regulation of the conditions upon which railroad companies may propel their cars over existing grade crossings, by providing, among other things, what signals of approaching trains shall be given (section 3787, Gen. St. 1902); that the railroad commissioners may order gates, or electric signals, or a flagman, at any railroad crossing in any town, city, or borough (section 3888); that they may permit passenger trains to run past any highway crossing at such rate of speed they may prescribe, and make orders for the regulation of the speed at which locomotives and cars shall cross highways (sections 3798, 3893); and that they shall have the exclusive power to regulate the speed of railroad trains within the limits of cities and boroughs (section 3894).

The evidence was that the train was running at from 25 to 50 miles an hour. The complaint alleges as an act of negligence that the rate of speed was high, unlawful, and dangerous. It was dangerous, and it would have been if running at the lowest rate named. It was not unlawful in the sense that it was in violation of any order of the railroad commissioners, as it does not appear that they had fixed any rate of speed. The train was apparently run at that rate of speed for proper railroad purposes. Upon the apparently undisputed facts the jury could not properly have found that the defendant was negligent in merely running its train over this crossing at the rate of speed named, in the absence of any restrictive order of the railroad commissioners. *Dyson v. N. Y. & N. E. R. R. Co.*, 57 Conn. 9, 21, 17 Atl. 137, 14 Am. St. Rep. 82; *Tessmer, Adm'r. v. N. Y., N. H. & H. R. Co.*, 72 Conn. 208, 212, 44 Atl. 38; *Gillette v. Goodspeed*, 69 Conn. 363, 368, 37 Atl. 973. In the first of these cases cited this court held that the trial court erred in deciding that the defendant was negligent in running its cars over a city grade crossing, unprotected by flagman, gate, or bell, at a rate of speed of from 35 to 40 miles an hour. In the second case it was held that the trial court committed no error in deciding that the railroad company was not negligent in running its train over a borough crossing, unprotected by flagman, bell, or gates at a rate of speed of about 50 miles an

hour. The crossings in both of the cases were dangerous, and as to affording opportunity to see approaching trains were evidently more dangerous than the one in the case at bar.

In the present case the trial court rightly and very clearly instructed the jury that they might find the defendant negligent, if they found that after the engineer knew, or should have known, that Freedman was in a position of peril he failed to slacken the speed of the train, or to blow the whistle, when reasonable prudence and care required him to do so. Upon the facts before us apparently the only reasonable grounds for a recovery by the plaintiff were that the engineer negligently failed either to keep a proper lookout in approaching this crossing, or to slacken the speed of the train sooner than he did. These questions of fact were fairly submitted to the jury, and were by the verdict answered in the negative.

There was no error in denying the plaintiff's motion in arrest of judgment. Having returned a verdict for the defendant, the jury were not required to answer the written interrogatories submitted to them. They were presented by the defendant only, and it appeared upon the face of the writing propounding them that they were to be answered only in case the jury returned a verdict for the plaintiff. Presumably plaintiff's counsel knew this. If they desired to submit interrogatories or to have those propounded by defendant answered in case of a verdict for the defendant, they should have made such desire known before the verdict was rendered. If they understood the interrogatories were to be answered even in case of a verdict for the defendant, they should, when the verdict was returned without such answers, assuming that the court might then properly have directed them to be answered, have at least either requested the court to order them to be answered, or have objected to the acceptance of the verdict without the answers, instead of remaining silent until after the jury was discharged. *Ward v. Busack*, 46 Wis. 407, 1 N. W. 107; *Mayo v. Halley*, 124 Iowa, 675, 100 N. W. 529; *Bagley v. Grand Lodge*, 131 Ill. 498, 22 N. E. 487. But in their brief, counsel for the plaintiff make the claim, which is somewhat inconsistent with that made in their motion in arrest of judgment, that the trial court erred in submitting these interrogatories to the jury. No such question was raised in the trial court, although the plaintiff apparently had full opportunity to do so. In the absence of objection the plaintiff may be presumed to have assented to the submission of these questions. *Willard v. Stevens*, 24 N. H. 276; *Allen v. Aldrich*, 29 N. H. 63. Clearly the question of the power of the court to do so is not raised by the motion in arrest, which only complains of the failure of the court to direct the interrogatories to be answered. The only way in

which it can be claimed to be raised by this appeal is by the assigned errors in the charge of the court in which it instructed the jury regarding the answering of the interrogatories. But as the right of parties to present such interrogatories, and the power and duty of courts to submit them to the jury, are important matters of practice, which have never been passed upon by this court, we shall consider these questions as if they were properly raised by the appeal.

Unlike a large number of our states, the statutes of which upon this subject are discussed by Mr. Clementson in his *Manual Relating to Special Verdicts and Special Findings by Juries* (chapter 3, p. 24), Connecticut has never by express legislation either regulated or authorized the submission of such interrogatories to juries in the trial of cases. Section 757, Gen. St. 1902, authorizes a special verdict by which the jury may find the facts and refer the questions of law to the determination of the court. Though they may to some extent both subserve the same purpose, there is still a material difference between special verdicts and findings by responses to interrogatories. By the former no unconditional general verdict is rendered, but the jury find the facts and submit the question of law arising upon them to the court. 1 *Swift's Dig.* p. 774. By the latter answers pertinent to, and perhaps controlling, although not necessarily fully covering, an issue framed, are given, always in connection with a general verdict. Clementson's *Special Verdicts*, 45. The purpose of the former is to furnish the basis of a judgment to be rendered, and of the latter, by eliciting a determination of material facts, to furnish the means of testing the correctness of the verdict rendered, and of ascertaining its extent. *Sturgis First National Bank v. Peck*, 8 Kan. 660; *Chicago, etc. R. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Durfee v. Abbott*, 50 Mich. 479, 15 N. W. 559. The power of the trial court to submit proper interrogatories to the jury, to be answered with the return of their verdict, does not depend upon the consent of the parties or the authority of statute law. In the absence of any mandatory enactment it is within the reasonable discretion of the presiding judge to require, or to refuse to require, the jury to answer pertinent interrogatories, as the proper administration of justice may require. *Dorr v. Fenno*, 12 Pick. (Mass.) 521; *Spaulding v. Robbins*, 42 Vt. 90. In *Walker v. New Mexico, etc., Pac. R. Co.*, 165 U. S. 593, 597, 17 Sup. Ct. 421, 422, 41 L. Ed. 837, Justice Brewer, in delivering the opinion of the court said: "The putting of special interrogatories to the jury and asking for specific responses thereto in addition to a general verdict is not a thing unknown to the common law, and has been recognized independently of any statute."

It has been for a long period the settled practice, in the courts of our sister New

England states, to propound such interrogatories to the jury, although Rhode Island is, we believe, the only one of them in which the practice has been sanctioned by statute, Clementson's *Special Verdicts*, c. 2, p. 16. In *Newell v. Roberts*, 13 Conn. 63, 73, the defendant pleaded four defenses upon each of which issue was joined. There was a general verdict for the defendant, under the instruction of the court, that the jury might return such verdict upon finding a certain fact. This court, by Williams, C. J., said that while it was not prepared to say that the verdict would not do entire justice to the parties in the case, it might in its consequences injuriously affect their rights beyond that suit, and that the parties had a right to an expression of the triers upon each of the distinct points so in issue. In *Frazier v. Harvey*, 34 Conn. 469, 470, which was an action on a warranty with the common counts in assumpsit, a general verdict for the plaintiff having been returned, the court inquired of the jury if they found the warranty proved. They replied that they did not. A new trial was granted upon the ground that there could be no recovery upon the common counts, and there was no criticism of the action of the court in so interrogating the jury. It has been the common practice in this state, when a complaint contains several counts for distinct causes of action, for the court to direct the jury, in case of a verdict for the plaintiff, to designate upon which count it was found. *Morris v. Bridgeport Hydraulic Co.*, 47 Conn. 279, 291; *Spencer v. N. Y. & N. E. R. R. Co.*, 62 Conn. 242, 251, 25 Atl. 350. In *Johnson v. Higgins*, 53 Conn. 236, 241, 1 Atl. 616, 619, the court, by Stoddard, J., said: "The practice obtains generally in this state rather to direct the jury to return verdicts upon each of several distinct counts, embracing independent matters, than to obtain the required information by inquiry of the jury, or by framing special verdicts, although both of the two latter modes have been resorted to." While we cannot expect from a jury such a special finding, as may be required of a court, of the facts upon which its judgment is founded, it is feasible, and often necessary, and especially as affording the basis of a possible appeal, where generally every intendment is in support of the verdict, that some of the elements which enter into the verdict may appear upon the record. *Carroll v. Bohan*, 48 Wis. 218. For this purpose the presiding judge has the power to submit written interrogatories to be answered by the jury upon returning a general verdict. When and to what extent this should be done, and when and how counsel may request interrogatories to be propounded, it is, to a great extent, in the absence of any statute or rule upon the subject, the duty of the trial court, in the exercise of a reasonable discretion to determine. *Nudd v. Burrows*, 91 U. S. 439, 23

L. Ed. 286; *Spurr v. Inhabitants of Shelburne*, 181 Mass. 429.

We shall not attempt to formulate definite rules for determining accurately in every case just what interrogatories may be so submitted to the jury. It may, however, be well to state the following as some of the general requisites of such permissible interrogatories: They should generally be few in number, and never so numerous as to confuse or perplex the jury in rendering their verdict. They should be so clear and concise as to be readily understood and answered by the jury. Each question should call for a finding of but a single fact. When practicable, each question should be so framed as to call for a categorical answer. Each question should ask for the finding of a fact, and never for a conclusion of law. No question should ask for the finding of a purely evidential fact, nor of an uncontroverted fact. Although not wholly covering, nor necessarily controlling, the determination of any issue framed, the fact sought to be elicited must be pertinent to some issue, and one which may be of material weight in deciding it. No interrogatory should be permitted, the response to which cannot serve either to limit or explain a general verdict or aid in proceedings for a subsequent review of the verdict or judgment which may be rendered. We do not find it necessary to decide whether the seven questions propounded conform to the principles above stated. It is sufficient to say that we find nothing in them to justify the conclusion that the necessity of answering them, if they rendered a verdict for the plaintiff, may have induced the jury to return a verdict for the defendant.

There is no error. The other Judges concurred.

(81 Conn. 660)

SULLIVAN v. CITY OF BRIDGEPORT.

(Supreme Court of Errors of Connecticut. Feb. 16, 1909.)

1. MUNICIPAL CORPORATIONS (§ 186*)—OFFICERS—POLICE—ACTIONS FOR COMPENSATION—DEFENSES.

The refusal of the board of apportionment and taxation of the city of Bridgeport to appropriate sufficient funds to pay the increased salary for patrolmen, authorized by ordinance, would not prevent a policeman from recovering the increased salary, as funds for that purpose could be made available either by reducing other expenses of the police department, or, if that was not possible, the city council could reduce the number of patrolmen or could, under its charter, make a special appropriation for that purpose out of any unappropriated city revenue, and, in the absence of a showing that there was not enough left unexpended out of the appropriation for the police department to pay the increased salaries, the failure of the board of apportionment and taxation to make an appropriation for that purpose was not a defense to an action for the increased compensation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 186.*]

2. MUNICIPAL CORPORATIONS (§ 164*)—COMPENSATION—INCREASE OF COMPENSATION—CONSTITUTIONAL INHIBITION.

The purpose of Const. Amend. art. 24, prohibiting cities from paying extra compensation to any public officer, or increase his compensation, to take effect during his continuance in office, was to prevent cities from making gratuitous compensation to public officers, and not to prohibit them from regulating their services and compensation, so that an ordinance increasing the salary of patrolmen, effective the succeeding fiscal year, was not the vote of the gratuity within the Constitution.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 370, 371; Dec. Dig. § 164.*]

3. MUNICIPAL CORPORATIONS (§ 67*)—LEGISLATIVE CONTROL—LOCAL LEGISLATION—POWER TO AUTHORIZE—REGULATION OF SALARIES.

The Legislature may authorize a city to make, alter, and repeal ordinances relating to the compensation of city officers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 67.*]

4. MUNICIPAL CORPORATIONS (§ 186*)—COMPENSATION—INCREASED COMPENSATION—INCREASED DURING TERM.

The charter of the city of Bridgeport prohibits the increase of the salary of any officer appointed for a definite term during his term of office, and another section makes certain provisions apply both to persons holding office for a fixed term and those holding during good behavior. *Held*, that the provision relating to the increasing salaries applied only to officers appointed for a definite term, and, since policemen held office until removed for cause, their salaries could be increased during the continuance of their appointment to the service.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 186.*]

Case Reserved from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Action by James H. Sullivan against the City of Bridgeport. On reserved questions upon an agreed statement of facts. Judgment advised for plaintiff.

Elmore S. Banks and William A. Redden, for plaintiff. Thomas M. Cullinan, for defendant.

THAYER, J. The plaintiff has been a member of the defendant's police force since 1893. Prior to October 9, 1907, and continuously up to the commencement of this action, he had been a policeman in grade A, the highest of the four grades into which the patrolmen of the police force are divided. By an ordinance fixing the salaries and compensation of the officers and men of the police department in force on and before October 9, 1907, policemen in grade A were entitled to and received \$2.90 per day. On that day the common council passed an ordinance, to take effect at the beginning of the city's next fiscal year, April 1, 1908, and repealing as of that date all inconsistent ordinances, whereby the salary or compensation of each of the officers and each grade of patrolmen was increased. The salary or compensation thereby fixed for patrolmen in grade A was \$3.25 per day. The

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff without reappointment continued to serve as a patrolman in that grade after April 1, 1908, and has demanded payment for such service since that date at the rate of \$3.25 per day. The defendant has paid him at the old rate, \$2.90 per day, and has refused to pay the balance claimed. The case is reserved for the advice of this court upon an agreed statement of facts.

The defendant's refusal to pay the increased compensation is based upon three grounds: First, "because both the board of apportionment and taxation and the common council of the defendant city failed and refused to make an appropriation for the police department sufficient to pay such increase in the compensation of members of the police department, and because it is provided by the charter of the city that no money, other than that appropriated, shall be expended for any purpose"; second, "because it is provided by the charter that 'no salary of any officer, employé, agent or servant of the town or city elected, chosen or appointed for a certain term shall be increased or diminished by any action of the common council to take effect during said term'"; third, because "such attempted increase in the compensation of the members of the police department was prohibited by article 24 of the amendments of the Constitution of the state."

It is the duty of the board of apportionment and taxation to determine in February each year the requirement of each department of the city government for the ensuing fiscal year, to apportion to each its required amount, and to lay a tax to meet the total requirement. The fact that in making its estimates for the police department this board failed or refused to make an appropriation sufficient to pay the increased compensation to the members of that department is not conclusive of the plaintiff's right to recover. The purpose of placing the power of apportionment and taxation in the hands of a special board was to protect the taxpayers from unusual and unnecessary expenditures, not to cripple the different departments by depriving them of the means of paying the ordinary salaries and running expenses of their departments. The board of police commissioners have no power to fix the number of patrolmen in their department or the pay of any of them. This power is given to the common council. After the number is fixed the board appoints the required number and can remove them only for cause, unless the number is reduced by the common council. The police commissioners cannot reduce or change the pay of the patrolmen. It clearly is not the intention of the charter that the board of apportionment and taxation should reduce the patrolmen's pay by apportioning to the police department an insufficient sum to provide the compensation fixed by law. When the number and compensation of the policemen have been legally established, it is the duty of that board to provide by a sufficient

appropriation and tax levy for their payment; but if they fail to do this the police commissioners may, the appropriation for their department being for a definite sum for general purposes, by cutting expenses elsewhere reserve sufficient for the payment of the fixed salaries. If this is not possible, the common council may under the charter make a special appropriation to meet the deficiency, if there is unappropriated revenue of the city sufficient to meet it, and, if not, it can reduce the number of policemen so that the appropriation already made will be sufficient to meet the salaries of those remaining. It is found as a part of the case that the board of apportionment and taxation failed and refused to make an appropriation sufficient to pay the increased salaries in the police department provided for in the ordinance of October 9, 1907, and that the common council has not since reduced the number of policemen or made a special appropriation for the purpose of paying the increase in salaries and compensation; but it is not found that, at the time this action was brought, there was not remaining of the appropriation which was made sufficient to pay the increase on all salaries then due. Less than two-thirds of the fiscal year had then passed, and presumably a large part of the appropriation for the police department then remained unexpended. It does not appear therefore that the city was not then in funds appropriated for the purpose sufficient to pay the plaintiff's demand. Upon the facts found therefore the defendant's first defense does not justify its refusal to pay the balance claimed if the same was legally due.

We assume that the refusal of the board of apportionment to appropriate sufficient to meet the increase in salaries was because, the board questioned, upon the grounds now urged by the defendant, the legality of that increase. If, as claimed, the common council in repealing the former ordinance and by passing a new one establishing larger salaries or compensation for the policemen, acted in violation of the defendant's charter or of article 24 of the amendments to the Constitution of the state, their action was void, and the increase was invalid. The construction and purpose of the twenty-fourth article of the amendments to the Constitution received the attention of this court in the recent case of *McGovern v. Mitchell*, 78 Conn. 536, 63 Atl. 433, and was there carefully and fully considered. It is there held that it is the purpose of the article to take from the public bodies therein mentioned, including cities, the power to make gratuitous compensation to public officers and employes in addition to that which is established by law or contract, and that it does not, either directly or by implication, take from them the power to regulate by legislation the public services and the compensation of public officers. They may therefore to the extent of their legislative power enact

laws or ordinances fixing the future compensation of such officers. The ordinance in question purports to establish the compensation which all the members of the police department shall receive after the 1st day of April following its enactment. It is not the vote of a gratuity in excess of what the law allows them, but a law establishing what they shall receive in the future. It differs in this respect from the vote in the case of *Wright v. Hartford*, 50 Conn. 546, relied upon by the defendant. In that case a gratuity was voted by resolution to a tiller-man in excess of the amount fixed by the existing ordinance.

The ordinance in the present case was not within the prohibition of article 24 of the amendments to the Constitution. If the common council had power to enact the ordinance, it was therefore valid. The charter gives the common council the power to make, alter, and repeal orders and ordinances relating to the salaries and compensation of all officers of the city. That the Legislature could confer upon the city the power of such local legislation is unquestionable. *State v. Carpenter*, 60 Conn. 97, 103, 22 Atl. 497; *Wallingford v. Hall*, 64 Conn. 428, 431, 30 Atl. 47; *State v. Cederaski*, 80 Conn. 478, 480, 69 Atl. 19. But the charter contains a provision that "no salary of any officer, employé, agent or servant of the town or city chosen or appointed for a certain term shall be increased or diminished by any action of the common council to take effect during said term," and it is claimed that the ordinance in question violates this provision of the charter. The provision affects only those officers who are chosen or appointed for a "certain term." The plaintiff was appointed in 1886 before the present charter and a preceding one were granted, and by the provisions of these two charters the plaintiff and other policemen in office when they were granted were continued in office. It does not appear for what, if any, term they were originally appointed. By the terms of the present charter all policemen hold office until removed or expelled by the police commissioners for just cause, unless the common council reduces their number, in which case, and for that cause, the said commissioners may dismiss a sufficient number to effect the reduction. Their tenure of office is therefore substantially during good behavior. They are not in for a certain, fixed, or definite term. The charter in another section makes certain provisions apply both to persons holding office for a fixed term and those holding by tenure of good behavior, thus recognizing a distinction between the two tenures. The charter by the prohibition in question manifestly intends that, when a person holds office for a fixed and certain term, his salary or compensation shall not be increased during such term; but does not aim to prevent an in-

crease of the salary or compensation of those whose terms are of uncertain and indefinite duration. It is well known that living expenses and wages have greatly increased since the plaintiff was appointed in 1886. It is reasonable, and was doubtless intended, that the salaries and compensation of the city's officers and employés should be kept proportionate to the expenses of living and the general rate of wages. The provision of the charter prohibiting a change of compensation was therefore limited to the cases of those short-term officers and employés the term of whose service is fixed and certain. The action of the common council in passing the ordinance establishing the compensation of policemen after April 1, 1906, so far as it affected the salaries of patrolmen, was not prohibited by the charter, but was legal. The plaintiff therefore is entitled to be paid, as claimed by him, at the rate of \$3.25 per day.

The court of common pleas is advised to render judgment for the plaintiff. No costs in this court will be taxed in favor of either party. The other Judges concur.

(51 Conn. 628)

WHALEN v. GLEESON.

(Supreme Court of Errors of Connecticut. Feb. 16, 1909.)

1. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR — DENIAL OF MOTION TO CORRECT FINDING.

The denial of a motion under Gen. St. 1902, §§ 795, 796, to correct a finding by striking out the statement that the court excluded secondary evidence of the contents of letters because not satisfied of the destruction of the originals, was not prejudicial to movent, where, owing to the fact that the court did not at the time of its ruling announce that it was of such an opinion as the reason therefor, the finding in respect thereto becomes immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1071.*]

2. EVIDENCE (§ 357*)—PRIVATE WRITINGS—ADMISSIBILITY.

The contents of letters alleged to have been written for and at the dictation of an illiterate person by an amanuensis are admissible to be considered with the other proof in the determination of that fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1496; Dec. Dig. § 357.*]

3. EVIDENCE (§ 353*)—OFFICIAL CERTIFICATES—TAX LISTS.

Under Gen. St. 1902, §§ 2296, 2302, 2303, 2305, imposing the duty of bringing in a tax list and verifying it by oath upon each taxpayer as a personal obligation, a tax list filed in the proper office, and bearing a certificate by an official having authority to administer oaths to taxpayers that he had in fact administered such an oath to the taxpayer, is properly received in evidence.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 353.*]

4. EVIDENCE (§ 373*)—AUTHORITY OF AGENT—PRESUMPTIONS.

A tax list not purporting to be signed or sworn to by the taxpayer, but by another as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

agent, there being no proof that such other had any authority to act, was improperly received in evidence, there being no presumption that those assuming to act as agents are such in fact, and none that what those who are agents may do is within their authority.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 373.*]

Appeal from Superior Court, New Haven County; Ralph Wheeler, Judge.

Application for the probate of the will of Catherine Killoughey, deceased. The will was admitted to probate in the probate court, and Mary Whalen, contestant, appealed to the superior court, which court also found in favor of the will, and contestant appeals. Reversed, and new trial ordered.

Ulysses G. Church and Joseph H. Reid, for appellant. Edward A. Harriman and James M. Lynch, for appellee.

BALDWIN, C. J. The paper admitted to probate as the will of Mrs. Killoughey gave her property in part to St. Patrick's Roman Catholic Church and the rest to the pastor of the parish for masses for the repose of her soul. It was executed July 2, 1906, and she died October 7, 1907. Her sole heir was a sister, the appellant. Both were over 70 at the time of her decease. Neither could read or write. Mrs. Killoughey had a son, Thomas, who died in 1903. The appellant lived in Illinois until January, 1907, when she went to Waterbury, and took care of her sister during her last illness, into which she had then fallen. She produced testimony to the effect that while in Illinois Mrs. Killoughey had from time to time sent letters to her or her family, which had been answered, and that when she left the state they were in a cigar box in her house in Aurora, and had not since been seen by her. She had two daughters, one of whom, Jennie Whalen, testified that after her mother went to Waterbury the Aurora house was sold, and she (the witness) had burned the cigar box and its contents; that she had read the letters; that one of them, addressed to her mother, came soon after the death of Thomas Killoughey, and was signed with the name of Catherine Killoughey; and that she (the witness) wrote and mailed an answer to it for her mother, addressed to her aunt at her residence in Waterbury; that a letter was received in reply signed with her aunt's name; and that other similar correspondence followed. She was then asked to state the contents of the first of the letters mentioned, received by her mother after the death of Thomas Killoughey, and whether it stated who the writer of it was. Testimony had already been given by a Mrs. O'Brien, who was a cousin of Mrs. Killoughey, that the day after his death Mrs. Killoughey asked her to write to the appellant to request the latter, in her behalf, to

come on and live with her (Mrs. Killoughey); that Mrs. Killoughey told her what to write, and, among other things, that she was old and nearing her end, and was well provided for, and would pay the expenses of her journey; and that she (the witness) put all these things into the letter. It was not claimed, and there was no evidence offered tending to show, that any letters were written for Mrs. Killoughey to Mrs. Whalen, or members of her family, which contained, or purported to contain, the language or expressions used or dictated by Mrs. Killoughey, except the letter of Mrs. O'Brien, or that the letters in question were ever read to her or assented to by her. Counsel for appellee objected to the evidence offered as to their contents on the ground that it was not sufficiently shown that they contained any expressions or declarations actually made by Mrs. Killoughey, and did not sufficiently appear to have been written from her dictation or by her direction. The court ruled and informed counsel for the appellant that he might introduce any letter which he would identify by reason of the testimony of the writer, be it Mrs. O'Brien or any other person, as written in behalf of Mrs. Killoughey to Mrs. Whalen, and also any letter written to Mrs. Whalen in Aurora, which was specifically in reply to a letter which she had caused to be written to Mrs. Killoughey, so that the one might be identified by the other, and that he would be required to identify any letter, the contents of which he sought to introduce, by evidence of some person who wrote it.

The questions put to Miss Whalen as to the contents of the letter written after the death of Thomas were thereupon excluded, as were similar questions relating to the contents of the subsequent correspondence as to which she had testified. The finding states that, at the time of these rulings, "the court was not fully satisfied of the destruction of all the letters in question, and no sufficient evidence of the identity of any of the contents of the letters claimed to have been burned as being declarations made or assented to by Mrs. Killoughey." A motion to correct the finding under Gen. St. 1902, §§ 795, 796, by striking out these statements, was filed, and exceptions based thereon are among the reasons of appeal. In support of these exceptions a transcript of the stenographer's notes of Miss Whalen's testimony has been made part of the record.

It appears from this transcript that the first of the grounds so stated for excluding the questions was not mentioned by the court at the time when the rulings were made. Had it been, it may be that the appellant would have been able to supply further evidence of the destruction of the letters. That sufficient proof that they had

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

been destroyed had been made was not denied by the counsel for the appellee in making their objections to the admission of the questions. It was a preliminary matter to be decided by the trial judge before any resort could be had to secondary evidence. If the questions were to be excluded because in his opinion no case had yet been made out for the admission of such evidence, that opinion should have been announced at the time as the reason for the rulings, and, not having been so announced, the finding in this respect is immaterial.

The second of the two grounds stated in the paragraph in question of the finding is somewhat obscurely expressed, but we understand it to mean that no sufficient evidence had been presented that any of the contents of the letters were declarations made or assented to by Mrs. Killoughey. As to the letter written by Mrs. O'Brien, there clearly had been sufficient evidence, and as to the other letters we are of opinion that the proofs offered as to the point in question were such as entitled the appellant to have that determined by the jury in connection with the evidence offered as to what the letters in fact contained. An illiterate person can only communicate by letter through the aid of an amanuensis. The signature must be that of the latter. Testimony from him that he wrote only what he was told to write is not the only means of determining that fact. The statements made may relate to what could not have been known to any one but the person from whom the letter purports to come; or they may be expressed in a particular way that is peculiar to him. They may be put in such a form as an uneducated person would naturally use, and they may be phrased in a style which conclusively shows that the words are those of the amanuensis. If, therefore, the letter be lost or destroyed, proof of its contents may be of material importance in determining from whom the communication really came. 8 Wigmore on Evidence, §§ 2148, 2153. The latter part of the paragraph in question was in effect a mere restatement of the reasons for the rulings which were given at the time. The appellant was therefore not prejudiced by the denial of motions to strike out the statements specified.

There was, however, error in excluding for such reasons the secondary evidence of what the letters contained, assuming that there had been sufficient proof of their loss. It was for the jury to say who wrote and who received them, after hearing their contents, and considering the intrinsic evidence that might be thus furnished as to their origin, in connection with whatever extrinsic evidence relevant to the same point might be produced by either party. *Fitch v. Bogue*,

19 Conn. 285, 290; *Deep River National Bank's Appeal*, 73 Conn. 341, 347, 47 Atl. 675.

The appellant offered evidence that the death of her son was a great shock to Mrs. Killoughey, and that she was never afterwards of sound mind, seldom left her house, and took but little interest in the care of her property. To meet this, the appellee, among other things, put on the witness stand two assessors of the town of Waterbury, who produced the original tax lists filed in their office as the lists of Mrs. Killoughey for the years 1903, 1904, 1905, and 1906. One of them testified that the list of 1903 was signed by her by her mark, and sworn to by her before him. This list was admitted without objection. The other assessor testified that the lists of 1904 and 1905 were signed by a mark and sworn to before him by some one purporting to be Mrs. Killoughey at the time when they filed; that he did not know Mrs. Killoughey personally; and that he could not say that she ever appeared before him. These two lists were properly received. They came from the proper official repository, and each bore a certificate by an official having authority to administer oaths to taxpayers that he had in fact administered such an oath to Mrs. Killoughey. Such a certificate is prima facie evidence of the truth of what is contained in it on the principle that every man acting officially shall be presumed to have done his duty until the contrary appears. *State v. Byrne*, 45 Conn. 273, 280; *State v. Main*, 69 Conn. 123, 140, 37 Atl. 80, 38 L. R. A. 623, 61 Am. St. Rep. 30. The duty of bringing in a tax list and of verifying it by oath is cast upon each taxpayer as a personal obligation. Gen. St. 1902, §§ 2296, 2302, 2303, 2305. It was required of Mrs. Killoughey, and the evidence in question went to show that she performed it. The list of 1906 did not purport to be signed or sworn too by her. The signature read "Bridget Donege, Agent," and the only affidavit was that of "Bridget Donege." Bridget Donege could not be found, and no proof was offered that she had any authority from Mrs. Killoughey to act for her. Under these circumstances there was error in admitting this list. There is no presumption that those assuming to act as private agents are such agents in fact, and none that what those who are private agents may do is within their authority. *Ward v. Metropolitan Life Ins. Co.*, 66 Conn. 227, 239, 33 Atl. 902, 50 Am. St. Rep. 80. So far as appears, Bridget Donege was a mere intermeddler, who was never employed by Mrs. Killoughey to represent her.

There is error, and a new trial is ordered. The other Judges concurred.

(81 Conn. 632)

NATIONAL FIRE PROOFING CO. v. TOWN OF HUNTINGTON et al.

(Supreme Court of Errors of Connecticut. Feb. 16, 1909.)

1. MECHANICS' LIENS (§ 13*)—PROPERTY SUBJECT—PUBLIC BUILDINGS—"ANY BUILDING."

Gen. St. 1902, §§ 4135-4138, providing for the creation and enforcement of a mechanic's lien for material furnished and services rendered in the construction of "any building," do not authorize such lien on a public school building.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 15; Dec. Dig. § 13.*]

2. MECHANICS' LIENS (§ 5*)—CONSTRUCTION OF STATUTE.

A mechanic's lien law, being in derogation of the common law, should receive a strict, rather than a liberal, construction.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 5; Dec. Dig. § 5.*]

3. MECHANICS' LIENS (§ 97*)—PERSONS ENTITLED—SUBCONTRACTORS.

An original contractor not being entitled, under Gen. St. 1902, §§ 4135-4138, to a mechanic's lien for material furnished and services rendered in the construction of a public school building, a subcontractor is not entitled to such lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 129; Dec. Dig. § 97.*]

Case reserved from Superior Court, Fairfield County; Edwin B. Gager, Judge.

Action by the National Fire Proofing Company against the Town of Huntington and others. On a trial in the Superior Court the case was reserved for the Supreme Court of Errors. Judgment advised for defendants.

This is an action by a subcontractor against the town of Huntington and sundry other subcontractors, who, like the plaintiff, had filed certificates of mechanic's lien on a town schoolhouse, to foreclose the plaintiff's lien, to ascertain what balance was due from the town on the "purchase price," and the respective amounts of the several liens, and to have the balance due from the town apportioned among the several lienors, brought to the superior court for Fairfield county and reserved (Gager, J.) for the advice of this court on a stipulation as to the facts. One of these was that the town of Huntington in the case of the plaintiff's lien and the lien of each of the defendants appearing had on hand at the time of the filing of the lien and of the service of notice of intention to claim lien an amount of money sufficient to pay such lien, and subject to such lien under the contract with the contractor if such lien is valid.

Edward A. Harriman and William S. Downs, for plaintiff. John W. Banks, for defendants.

BALDWIN, C. J. (after stating the facts as above). Gen. St. 1902, §§ 4135-4138, provide for the creation, under certain condi-

tions, of a mechanic's lien in favor of any original contractor or subcontractor having a claim for over \$10 for material furnished or services rendered in the construction of "any building, or any of its appurtenances." These general words, if taken literally, cover every kind of building, public or private. It is clear, however, that they could not be construed to embrace buildings belonging to the state. *State v. Kilburn*, 81 Conn. 9, 11, 69 Atl. 1028. Nor do they include any public buildings belonging to corporations or communities created by the state as governmental agencies for purely public purposes, to defray the cost of which they can freely exercise the power of taxation.

The mischief which the statute was designed to remedy is an important guide in ascertaining its meaning. A thing within the letter of a statute may be unaffected by its provisions, if not within the intention of the makers, and if what was the intention sufficiently appears from the terms which they used, in connection with the conditions calling for such legislation. *Bridgeport v. Hubbell*, 5 Conn. 237, 243; *Wetherell v. Hollister*, 73 Conn. 622, 625, 48 Atl. 826; *Kelley v. Killourey*, 81 Conn. 320, 70 Atl. 1031. The statute under consideration created a new means of securing the claims of a particular class of creditors. It is in derogation of the common law, and of a kind calling for a strict, rather than a liberal, construction. *Chapin v. Persse & Brooks Paper Works*, 30 Conn. 461, 79 Am. Dec. 263; *Hubbell v. Kingman*, 52 Conn. 17, 19. The mischief to be prevented was loss to those furnishing services or materials in the construction of a building if unable to collect what might be due them on such account from the owner of the real estate. The original contractor for the erection of a public building for such a public corporation as has been described is always sure of his pay. His debtor commands the resources of the whole community. As no lien is necessary for his protection, it is not to be presumed, in view of what such a lien would put it in his power to do, that the General Assembly intended to give him one. The possessor of a mechanic's lien on real estate can gain title to it by foreclosure. If such a lien can be imposed upon public buildings, they can thus be turned into private buildings. If it can attach to a schoolhouse, it is difficult to see why it would not equally attach to a city hall, a county courthouse, or a county jail. It would be intolerable to put it in the power of a private citizen in case the negligence of a county should result in his obtaining a foreclosure of a mechanic's lien, to take possession of a courthouse, and turn out the courts, or of a jail, and turn out the prisoners.

It is suggested that the statute may be so construed as to permit a lien, but not its enforcement against the public corporation.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

This would strip the privilege of most of its value. The right and the remedy must stand or fall together. True, should the corporation sell the building to a private citizen, such a lien might be foreclosed; but it is ordinarily to be presumed that a building devoted to public uses will continue permanently to be devoted to them. It is therefore our opinion that the statute was not intended to give any lien on a public building to an original contractor. This being so, it cannot have been within its purpose to give one to subcontractors. To them the owner of the building owes no debt. Their equities are derived from their relation to the original contractor, and are not superior to his. We have held that a railroad station owned by a railroad corporation may be the subject of a mechanic's lien. *Botsford v. New Haven, Middletown & Willimantic R. R. Co.*, 41 Conn. 454. Such a corporation, being a private one, though serving public as well as private uses, and having no power of taxation to pay its debts, is not at all in the position of a strictly governmental agency, such as is a town or county. *Bradley v. New York & New Haven R. R. Co.*, 21 Conn. 294, 306; *McKeon v. N. Y., N. H. & H. R. R. Co.*, 75 Conn. 343, 348, 53 Atl. 656, 61 L. R. A. 736.

The claims for relief other than that for a foreclosure are subsidiary to that, and must fall with it.

The superior court is advised to render judgment for the defendants; and they will recover costs in this court. The other Judges concurred.

(76 N. J. L. 819)

**SEASIDE REALTY & IMPROVEMENT CO.
v. ATLANTIC CITY.**

(Court of Errors and Appeals of New Jersey.
Nov. 17, 1908.)

Error to Supreme Court.

Action by the Seaside Realty & Improvement Company against Atlantic City. Judgment for defendant (74 N. J. Law, 178, 64 Atl. 1081), and plaintiff brings error. Affirmed.

Thompson & Cole, for plaintiff in error. Harry Wootton, Godfrey & Godfrey, and Gilbert Collins, for defendant in error.

PER CURIAM. The judgment under review should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Reed in the Supreme Court.

GARRISON, J. (dissenting). I am unable to reach the conclusion that the object of the supplementary act of 1903 (P. L. p. 337), which is admittedly the sole authority for the municipal resolution under review is expressed in the title of the act to which it is supplemental.

The object of the supplementary act in question is to authorize the riparian commissioners to grant lands of the state under water to certain nonriparian owners, to wit, municipalities fronting on such waters. The title of the act to which such legislative object is supplemental is "An act to ascertain the rights of the state and the riparian owners in the lands lying under the waters of the bay of New York and elsewhere in the state."

It is going a great way to hold that "to ascertain" means "to convey away," so that in this title the words "to ascertain the rights of the state and the riparian owners" expresses that the legislative object was to authorize a grant outright of lands under water by one of the parties named in the title (i. e., the state) to the other party named therein (i. e., riparian owners).

But, conceding that this is so, and assuming, even further, that the title were actually amended, so that it read, "The object of this act is to authorize grants of the state's lands to riparian owners," I would still be unable to take the next step, and say that such title expressed that the object of the act was to authorize such grants to be made to nonriparian owners—a class not mentioned in, and, because not mentioned, excluded from, such title.

Unless, however, this last step be taken, the supplement of 1903 is entirely invalid, as not being within the object expressed in the title of the act to which it is a supplement.

Being unable to agree that "to ascertain the rights of the state and the riparian owners" is the equivalent of "to grant the lands of the state to nonriparian owners," I am constrained to withhold my affirmance of the judgment of the court below, which rests fundamentally upon the proposition that these two are equivalent expressions, which satisfy the constitutional requirement that the object of every act shall be expressed in its title.

(77 N. J. L. 611)

MAY v. HURLEY et al. STEELMAN v. SAME. TAULANE et al. v. SAME.

(Court of Errors and Appeals of New Jersey. March 1, 1909.)

SHIPPING (§ 62*) — AUTHORITY OF MASTER — PLEDGE OF OWNER'S CREDIT.

The authority of a master of a vessel to bind the owners in personam falls within the law of principal and agent, excepting when such authority arises ex necessitate; and there is no authority ex necessitate in the master of the vessel to pledge the owner's credit where the owner or his managing agent is either at the port of the ship's anchorage or so near it as to be reasonably expected to intervene personally.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 257-269; Dec. Dig. § 62.*]

(Syllabus by the Court.)

Error to Circuit Court, Camden County.

Actions by William C. May, by Zephaniah S. Steelman and by George Taulane, Jr., and others, against W. L. Hurley and others. Judgments for defendants, and plaintiff in each case brings error. Affirmed in each case.

William T. Read, for plaintiffs in error.
Ralph W. E. Donges, for defendants in error.

DILL, J. In this case a single writ of error was sued out for the purpose of reviewing three separate judgments that resulted from as many different actions that were tried together by consent. There should, of course, have been three separate writs of error; but, this being suggested upon the argument, it was agreed to treat the record as amended to make three writs of error and separate returns.

The one question of importance presented by this review is whether the master of a vessel, in the absence of special authority, may pledge the owner's credit for supplies and repairs, when the owner is at the port of the ship's anchorage, or so near to it as to be reasonably expected to intervene personally. The plaintiffs sued, in personam, the owners of the bark *Primus* for supplies furnished and services rendered upon the order of the master while the vessel lay in anchor at the port of Philadelphia, opposite the city of Camden, where the owners resided, as the plaintiffs knew. The theory of the plaintiffs was that the supplies and services were necessary for the vessel, that they were furnished upon the order of the master, and that as a matter of law the master was the agent of the owners of the vessel, and authorized ex necessitate to bind them for necessities in the way of supplies and repairs, irrespective of the port where the vessel was located. The defendants urged the rule that there is no authority ex necessitate in the master of the vessel to pledge the owner's credit where the owner or his man-

aging agent is either at the port of the ship's anchorage or so near it as to be reasonably expected to intervene personally. The court left every disputed issue of fact to the jury, including the question whether the supplies thus furnished were necessities, and whether the managing owner, who lived just across the river from the port where the vessel was anchored, was so near as to be reasonably expected to intervene personally. The jury found for the defendants.

The issue is presented by an exception to the refusal of the trial judge to direct a verdict in favor of the plaintiff and by an exception to the charge. In both rulings and throughout the trial the court followed the rule in *Arthur v. Barton*, 6 Mees. & W. 142: "Under the general authority which the master of a ship has, he may make contracts and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent, who can personally interfere to do the thing required. Therefore if the owner, or his general agent, be at the port, or so near to it as to be reasonably expected to interfere personally, the master cannot, unless specially authorized, or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him, or to his agent, to do what is necessary." In this we concur, following *Johns v. Simons*, 2 Q. B. 425; *Stonehouse v. Gent*, 2 Q. B. 431; *Beldon v. Campbell*, 6 Exch. 886; *The Jeanie Landles* (D. C.) 17 Fed. 91; *New England Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387, 10 L. Ed. 213; *Gager v. Babcock*, 48 N. Y. 154, 8 Am. Rep. 532; *Dyer v. Snow*, 47 Me. 254; *Pentz v. Clarke*, 41 Md. 327; *Stearns v. Doe*, 12 Gray (Mass.) 482, 74 Am. Dec. 608. We decline to follow *Winsor v. Maddock*, 64 Pa. 231, and *Carr v. Burke*, 82 Mo. 233.

The ordinary rules of law as to principal and agent apply, excepting in so far as the peculiar exigency involved alters it. The exigency arises from the voyage or necessity when the master is out of touch with the principal. It is necessity, not necessities, that is the basis of the rule which gives the master authority. In this case, there being a known opportunity of communicating with the owners that accorded with the rule we have laid down, the master could not be considered as having authority to pledge the owners' credit.

Holding, as we do, that the trial court did not err either in its refusal to direct a verdict or in its charge, the other alleged errors fall likewise.

The judgment in each case is affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(75 N. J. E. 239)

HOWELL v. STONE et al.(Court of Errors and Appeals of New Jersey.
March 1, 1909.)**CHattel Mortgages (§ 55*)—AFFIDAVIT OF
CONSIDERATION—SUFFICIENCY.**

In the case of a bona fide chattel mortgage the statutory affidavit of consideration (P. L. 1902, p. 487) should be liberally, not technically, construed.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 55.*]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by George Howell against Wesley Stone and Daniel E. Downey. Decree for complainant, and defendants appeal. Reversed.

George H. Large and Howard Carrow, for appellants. Ralph V. Skinner, for respondent.

DILL, J. The decree of the Court of Chancery under review set aside a chattel mortgage in favor of a subsequent judgment of the plaintiff, holding that the statutory affidavit did not as a matter of law state "the consideration of said mortgage." P. L. 1902, p. 487. The learned Vice Chancellor said: "I wish to say in conclusion that I have reached this view of the case with great disinclination, for the reason that I found no aspect of fraud in the transaction. The making of the mortgage was an honest effort to secure an honest indebtedness, and it falls not because of any turpitude imputed to the transaction, but because of the noncompliance with a statutory requirement of considerable technicality." Prior to the decision of this court in *American Soda Fountain Co. v. Stolzenbach* (N. J.) 68 Atl. 1078, 16 L. R. A. (N. S.) 703, the statutory affidavit of consideration of a chattel mortgage had been construed by courts below as "a statutory requirement of considerable technicality," but in that case we squarely rejected that doctrine, holding that, in the absence of fraud, instruments so common in the course of commercial transactions by laymen as chattel mortgages should be sustained whenever there is an honest and substantial compliance with the statute. An affidavit of consideration is not to be tested by the rules of pleading nor treated as a technical requirement. On the contrary, it should be the aim of courts, when the mortgage is bona fide, to preserve and not to destroy, and, as Sir Matthew Hale said, the court should be astute to find means to make such instruments effectual according to the honest intent of the parties. *Roe v. Tranmarr*, Willes, 682. Ap-

plying this rule to the facts before us, we think that the conclusion at which the learned Vice Chancellor below arrived was erroneous.

Briefly as to the facts, Dr. T. E. Gurtner and his wife, Selma R. Gurtner, were the owners of a farm in Hunterdon county. The doctor bought from Stone & Downey, the defendants in this action, a quantity of farm implements and other articles, including fertilizers, which were sent to and used on or about the farm. Promissory notes to the amount of the purchases drawn by the wife to the order of the doctor and indorsed by both were given to Stone & Downey. These notes were at maturity dishonored, and Stone & Downey demanded security. Thereupon the doctor and his wife gave a second mortgage on the farm for the amount of the notes, and as further security also executed the chattel mortgage in question for a like amount, reciting in the body of the chattel mortgage that it was collateral to the real estate mortgage. The affidavit stated that the consideration of the mortgage was "goods and chattels consisting of a great variety of goods used on or about the farm of said Selma R. Gurtner at Pattenburg, Hunterdon county, N. J., for which her promissory notes were given and upon which no payments have been made." Discussion as to whether the notes of the wife come within the prohibition of the married woman's act is from our point of view wide of the mark. The original purchase price of the goods was unpaid, although the debt had subsequently been put in the form of various notes, none of which had been honored. The purpose of the parties was by this chattel mortgage to secure this original indebtedness. The statement that the consideration was the goods and chattels used on the farm was the fact, although technically it disregarded the various intermediary forms of written evidence of this debt which the parties had executed. It was likewise true that for the original indebtedness the promissory notes of the wife had been given, and that they were unpaid. It was also accurate, as stated in the body of the mortgage, that the chattel mortgage was given as collateral to the real estate mortgage given to secure this same indebtedness. The statement of the consideration was a summary of the facts, rather than a detailed history of the transaction. As was said in *Strong v. Gaskill* (N. J. Err. & App.) 59 Atl. 339, the affidavit stated the consideration with substantial truth, and it is immaterial that it is unartificially drawn and not technically precise.

The decree appealed from is therefore reversed, with costs.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(222 Pa. 448)

DERRY COAL & COKE CO. v. KERBAUGH.
(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. EXPLOSIVES (§ 8*)—CARE REQUIRED—NEGLIGENCE.

A person in possession of dynamite is bound to use the highest degree of care as to third parties, and failure to take reasonable precautions to prevent explosions is negligence.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. §§ 4, 5; Dec. Dig. § 8*]

2. EXPLOSIVES (§ 8*)—NEGLIGENT STORAGE—EVIDENCE.

In an action to recover for injuries to houses by an explosion of dynamite, where the evidence shows that it was stored in a small building, 15 feet square, that there was a red-hot stove in the building within a few inches of the dynamite, that explosive caps were on the floor, and that such a storage was unsafe, a judgment for plaintiff would be sustained.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. §§ 4, 5; Dec. Dig. § 8*]

Appeal from Court of Common Pleas, Westmoreland County.

Action by the Derry Coal & Coke Company, to the use of E. F. Saxman, against H. S. Kerbaugh. Verdict for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John E. Kunkle and Edward B. Robbins, for appellant. Paul H. Gaither and Charles E. Whitten, for appellee.

FELL, J. A number of houses owned by the plaintiff were injured by the explosion of dynamite and blasting powder that had been stored in two small frame buildings, near each other and within a half mile of the plaintiff's property. Several tons of dynamite were placed in a building 15 feet square and 7 feet high, in which there was a stove used to heat the building and to thaw dynamite that had frozen. On three sides of the stove there were racks, on which the frozen dynamite was placed to thaw it for use. There was testimony tending to show that boxes of dynamite placed on the racks would be from 10 inches to 2 feet from the stove; that 20 minutes before the explosion there were boxes of dynamite on the racks, and that the stove was red hot; that dynamite would explode without contact with fire at a temperature of 360 degrees; that it was unsafe to have a red-hot stove in a small building where a large quantity of dynamite was stored; that on the floor of the building there were bundles of wires to which were attached dynamite caps, which would explode if trod upon; that a few seconds before the explosion a fireman in charge of the buildings was seen running from them towards men who were working in a cut nearby, waving his hands as though to warn them of danger. There was no evidence of negligence in the care of the powder house, and the instruc-

tion to the jury was that, if the explosion originated in that house, there could be no recovery. The verdict establishes as a fact that the first explosion was in the dynamite house, and the only question to be considered is whether there was sufficient evidence of negligence in storing and handling the dynamite to warrant the submission of the case to the jury.

The exact cause of the explosion was not shown, but the case was not left to the jury to find negligence from the mere fact of the explosion. A condition, entirely under the control of the defendant, was shown, to which as a producing cause the explosion might be attributed. The presence of a red-hot stove in a small building, and within a few inches of the dynamite and of explosive caps on the floor, was under the testimony an unsafe condition, from which an explosion might result. In the recent case of *Sowers v. McManus*, 214 Pa. 244, 63 Atl. 601, it was said: "While the possession of dynamite to be used for lawful purposes is neither unlawful nor negligent, the person in possession of it is, as to third parties, bound to the highest degree of care, and failure to take any reasonable precaution to prevent explosion of it while in storage is negligence." No explanation of the cause of the explosion was furnished by the defendant, and it was left to the jury to accept the theory of the plaintiff, based on affirmative evidence of negligent acts, or that of an unaccountable accident advanced by the defendant.

The judgment is affirmed.

(222 Pa. 446)

FOSTER v. ALLSHOUSE.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

WITNESSES (§ 144*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Under Act May 23, 1887 (P. L. 159) § 5, cl. "e," where the payee of a note, who was one of the makers, assigned it to another, and dies, another of the makers is incompetent to testify that he did not sign the note and that his alleged signature was a forgery.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 631; Dec. Dig. § 144*]

Appeal from Court of Common Pleas, Westmoreland County.

Action by W. H. Foster, for the use of the Merchants' Trust Company of Greensburg, against J. W. Allshouse. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. S. Byers and A. C. Snively, for appellant. John B. Keenan and John E. Kunkle, for appellee.

POTTER, J. This was an issue awarded to determine the genuineness of the signature to a judgment note. The note purported to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have been made by W. H. Foster, W. B. Croushore, E. L. Woolsey, and J. W. Allshouse, to the order of W. H. Foster, and was by him sold and assigned to the Merchants' Trust Company of Greensburg. Judgment was entered in the name of Foster to the use of the trust company. Foster died soon after the judgment was entered. Allshouse petitioned the court to open the judgment and admit him to a defense, averring that he had not signed the note and that his alleged signature was a forgery. Upon the trial of the issue which was awarded, Allshouse offered to testify that he did not write the name "J. W. Allshouse" to the note in suit and that he did not authorize any person to write it there for him. He also offered to identify his genuine signature. The trial judge ruled that the defendant was not a competent witness, Foster being dead, and excluded the testimony. The correctness of this ruling is the only question raised by this appeal.

If forgery was committed in this connection, it must have been in the lifetime of Foster, the payee of the note. The interest of J. W. Allshouse as one of the makers of the note was clearly adverse to the claim of the payee, and that claim passed into the hands of the trust company in the lifetime of the payee, and is now held by it. The trial judge was entirely right in holding that the case falls literally within the terms of section 5, cl. "e" of the act of May 23, 1887 (P. L. 159), which is as follows: "Nor where any party to a thing or contract in action is dead * * * and his right thereto or therein has passed either by his own act or by the act of the law to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased * * * party be a competent witness to any matter occurring before the death of said party," etc. It matters not that Foster, in addition to being the payee, was also one of the makers of the note. This did not in any way change the character of the interest of Allshouse, or render it less adverse to that of Foster, the deceased. The defendant was permitted to testify as to signatures made by him after the death of Foster. But the offers of testimony, which were rejected, were to show that defendant did not sign the note, that he did not authorize it to be signed for him, and that certain other signatures were made by him. These were all questions of fact, as to matters occurring before the death of Foster, the payee of the note, and as to any such thing the surviving party could not testify.

We do not find in the terms of the offers anything to support the suggestion of counsel for appellant that the testimony of defendant would tend to prove, as an existing fact

at the time of the trial, that the alleged signature was not that of defendant. There was no offer to show any change in the signature, or in the conditions in that respect which existed before the death of Foster, the other party to the contract.

The assignments of error are overruled, and the judgment is affirmed.

(22 Pa. 419)

BUSH v. HARTFORD FIRE INS. CO.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. INSURANCE (§ 371*) — FIRE INSURANCE — WAIVER OF CONDITIONS OF POLICY.

An insurance company may either expressly or by implication waive compliance with any condition in the policy to be performed by the insured, unless by such act insured loses his insurable interest.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 941; Dec. Dig. § 371.*]

2. INSURANCE (§ 383*) — WAIVER OF CONDITIONS.

Though an insurance policy provides that there should be no waiver of any condition, except by express agreement indorsed on the policy, a condition in the policy may be waived by parol.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1018; Dec. Dig. § 383.*]

3. INSURANCE (§ 558*) — PROOFS OF LOSS — WAIVER OF OBJECTIONS.

Where insured transmits proofs of loss within the time required in the policy, the insurers must, if they are dissatisfied, notify the insured, giving him opportunity to rectify his mistake and silence for any considerable time may be a waiver of any other proofs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1384; Dec. Dig. § 558.*]

4. INSURANCE (§ 558*) — PROOFS OF LOSS — WAIVER OF OBJECTIONS.

An insured sent his proofs of loss within the time provided by the policy, and received no notice of any objections to them, and wrote to ask if any other proofs were necessary, and received no reply, and the adjusters made no claim that the proofs were insufficient. *Held*, a waiver of the right to demand other proofs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1384; Dec. Dig. § 558.*]

5. INSURANCE (§ 558*) — PROOFS OF LOSS — WAIVER OF OBJECTIONS.

Fifty days before the expiration of the 60 days within which proofs of loss were to be furnished to an insurance company, the parties to the policy signed a nonwaiver agreement, and insured thereafter filed proofs of loss within 60 days of the fire. The insurance company demanded no other proofs. *Held*, that the nonwaiver agreement could not defeat the insured's allegation of waiver of further proofs.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 558.*]

6. INSURANCE (§ 232*) — STOCK OF GOODS — "UNCONDITIONAL SOLE OWNERSHIP."

An insurer of goods obtained possession of them from their owner under an agreement to replace them, if he sold them, or pay the owner for them at a time specified, and obtained insurance thereon. The previous owner had no control over the goods and no right to repossess himself of them. *Held*, that insured had "an unconditional sole ownership" within the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

meaning of such words, as used in the policy of insurance.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 282.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7154, 7155.]

Appeal from Court of Common Pleas, Armstrong County.

Action by M. E. Bush against the Hartford Fire Insurance Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The court below, through Patton, P. J., charged in part as follows:

"The dispute in this case arises, in the first place, under the sixty-seventh, sixty-eighth, and sixty-ninth lines of the policy, where these words are found: 'If fire occur the insured shall give immediate notice of and loss thereby in writing to this company, protect the property from further damages, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quality and cost of each article and the amount claimed thereon.' It was incumbent upon the plaintiff in this case to do that, and, to show that he did comply with that requirement, he testifies that on the day of the fire he gave notice to young Mr. McLaughlin, the son of the insurance agent, and that he visited the fire on the very day of the fire, and also that Mr. R. M. McLaughlin knew of the fire. Mr. R. M. McLaughlin, the old gentleman, testified that he knew of the fire the day it occurred. There is an act of assembly passed in Pennsylvania in 1883 for the benefit of the insured which simplifies the matter somewhat. That act of assembly sets forth that all that is necessary for the insured to do is to give notice to the local agent of the company within 10 days of the fire, so that that was complied with in this case. We instruct you, first, that after the fire the insured had to give immediate notice thereof in writing to this company. That, we instruct you, has been complied with in the manner as we have stated. It was also his duty to protect the property from further damage, and separate the damaged from the undamaged property, but under the facts as shown in this case that could not be done, because it was a total destruction of the property. Then he was to make a complete inventory of the same, stating the amount and cost of each article and the amount claimed thereon. That he has attempted to do, as we will directly call your attention to.

"It is not materially objected to that the plaintiff did not comply with that provision of the policy. The serious controversy here arises out of the provision beginning at line 69 in the policy, which is as follows: 'And within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company signed and sworn to by said insured, stating

the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon, all encumbrances thereon, all other insurance, whether valid or not, covering any of said property, and a copy of all descriptions and schedules in all policies.' The policy provides for a number of other matters which we need not read to you. We instruct you, gentlemen, that the plaintiff, under the law, did not literally comply with that provision of the policy, that he did not comply with it according to law, and, if there was nothing else in the case, it would be your duty to render a verdict in favor of the defendant, because we instruct you as a matter of law that he did not comply with that provision of the policy which we have read to you. The matter which will be for your consideration is this: Did this company, acting through its agents and representatives, so mislead and lull into security this plaintiff from making a strict compliance with the terms of the policy that, on account of being misled and being lulled to sleep by the conduct and actions of these agents, he failed to comply with this provision? If you believe from the testimony and under the instruction that we will give you that they waived a compliance of this part of the policy, then the plaintiff could recover, notwithstanding the fact that he did not comply with the written terms.

"In regard to that you have, first, the meeting on February 13th. That was 10 days after the fire. Mr. Chapman, who was special agent of the Hartford Fire Insurance Company for Western Pennsylvania, with a certain Mr. Young, came there upon the premises and visited the ruins. They had a talk there with Mr. Bush, in which they asked him in regard to this fire. He told them about this agreement with Mr. Beighley, and they said to him that that would ball up the whole affair. Bush says they requested him to send that agreement and they would adjust the loss, that they would come back as soon as they got the article, and that no complaint was made at that time about no proofs of loss being furnished, and that he was not asked to furnish any other. You have also the testimony of Mr. R. M. McLaughlin at that time, if I recollect the testimony, I believe it was with Mr. Chapman, but that is entirely for the jury, that Mr. Chapman said to Mr. McLaughlin that there would be nothing else to do but pay the loss, and Mr. McLaughlin says that he told Bush that, that he communicated that to Bush. At that conversation it is also in evidence that, after Mr. Bush had communicated to these agents the fact of this agreement with Beighley, what is called a nonwaiver agreement was entered into. That agreement reads as follows: 'It is hereby mutually understood and agreed by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and between M. E. Bush, of the first part, and the American Fire Insurance Company, of Philadelphia, Penna., and other companies signing this agreement, parties of the second part, that any action taken by said parties of the second part in investigating the cause of the fire or investigating and ascertaining the amount of loss and damage to the property of the party of the first part, caused by fire alleged to have occurred on February 3d, 1907, shall not waive or invalidate any of the conditions of the policies of the parties of the second part, held by the party of the first part, and shall not waive or invalidate any rights whatever of either of the parties to this agreement. The intent of this agreement is to preserve the rights of all parties hereto and provide for an investigation of the fire and the determination of the amount of the loss or damage, without regard to the liability of the parties of the second part. Signed in duplicate this 13th day of February, 1907. M. E. Bush, American Fire Insurance Co., by W. D. Strobel, Jr., Adjuster, per J. M. Young; Hartford Fire Insurance Co., by Hubert W. Chapman, Special Agent. Then during that same conversation the testimony is that Mr. Young, who was with Mr. Chapman, appeared to do some talking and told Bush that when they got a copy of the Beighley agreement that they would proceed, but that without it they could not proceed with the adjustment. Gentlemen, you can take into consideration everything that occurred there that day between Mr. Bush on the one side, and Mr. Chapman representing the defendant corporation, and what was said by him, and what was said by Mr. Young in the presence of Mr. Chapman, and determine from that whether or not there was anything there to mislead Mr. Bush or to lull him into a sense of security in not furnishing those proofs of loss.

"The next question that comes is this: There is some dispute in the testimony in regard to the date when these so-called proofs of loss were furnished to the defendant corporation. There is some testimony here that they were forwarded on March 15th. There is an envelope offered in evidence which is postmarked on March 15th. Mr. McLaughlin says that he mailed these so-called proofs of loss within a month or six weeks. Mr. Strobel, the agent, I believe, testifies that they were not received until March 24th. Now, as we have instructed you, these so-called proofs of loss were not sufficient, and the jury can take this into consideration that this defendant corporation, if it received those proofs of loss and retained them without making any objection to them, or saying that they were not complete, you can consider that with the other evidence in the case in determining whether or not the plaintiff in this case was lulled into a feeling of security. Then we have the meeting, the date of which is disputed. Mr. Bush testifies that some

time within the 60 days of the fire he received notice from Mr. McLaughlin, the local agent, to go to Pittsburg, and see these people in regard to adjusting the loss. Mr. Bush states that he went to Pittsburg within the 60 days, and that he talked there with Mr. Strobel and Mr. Chapman, and that they said there that the only objection was as to this partnership agreement, and that nothing was said about the proofs of loss. Mr. Nelson was also present at that conversation, and he says that Mr. Strobel in the presence of Mr. Chapman said that the company was not liable, and that the policy should have been taken in the name of Beighley, and that there were no objections made as to the proofs of loss. Now, then, gentlemen of the jury, you can consider that, consider everything that was said by Mr. Bush and Mr. Nelson and Mr. Strobel and Mr. Chapman, and determine whether or not these parties waived a formal proof of loss, or if by their conduct, their actions, and their declarations they misled Mr. Bush into believing that it was not necessary to furnish further proofs of loss.

"The next matter we have on the part of the plaintiffs is the construction put upon this contract by their general agent. It seems from the testimony offered in evidence that on April 24th, Mr. Guthrie, attorney for Mr. Bush, wrote the following letter: 'George L. Chase, President Hartford Fire Insurance Co., Hartford, Conn.—Dear Sir: M. E. Bush, of Paulton, Westmoreland County, was insured in your Company under Policy No. 803 for \$2,000 by R. M. McLaughlin and Company, Agents at Apollo, Pa. His store was burned February 3d, 1907, with all its contents. Proofs of loss were furnished by the assured to R. M. McLaughlin, Agent, and by him transmitted to your representative at Pittsburg, George W. Chapman, who visited Paulton several weeks ago for the purpose of adjusting the loss. The matter has not yet been adjusted. If you desire any further information or additional proofs of loss kindly advise me and the same will be furnished. Very truly yours, Walter J. Guthrie, Attorney for M. E. Bush.' To that letter an answer was made on April 29, 1907, which is as follows: 'Walter J. Guthrie, Attorney, Apollo, Penna.—Dear Sir: We have your favor of the 24th inst. addressed to President Chase, in reference to claim of M. E. Bush under policy No. 803. We have written to Pittsburg to-day to get further information regarding this matter, and when we do we will advise further. Very truly yours, Frederick Samson, Gen. Agent.' Then again on April 30, 1907, this letter was sent to Mr. Guthrie: 'Hartford, April 30th, 1907. Walter J. Guthrie, Attorney, Apollo, Penna. Dear Sir: Referring again to your communication of the 24th inst. will say that the claim under our policy No. 803 has been put into the hands of Mr. W. D. Strobel, Jr., No. 309 4th Avenue, Pittsburg, Penna., for answer. Yours

very truly, Frederick Samson, Gen. Agent.' Then the next communication in relation to this matter is the following: 'Hartford, May 2d, 1907. W. D. Strobel, Jr., Pittsburg, Pa. Dear Sir: I have your communication of April 30th, in reference to the M. E. Bush claim at Apollo, Pa., agency, and note your remarks in reference to the matter. This is the claim in reference to which we sent a letter from a lawyer within a day or two. I have read very carefully the copy of the contract between Mr. Bush and the owner, Mr. J. H. Beighley. It strikes me after reading the agreement that it is no more or less than the renting of the store. To be sure, there was a valuation of goods which were evidently rented, amounting to \$25. We should feel that if this matter should go into court Mr. Bush would be declared owner of the property. Certainly if he has \$6,000 to \$8,000 involved in this business, and under the contract as between him and the owner of the real estate there is a rental of only \$25, I don't think a jury would consider the question a minute. They would simply say he owns the stock, pay the loss. I should advise if the loss is straight and honest, making a settlement. I don't think we have a ghost of a show in court unless you have something else to stand on aside from the contract between these parties. I should advise going on to the ground and settling the loss in some way. If a compromise can be gotten out of it we shall not object to it. If it is an honest loss and the man has the property he claims, it looks to us like a total loss. Yours truly, Frederick Samson, Gen. Agent.'

"Now, although that letter is written after 60 days had expired, you can consider it with the other evidence in the case in regard to the conduct and actions of the agent in resisting the payment of this loss after receiving that letter from the general agent of the defendant company.

"On the part of the defendant there is testimony that is for your consideration here of Mr. Strobel. If I understood his testimony, these proofs of loss did not come into his hands until after the 60 days were passed. If that is so, it would not be binding on the defendant corporation. You will also consider that on February 13th, at the time that these men had this conversation with Mr. Bush, that he signed what is known as a nonwaiver agreement. After that was signed, anything said by these men would not be a waiver, but you can consider what was said before this nonwaiver agreement was signed. In regard to this conversation that occurred in the forepart of April, both Mr. Strobel and Mr. Chapman testify that that conversation was on April 15th. If that was the case, then it would be after the 60 days was up, and anything that was said then would not be binding on this defendant company as a waiver of proofs of loss. There is a dispute in the testimony which the jury will have to reconcile as best you can. Mr. Chapman and Mr.

Strobel say that that conversation occurred on April 15, 1907, while Mr. Nelson and Mr. Bush say it took place in the latter part of March or the 1st of April, or early part of April. If it occurred after the 60 days, then the jury could not consider it on the question of waiver. If it occurred within the 60 days, then the jury could consider it on the question of waiver. You also have the testimony of Mr. Young and Mr. Chapman as to the conversation that took place with Mr. Bush on February 3d. You also have the testimony of Mr. Chapman and Mr. Strobel as to the conversation that took place at this second meeting. The witnesses differ somewhat in details as to what the conversation was, and it will be for the jury to reconcile the testimony as best you can. You will take the testimony as a whole, and determine whether or not by the actions and conduct of the agents of the defendant company they waived a strict compliance with the terms of this policy of insurance, whether or not they so conducted themselves as to lead Mr. Bush into a false belief that a strict compliance with the conditions of this policy would not be required.

"Gentlemen of the jury, there is another defense set up by this defendant. In the sixteenth and nineteenth lines of the policy it is set forth as follows: 'If the interest of the assured be other than the unconditional and sole ownership, then this policy shall be void.' Now, the defendant company alleges that Mr. Bush was not the sole owner of this property, and to substantiate that defense the following agreement was offered in evidence: 'Article of agreement made this 1st day of March, 1904, between J. H. Beighley of the first part and Bush and Crawford of the second part, witnesseth: That the said party of the first part does hereby lease and let unto the said parties of the second part from the 1st day of March, 1904, for the term of two years, for the yearly rental, three hundred dollars, payable in monthly installments of twenty-five dollars each, the following described property, namely, the two-story frame store building, including ware room and sheds, situated in the village of Paulton; also his entire stock of goods and fixtures contained in said store building amounting to \$2,500, together with horse, harness and wagon valued at \$——. The party of the first part agrees to relet the said building and stock unto the said parties of the second part at the expiration of this lease for a term of one, two, three, four or five years at the same rental and on the same terms. The party of the first part agrees to give the party of the second part ninety days' notice should he wish them to quit at the expiration of this lease, and the said second parties agree to give the said first party ninety days' notice should they wish to quit at the expiration of the lease. The said second parties agree to leave the building in as good condition as at the time of leasing, damage by fire and the natural wear

of the building excepted. The party of the first part agrees to take the entire invoice and turn over all papers should the said second parties decide to quit at the expiration of this lease. Should the amount of invoice be less than that at which it was taken, then the said second parties agree to pay the said first party the difference in cash. The party of the first part agrees to sell at the amount of this invoice to the parties of the second part at any time said second parties decide to buy. In the event of the parties of the second part buying said invoice, then the party of the first part agrees to rent the said building to the parties of the second part for a term of two years at the monthly rental of fifteen dollars. The said second parties are given the privilege of again renting said building for term of one, two, three, four or five years at the expiration of said term. The party of the first part agrees that he will not engage in the store business during the life of any lease with the parties of the second part within a radius of two miles of Paulton. J. H. Beighley. Bush and Crawford. M. E. Bush. M. M. Crawford. Gentlemen of the jury, in regard to that paper we instruct you as a matter of law that Mr. Bush was sole and unconditional owner of the property and comes within the requirements of that part of the contract. Although the parties used the words 'lease' and 'let,' yet in our opinion that paper did not constitute what is known in law as a bailment, and Mr. Bush was the sole owner of the property at the time he effected the insurance.

"On the part of the defendant we have been asked to answer the following point: (1) That under the law and all the evidence in the case the verdict of the jury should be for the defendant. That point is refused, but we reserve the question with the privilege of entering judgment non obstante verdicto.

"Gentlemen, the main question before you is this: Did these agents of this insurance company waive a strict compliance with the terms of this policy in regard to the proofs of loss, or did they so conduct themselves as to mislead Mr. Bush into not strictly complying with the terms of the policy? If the jury believes that they did, then your verdict should be in favor of the plaintiff for the sum of \$2,000, with interest from 60 days after proofs of loss were waived, say interest from June 3d last. But, if you find that these agents did not mislead Mr. Bush, that he was not lulled to sleep by their conduct, and that they did not waive a strict compliance with the terms of the policy, then your verdict should be in favor of the defendant company."

Verdict and judgment for plaintiff for \$2,000. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. K. Jennings, Dale C. Jennings, and Ross Reynolds, for appellant. J. W. King and W. J. Guthrie, for appellee.

MESTREZAT, J. It is well settled that an insurance company may waive a compliance with any condition of a policy to be performed and observed by the insured, except, as it has been held, when the insured by the act loses his insurable interest. The condition is inserted in the policy for the benefit of the insured, and hence there is nothing to prevent the company from waiving it whenever it may desire. This may be done expressly or by implication; and in either case the company thereafter cannot insist upon a performance of the condition. The law will not permit it to mislead or deceive the holder of its policy by any act or conduct on its part, and thereafter, to his detriment, insist upon full performance of a condition which it has waived. As said by Chief Justice Church in *Brink v. Hanover Fire Insurance Company*, 80 N. Y. 108: "Every consideration of public policy demands that insurance companies should be required to deal with their customers with entire frankness. They may refuse to pay without specifying any ground, and insist upon any available ground; but, if they plant themselves upon a specified defense, and so notify the assured, they should not be permitted to retract after the latter has acted upon their position as announced, and incurred expenses in consequence of it." In *Freedman v. Fire Association*, 168 Pa. 249, 254, 32 Atl. 39, 40, this court, in an opinion by our Brother Fell, said: "The trend of our decisions has been to hold insurance companies to good faith and frankness in not concealing the ground of defense and thus misleading the insured to his disadvantage. They may remain silent except when it is their duty to speak, and the failure to do so would operate as an estoppel; but, having specified a ground of defense, very slight evidence has been held sufficient to establish a waiver as to other grounds." It is also settled law that an insurance company may waive a condition in a policy by parol, although it contains a stipulation that there shall be no waiver of any condition except by an express agreement indorsed on the policy. This rule is stated as follows in 16 Am. & Eng. Ency. of Law (2d Ed.) 935, with a citation of authorities sustaining it: "This rule [permitting the waiver of a condition by parol] applies notwithstanding stipulations in the policy that nothing less than an express agreement indorsed on the policy shall be effectual for that purpose, since such a stipulation is itself a condition and is as capable of being waived or dispensed with as any other condition of the instrument, and since parties to contracts cannot so tie their wills as to be unable thereafter to do by consent what the law allows." And in 19 Cyclopaedia of Law & Procedure, 777, it is said:

"Even a stipulation that the conditions of a policy cannot be waived, or if waived at all only in a certain manner, may itself be waived." Nor can an insurance company, after alleging or setting up a certain breach of the policy as a forfeiture, be permitted subsequently to defend an action on the policy on the ground of different or other breaches of the contract. It has been generally held that, if the insurer after a loss has occurred claims a forfeiture for noncompliance with certain conditions of the policy, it cannot be heard afterward to assert further or different breaches as a defense. 19 *Cyclopedia of Law & Procedure*, 793; *Western, etc., Pipe Lines v. Home Insurance Company*, 145 Pa. 346, 22 Atl. 635, 27 Am. St. Rep. 703.

Another well-settled principle applicable to the case in hand is that, when the insured in good faith transmits to the insurer what he terms sufficient proofs of loss within the time required in the policy, it is the duty of the insurer, if such proofs for any reason are unsatisfactory, to promptly notify the insured, setting forth wherein the proofs do not comply with the conditions of the policy, and thereby give the insured an opportunity to rectify his mistake. Silence on the part of the insurer for any considerable time after the receipt of such proofs of loss will be taken to be a waiver of the necessity for any further proof of loss, and such proofs, furnished by the insured, will be held to be a compliance with the condition of the policy. In *Gould v. Dwelling-House Insurance Company*, 134 Pa. 570, 588, 19 Atl. 793, 795, 19 Am. St. Rep. 717, the present chief justice, delivering the opinion, formulates the rule from our decisions on this subject as follows: "If the insured, in good faith, and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy, good faith equally requires that the company shall promptly notify him of their objections, so as to give him the opportunity to obviate them; and mere silence may so mislead him to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel." This rule has since been approved and enforced in many cases, the more recent of which are *Welsh v. London Assurance Corporation*, 151 Pa. 607, 25 Atl. 142, 31 Am. St. Rep. 786; *Moyer v. Sun Insurance Office*, 176 Pa. 579, 35 Atl. 221, 53 Am. St. Rep. 690. Under the facts, as they appeared at the trial, and the law applicable thereto, it was a question for the jury to determine whether the defendant company had by its action and conduct waived any further proofs of loss than those furnished by the plaintiff. It is apparent throughout the case that the plaintiff acted with the utmost good faith towards the defendant company in regard to his loss. Immediately after the fire he notified the local agent who countersigned the policy of the loss, and at the plaintiff's suggestion the

agent at once notified the company. This notice was on a form furnished by the company for that purpose, and hence was in due form and conveyed to the company the necessary information concerning the fire. The company evidently acted upon this notice because within a few days thereafter its own special agent, Chapman, with the adjuster of the American Fire Insurance Company, which also had an insurance of \$2,000 on the same property, appeared at the scene of the fire. Shortly thereafter, on the same day, these agents of the companies had an interview with the plaintiff in a local hotel. The company's local agent at Apollo testified that on this occasion Chapman "admitted that it was a total loss. He talked very reasonably about it, and I supposed that there would be nothing else to do but to pay it unless something else turned up." From the testimony it is apparent that the loss would have been adjusted then and there had it not been for an incidental remark of the plaintiff that he still owed \$2,000 on the goods which had been consumed by the fire. The plaintiff testifies that, when the adjusters learned this fact, they declined to proceed further with the adjustment until they had a copy of the contract between the plaintiff and Beighley, from whom he had procured the goods, and that they then said they would "come back and complete the adjustment." So far as appears from the evidence, nothing was said at this interview about the proofs of loss, or that any would be demanded. The plaintiff, however, in about a month thereafter, had prepared an inventory or statement in detail of the goods destroyed, verified by the affidavits of himself and the clerk who assisted him in making the inventory, and then handed it to the local agent of the defendant company, by whom it was on the same day sent to one of the adjusters at Pittsburgh, where Chapman, the special agent of the defendant company, saw and had access to it. The company failed to notify the plaintiff of any objection to this proof of loss, or in any way to intimate to him that it was not satisfactory and in conformity with the requirements of his policy. So far as he knew, therefore, he had complied with the condition of his contract requiring him to furnish proofs of loss, and had no reason to believe that the proofs furnished were in any respect objectionable to the defendant. Again, and within 60 days from the time of the fire, the plaintiff with a friend, at the request of Chapman, met him and Strobel, the adjuster of the American Fire Insurance Company, at the latter's office in Pittsburgh "for the purpose (as stated by Chapman) of ascertaining, if Bush would agree to an offer of compromise settlement." The conversation at this interview related entirely to the plaintiff's loss and offer of compromise by Chapman. Not a word was said by either of the adjusters in regard to the proofs of loss, or that they were

insufficient, or did not comply with the conditions of the policy. A compromise was suggested on the part of the adjusters on the basis of the satisfaction of the claim on payment of one-half of the amount of the insurance. The plaintiff at once declined to accept the proposition, and insisted upon the payment of the full amount of the policy.

On April 24, 1907, Bush's attorney wrote the defendant company, stating that his client held their policy for \$2,000 on his goods; that they had been totally destroyed by fire; that proofs of loss had been furnished; that its agent had visited Paulton several weeks prior thereto to adjust the loss; that the matter had not been adjusted, and concluding: "If you desire any further information or additional proofs of loss, kindly advise me, and the same will be furnished." The company's general agent replied on April 29th, acknowledging receipt of the letter, and saying he had written to Pittsburg for further information and would advise further. The next day the general agent again wrote in reply that the claim had been put in W. D. Strobel's hands for answer. No objection to the proofs of loss was made in the replies of the company's agent nor an intimation of any defense to the claim. If these several facts were established, of which there was ample proof to go to the jury, the jury was fully justified in finding that the defendant company did not intend to insist upon further proofs of loss than those furnished by the plaintiff. It is manifest, we think, that the loss would have been adjusted at the first interview on February 13th if nothing had been said about the indebtedness of the plaintiff to Beighley and the contract under which he held the goods. A further consideration of the adjustment, if the evidence is believed, was postponed by the adjusters simply because of the doubt arising in their minds of the right of the plaintiff to recover by reason of his not being the sole owner of the goods which were insured. The same objection to the claim, although manifestly not regarded by them as substantial, was in the minds of the adjusters when the plaintiff subsequently met them at their request in Pittsburg to attempt a compromise. At that time the plaintiff had sent his proofs of loss, and they were in the possession of the company. He had received no notice from the company of any objections to the proofs nor that they were not in due form and in strict compliance with the policy. The Pittsburg interview also passed off without any intimation on the part of the company or its agent that the proofs were not sufficient. The jury was therefore fully justified in finding that the silence of the company until the bringing of the suit was under the circumstances a waiver of the right to demand other or further proofs of loss. Under the authorities cited the testimony clearly made the ques-

tion one of fact for the jury, and the court properly submitted it.

It may well be admitted that the counsel for the plaintiff made a mistake when he advised his client to sign the nonwaiver agreement. There was absolutely no necessity for this agreement, if the company intended to carry out in good faith its contract with the plaintiff. The agreement was signed by the plaintiff when the adjusters came to the scene of the fire on February 13th, at least 50 days before the expiration of the 60 days within which proofs of loss were required to be filed. The interim was amply sufficient for the company to investigate the cause of the fire and ascertain the amount of loss, and to affirm or deny its liability. There was therefore no necessity for an agreement "to preserve the rights of all parties," and the only effect of such an agreement was to supply the company with evidence to defeat the plaintiff's allegation of waiver. But the agreement does not necessarily defeat the plaintiff's right to recover in this action. It was simply a part of the evidence which was submitted to the jury to determine whether the defendant company had waived its right to insist upon other and more formal proofs of loss. As pointed out above, aside from this agreement, the evidence was ample to justify the jury in finding that there had been a waiver of the proofs of loss. The nonwaiver agreement was signed by the plaintiff on February 13th. It was subsequent to that date and within 60 days of the fire that he furnished the proofs of loss to the company through the local agent. By its conduct on the various occasions referred to in the evidence, did the defendant intend to waive its rights under the policy to require other proofs of loss, and was the evidence sufficient to warrant the jury in so finding? If this agreement had been inserted in the policy in the first instance, instead of being made part of it by subsequent agreement, the defendant company could undoubtedly have waived all its rights thereunder. This proposition is clearly supported by the authorities we have cited above. The parties to this contract were the parties to the policy, and, as either party could waive his rights under the policy, he certainly could do so under the contract. Those who make a contract of insurance can unless prevented by law unmake or avoid it, and either party may decline to insist upon the performance of stipulations made for his benefit. We therefore think the learned judge was right in submitting it as a part of the evidence to the jury to determine the question whether the defendant company had waived its rights to insist upon more formal proofs of loss.

The other defense interposed by the defendant company to the plaintiff's action is that he was not the sole owner of the property insured. The policy provides that it

shall be void "if the interest of the insured shall be other than unconditional and sole ownership." The plaintiff held this property by a contract with one Beighley. By the terms of that agreement, Beighley leased to Bush the store and also the goods contained in it. The policy involved in this litigation covered the goods. The goods were delivered by Beighley to Bush for a term of two years with the privilege to the latter of retaining them for five years longer or purchasing them if he desired. At the expiration of the lease Bush was to pay Beighley the difference in the invoices taken at the time he received them and when they were redelivered to Beighley. In the meantime Bush had sole possession of the goods and the right to sell any or all of them; the difference between the value of the goods in the store at the time he took possession and when he relinquished possession to Beighley, at the end of the lease, being the price he had to pay. Bush, therefore, by this contract between him and Beighley, obtained possession of the goods with the right to sell them, and was required to replace them or pay Beighley for them at the time specified in the agreement. He was required to pay at the end of his lease for the goods which the invoice, then taken, showed to have been sold by the plaintiff, whether it was all or a part of the goods. As testified by Bush: "Mr. Beighley turned the goods over to me and I was to pay for the goods in goods or in cash; it didn't matter which." While the goods were in the possession of the plaintiff under the contract, Beighley had no control whatever over them, and had no right to repossess himself of them. They were absolutely in the possession and control of the plaintiff, and he had the right to dispose of them at any price or any way he saw fit. At the time of issuing the policy insuring the goods, and until they were destroyed by fire, it is manifest, we think, that under the contract with Beighley the plaintiff's interest in the goods was an "unconditional and sole ownership" within contemplation of the policy. The learned judge was therefore right in so construing the contract.

We may appropriately conclude this opinion by quoting from a letter of the defendant's general agent to one of the adjusters on May 2, 1907, which shows the interpretation put upon this contract by the defendant company, and, further, that, if his advice had been taken, the company would not now be attempting to defeat an honest claim by the baldest technicality. The letter reads: "I have read very carefully the copy of the contract between Mr. Bush and the owner, Mr. J. H. Beighley. It strikes me after reading the agreement that it is no more or less than the renting of the store. * * * We should feel that if this matter had to go into

court Mr. Bush would be declared owner of the property. Certainly if he has from \$6,000.00 to \$8,000.00 involved in this business, and under this contract as between him and the owner of the real estate, there is a rental of only \$25.00, I don't think a jury would consider the question a minute. They would simply say he owns the stock—pay the loss. * * * I don't think we have a ghost of a show in court unless you have something else to stand on aside from the contract between these parties. I should advise going on to the ground and settling the loss in some way."

The judgment is affirmed.

(222 Pa. 462)

HUGHES v. CENTRAL ACCIDENT INS. CO.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. INSURANCE (§ 539*)—ACCIDENT INSURANCE —"IMMEDIATE NOTICE."

The word "immediate," as used in a policy of accident insurance, requiring an "immediate notice" of an accident, means a reasonable time after the accident, under the circumstances of the particular case.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1329; Dec. Dig. § 539.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3393, 3394; vol. 8, p. 7681.]

2. INSURANCE (§ 668*)—ACCIDENT INSURANCE —NOTICE OF INJURY.

Where a passenger on a train is struck by a cinder in his eye, and five weeks thereafter is informed by a physician that a cataract is forming, from the accident, and no immediate notice is thereupon given to an accident insurance company, the question whether it was given within a reasonable time is for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1776; Dec. Dig. § 668.*]

3. INSURANCE (§ 662*)—ACCIDENT INSURANCE —ACTION ON POLICY—EVIDENCE.

After insured had given notice of an accident to the insurance company, and it denied all liability, on the ground that the notice was too late, but thereafter sent insured a form, requesting him to state the facts therein, but denying all liability, the blank filled out is for the consideration of the jury as one of the elements in the case.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 662.*]

4. INSURANCE (§ 146*)—ACCIDENT INSURANCE —CONSTRUCTION OF POLICY.

The language of the conditions in an accident insurance policy is to be construed most favorable to the insured.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 146.*]

5. INSURANCE (§ 559*)—ACCIDENT POLICY —PROOFS OF LOSS—WAIVER.

An unqualified refusal by an insurance company to pay a loss, based on facts within the company's knowledge, justifying insured that the furnishing proofs of loss would be useless, is a waiver thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 559.*]

6. INSURANCE (§ 559*)—ACCIDENT INSURANCE —DEFENSES.

An accident insurance company, denying all liability on the ground that notice of the ac-

cident had not been sent in time, cannot defend on the ground that proofs of loss had not been furnished.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 558.*]

Appeal from Court of Common Pleas, Jefferson County.

Action by C. Hughes against the Central Accident Insurance Company of Pittsburg. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant presented, inter alia, these points: "(1) If the plaintiff received the injury he alleges on December 14, 1904, the notice received by the company on January 31, 1905, was not a compliance by the plaintiff with the provision of the policy that 'immediate written notice must be given the company at Pittsburg, Pa., of any accident and injury for which a claim is to be made, with full particulars thereof, and full name and address of the insured.' Answer: Refused." "(4) There is no sufficient evidence that the company waived that provision of the policy which has just been referred to. Answer: Refused. If the jury find that the defendant denied all liability under the policy, on the ground that the preliminary notice therein provided for had not been given in time, such denial of liability would be evidence of a waiver of proofs of loss, and the sufficiency of the evidence to establish such waiver is for the jury." "(8) Under the undisputed evidence in the case the plaintiff has not shown the irrecoverable loss of the sight of his eye, within the provision of the policy entitling him to specific benefits for the irrecoverable loss of the sight of an eye within 90 days from the date of accident. Answer: Refused." The court below charged in part as follows: "But what is meant by immediate written notice is notice within a reasonable time after the accident, and what is a reasonable time is for the jury to determine, under the facts and circumstances of the case. Under the peculiar circumstances of this case, and especially in view of the fact that the plaintiff did not know, and had no reasonable grounds for anticipating, the result of the injury to his eye until on or about the time he notified the defendant company of the accident, I do not think the court is warranted in saying as a matter of law that that notice was not given in time, and I, therefore, submit it as a question of fact to be determined by the jury."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Stephen Stone, William A. Stone, Charles Corbet, Edward A. Carmalt, and Nathan L. Strong, for appellant. Cadmus Z. Gordon and Jacob L. Fisher, for appellee.

STEWART, J. The plaintiff, while a passenger in a railroad car, received a wound in

his right eye, through external, violent, and accidental means, independently of all other causes, which resulted in a total and irrecoverable loss of vision in the injured eye. The jury so found, upon evidence which, if convincing to them, was entirely sufficient to support their verdict. The only questions raised by the assignments which call for consideration are those which challenge the sufficiency of plaintiff's compliance with the provisions of the policy under which he was insured, in the matter of notice and proofs. The policy contains the following provision: "Immediate written notice must be given to the company at Pittsburg, Pa., of any accident and injury for which a claim is to be made, with full particulars thereof, and full name and address of the insured." The accident occurred December 14, 1904. The written notice of the accident was not given to the company until January 27, following. Appellant complains that the delay in notifying the company was so great that the court should have decided it as a matter of law adversely to the plaintiff. It has been repeatedly ruled, in actions under policies requiring immediate notice to be given of the accident, that the word "immediate" is to be construed as meaning a reasonable time after the accident, under the facts and circumstances of the particular case. Cases arise where the delay has been so great that the court is fully justified in ruling it as a matter of law, but this occurs only where the admitted facts and circumstances disclose nothing by way of extenuation or excuse. Where the facts are sufficient to account in some measure for the delay, without reflecting upon the diligence or good faith of the assured, it is for the jury to say whether the delay was reasonable or not under the circumstances. The present case is in some respects exceptional. The finding of the jury refers the plaintiff's loss of vision in his right eye to the accident which happened in a railroad car, thus described by Dr. Zeigler, an expert witness, called by the plaintiff: "A perforation of the lens by a minute foreign body, or of some anterior portion of the eyeball, which caused an inflammation of the tissues surrounding the lens, thereby disturbing its nutrition, a cataract resulting therefrom." When a passenger in a railroad car is so unfortunate as to get a cinder in his eye—and that is just what happened to this plaintiff—it is not such an unusual occurrence as to occasion surprise, or create any special anxiety as to results, unless indeed the irritation and pain should long continue. A disappearance or subsidence of the irritation usually denotes, at least to people without technical or scientific knowledge in regard to such matters, that the foreign substance that caused the disturbance has not found lodgment in the eye, and it at once ceases to be a matter of con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cern. The plaintiff was made painfully aware of the fact that he had been struck in his right eye by a spicula of some sort, supposed by him to be a cinder. He called to his assistance a fellow passenger, who upon examination could find nothing foreign in the eye. The irritation and pain that followed the accident continued during the afternoon and night, but by the next morning both had subsided, and the inconvenience and discomfort, then but slight, soon disappeared entirely. The plaintiff resumed his work as a practicing dentist, and gave the accident no further thought. Several weeks afterwards, however, realizing some impairment of vision in the eye that had been injured, he had the eye examined by a physician who happened in his house on a social call. The examination there made was superficial, but the doctor expressed the opinion that a cataract was forming in the eye. Within a week or two after, either on January 4th or 9th, the dimness of vision meanwhile having increased, plaintiff consulted Dr. Walters, a specialist, who found the beginning of a cataract, but no exciting cause for it. Now it may be that had the plaintiff been given to understand at either of these examinations that the cataract forming in his eye could be attributed to the injury he had received in the car, it would have been his duty at once to have notified the company of the accident. But it is impossible to derive any such fact from the evidence, at least with that certainty with which it must be made to appear before the court could accept it as a fact. Dr. Walters says that he thought that the cataract might be "traumatic" in its nature, but he does not say that he so told the plaintiff, and it is by no means certain that the latter would have understood its relation to the accident had he been so told.

The association between cataract and a spicula of cinder which weeks before had found its way within the eye and irritated it for a day, would not be likely to occur to the unscientific mind. It did not occur to Dr. Walters until his second examination on January 27th the day plaintiff sent his notice to the company; nor did it occur to Dr. Zeigler, another of plaintiff's expert witnesses, until after his second examination on May 13th, and it has not yet occurred to Dr. Robinson, who, testifying on behalf of the defendant, says there was no connection whatever between the cataract which blinded plaintiff's eye and the cinder accident, and that in all his experience, admittedly large, he has never seen a cataract caused by cinder getting in the eye. When did the plaintiff first have reason to believe that his loss of sight resulted from the accident in the car? The answer to this question would largely determine whether the notice to the company was unreasonably delayed. Like all other questions of fact in the case, it was

for the jury; and the court very properly left it with them, under very full and fair instructions as to the law. The notice in the case, though it did not indicate specifically the day on which the accident happened, stated the time approximately, and stated specifically where and under what circumstances it had occurred. Although directed to the agent of the company, and not to the home office, yet it was forwarded at once by the agent to the company, and its receipt was acknowledged. In point of substance it fairly met the requirements of the policy. The policy contained this further provision: "Affirmative proof of death by external, violent and accidental means, or of loss of limb or sight, or of duration of disability, must also be furnished to the company within two months from the time of death, or loss of limb, or sight, or of the termination of disability." Nothing is specified as to the extent or character or mode of the proof required, except that it be affirmative. In its letter to the plaintiff acknowledging the receipt of the notice sent as to the accident, the company, in positive and express terms, refused to recognize any liability to the plaintiff, on the ground that the notice given did not follow immediately upon the accident. This letter reads in part as follows: "We hardly feel, Doctor, that we can for a moment consider the claim, the notice of which comes to us at so late a date. If you will kindly refer to your policy you will find that notice of accidental injury must be given to the company immediately. * * * We are extremely sorry that this matter was neglected on your part, but a safe and businesslike conduct of insurance business will not permit us to disregard so vital a provision of the contract." The week following the receipt of this letter, the plaintiff wrote to the company, stating, as the reason of delay in giving notice of the accident, that he had not expected serious results, and that it was only when the doctor advised him fully as to the situation that he traced his present condition—loss of sight in the right eye—to the accident. The reply of the company, under date of February 11th was another equally positive and explicit denial of liability, on the ground of delay in giving notice; but it expressed a willingness, on the part of the company, that the plaintiff submit the facts of his case, not proofs. The letter proceeds: "Now strictly speaking, as we have said before, we cannot consider ourselves liable under our policy for the injury you suffered. Still we are perfectly willing, if you desire, that you submit the facts of your case. Perhaps there may be an equity in it, and we will look into the matter and allow that equity. Legally we are not liable and cannot bar out the conditions of our policy, but if you desire to fill up the inclosed blanks you may do so. We send them with reservation of all our rights, waiving under the condi-

tions of the policy, but simply that you may present the facts to us, and that you may show under what basis you are asking us to recognize a claim or some equities for your disability and loss." The blanks furnished the company were filled up and forwarded April 4th, the delay in forwarding being due to the absence of Dr. Walters. The blank filled up by Dr. Walters, accompanied by his jurat, may be fairly regarded as the affirmative proof required by the policy. It contained an express averment that plaintiff, while riding in the train, was struck in the eye by a foreign body, which lodged in the eye, and that some weeks later in examining the eye he found a cataract practically producing total blindness. If anything more than this was required by the company, it should so have appeared in the policy. "While courts will extend all reasonable protection to insurers, by allowing them to hedge themselves about by conditions intended to guard against fraud, carelessness, want of interest, and the like, they will nevertheless enforce the salutary rule of construction that as the language of the conditions is theirs, and is therefore in their power to provide for every proper case, it is to be construed most favorably to the insured." May on Insurance, § 175.

The sworn statement of Dr. Walters was affirmative proof of what was claimed by the plaintiff as to the cause of the accident and the extent of his injury. It was not, as we have seen, submitted as proof of loss; but it nevertheless answered the whole purpose of the policy requirements, in sustaining and corroborating the plaintiff's statement in its material features. It is unimportant what the purpose was in forwarding it, if it met the requirements of the policy. The learned trial judge so held, and submitted it to the jury to determine whether it had been forwarded without unreasonable delay. But apart from this, even though the proofs were defective, and were not sent within the required time, the defendant was not in position to defend on any such ground. It disclaimed liability on the policy immediately upon receipt of notice of the accident, on the ground that the notice came too late. It asserted and reasserted its determination to refuse payment because of the plaintiff's default in this respect, and only sent the blanks for proofs to the plaintiff because of his inopportunity, and to the end that it might determine whether there were equitable considerations which should move them, not to pay a legal obligation, but rather to extend charitable relief. It is settled law that an unqualified refusal to pay a loss, based on facts within the company's knowledge, and made under such circumstances as to justify the insured in believing that the rendition of proofs would be a vain act, and that they would not be examined, is an equivalent of

an express agreement of waiver. The rule is thus stated in May on Insurance (section 469): "A distinct denial of liability and refusal to pay, on the ground that there is no contract, or that there is no liability, is a waiver of the condition requiring proof of the loss. It is equivalent to a declaration that they will not pay though the proof be furnished; and, to require the presentation of proof in such a case, when it can be of no importance to either party, and the conduct of the party in favor of whom the stipulation is made has rendered it practically superfluous, is but an idle formality, the observance of which the law will not require." The doctrine here expressed has received repeated recognition by this court. We need only refer to *Penna. Fire Ins. Co. v. Dougherty*, 102 Pa. 568, *Inland Ins., etc., Co. v. Stauffer*, 33 Pa. 397, *Home Ins. Co. v. Davis*, 98 Pa. 280, and *Lebanon Mutual Ins. Co. v. Erb*, 112 Pa. 149, 4 Atl. 8.

A review of the whole case has satisfied us that appellant is without cause of complaint. It was fairly submitted on the facts, and the instructions as to the law were correct. Appellant was given a larger latitude in its defense than it was entitled to claim. Judgment affirmed.

(232 Pa. 410)

BRACKEN v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. TRIAL (§ 260*)—REFUSAL OF INSTRUCTIONS GIVEN.

Where defendant asks instructions as to the duty of a person entering on five tracks of a railroad before crossing the same, the denial of the instructions was harmless where two other points were submitted by defendant, each defining the same standard of duty as was asserted in the first, and both were affirmed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

2. EVIDENCE (§ 474*)—OPINION EVIDENCE—ADMISSIBILITY.

Where a witness is familiar with a particular grade crossing, having seen trains frequently passing it, he may be permitted to testify that a particular train was running at the usual rate, though he was not an expert.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2202; Dec. Dig. § 474.*]

3. APPEAL AND ERROR (§ 1201*)—REVERSAL—NEW TRIAL—ADDITIONAL PARTIES.

Where an action for wrongful death is brought in a father's name, the mother's name may be added as a party plaintiff after the case has been reversed on appeal, and is called for second trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1201.*]

4. CONTINUANCE (§ 30*)—GROUNDS—SURPRISE BY AMENDMENT.

Where an action by a father is brought for the use of another and judgment for plaintiff is reversed, and the name of the mother is then added by amendment, omitting the name of the use plaintiff, such omission is no ground for a continuance on the ground of surprise.

[Ed. Note.—For other cases, see Continuance, Dec. Dig. § 30.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Court of Common Pleas, Cambria County.

Action by H. C. Bracken against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

At the trial the defendant, by Mr. Storey as counsel, pleaded surprise as follows: "The court having directed that the jury be qualified to try the case of Hudson C. Bracken against the Pennsylvania Railroad Company, entered to No. 32, June term, 1903, H. W. Storey, counsel for the defendant company, objects to the changing of the parties at this time—just as the jury is to be sworn—from that of Hudson Bracken, for the use of W. David Lloyd, against the Pennsylvania Railroad Company, for the following reasons: (1) That the record shows that the judgment was assigned to W. D. Lloyd and an appeal taken to the superior court in that way. (2) That the cause was put down for trial for the March term of court in the name of Lloyd v. Pennsylvania Railroad Company, and so appears on the official calendar and in the public advertisements in the newspapers in the list of causes for trial. (3) That the subpoenas issued to the defendant company were in the name of and for the use of W. D. Lloyd against the Pennsylvania Railroad Company. (4) We plead surprise at the changing of the parties at this time, and state to the court that we have not subpoenaed any witnesses and have none in court, and are unable to meet the case of Bracken (Lloyd) v. Pennsylvania Railroad. Therefore we ask that the cause be continued."

The Court: "This cause was heretofore tried in this court under the title of Hudson C. Bracken v. P. R. R. Company. After verdict and judgment entered thereon, the judgment was assigned to W. David Lloyd, and, upon appeal, the judgment entered in the court below was reversed, set aside, and a venire de novo awarded by the superior court. We believe this disposes of any claim by Mr. Lloyd out of the assignment of the judgment, as it no longer exists, and the cause of action remains in Hudson C. Bracken, and the jury should be qualified to try that cause. For this reason, we deny the motion of counsel for the defendant company, note an exception, and seal a bill."

The attention of the court having been called to the omission to dispose of the rule granted March 6, 1905, to show cause why the plaintiff should not be allowed to amend the statement by including therein the name of Alice Bracken, the mother of the decedent and wife of Hudson C. Bracken, the plaintiff, before jury sworn, upon motion of counsel for plaintiff, that the rule is now made absolute and the name of Alice Bracken is added to the pleadings, as one of the parties plaintiff.

H. W. Storey, counsel for defendant, objects to the amendment for the reason that

the statute of limitations interposes inasmuch as the death of the son occurred on November 29, 1902, and that the making of the rule absolute, after the intervention of several regular terms of court, would be improper and illegal, and we ask the court to note an exception.

The Court: "Exception noted and bill sealed."

Louis Schenkemeyer, a witness called by the plaintiff, was asked this question: "Mr. Lloyd: Q. How was it [the train] going compared with the trains usually going over the crossing? Mr. Storey: Objected to for the reason the question calls for an opinion of the witness. The Court: We overrule the objection, note an exception, and seal a bill for defendant. Q. How was it going compared with the trains usually going over that crossing? A. I suppose I have seen trains going over that crossing as fast as that train was running, but it is a hard matter for a man that is not familiar with it to tell. Q. Do you mean by that the train was going as fast as the fastest train that you have seen going over that crossing? Mr. Storey: Objected to as incompetent and as asking for an opinion from the witness, and for the reason that counsel is attempting to get something out of the witness when he has repeatedly said that he could not determine the speed of any train. The Court: The objection is overruled, exception noted, and bill sealed for the defendant. A. I am telling you that the train was going at the usual rate of speed, at a fast rate of speed, and that is about all I can say about that; but there are trains that have run faster through there, I think, as I have understood they have."

Andrew Dennison, a witness called by the plaintiff, was asked this question: "Q. How fast was it [the train] coming? A. I could not tell you that. Q. How fast was it coming compared with passenger trains running over that crossing? Mr. Storey: We think this is objectionable. Some passenger trains run faster than others. The Court: The objection is overruled, an exception noted, and a bill sealed for the defendant. A. It was coming straight at me. I think it was coming pretty fast. It was going as fast as they run passenger trains through there. Q. Was this train going as fast as passenger trains cross this crossing when the gates are down? A. Yes, sir; I think it was."

Defendant presented this point: "Where there are five tracks on the main line of a trunk railroad, it is the duty of one crossing to look and listen, in both directions, even after he has crossed three of the tracks. The Court: This proposition is for the jury, and the request is denied. We may add that we know of no court that has ever held as a proposition of law that one must stop, look, and listen between the several tracks of the railroad. Negligence has been

defined to be a lack of caution according to the circumstances, and the jury must determine whether or not, after one has crossed a number of tracks of a railroad, it would be safer for him to stop, or safer to go on."

Verdict for plaintiff for \$1,906.70, upon which judgment was entered for \$1,750; all above that amount having been remitted.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. W. Storey, for appellant. William Williams and W. David Lloyd, for appellee.

STEWART, J. That the evidence was sufficient to carry this case to the jury on the question of defendant's negligence is not disputed. The effort was to charge the young lad who met his death with contributory negligence. These were the circumstances: The boy, Harry Bracken, under the age of 13 years, was playing with some companions at a point near the railroad crossing between Johnstown and Morrellville on the Cambria side. The safety gates at the crossing were closed to give a clear track to a passing engine or train, and several wagons and cabs were waiting outside for the lifting of the gates. As soon as lifted, these cabs and wagons entered upon the crossing. Young Bracken and two of his companions got up on the rear end of the wagon third from the gates, with a view to cross over. The railroad tracks at this point are five in number. Before proceeding far upon the crossing, two of the boys, not because of any sense of danger, but simply to return to the Cambria side, jumped from the wagon. As soon as they had alighted, they observed an approaching passenger train coming with rapid speed from the west, and then not more than 15 or 20 yards from the wagon. They signaled as best they could to Bracken, who was well toward the front of the wagon, but in another instant the wagon with Bracken in it having crossed three of the tracks was on the fatal fourth, where the collision occurred. The driver escaped by jumping just in time, the wagon was utterly demolished, and the boy instantly killed by the passing train. Several of the witnesses testified that, when they saw the boy on the wagon, he was not looking in the direction from which the train approached. None, however, say that they had him under their eyes for more than an instant, and that immediately before the accident occurred. A single witness testified that had the boy looked to the west when the wagon was on track No. 3, while he might not have been able to see the engine or cars of the approaching train, because of standing cars on a nearer track, he could have seen the smoke and steam from the train approaching. The inference defendant sought to derive from the testimony was that the boy was either negligent in failing to observe the train approaching in time to escape the danger, or, if he did ob-

serve it, was reckless in attempting to cross track No. 2 after the danger became apparent. That failure attended the effort to persuade the jury that the boy's negligence contributed to the accident cannot be surprising to one who reads carefully the evidence. We are here, however, concerned only to inquire whether the defendant, because of misdirection by the trial judge as to the law governing the case, was denied a fair opportunity to make good its contention in this regard before the jury. The complaint is with respect to the answer given the first of the points submitted by the defendant. The point asked the court to say: "Where there are five tracks on the main line of a trunk railroad, it is the duty of one crossing to look and listen in both directions even after he has passed three of the tracks." The answer to this question was as follows: "This proposition is for the jury, and the request is denied. We may add that we know of no court that has ever held as a proposition of law that one must stop, look, and listen between several tracks of the railroad. Negligence has been defined to be a lack of caution according to the circumstances, and the jury must determine whether or not, after one has crossed a number of tracks of a railroad, it would be safer for him to stop, or safer to go on." Clearly this answer went wide of the mark, because of a misapprehension of what was included in the point submitted. The attention of the trial judge should have been called to the mistake. The point did not ask instructions to the effect that it was the duty of one who had crossed three tracks to stop, look, and listen before entering on the fourth track. Had it embraced any such proposition, the refusal of the point would have been entirely correct. *Ayers v. Railway Company*, 201 Pa. 124, 50 Atl. 958. The standard of duty asserted by the point was a legal obligation to look and listen before advancing upon the fourth track. In other words, what the point asserted was that it is the duty of one attempting to cross several tracks not to cease his watchfulness upon crossing the first or the second in safety, but to continue to exercise his senses and be observant of obvious conditions until the crossing has been accomplished. So explained, the point should have been affirmed. But we cannot see that defendant was in anywise prejudiced by its rejection or the answer given in view of the fact that two other points were submitted by the defendant, each defining virtually the same standard of duty as was asserted in the first, both of which were unqualifiedly affirmed. These points were, second, "that if the driver and the decedent were guilty of contributory negligence in not looking and listening after entering on the crossing the plaintiff cannot recover; * * * fourth, that if the jury believe the decedent was a bright, intelligent boy, and of sufficient mental capacity and knowledge to comprehend

danger, and did not use ordinary precaution by looking for the approaching train, the plaintiff cannot recover." There was nothing in the answer to the first point which conflicted in the slightest with the law as declared in the answers to the second and fourth. Had the first point contained what the trial judge supposed, its rejection would have been entirely correct. All the defendant lost through the mistake was a qualified affirmance of the first point, which loss was fully made up by the repeated and unqualified affirmance of the doctrine therein asserted in the answers to the succeeding points. This must have left defendant without prejudice, and because we think this so evident, conceding the mistake, the case does not call for a reversal on this assignment.

The third and fourth assignments relate to the admission of the testimony of several witnesses as to the rate of speed maintained by the train at the crossing. These require but a word by way of review. Not being trainmen, and being without any experience which would enable them to form any intelligent judgment as to the rate of speed per hour at which the train was moving, but being familiar with the particular crossing, and frequently having seen trains pass at this point, they were permitted to state that, so far as they could judge, the train was running at a rate which was usually maintained at the crossing when the gates were closed. We see no error in this. The testimony bore upon both disputed points—the negligence of the defendant and the contributory negligence of the boy—and the question was one of fact in regard to which expert knowledge was not required in order to qualify one to speak with sufficient accuracy for the legitimate purposes of the case. It could be determined as well from common observation and experience.

The action was originally brought in the name of Hudson C. Bracken, the father of the boy who was killed, and a trial was had on the case as it thus stood on the record, resulting in a verdict for the plaintiff. While a motion for a new trial was pending, and at the instance of the plaintiff, a rule issued to show cause why the name of Alice Bracken, the mother of the decedent, and wife of Hudson C. Bracken, should not be added as party plaintiff. The motion for a new trial having been refused, an appeal was taken to the superior court, which resulted in a reversal for errors which are not repeated here, and therefore do not concern us. When the case was called for trial a second time, March 2, 1906, no answer had been filed to the rule for amendment and the motion remained undisposed of. Before the jury was sworn, the attention of the court having been called to the undisposed of motion, the rule was made absolute, and it was ordered "that the name

of Alice Bracken be added to the pleadings as one of the parties plaintiff." The jury was then sworn as to both plaintiffs. The action of the court in allowing the amendment is made the subject of another assignment. It is only necessary to refer to the case of *Weaver v. Iselin*, 161 Pa. 386, 29 Atl. 49, as ample and conclusive authority for the action of the court. In that case the suit was brought by the father alone, and the amendment adding the name of the wife as party plaintiff was allowed upon the argument of the appeal in this court from the judgment of the lower court. The matter is thus disposed of in the opinion filed in the case: "We have no doubt as to the right of the plaintiffs to amend, in the manner proposed, even at this stage of the case. It appearing that the name of Susanna Weaver, wife of the plaintiff George Weaver, was omitted from the record by mistake, and counsel having moved to amend by adding her name as one of the plaintiffs, it is ordered that the record be amended accordingly." The amendment in that case was open to every objection that is urged here.

Before the amendment was allowed here changing the parties, the case had appeared on the trial list as that of *Hudson C. Bracken, to the Use of W. D. Lloyd, v. Pennsylvania Railroad Company*. It seems that, after the result was reached on the first trial, Hudson C. Bracken assigned the judgment obtained to Lloyd. The amendment omitted the name of this use plaintiff, and the case stood in the name of the legal plaintiffs alone. Because of this omission defendant claimed surprise and demanded a continuance, which was refused. This refusal to continue is made the subject of the remaining assignment. The fact that the case appeared on the trial list to the use of another than the legal plaintiff was of no consequence whatever; nor was it at all material that in the appeal to the superior court the use plaintiff's name appeared. The cause of action was in the legal plaintiffs alone, and the party marked as use plaintiff, if he had any rights whatever in the action, could recover them only as the cause of action in the legal plaintiffs was established on the trial. It was not the right of recovery in any use plaintiff that defendant was called upon to meet, but the right of the legal plaintiffs. The amendment omitting the use party's name was not merely formal, but wholly unnecessary. If the defendant thought to defeat the action solely because the use plaintiff had no right to recover, and neglected to prepare its defense against the legal plaintiffs who alone had the right of action, it was the kind of mistake which ought never to be allowed to delay the trial of a case.

The assignments of error are overruled, and the judgment is affirmed.

(223 Pa. 451)

H. C. FRICK COKE CO. v. MT. PLEASANT TP. et al.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. HIGHWAYS (§ 125*)—TAXATION—ROAD TAX —“LAST ADJUSTED VALUATION.”

Under Act April 12, 1905 (P. L. 142), providing for the levy of a road tax on “the last adjusted valuation” for county purposes, there is no such valuation until the county commissioners have corrected the assessor’s return, and the board of revision has given the taxpayers opportunity to object.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 125.*]

2. TAXATION (§ 495*) — ADJUDICATION OF BOARD OF REVISION—APPEAL—EFFECT.

Act April 19, 1889 (P. L. 37), authorizing any owner of taxable property dissatisfied with the valuation of the board of revision to appeal, does not, because of such an appeal, prevent the collection of the tax.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 495.*]

3. HIGHWAYS (§ 129*)—ROAD TAX—ILLEGALITY—INJUNCTION.

Act April 15, 1834 (P. L. 509), authorizing a taxpayer to appear before the county commissioners sitting as a board of revision asking relief from a tax, affords no such adequate remedy at law as to exclude the jurisdiction in equity to restrain the supervisors of a town from levying a road tax on a valuation of property which is not under Act April 12, 1905 (P. L. 142), based on the last adjusted valuation for county purposes.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 129.*]

Appeal from Court of Common Pleas, Westmoreland County.

Bill by the H. C. Frick Coke Company against the township of Mt. Pleasant and J. A. Porch, tax collector. Decree for plaintiff. Defendants appeal. Affirmed.

The court entered a decree as follows: “And now, June 27, 1908, this case having been heard on bill, answer, and proofs, and after argument and due consideration, it is ordered, adjudged, and decreed that the road taxes in Mt. Pleasant township for the year 1907 have been paid by the plaintiff company so far as it is legally chargeable therewith, and the said township of Mt. Pleasant and J. A. Porch, collector of said taxes, are hereby enjoined and restrained from the collection of any other road tax from the said plaintiff for the year 1907; that the defendants pay the costs of this proceeding.” Error assigned was the decree of the court.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James S. Beacom and David L. Newill, for appellants. James S. Moorhead and Robert W. Smith, for appellee.

MESTREZAT, J. This bill was filed by the plaintiff to restrain the defendants from collecting road taxes for the year 1907. The prayer of the bill was granted, and the defendants have appealed.

The township of Mt. Pleasant, one of the defendants, is a township of the second class. The plaintiff company is the owner of property in the township, the valuation of which for county purposes for the year 1906 had been fixed and adjusted at \$2,014.545. As required by law, the road supervisors of the township met in March, 1907, and levied a tax on the taxable property therein for road purposes at the rate of 4½ mills for work tax and 2½ mills for cash tax, or seven mills in all. On May 31, 1907, the plaintiff company tendered to defendant Porch, the treasurer of the township, \$13,397.67, the amount of road tax due upon the valuation of the plaintiff’s property for the year 1906. The treasurer declined to receive the amount in full satisfaction of the road tax, but did accept it on account of the road taxes due from the plaintiff for the year 1907. The assessor of the defendant township made and returned a valuation for the purpose of taxation to the county commissioners for the triennial year of 1903 prior to March 1, 1907. This valuation was revised and increased by the county commissioners, sitting as a board of revision, on June 25, 1907. From the valuation thus fixed by the board, the plaintiff company appealed to the common pleas, and its valuation was not finally adjudicated by that tribunal until later in the year 1907. Subsequent to the decree of the common pleas, revising and fixing the valuation, defendant Porch, treasurer of the township, notified the plaintiff company that on the valuation fixed by the court there was still due from it for road taxes for the year 1907 the sum of \$16,664.38 for work tax, and \$11,524.86 for cash tax, to which a penalty of 5 per centum would be added after November 1st, and threatened to levy upon and sell the plaintiff’s personal property in payment of the balance thus claimed to be due. This bill was then filed to restrain the defendant township and its collector from collecting the additional sum alleged to be due the township for road taxes.

As suggested by the court below, the determination of the cause requires the solution of two questions, viz.: (1) What is meant by “the last adjusted valuation for county purposes” as the phrase is used in the act of April 12, 1905 (P. L. 142)? (2) If aggrieved, is plaintiff entitled to equitable relief as prayed for in its bill? The learned trial judge has correctly answered both questions, and his very clear and full discussion amply sustains his conclusion.

The township of Mt. Pleasant, being a township of the second class, is within the provisions of the act of April 12, 1905 (P. L. 142). The second section of the act requires the supervisors to meet on the first Monday of March, and “proceed immediately to levy a road tax, which shall not exceed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ten mills on each dollar of valuation, this valuation shall be the last adjusted valuation for county purposes, and which shall be furnished to said road supervisors by the commissioners of the proper county." The section also provides that, before issuing the duplicate and warrant for the collection of road taxes, the board of supervisors of every township that has not abolished the work tax shall give all taxables "full opportunity to work out their respective taxes." By the sixth section of the act, all taxpayers who pay their taxes before June 1st shall receive an abatement of 5 per centum, all taxes paid to the treasurer between June 1st and November 1st must be paid in full, and taxes paid thereafter must be paid with a penalty of 5 per centum. It will be observed that the basis for levying the tax is "the last adjusted valuation for county purposes, and which shall be furnished to said road supervisors by the commissioners of the proper county." In March, 1907, when the supervisors of Mt. Pleasant township met to levy the tax, pursuant to the act of 1905, what was "the last adjusted valuation for county purposes" furnished to the supervisors of the township by the county commissioners? It was upon that valuation that the statute required the supervisors to make the levy for the year 1907. The plaintiff maintains that it was the valuation of 1906, which, it is conceded, had been adjusted by the proper taxing authorities. The defendants contend that it was the valuation made by the township assessor and returned to the county commissioners in the fall of 1906 for the purposes of taxation for the year 1907. The learned court below sustained the plaintiff's contention.

The taxing system of this state is entirely a creature of statutory law, and the several steps required to be taken in the assessment and collection of taxes are regulated by statute. The general act of April 15, 1834 (P. L. 509), as supplemented and modified by subsequent legislation, is the present law of the state on the subject. It defines the subjects of taxation, and provides the manner of making the assessments and the collection of taxes. The county commissioners issue their precept to the assessor on or before the second Monday of September, and he is required on or before December 31st to return to the commissioners a list of the names of all taxable persons, and a list of all property taxable by law within his district, together with a valuation of the same to be made as provided by the statute. The commissioners may raise or reduce the value placed upon the property by the assessor, and, after having examined and corrected the assessment or valuation, they are required to send a transcript of the assessment, together with a statement of the rate to the assessor, who is required to notify the taxable of the day fixed for an appeal. If the taxpayer desires, he may appear before the commissioners, who then sit as a board of

revision, and ask such relief as he thinks he may be entitled to. Immediately after the conclusion of the appeals, the board of revision is required "to regulate the assessment according to the alterations made." By the act of April 19, 1889 (P. L. 37; 2 Purd. Dig. [12th Ed.] p. 1984), if dissatisfied with the valuation, any owner of taxable property may appeal from the decision of the board of revision to the common pleas; and, by a subsequent statute, the judgment of the common pleas may be reviewed by the proper appellate court. By this brief reference to the mode of procedure in the assessment of property for taxation, it is apparent, we think, that the mere return of the township assessor is not an "adjusted valuation" within the meaning of the act of 1905. It is simply one of the several steps to be taken in ascertaining the adjusted valuation of property for the purposes of taxation. Until the commissioners have examined and corrected the assessor's return and the board of revision has given the taxpayer an opportunity to be heard and has thereafter finally adjudicated the valuation, there is no assessment or valuation upon which a tax can be levied for either county or township purposes. Until that time, it is apparent there has been no "adjusted valuation for county purposes." As long as the valuation returned by the assessor is open to correction by the board of revision, it certainly cannot be that the valuation has been adjusted within contemplation of the statute. The act of 1905 is specific as to the character of the valuation upon which the tax shall be levied. It is not simply a valuation returned by the assessor, but, as the act itself declares, "this valuation shall be the last adjusted valuation for county purposes, and which shall be furnished to said road supervisors by the commissioners of the proper county." The Legislature, therefore, has not left open to doubt what the road supervisors shall have before them when they meet on the first Monday of March in each year to levy the road tax. It is "the last adjusted valuation," and not merely the valuation returned by the assessor. While the act of 1889 authorizes an appeal to the common pleas from the final adjudication of the board of revision, the appeal is not a supersedeas, and does not prevent the collection of the tax. If the valuation is reduced, the excess of taxes is returned to the person who paid them.

The other and remaining question is whether the plaintiff company can redress its grievances by a bill in equity. While the assessment and collection of taxes are matters of statutory regulation and the taxing officers must strictly pursue the provisions of the acts of assembly in levying and collecting taxes, it is equally true that where there is a remedy at law the owner of taxable property if aggrieved, must seek redress in the manner pointed out by the statute. If, therefore, the Legislature has provided a remedy which will afford the plaintiff company adequate relief

for its grievances, it must pursue that remedy, and cannot invoke the assistance of a court of equity to prevent the wrongs with which it is threatened by the taxing officers of the defendant township. But has the Legislature provided a remedy for the grievances of which the plaintiff complains in this suit? It is so contended by the defendants, and the remedy relied on is the thirty-sixth section of the act of April 15, 1834 (P. L. 517; 2 Purd. Dig. [12th Ed.] p. 1998), which provides as follows: "That it shall be lawful for any person aggrieved by such rate or assessment to apply by petition to the next court of quarter sessions of the respective county, who shall have power to take such order thereupon, as to them shall be thought expedient, and the same shall conclude and bind all parties." It is conceded by both parties to this litigation that this section of the act of 1834 applies only to township taxes. It is contended by the defendants that the act provides a remedy for any party who is aggrieved by the action of the taxing authorities in fixing an illegal or incorrect rate of assessment of his property for township purposes; that the injury complained of in the bill in this case is that the assessment of the plaintiff's property made by the supervisors is on a wrong valuation or basis; and that, therefore, the act of assembly affords the plaintiff adequate relief by an appeal to the quarter sessions. It is true, as argued by defendants, it is not alleged in the bill that the supervisors did not have the authority to levy a tax or that the property on which the tax was levied was not taxable for township purposes. Let us examine the facts of the case, as presented by the pleadings and testimony, and see whether the act of assembly furnishes an adequate relief for the injury complained of in the bill filed by the plaintiff.

It is conceded that the supervisors did not levy a tax in March, 1907, on the adjusted valuation for the year 1906. The board of revision did not adjust the valuation of the plaintiff's property for county purposes for 1907 until June 25th of that year, when they fixed the valuation at \$750 per acre, which, on appeal to the common pleas, was finally adjusted some months thereafter at \$680 per acre. It is apparent, therefore, that the supervisors did not levy a tax in March, 1907, on the valuation of the plaintiff's property returned by the assessor for that year and adjusted by the board of revision, and we think it equally clear that the supervisors did not make the return of the assessor for that year the basis of the tax levied for the year. If the officers had levied the tax on the valuation returned by the assessor for the year 1907, and given the plaintiff company notice of the tax as required by the statute, it is quite probable that the company would have been compelled to go into the quarter sessions for relief. The company would then have had an opportunity to have the basis

of the valuation corrected by "the next court of quarter sessions."

The plaintiff, however, is not threatened with a sale of its property by the township collector for taxes levied upon the valuation returned by the assessor of the township for 1907. The defendants do not seek to enforce a tax levied upon such basis, nor is the plaintiff company resisting the collection of taxes laid upon that basis. The claim of the defendants is made for taxes levied upon a valuation as finally revised by the court in the fall of 1907. This appears by paragraph 6 of the defendant's answer, which, *inter alia*, is as follows: "This notice (requiring the plaintiff company to pay the taxes in dispute) has been given, and this claim is made upon the said plaintiff under the belief that the valuation returned by the assessor for the year 1907, as finally revised by the county commissioners and the court of common pleas, is the basis on which the taxes for 1907 were levied and should be collected." It is apparent, we think, that the undisputed facts of the case show that the thirty-sixth section of the act of April 15, 1834, furnishes no adequate remedy for the relief sought by the plaintiff company, and which we hold it is entitled to. We need not discuss or determine the meaning of the words "rate" or "assessment" as used in the act of assembly, as the facts of this case show that the plaintiff company could not avail itself of the statute to afford it redress for the grievances of which it complains. There was no action of the supervisors in March, 1907, in fixing a basis for the levy of that year from which the plaintiff could have appealed to the next court of quarter sessions as required by the act of 1834, which, as stated by the counsel of the defendants, commenced on the second Monday of the following May. So far as the record discloses, there was no attempt on the part of the taxing authorities of the township to comply with the act of 1905 by giving the plaintiff company notice of the levy of any road tax in March, 1907, or by giving it notice and an opportunity to work out its portion of the work tax or to pay the cash tax assessed against it in that month so as to secure the abatement of five per cent. and avoid the penalty imposed by the statute. In fact, the action of the supervisors in not levying the tax in March on the last adjusted valuation prevented a compliance with those provisions of the law.

The conduct of the supervisors in delaying the levying of the tax on the last adjusted valuation and in now seeking to recover the taxes levied on the basis of the valuation fixed by the court in the fall of 1907 deprives the plaintiff of an opportunity to appeal for redress to the next court of quarter sessions within the meaning of the act of 1834. The act of 1905, in its mandatory provisions requires the supervisors to levy the tax at their session in March. The basis as well as the rate of taxation is then

fixed, or should be, if the provisions of the statute are observed. The taxpayer can then determine whether he is aggrieved by the action of the supervisors; and the act of 1834 contemplates that, if he is aggrieved "by such rate or assessment," he shall "apply by petition to the next court of quarter sessions of the respective county" for relief. The "next court of quarter sessions" is the court which first convenes in regular session subsequent to the date when the law requires the rate or assessment to be fixed by the supervisors. The purpose of the Legislature was to give the taxpayer a speedy and summary remedy for his grievances. It is necessary that the taxing officers act promptly in levying and collecting taxes, and to accomplish the purpose it is necessary that any objection by the taxpayer to the action of the supervisors should be speedily disposed of. This could be done, and was intended to be done by requiring the taxpayer to apply to the next court of quarter sessions after the tax was levied. It is absolutely necessary that this interpretation of the act of 1834 should prevail if the taxpayer's rights are to be protected and enforced under the act of 1905. By that statute the taxpayer is entitled to an abatement of 5 per cent. if he pays his taxes before June 1st of the year, and is subjected to a penalty of 5 per cent. if they are not paid until after November 1st of the year. The act also requires the supervisors to give the taxpayer an opportunity to work out his work tax. It is therefore apparent that "the next court of quarter sessions," to which a taxpayer may appeal for an alleged incorrect or illegal levy, is the court immediately succeeding the levy of road taxes made in March.

We think it clear that the remedy invoked by the plaintiff company in this proceeding is the only one which can give adequate relief for the injury or wrong threatened it, and therefore the bill must be sustained. If our conclusion deprives the township of a large part of its revenues by permitting the plaintiff company to escape payment of its road taxes on the valuation of 1907, the loss is attributable to the statute, the provisions of which are clear and mandatory. We cannot assume the functions of the Legislature, and, by construction, furnish a remedy which lies solely with that department of the government. It is our province to construe, and not to make, the law.

The decree is affirmed.

(104 Me. 333)

IN RE RUGGLES' ESTATE.

(Supreme Judicial Court of Maine. Sept. 10, 1908.)

1. WILLS (§ 524*)—CONSTRUCTION—DESIGNATION OF BENEFICIARIES—GIFT TO A CLASS.
When a testamentary gift is made to a class of persons, to take effect in possession im-

mediately, only those take who constitute the class at the death of the testator, when the will becomes operative, unless a different intention appears from the will or from circumstances proper to be considered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116-1127; Dec. Dig. § 524.*]

2. WILLS (§ 523*)—CONSTRUCTION—RESIDUARY BEQUEST.

The will of a testatrix contained the following residuary clause: "All the rest, residue and remainder of my estate I give, devise and bequeath to my heirs and the heirs of my late husband, Hiram Ruggles, those standing in the same degree of relationship either to myself or said Hiram to share alike according to the laws of descent in this State."

Held, that the manifest intent of the testatrix was to divide the residue of her estate into two equal parts, one part to go to her heirs and the other part to go to her husband's heirs, and that the persons who are to take as such heirs, and the proportions which they are to take, are to be determined "according to the laws of descent in this State."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1115, 1142; Dec. Dig. § 523.*]

3. WILLS (§ 506*)—CONSTRUCTION—DEVISE TO HEIRS OF DECEASED HUSBAND.

The said Hiram Ruggles died testate, leaving neither issue, father, mother, brother, nor sister, but the descendants of six deceased brothers and sisters. Held, that the persons entitled to the one-half of the residue devised to his heirs "according to the laws of descent in this State" are determined by Rev. St. 1903, c. 77, § 1, rule 6, under which "it descends to his next of kin in equal degree."

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1091; Dec. Dig. § 506.*]

4. WILLS (§ 532*)—CONSTRUCTION OF BEQUEST—"NEXT OF KIN IN EQUAL DEGREE."

At the death of the testatrix there were living 11 nieces and nephews and 8 grandnieces and grandnephews of the said Hiram Ruggles. Held, that his "next of kin in equal degree" are his 11 nieces and nephews living at the death of the testatrix, and that they are to take the one-half of the residue devised to his heirs per capita, and not per stirpes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1145, 1146; Dec. Dig. § 532.*]

(Official.)

Report from Supreme Judicial Court, Penobscot County, at Law.

Appeal of Mary Seavey Fairbanks from a decree of the probate court ordering distribution of the residue of the estate of Lydia H. Ruggles. Case reported. Decree of judge of probate affirmed.

The decree was as follows: One-eighth thereof to each of the two sisters of the testatrix; one twenty-fourth thereof to each of her six nieces and nephews; one twenty-second thereof to each of the eleven nieces and nephews of Hiram Ruggles, the deceased husband of the testatrix. The case came on for hearing at the April term, 1908, Supreme Judicial Court, Penobscot county, at which time and by agreement of the parties it was reported to the law court, that court "to render such judgment as the law and the evidence require."

Argued before SAVAGE, PEABODY, CORNISH, KING, and BIRD, JJ.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

E. C. Ryder and H. L. Fairbanks, for appellant. Matthew Laughlin, for appellees.

KING, J. Lydia H. Ruggles devised and bequeathed the residue of her estate in the following language:

"All the rest, residue and remainder of my estate I give, devise and bequeath to my heirs and the heirs of my late husband, Hiram Ruggles, those standing in the same degree of relationship either to myself of said Hiram to share alike according to the laws of descent in this State."

The testatrix died in November, 1905, leaving surviving her two sisters, also a niece and two nephews, children of a deceased brother, and three other nieces, children of another deceased brother. Hiram Ruggles died in May, 1889, testate, leaving neither issue, father, mother, brother, nor sister, but the descendants of six deceased brothers and sisters. At the time of the death of testatrix there were living eleven nieces and nephews, and eight grandnieces and grandnephews, whose parents were deceased, of Hiram Ruggles.

Upon petition for order of distribution of the residue of the estate the judge of probate decreed one-eighth thereof to each of the two sisters of testatrix, one twenty-fourth to each of her said six nieces and nephews, and one twenty-second to each of the eleven nieces and nephews of Hiram Ruggles.

From this decree Mary Seavey Fairbanks, a grandniece of Hiram Ruggles, appealed, assigning as reasons therefor (1) that the residue of the estate should not be divided equally between the heirs of the testatrix and the heirs of Hiram; (2) that the heirs of Hiram should not be determined as of the date of the death of the testatrix but of the date of his death; (3) that the heirs of Hiram were not his nephews and nieces to the exclusion of his grandnephews and grandnieces whose parents were deceased; (4) that the heirs of Hiram should not take per capita but per stirpes.

The case is reported to this court for determination.

The chief question presented is whether the testatrix in the residuary clause of her will made a devise to her heirs and the heirs of her husband as individuals to take per capita or a devise in equal parts to her heirs and to his heirs as two classes.

In *Daggett v. Slack*, 8 Metc. (Mass.) 450, Shaw, C. J., states the rule thus: "A devise to heirs, whether it be to one's own heirs or to the heirs of a third person, designates not only the persons who are to take, but also the manner and proportions in which they are to take; and that, when there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they shall take as heirs would take by the rules of descent." In *Lord v. Bourne*, 63 Me. 368, 18 Am. Rep. 234, it is

held that a devise or bequest to the "heirs" of an individual without addition or explanation vests the property in the persons who would take it in case of intestacy under the laws of descent and distribution. See, also, *Talcott v. Talcott*, 39 Conn. 186; *Woodward v. James*, 115 N. Y. 359, 22 N. E. 150; *Richards v. Miller*, 62 Ill. 417; *Holbrook v. Harrington*, 16 Gray (Mass.) 102; *Bassett v. Granger*, 100 Mass. 348; *Townsend v. Townsend*, 156 Mass. 454, 31 N. E. 632; *Allen v. Boardman*, 193 Mass. 284, 79 N. E. 260, 118 Am. St. Rep. 497.

In the residuary clause of her will the testatrix devised the residue of her estate "to my heirs and the heirs of my late husband, Hiram Ruggles." Those words, without addition or explanation, would be construed, according to the well-recognized rules of testamentary construction and the authorities, as a devise in equal parts to two classes—the persons who are to take and the manner and proportions in which they are to take under each class to be determined by the rules of descent. Do the added words "those standing in the same degree of relationship either to myself of (or) said Hiram to share alike according to the laws of descent in this state" indicate a different intention of the testatrix? We think not. On the contrary, those words make it manifest that the testatrix did not intend for her heirs and the heirs of her husband to take equally as individuals because she expressly provides that they are to share "according to the laws of descent in this state," a provision that cannot be complied with if they are to share equally per capita.

But, granting that the laws of descent are not to be disregarded, it is suggested that the words "those standing in the same degree of relationship either to myself or said Hiram to share alike" indicate an intention of the testatrix to dispose of the residue of her estate to her heirs and Hiram's heirs as if they were all her heirs, but "according to the laws of descent in this state."

Giving that interpretation to the language, it will be found that the result suggested by the literal meaning of the words "to share alike" can in no sense be realized, for in such case the nieces and nephews of Hiram, representing different branches of his family, would take shares differing widely in amount. Under one branch of Hiram's family a niece would take one-sixtieth, while under another branch a niece would take one-tenth, being the same share that a sister of the testatrix would take under that interpretation.

No reason appears why the testatrix should prefer her husband's relatives so that one of his nieces or nephews should receive as large a share as her own sister. Such a disposition of property is unnatural and not in accord with family ties and affections. We do not think the testatrix so intended.

The language used does not require such construction.

A careful examination of the whole residuary clause of the will satisfies us that the manifest intent of the testatrix was to divide the residue of her estate into two equal parts, one to go to her heirs and the other to her husband's heirs, and that she used the words "those standing in the same degree of relationship either to myself or said Hiram to share alike according to the laws of descent in this state" to make plain her intent that no one of her heirs was preferred over another standing in the same degree of relationship to her, and likewise that no one of Hiram's heirs was preferred over another standing in the same degree of relationship to him, but that all of her heirs on the one side and Hiram's heirs on the other were regarded by her impartially and were "to share alike," without distinction or discrimination, "according to the laws of descent in this state."

It is a well-settled general rule that when a testamentary gift is made to a class of persons, to take effect in possession immediately, only those take who constitute the class at the death of the testator, when the will becomes operative, unless a different intention appears from the will, or from the circumstances proper to be considered. *Howland v. Slade*, 155 Mass. 415, 29 N. E. 631; *Smith v. Smith*, 186 Mass. 138, 71 N. E. 314; *Worcester v. Worcester*, 101 Mass. 128, 132; *Campbell v. Rawdon*, 18 N. Y. 412; 1 *Jarman on Wills*, 286, 287. This rule must be applied in the case at bar. No question is raised as to the persons entitled to share as the heirs of the testatrix.

Hiram Ruggles left neither issue, father, mother, brother, nor sister; consequently the persons entitled to the one-half of the residue devised to his heirs "according to the laws of descent in this state" are determined by Rev. St. 1903, c. 77, § 1, rule 6, under which "it descends to his next of kin in equal degree."

At the death of the testatrix there were living eleven nieces and nephews, and eight grandnieces and grandnephews, of Hiram Ruggles. But his grandnieces and nephews, not being related to him in equal degree with his nieces and grandnephews, are not entitled to share under rule 6. Accordingly his "next of kin in equal degree" are his eleven nieces and nephews living at the death of testatrix, and they are to take the one-half of the residue devised to his heirs per capita, and not per stirpes. *Davis v. Stinson*, 53 Me. 493.

The decree of distribution appealed from conforms in all respects with the construction of the residuary clause of the will as herein determined, and the entry must be:

The decree of the judge of probate, affirmed with costs.

(81 Conn. 667)

E. L. CLEVELAND CO. v. CHITTENDEN.
(Supreme Court of Errors of Connecticut. Feb. 16, 1909.)

1. **BILLS AND NOTES (§ 467*)—ACTIONS—INDORSEMENT—PLEADING.**

The complaint in an action on a note, setting out the execution of the note, which is embodied in it by reference and annexation as an exhibit, and then adding that it was by the indorsement of defendant transferred to plaintiff, will not be construed as alleging a special indorsement, in view of the note annexed being indorsed in blank; a transfer being the act by which an owner of a thing delivers it to another with intent to pass title.

[Ed. Note.—For other cases, see *Bills and Notes*, Dec. Dig. § 467.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7064-7070, 7819.]

2. **PLEADING (§ 388*)—IMMATERIAL VARIANCE.**

Even if the complaint in the action on a note against the maker pleads a special indorsement, when it was in blank, this is within *Practice Book* 1908, p. 245, § 149, requiring immaterial variances to be disregarded; the distinction being of no practical importance.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1308; Dec. Dig. § 388.*]

Appeal from Superior Court, Fairfield County; Joel H. Reed, Judge.

Action by the E. L. Cleveland Company against Edgar D. Chittenden. Judgment for plaintiff. Defendant appeals. Affirmed.

The plaintiff is the owner for value of a note drawn by the defendant to his own order, indorsed by the latter in blank and by the latter delivered to the plaintiff. The complaint sets out the execution of the note, which is annexed as an exhibit, and then adds that it was by the indorsement of the defendant transferred to the plaintiff, that the plaintiff still owns it, and that it has not been paid. Upon the trial, which involved the determination of defenses unsuccessfully interposed, the plaintiff offered the note in evidence. It then appearing that the indorsement thereon was in blank, its reception was unsuccessfully objected to upon the ground that in that form it was inadmissible to prove the allegation of the complaint.

John C. Chamberlain and Elbert O. Hull, for appellant. John W. Banks, for appellee.

PRENTICE, J. (after stating the facts as above). The defendant complains because, as he says, the complaint counts upon a special indorsement, while it was permitted to be supported by proof of a blank indorsement. This contention rests, in the first place, upon a severely literal interpretation of the complaint, and one which overlooks the fact that the note with its indorsement thereon was embodied in it by reference and annexation as an exhibit. Pleadings are not to be so construed under our practice act. *Price v. Bouteiller*, 79 Conn. 255, 257, 64 Atl. 227. This pleading easily yields to the reasonable construction consistent with its

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

manifest purpose and the ends of substantial justice in that it avers that the plaintiff became the holder of the note through its indorsement and delivery to him by the defendant, its maker, with the intention of passing the title thereto. "A transfer is defined to be the act by which the owner of a thing delivers it to another person with the intent of passing the rights he had in it to the latter." *Robertson v. Wilcox*, 36 Conn. 428, 429.

The defendant's contention also overlooks our rule that immaterial variances are to be disregarded. *Practice Book 1908*, p. 245, § 149. This is an action against the maker. The face of the instrument determines the extent of his obligation. The indorsement is significant only as indicating the plaintiff's right to enforce that obligation as the holder of the note, and the extent of that right; that is, whether it be unrestrictive, restrictive, qualified, or conditional. *Gen. St. §§ 4203-4209*. The indorsement here set out was neither restrictive, qualified, nor conditional. Such being the case, it was absolutely immaterial to the creation of the relation between the defendant as the maker of the instrument and the plaintiff as its holder, to the character of that relation, and to the determination of the rights and obligations of the parties as between each other through that relation, whether the channel through which in strict legal contemplation the plaintiff's ownership was derived was that of a special indorsement or a blank indorsement, which the plaintiff might at his pleasure transform into a special one, or whether or not a blank indorsement had in fact been transformed into a special one. Whatever distinction could be pointed out is one which lies wholly within the domain of techniques, and is of no practical importance.

There is no error. The other Judges concurred.

(81 Conn. 626)

ALLEN v. LYNES.

(Supreme Court of Errors of Connecticut. Feb. 16, 1909.)

1. EXECUTION (§ 403*)—SUPPLEMENTARY PROCEEDINGS—ACTION.

In an action against a judgment debtor to recover for refusing to pay the judgment debt while having property concealed, not exempt from execution under *Gen. St. 1902, § 1099*, providing for such action, it was unnecessary that the complaint should aver that the action was brought under such section.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1132; Dec. Dig. § 403.*]

2. FRAUDULENT CONVEYANCES (§ 309*)—VALIDITY—INSTRUCTIONS.

An instruction that if a conveyance of land by a debtor was not made to a bona fide purchaser for value, the equitable title would remain in the grantor, and his creditors could seize the land to satisfy their claims, was ob-

jectionable, as ignoring the distinction between prior and subsequent creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 949; Dec. Dig. § 309.*]

3. TRIAL (§ 261*) — REQUEST TO CHARGE — FORM.

Error cannot be assigned on the refusal to comply with a request for instructions presented as a unit, where some of the instructions are inconsistent with the law.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 660; Dec. Dig. § 261.*]

4. EXECUTION (§ 403*)—SUPPLEMENTARY PROCEEDINGS — FRAUDULENT CONVEYANCES — PROPERTY CONCEALED.

Where, in an action by a subsequent judgment creditor to recover for her debtor's refusal to pay the judgment debt, and for concealing property not exempt from execution, plaintiff's indebtedness arose subsequent to the conveyance alleged to have been fraudulent, the burden was on her to prove, not only that the conveyance was made with intent to defraud subsequent creditors, but also that the property was being concealed and withheld, so that it could not be taken by legal process when plaintiff became a creditor.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1136; Dec. Dig. § 403.*]

5. EXECUTION (§ 403*)—SUPPLEMENTARY PROCEEDINGS—STATUTES.

Gen. St. 1902, § 1099, providing for a judgment creditor's action to recover against the debtor for refusing to pay the judgment debt, while having sufficient estate not exempt from execution concealed and withheld so that it could not be taken by legal process, was designed to preserve the remedy, by imprisonment for debt, when the debtor, having property sufficient to pay his creditor, fraudulently conceals or withholds it in order to prevent its being taken by legal process; the gist of the action being the creditor's fraud.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1131; Dec. Dig. § 403.*]

6. FRAUDULENT CONVEYANCES (§ 230*)—LEVY OF EXECUTION.

Where property is conveyed by a debtor with an actual intent to defraud subsequent creditors, they may levy on the property so conveyed precisely as if the deed had never been made, provided the grantee has participated in the fraud.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 660; Dec. Dig. § 230.*]

7. FRAUDULENT CONVEYANCES (§ 208*) — TRUSTS FOR DEBTOR—INTENT TO DEFRAUD—SUBSEQUENT CREDITORS.

A subsequent creditor could only establish fraudulent concealment of property by her debtor by proof that a grantee thereof had agreed to hold the title for the debtor's benefit, or that there was an actual intent, on the part of the debtor, participated in by the grantee, to defraud subsequent creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 631; Dec. Dig. § 208.*]

Appeal from Court of Common Pleas, Hartford County; Epaphroditus Peck, Judge.

Action by Catherine Allen against Bridget F. Lyness for refusal to pay a judgment debt, while having sufficient nonexempt property concealed and withheld, so that it could not be taken by legal process. Judgment for defendant, and plaintiff appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Percy S. Bryant and Harry M. Burke, for appellant. Herbert O. Bowers, for appellee.

BALDWIN, C. J. This complaint (treating it, as both parties have done, as charging fraud) states facts which, if true, gave an action under Gen. St. 1902, § 1099. It was unnecessary to aver that the action was brought on the statute. *Williams v. Mead*, 80 Conn. 434, 436, 68 Atl. 1009. The complaint did not describe the estate concealed or withheld, but it was, as the plaintiff claimed on the trial, an interest in land. It was conceded that the defendant owned an equity of redemption in this land, under a deed from her father, from 1893 to 1899; that she then conveyed it to her only child, Margaret A. Lyness; that the latter, in July, 1902, reconveyed it; that no money was paid as a consideration for either conveyance; that on September 22, 1902, the defendant reconveyed it to her daughter, subject to a new mortgage, which she had put upon it, for \$400; that in 1904 the defendant became indebted to the plaintiff; that the plaintiff in 1905 recovered a judgment on such debt against the defendant, who refused to pay on demand; and that the equity in the land was then worth enough to pay it in full. The plaintiff offered evidence to prove that the \$400 mortgage was put on by the defendant in August, 1902, partly to pay debts which she owed to the amount of over \$225, and that the defendant in many ways dealt with the land as if she were the absolute owner, while the paper title was in her daughter. It did not appear that any debts due from the defendant on September 22, 1902, remained unpaid, excepting her \$400 mortgage note. The defendant offered evidence to prove that her earnings and her daughter's earnings had enabled her father to acquire the land; that he conveyed to her on the understanding that she should convey to Margaret when the latter was older; that another relative had contributed \$300 towards the purchase of the land, and expressed the desire that it should go to Margaret's benefit; and that the defendant had dealt with the land in behalf of Margaret, and to save her the trouble of attending to it.

The plaintiff asked the court to instruct the jury that a person might, as to his creditors, be the real owner of land the legal title to which stood in another's name; that the law would not permit the owner of land to convey it to another, if this would prevent his creditors from collecting their dues: that if such a conveyance were not made to a bona fide purchaser for value, the equitable title would remain in the grantor, and his creditors could seize the land to satisfy their claims; and that, if they found that the defendant was the equitable owner of the land in question, or that the conveyance to Margaret A. Lyness prevented the plaintiff from collecting her judgment against the defendant, the plaintiff was entitled to a verdict.

These requests were presented as a unit. It would have been error to instruct the jury that if a conveyance of land were not made to a bona fide purchaser for value, the equitable title would remain in the grantor, and his creditors could seize the land to satisfy their claims. Such a charge would have ignored the distinction between creditors who were such when the conveyance was made, and those who became creditors subsequently. Error cannot be assigned on the refusal to comply with a request for instructions, some of which are inconsistent with law.

The plaintiff also asked the court to instruct the jury that if the defendant, while indebted, conveyed to her daughter upon a valuable, but inadequate, consideration, such inadequacy was evidence of actual fraud; that whether a transaction was fraudulent as to creditors was always a question of fact; that the essence of fraud consists chiefly in motive, and is seldom reached through direct testimony; and therefore that the law, in many cases, dispenses with the necessity of positive proof, and permits the introduction of circumstantial, presumptive, or persuasive evidence. This request is couched in language mainly drawn from certain opinions of this court. *Washband v. Washband*, 27 Conn. 424, 430; *Olmsted v. Hoyt*, 11 Conn. 376, 380. It is seldom that extracts of that nature are adapted for use in instructing a jury. Here, for instance, the important thing was not what kind of evidence will be dispensed with "in many cases," but what kind had been put before the jury in this particular case, and what was the weight which they were at liberty to accord to it. On these points the charge as given was clear and adequate. The jury were instructed that, as to the claim that the deed of September 22, 1902, was given with intent to defraud those who might thereafter become creditors of the grantor, they were to say whether the plaintiff had proved it by a fair preponderance of the evidence, and that if she had, she was entitled to a verdict. This portion of the charge affords no ground of complaint to the appellant. It was too favorable to her. On that branch of the case she was bound to establish two fraudulent acts: One the giving of the conveyance in 1902, and the other the concealing or withholding the property, so that it could not be taken by legal process three years afterwards. The instruction complained of would have supported a verdict, if only one of these acts had been proved.

The statute was originally enacted as part of the change in our system of judicial procedure by which imprisonment for debt was abolished. Pub. Acts 1842, p. 37, c. 23. It was designed to preserve that remedy when the debtor, having property sufficient to pay his creditor, fraudulently concealed or withheld it from him in order to prevent his taking it by process of attachment or execution. The gist of the statutory action thus given was this fraud on the creditor. Arm-

strong v. Ayres, 19 Conn. 540, 546. He was bound to show that the debtor had property subject to levy, sufficient to pay the debt; but this would be unavailing unless it were further shown that the defendant concealed it, or withheld it from the reach of civil process. *Dikeman v. Ketchum*, 25 Conn. 363, 368; *Atwater v. Slepcow*, 74 Conn. 671, 51 Atl. 1063.

It is a further ground of appeal that the court instructed the jury that if they did not find that the plaintiff had proved, either that by the understanding of the parties to the deed of September 22, 1902, the real beneficial interest remained in the defendant, while the apparent and record title was placed in the name of the daughter, or that the deed was given with an actual purpose and intent to defraud creditors, their verdict should be for the defendant. In order to show that the defendant, when in 1905 she refused to pay the plaintiff's judgment, had property enough to pay it, it was necessary to establish that the real estate in question, the title to which stood in the name of a third party, was—as respects the plaintiff—really the property of the defendant. It could be such only in case one of two things were true, namely, that by the understanding or agreement of the parties to the deed the daughter was to hold the title for the mother's benefit; or that the deed was given with an actual intent to defraud such as might thereafter become creditors of the grantor, in which case, as to them, it could be levied on by legal process precisely as if the deed had never been made, provided the grantee had participated in the fraud. See *Partelo v. Harris*, 26 Conn. 480, 483. There was therefore nothing in this part of the charge of which the plaintiff could complain.

The jury were also properly told that, with respect to the claim of an actual intent, in giving the deed, to defraud future creditors, a fraudulent intent on the defendant's part, at any other time than September 22, 1902, would only be material for what light it would throw on the occurrences of that day, and that, as the defendant owed nothing to the plaintiff until long after September 22, 1902, the latter must show an actual intent to defraud future creditors in giving the deed of that date. *Barbour v. Conn. Mut. Life Ins. Co.*, 61 Conn. 240, 251, 23 Atl. 154; *Bassett v. McKenna*, 52 Conn. 437. We have not found it necessary to decide whether the fact that, after the conveyance of September 22, 1902, the land was still open to attachment and levy as the property of the defendant was sufficient to defeat this action, nor whether the statute reaches a case where the property, as to the concealment of which, or the withholding from legal process, fraud is charged, is real estate. The court below, in compliance with the plaintiff's request, instructed the jury that it does reach it, and

no reason of appeal on this account is, or could be, set up by her.

There is no error. The other Judges concurred.

(81 Conn. 636)

BOOTH V. PRETE.

(Supreme Court of Errors of Connecticut. Feb. 16, 1909.)

1. BANKRUPTCY (§ 326*) — MUTUAL DEBTS — SET-OFF.

Where, prior to bankruptcy, a bank was indebted to the bankrupt on a deposit account, and the bankrupt was indebted to it on a note, the bank on the maturity of the note could apply the deposit account to the payment thereof, the debts being mutual, under Bankr. Act July 1, 1898, c. 541, § 68, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), declaring that, in all cases of mutual debts between the estate of a bankrupt and a creditor, an account shall be stated, and one debt shall be set off against the other and the balance only shall be allowed or paid.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 326.*]

2. BANKRUPTCY (§ 178*) — "TRANSFER OF PROPERTY."

Set-off by a bank of a deposit account due a bankrupt against his liability to the bank on a note is not a "transfer of property" by the bankrupt within Bankr. Act July 1, 1898, c. 541, § 1, subd. 25, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), declaring that a transfer shall include the sale and every other and different mode of disposing of or parting with property or the possession thereof absolutely or conditionally as a payment, pledge, mortgage, gift, or security.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 209; Dec. Dig. § 178.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7066, 7067, 7819.]

3. BANKRUPTCY (§ 165*) — "PREFERENCE."

Where a bank on the maturity of a bankrupt's note in good faith, and not merely for the purpose of appropriating the bankrupt's deposit to the benefit of another, set off such deposit against a note due the bank from the bankrupt, such set-off was not a "preference," within Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), providing that a person shall be deemed to have given a preference, if, being insolvent, he has made a transfer of any of his property which will enable one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 165.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5498, 5499; vol. 8, p. 7759.]

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action by John R. Booth, as trustee in bankruptcy of George W. Humphry, against Ralph Prete. Judgment for defendant, and plaintiff appeals. Affirmed.

J. Birney Tuttle, for appellant. Matthew A. Reynolds, for appellee.

THAYER, J. The plaintiff, as the trustee of the bankrupt estate of George W. Humphry, brings this action to recover from the defendant \$464.61, the amount of a deposit

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which the bankrupt had in the Merchants' National Bank of New Haven on March 17, 1908, and which was on that day applied by the bank in part payment of a note of the bankrupt payable on that day at the bank to the order of the defendant, and by him indorsed and discounted there. This application of the deposit was within four months of the filing of the petition in bankruptcy, and it is claimed that the action of the bank in making it worked a preference in favor of the defendant voidable by the trustee under section 60b of the United States bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 799 (U. S. Comp. St. Supp. 1907, p. 1031). If this claim is correct, the plaintiff was entitled to recover.

The bank at the time of the application of the deposit was the owner of the note, having discounted it for the defendant, and was therefore a creditor of the bankrupt. It was also his debtor to the amount of his deposit. They were mutual debts, and subject to be set off against each other under section 68 of the bankruptcy act. *N. Y. County Bank v. Massey*, 192 U. S. 138, 146, 24 Sup. Ct. 199, 48 L. Ed. 380; *In re Scherzer* (D. C.) 130 Fed. 631, 632; *In re Semmer Glass Co.*, 135 Fed. 77, 67 C. C. A. 551; *Lowell v. International Trust Co.*, 158 Fed. 781, 784, 86 C. C. A. 137. Such set-off is not a transfer of property by the bankrupt within section 1, subd. 25, of the act, and does not give a preference within section 60a of the act. *County Bank v. Massey*, supra. The case last referred to distinguishes between cases like *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 444, 21 Sup. Ct. 906, 45 L. Ed. 1171, and other cases cited by the plaintiff, where there was a payment by the bankrupt of his notes due at the bank, and cases like the present, where a bank, having a general deposit of the bankrupt, sets it off against his notes of which it is the owner. The payment of the note in the former case is a preference voidable against both the bank and the indorser who may have negotiated it. It changes the relations existing between the bank and the bankrupt. But in equity and under the statutes of this and other states, where there are mutual debts, the difference between them after one has been set off against the other is deemed to be the only sum really due. Section 68 of the bankruptcy law recognizes this and permits the set-off. The fact that the set-off in the present case was made by the bank prior to the filing of the bankruptcy petition does not affect the question because it did only what the law would have done had the bank waited until the petition was filed. *In re Scherzer*, supra.

We are assuming that the transaction was bona fide. If the giving of the note and the application of it in disposing of the bank-

rupt's deposit was, as claimed by the plaintiff, a trick devised to appropriate the bankrupt's deposit to the defendant's benefit, it would not stand. But the finding does not warrant the claim. We must treat it, as the trial court has done, as a bona fide transaction. So treated, the set-off did not work a preference in favor of either the bank or the defendant.

There is no error. The other Judges concurred.

(81 Conn. 615)

KELLEY v. TOWN OF TORRINGTON.

(Supreme Court of Errors of Connecticut. Feb. 16, 1909.)

1. APPEAL AND ERROR (§ 997*)—REVIEW—DIRECTION OF VERDICT—SUFFICIENCY OF EVIDENCE.

To entitle plaintiff in scire facias against a garnishee to a reversal of a judgment on a directed verdict that at the time of the garnishment there was nothing due the principal defendant from the garnishee, the record must show that there was evidence supporting every fact essential to plaintiff's recovery, and also no undisputed fact which would prevent his recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4024; Dec. Dig. § 997.*]

2. CONTRACTS (§ 319*)—PERFORMANCE PREVENTED BY OTHER PARTY—PART PERFORMANCE—RECOVERY.

Where a contractor has been wrongfully prevented from completing his contract, he may recover for the work done.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1500; Dec. Dig. § 319.*]

3. HIGHWAYS (§ 113*)—IMPROVEMENTS—CONTRACT FOR IMPROVEMENTS.

Pub. Acts 1905, p. 432, c. 232, provides for the improvement of highways at the expense of the state and town in which the highway is located, requires the selectmen to advertise for bids for the work according to plans prepared by the state highway commissioner, and to award the contract to the lowest bidder, who must enter into a contract for the work and give bond for the faithful performance thereof. *Held*, that the town selectmen cannot waive any of the requirements in the act, nor can they expend any of the money appropriated by the town or state for highway improvements except in compliance with such requirements.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 113.*]

4. HIGHWAYS (§ 113*)—IMPROVEMENTS—BOND OF CONTRACTORS—WAIVER—QUESTION FOR JURY.

Town selectmen having no authority to waive the bond by the contractor for the improvement of a highway required by Pub. Acts 1905, p. 432, c. 232, the refusal to submit to a jury a question whether the selectmen, by allowing the contractor to commence the work without having filed his bond, waived the giving of such bond was proper.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 113.*]

5. HIGHWAYS (§ 118*)—CONTRACT FOR IMPROVEMENTS—LIABILITY OF TOWN.

A town is not liable for work on a highway which the selectmen had no authority to contract for.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 118.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. HIGHWAYS (§ 113*)—IMPROVEMENTS—CONTRACT—EXTRA WORK.

Where the plans used by a contractor in preparing his bid for a contract for improving a highway called for the straightening and changing the grade of the highway, a charge for the work of such straightening and grading cannot be made as for extra work.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 113.*]

7. HIGHWAYS (§ 119*)—IMPROVEMENTS—CONSTRUCTION OF CONTRACT.

Pub. Acts 1905, p. 432, c. 232, provides for improvement of highways according to plans prepared by the state highway commissioners, certain portions of the expense to be borne by the state and the town in which the improved highway is located. Gen. St. § 3824, provides that where there are street car tracks on a highway to be improved, any required change in the grade shall be made at the expense of the town, and the street car company shall then conform its tracks to the new grade without expense to the town. *Held*, that an agreement with the town by a street car company to pay one-half of the expense of changing the grade as a part of the improvement does not affect the state.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 119.*]

8. TRIAL (§ 169*)—DIRECTING VERDICT.

On scire facias against the garnishee, where there is no evidence to sustain plaintiff's claim, a verdict may properly be directed for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 381-389; Dec. Dig. § 169.*]

9. GARNISHMENT (§. 191*) — PROCEEDINGS AGAINST GARNISHEE—COSTS.

The return of a writ of garnishment, pursuant to Gen. St. § 882, reciting that the garnishee "failed to disclose that it was indebted to defendant," does not show that the garnishee failed to make any disclosure, so as to relieve plaintiff from liability for costs on an unsuccessful proceeding against the garnishee for judgment.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 191.*]

Appeal from Court of Common Pleas, Litchfield County; Albert McC. Mathewson, Judge.

Scire facias by Edward J. Kelley against the Town of Torrington, as garnishee for the amount of a judgment obtained by plaintiff against the original defendants, William Mella & Co. From a judgment for defendant, plaintiff appeals. No error.

See, also, 80 Conn. 378, 68 Atl. 855.

Leonard J. Nickerson and Homer R. Scoville, for appellants. Walter Holcomb, for appellee.

THAYER, J. The plaintiff brought his action against William Mella & Co., and recovered judgment against them. Claiming to have secured by process of foreign attachment inserted in his writ a debt due to that firm from the town of Torrington, he now seeks on scire facias to obtain a judgment against the town for the amount of his judgment against the original defendant.

The question at issue between the parties upon the trial was whether, at the time suit

was brought against Mella & Co., July 19, 1906, any debt was due to that firm from the town. In the trial court a verdict was directed for the defendant. The plaintiff claims that this was error, and that he is entitled to a new trial because of the error. To entitle him to a new trial the record must disclose that there was evidence from which the jury would have been warranted in finding proven every fact essential to the plaintiff's recovery, and also disclose no proved and undisputed fact which would prevent his recovery. He claimed to have proved that at the time the town was factorized it was indebted to Mella & Co. for work performed in grading and improving one of its highways known as the "Daytonville Road." At a former trial of the case he claimed that this work was done at the request and by direction of the defendant's selectmen, no price being fixed for the same, and that the town was bound to pay therefor what the work was reasonably worth. *Kelley v. Town of Torrington*, 80 Conn. 378, 68 Atl. 855. Upon the present trial he claimed that the work was done under a written contract made with the town pursuant to Good Roads Act (Pub. Acts 1905, p. 432, c. 232); that the work was entered upon on May 21, 1906, and continued until July 6th following, when the firm's workmen struck, and the work was abandoned; that Mella & Co. were obliged to abandon the work because they were unable to procure any money from the town with which to pay their men, and because they were required to change, straighten, and lower the grade of the roadbed and safeguard the tracks of a street railway, which was located upon the highway which was being improved. His claim is that these requirements and the town's refusal to pay were wrongful, and prevented the firm from completing the contract, and justified their abandonment of it and treating it as rescinded, that they were therefore entitled to compensation for the work actually performed, and that, if not, they were entitled to compensation for the extra work claimed to have been done in safeguarding, straightening, and lowering the grade of the railway tracks.

If the plaintiff failed to perform his contract, he could not recover under it, but if there was a contract which the defendant wrongfully prevented him from completing he could recover for the work done. *Connelly v. Devoe*, 37 Conn. 570, 576, *Valente v. Weinberg*, 80 Conn. 184, 135, 67 Atl. 369, 13 L. R. A. (N. S.) 448. The defendant claims that no such contract was proved. The statute (Pub. Acts 1905, p. 432, c. 232) requires that the improvement of highways therein provided for, except in cases where the cost will not exceed \$1,000, shall be submitted to competition; that it shall be let to the lowest bidder; that the work

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shall be done under a written agreement by the contractor to do it in accordance with plans and specifications prepared under the direction of the state highway commissioner; that such agreement shall be signed by the contractor, the selectmen of the town, and said highway commissioner, and a copy thereof filed with the latter; and that the contractor shall give a bond conditioned for the faithful performance of the work in accordance with the plans and specifications and the terms of the contract. These requirements are for the protection of the state, which pays the larger part of the cost of the improvements. *Griswold v. Guilford*, 75 Conn. 192, 195, 52 Atl. 742; *Kelley v. Torrington*, 80 Conn. 378, 382, 68 Atl. 855. It is important to the state that these requirements of the statute be strictly complied with. These improvements are being made in all parts of the state. The contracts on file with the highway commissioner are evidence at hand as to the cost of the work and the terms upon which it is to be performed. They prevent any arrangement between the contractors and the officers of the town detrimental to the interests of the state. And the bond, in case the contractor fails to complete his contract, secures the state from loss such as was incurred in the present case if the contractor fails to perform his contract. While the towns nominally make the improvements, their powers, and the powers of their officers, are prescribed and limited by the statute. Their selectmen have no power to expend for other purposes the money appropriated by the town and state for these improvements, and they have no power to waive any of the requirements of the statute which safeguard the interests of the state and the taxpayers.

Upon the trial the following facts were proved and not disputed: The defendant appropriated \$9,000 to improve its highways under the statute in question. The Daytonville road was duly selected as one of its roads to be improved. Calls for bids were duly advertised, and Mella & Co. were bidders, and the lowest bidders for the contract. The contract was awarded to them. Supposing that they would be able to furnish the required bond, they at once entered upon the work without having executed either the contract or bond required by the statute. One of the partners shortly after retired from the firm, and the others were unable to procure a bond. The defendant would provide them with no money with which to pay their help, the help struck because they were not paid, and the firm abandoned the work. No contract was ever executed by the firm, the selectmen, and the highway commissioner, and no bond was ever given. It was, however, claimed by the plaintiff, but disputed, that the selectmen waived the giving of the bond, and that Mella & Co. signed and tendered to the selectmen a contract

such as the statute requires, which had been prepared by the highway commissioner when the contract was awarded. He claims that these disputed questions should have been submitted to the jury. As already stated, the selectmen had no power to waive the giving of the bond, and they were not required to sign the contract, if tendered, unless it was accompanied with the bond. The bond was required as security for the faithful performance of the contract by the contractor, and the selectmen could not be asked to bind the town to the terms of the contract until the contractors also were bound. There was nothing in these claims which could properly have been submitted to the jury. The record thus shows that there was an entire absence of evidence to go to the jury to sustain the plaintiff's claim that there was a contract between the town and Mella & Co. The contract not being proved, the jury could not be asked to find that anything was due from the town to Mella & Co. under it, or for a breach of it.

The tracks of the Torrington & Winchester Street Railway Company were located upon the highway which was improved. The plaintiff claims that Mella & Co. did work not called for by the contract, and not belonging to the town, in straightening and changing the grade of the roadbed and safeguarding the tracks of this railway. If they did work not belonging to the town to do, the selectmen had no authority to direct them to do it, and the town is not liable for it. *Kelley v. Torrington*, supra. But the statutes provide that a railway company having its tracks located upon a highway shall not be required to change the grade of any portion of the highway, but that when a town changes the grade of any such highway, the company shall, when the highway is completed, conform the grade of its tracks to the newly established grade without cost or expense to the town. Gen. St. § 3824. The work of straightening and grading such a highway, while it thus straightens and changes the grade of the railway and furnishes a roadbed for the relocation of its tracks, falls upon the town, and no part of it upon the railway company. The plans which the contractors used in preparing their bids, and which are a part of the record, show the location of the railway tracks upon the original highway, and their proposed location upon the highway after it should be improved, and shows that the only straightening and changing of grade called for is that involved in the straightening and changing the grade of the highway. This the statute places upon the town, and was to be performed by the contractor. It is not extra work, but was included in the bid.

The railway company, as an inducement to the town to select the Daytonville road for improvement, agreed with the town to pay one-half of its share of the expense of the

improvement, and afterwards paid it. It is claimed that this was a fraud upon the state, that the payment was made for changing the grade of the tracks, and that the contractors were entitled, out of this money in the hands of the town, to payment for the work claimed to have been done for the railway company. While such an arrangement as is thus suggested could not be upheld, no good reason is suggested why a street railway company, a manufacturing company, a driving club, or any other person interested in having a road improved may not properly agree to bear a portion of the town's expense if such improvement is made. It does not affect the state in any way. The improvement cannot be made with the state's aid unless the highway commissioner approves the selection of the road. And the cost to the state is not affected by the fact that a portion of the town's burden is borne by private individuals. The contract between the town and the railway company is made a part of the record, and disproves the claim that the town undertook to make changes in the tracks which properly belonged to the railway company. As the payment was not for work done by the town or the contractors which belonged to the railway company, the claim that Mella & Co. did extra work for which they were entitled to pay, either from money paid by the railway or otherwise, presented no question for the jury. As there was thus no evidence to sustain either of the plaintiff's claims, a verdict was properly directed for the defendant.

The appeal raises several questions of evidence which it is unnecessary to discuss, as they do not relate to the facts decisive of the case already considered, and would only be of interest to the parties in case of a new trial.

It is claimed that the court erred in giving the defendant judgment for costs upon the ground that it failed to appear in court in the original action, and disclose whether it had any effects of the original defendants in its possession, or was indebted to them, and failed to excuse itself from so doing by disclosing to the officer at the time the factorizing process was served upon it, as provided in section 882 of the statutes. But the finding does not show that the defendant failed to appear in court and disclose, and the officer's return, upon which the plaintiff relies as showing a failure to disclose to the officer, says only that the defendant "failed to disclose that it was indebted" to Mella & Co. This does not prove that it failed to disclose that it was not indebted. It does not appear from the record, therefore, that the judgment for costs was improper.

There is no error. The other Judges concurred.

(81 Conn. 645)
STATE ex rel. CITY OF WATERBURY v. NEW YORK, N. H. & H. R. CO.
 (Supreme Court of Errors of Connecticut. Feb. 16, 1906.)

1. STREET RAILROADS (§ 7*)—CONSTRUCTION OF RAILWAY OR EXTENSION—EFFECT OF APPROVAL OF PLAN—CONDITION PRECEDENT TO LOCATION.

Gen. St. 1902, § 8833, provides that, where a street railroad company constructs a railway or lays new tracks, it shall make a plan showing the highways in or through which it proposes to lay its tracks, their location as to grade, and the center line of the highways, and such changes, if any, as are proposed to be made in any highway, and such plan shall be presented to the mayor and common council, who, after a hearing, may adopt it or modify it as they deem proper, and notify the company of their decision, but that no company shall construct a railway or lay additional tracks except in accordance with the plan approved by the city authorities, or, on appeal, by the railroad commissioners or superior court, as provided in sections 8832, 8834. *Held*, that, where a plan presented was an entirety, the approval thereof was an approval of it in its entirety, and such approval either by the city authorities or on appeal was a condition precedent to the location of an extension.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 7.*]

2. STREET RAILROADS (§ 40*)—RIGHT TO MAKE LOCATION—NATURE OF POWER.

The right to locate a railway or any part of it is a power of election, and, when once exercised, is exhausted in the absence of a statute to the contrary.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 40.*]

3. STREET RAILROADS (§ 46½*)—EXTENSION OF LINE—OBLIGATION TO COMPLETE.

Where the location of an extension of a street railroad is made and approved as a whole, the company is not obliged to construct it, but, if it enters on its construction, it must not stop when it has constructed a part and proceed to operate cars thereon without completing it within a reasonable time.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 46½.*]

4. STREET RAILROADS (§ 46½*)—EXTENSION OF LINES—CONDITIONS OF APPROVAL BY CITY AUTHORITIES.

One of the particulars of a plan of a street railroad extension which city authorities had power to modify under Gen. St. § 8833, as a condition of their approval, was the grade proposed for the tracks, and another was the change, if any, to be made in any highway, and their approval was conditioned on the company's bringing the street, in a part of the extension, throughout its full width, to a specified grade, and putting it, both within and outside of the tracks, in good condition for public travel, and another condition required this and certain other work to be completed, and the whole extension to be put in operation by a specified date. *Held*, that both these conditions were germane to the plan.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 46½.*]

5. STREET RAILROADS (§ 46½*)—EXTENSION OF LINES—TIME FOR COMPLETION OF WORK—POWER OF CITY AUTHORITIES.

The right given a street railroad company by the state to locate its railroad in city streets within a certain period is a qualified right, subject to the approval and control of the city au-

thorities pursuant to Gen. St. 1902, § 3833, and hence it does not prevent shortening of such period by the city in case of an extension, which, in the order of approval, was required in the public interest to be completed during the current season.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 46½.*]

6. STREET RAILROADS (§ 49*)—EXTENSION OF LINES—OBLIGATION OF LESSEE.

A lessee succeeding to the rights and franchises of a street railroad company takes the same burdened with the obligation of its lessor to complete the construction of an extension begun by it, and put the same in operation.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 126; Dec. Dig. § 49.*]

7. STREET RAILROADS (§ 66*)—EXTENSION OF LINES—PARTIAL ABANDONMENT.

If the entire authorized extension of a street railway has been completed and put in operation, no part of it can afterwards be abandoned at the will of the company.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 145; Dec. Dig. § 66.*]

8. MANDAMUS (§ 187*)—ALTERNATIVE WRIT—MOTION TO QUASH—REVIEW OF DETERMINATION.

Where the superior court has found all the issues for defendant, and adjudged an alternative writ of mandamus insufficient, if any of the grounds assigned for quashing it were valid, there is no error.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 436; Dec. Dig. § 187.*]

9. STREET RAILROADS (§ 49*)—EXTENSION OF LINES—OBLIGATIONS OF LESSEE.

The fact that the lessee of a street railroad company was not a party to proceedings for proposed alterations and extensions was no objection to mandamus to require completion of an extension begun by the lessor, as the lessee thereafter succeeded to the rights, franchises, and obligations of the lessor.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 49.*]

10. STREET RAILROADS (§ 49*)—EXTENSION OF LINES—OBLIGATIONS OF LESSEE.

That a street railroad has not completed an extension by the time required by a city in the order approving of its plans therefor is no excuse for not subsequently doing so, and its lessee stands in its shoes in this respect.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 12; Dec. Dig. § 49.*]

11. MANDAMUS (§ 162*)—ALTERNATIVE WRIT—MOTION TO QUASH—SUPPORTING BY ALLEGATIONS OF FACT.

A motion to quash an alternative writ serves the purpose of a general demurrer, and cannot be supported by allegations of fact.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 340; Dec. Dig. § 162.*]

12. MANDAMUS (§ 160*)—ALTERNATIVE WRIT—MOTION TO QUASH—SUFFICIENCY OF WRIT—ALLEGATION AS TO REQUEST OR DEMAND.

A direct allegation in an alternative writ of mandamus of a refusal to complete the extension of a street railroad is sufficient as against a motion to quash on the ground that the writ shows no request or demand of respondent.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 160.*]

13. MANDAMUS (§ 146*)—STATE AS PARTY PLAINTIFF.

An alternative writ of mandamus which is entitled, "State of Connecticut, ex rel.," a certain city against a specified railroad company, is a proceeding in which the state, as the party

plaintiff, is seeking to enforce its laws, and is not open to the objection that the state and not the city named control the use by the public of the defendant's railway and the interest of the public in its operation.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 287; Dec. Dig. § 146.*]

14. STREET RAILROADS (§ 46½*)—EXTENSION OF LINES—MANDAMUS TO COMPEL—EFFECT OF AMENDMENT OF CHARTER.

The amendment to the charter of the Connecticut Railway & Lighting Company in 1905 (14 Sp. Laws, p. 704), though validating and confirming the location and construction of the railway, as formerly located and constructed, did not prevent the state in mandamus on relation of a city from complaining that a part of a certain route had not been finished, as this assumed that what was done was lawful as far as it went, and simply insisted that a franchise to lay a railway on a certain route in part executed shall be wholly executed.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 46½.*]

15. MANDAMUS (§ 162*)—COMPELLING EXTENSION OF STREET RAILROAD—LACHES—GROUND FOR QUASHING ALTERNATIVE WRIT.

A delay of three years in bringing mandamus to compel a street railway company to complete the construction of an extension does not call for explanation, in the first instance, on the face of an alternative writ, when assigned as ground for motion to quash.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 162.*]

16. MANDAMUS (§ 146*)—PROCEEDINGS AGAINST STREET RAILROAD COMPANY—WRIT IN NAME OF CITY OR STATE.

Gen. St. 1902, § 8824 (Pub. Acts 1907, p. 806, c. 219), provides that the mayor and common council of each city shall have in the first instance exclusive control over the placing of street railroad tracks, and of changes in grade of a railway, and, if any company shall fail to obey their orders in these respects, "may proceed by mandamus to compel such company, at its own expense, to carry out such orders." *Held*, that the procedure in such case may be in the name of the city, but that there was no reason why it may not be in the name of the state on relation of the city, or in the name of the state alone.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 287; Dec. Dig. § 146.*]

17. MANDAMUS (§ 131*)—SUBJECTS OF RELIEF—CONSTRUCTION AND OPERATION OF STREET RAILROADS—OBLIGATION IMPOSED BY LAW.

The state can always proceed by mandamus to enforce a legal duty created by the authority to which it has intrusted power to create it, and, when it invests a city with power to make orders with respect to the construction or operation of a street railroad, it charges those against whom such orders may be directed with the duty of obeying them, and their duty is therefore one of law.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 131.*]

Appeal from Superior Court, New Haven County; William L. Bennett, Judge.

Motion by the state's attorney before the superior court for New Haven county, made on the relation of the city of Waterbury, for a writ of mandamus against the New York, New Haven & Hartford Railroad Company. An alternative writ was quashed on defendant's motion, and the relator appeals. Reversed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The writ stated this case: In 1904 the Connecticut Railway & Lighting Company presented a petition to the mayor and board of aldermen of the city of Waterbury for the approval of its plan for the location of certain proposed alterations and extensions of its electric railway within said city, described as follows: "Extension from East Main Street to the Pearl Lake Road. Commencing at a point in the center of the East Main street track at the junction of East Main street and Cole streets; thence through Cole street to Franklin street to Union street; thence through Union street to Baldwin street; thence through Baldwin street to Baldwin Hill or Piedmont street; thence through Chapel street to the Pearl Lake Road." It was duly referred to the board of public works, which, after a public hearing, reported its recommendation that the approval desired should be granted upon certain conditions; and thereupon it was so granted by the board of aldermen with the approval of the mayor in March, 1904. These conditions were as follows: (1) That the location of the tracks from Cole street through Franklin street to Union street adjoin the West line of Union Square, so called. (2) That said company shall repair and strengthen the bridge over Mad river, known as Scovill's bridge, so that it shall be safe under the changed conditions, and shall thereafter bear a reasonable proportion of the cost of keeping and maintaining said bridge in safe condition, and also, whenever in the opinion of the board of aldermen public necessity and convenience require the reconstruction or widening of said bridge or the removal of said bridge and the construction of a new, wider, and stronger bridge, of such dimensions and materials as said board shall determine, the said Connecticut Railway & Lighting Company shall pay to the city of Waterbury a reasonable proportion of the total cost of such changes in said bridge, or of such new bridge, and shall thereafter bear a reasonable proportion of the cost of maintaining such new or reconstructed bridge in safe condition. (3) That all new or additional poles to be erected and used for the support of the wires for the operation of the cars of said company along said road shall be of wood, of neat design, and subject to the approval of the board of commissioners of public works. (4) From Baldwin Hill street to the terminus of the said railroad said company shall widen the highway upon which its tracks are to be laid to the full width as laid out by the town of Waterbury, bringing all of said highway to the now existing grade, and leaving its surface, for its full width, in good condition for public travel, it being understood that in the execution of such work said railroad company shall not be held liable for land damages to the adjoining proprietors. (5) That said company shall lay and maintain a cobble pavement between the rails and two feet on each side

throughout the whole length of the line as described in this extension. (6) That all work to be performed under these conditions shall be done and completed by said company on or before the 15th day of November, 1904, and said company shall have said extension in operation and open to the use of the public on or before said date. No appeal was taken by the company, but it thereupon proceeded to construct its tracks on a portion of the highways named in its petition, and to operate its cars thereon. It has ever refused and neglected to complete the work by extending its tracks through Chapel street to the Pearl Lake Road. The defendant in 1907 succeeded, as its lessee, to its rights, franchises, and obligations with respect to its electric railway system; but has, in like manner, ever neglected and refused to complete the work by making and operating such extension. The writ commanded the defendant before the 1st day of February, 1908, to extend its tracks through Chapel street to the Pearl Lake Road, and operate its cars thereon conformably to said conditions, or to show cause to the contrary. The motion to quash asserted, among other things, that the mayor and board of aldermen had no jurisdiction or power to require the Connecticut Railway & Lighting Company to construct its railway upon Chapel street or upon any street or streets whether as a condition of their approval of a plan for the construction of its railway upon highways within said city or otherwise; and it was upon this ground—the second of those stated in the motion—that, according to the memorandum of decision, the writ was quashed. As successor to the Waterbury Traction Company, the Connecticut Railway & Lighting Company had a franchise from the state "to locate and construct a railway upon the route or routes hereinafter set forth, * * * to wit, * * * From the South Main street terminus of the present tramway along the Waterbury Road, so called, to Grove Cemetery in the town of Naugatuck, Platt's Mill Road, Pearl Lake Road, Chapel street, Baldwin Hill street, Baldwin street, Mill street, Union street, Franklin street, Cole street." 11 Sp. Laws, p. 724, § 1; 13 Sp. Laws, p. 754, § 4; 15 Sp. Laws, p. 573, § 2. The time for constructing a railway on this route has been extended from time to time, and now runs to July 1, 1909. Gen. St. 1902, § 3835; 12 Sp. Laws, p. 1016; 14 Sp. Laws, pp. 120, 704; 15 Sp. Laws, p. 574, § 3.

John P. Kellogg, for appellant. Benjamin I. Spock, for appellee.

BALDWIN, C. J. (after stating the facts as above). The Connecticut Railway & Lighting Company, the predecessor in title of the defendant, having a franchise from the state for the construction and operation of a railway in certain streets in the city of Waterbury, submitted to the city author-

ties a plan for exercising this franchise with respect to some of these streets pursuant to Gen. St. 1902, § 3823. This provided that, before any such company shall proceed to construct a railway or lay new tracks, it shall "cause a plan to be made showing the highway or highways in or through which it proposes to lay its tracks, the location of the same as to grade and the center line of said highways, and such changes, if any, as are proposed to be made in any highway," and that "said plan shall be presented to the mayor and court of common council of each city * * * within which such company proposes to operate its railway, who shall, thereupon, after public notice, proceed to a hearing of all parties interested therein, and after such hearing may accept and adopt such plan, or make such modifications therein as to them shall seem proper, and shall, within sixty days after the presentation of such plan, notify such company in writing of their decision thereon and of such modifications therein as they have made," and that "no such company shall construct such railway or lay additional tracks, except in accordance with a plan approved by the authorities aforesaid, or approved on appeal, by the railroad commissioners or the superior court, as provided in §§ 3832, 3833, and 3834."

The plan presented was an entirety. It was denominated a plan for an "Extension from East Main Street to the Pearl Lake Road." The proposed location started in East Main street, and was to end at the Pearl Lake Road, reaching the latter by way of Chapel street. The approval of the plan was an approval of it in its entirety. Such an approval, either by the city authorities or given upon an appeal from their action, was a condition precedent to the location of such an extension. *Central Railway & Electric Company's Appeal*, 67 Conn. 197, 210, 35 Atl. 32. The right to make a location of a railway or of any part of it is a power of election, and, when once exercised, is exhausted, in the absence of a statute to the contrary. *Hartford & Conn. Western R. R. Co. v. Wagner*, 73 Conn. 506, 509, 48 Atl. 218. The location by the Connecticut Railway & Lighting Company of its extension from East Main street to the Pearl Lake Road has been made. It has been made and approved as a whole. The company did not thereby come under an obligation to enter upon the construction of the piece of road thus located. But it did come under an obligation, if it should enter upon the construction of that piece, not to stop when it had constructed part of it, and proceed to operate cars upon that part, without going forward further, within a reasonable time, to complete the extension. The city authorities had power to modify the plan submitted as a condition of their approval in any way legitimately affecting one or more of the particulars, which

the statute required such plans to specify. One of these particulars was the grade proposed for the tracks. Another was the change, if any, to be made in any highway. The city authorities were of opinion that changes were proposed in the plan with respect to that part of the route running from Baldwin Hill to the terminus of the extension, which required modification. Their approval was therefore conditioned on the company's bringing the street, in that part of the extension throughout its full width to a specified grade, and putting it, both within and outside of the railway tracks, in good condition for public travel. Another condition required this and certain other work to be completed, and the whole extension to be put in operation by November 15, 1904. These conditions were strictly modal. They related to the manner of proceeding. The first guarded the public against irregular grades and too narrow a roadway. The second guarded the public against unnecessary delays in the performance of the work, and insured their receiving the full benefit of the entire extension, if any part of it were constructed and used. Both were germane to the plan of location. *Central Railway & Electric Company's Appeal*, 67 Conn. 197, 214, 35 Atl. 32, 219; *Waterbury's Appeal*, 78 Conn. 222, 225, 61 Atl. 547.

It is argued that, since the state had given the company a right to locate its railway in the streets in question within a period which would not have elapsed on November 15, 1904, this time could not be shortened by the city. This right of location, however, was given subject to the approval and control in certain particulars of the city authorities. It was a qualified, not an absolute, right. The company could not begin the laying of a track by digging up the pavement in a busy thoroughfare, and leave things in such a shape for months or years. It must act reasonably in the exercise of its franchise, and the General Assembly left it with the municipal authorities in the first instance to see that it should so act. The order of approval now in question was, in effect, a declaration by proper agents of the law that the public interest required that the particular extension contemplated should, if undertaken, be carried to completion during the current season. It follows that the specific ground on which the memorandum of decision indicates that the writ was quashed was insufficient. Part of the extension approved having been constructed and put in operation by the Connecticut Railway & Lighting Company, it came under an obligation, so far as appears from the writ, to build the rest of it, and put that in operation, conforming, as respects so much of the route as runs from Baldwin Hill street to the terminus at Pearl Lake Road, to the condition imposed by the city in that regard. If the entire extension had been so com-

pleted and put in operation, it is certain that no part of it could have been subsequently abandoned at the will of the company. *State v. Hartford & New Haven R. R. Co.*, 29 Conn. 538, 547. The reasons for this apply conversely. The benefits and the burdens coming from the conditional approval of the location go together. It was not within the company's power to accept and take advantage of what it deemed beneficial, and yet escape the burdens incident to a full completion of the extension in the manner authorized. It appears from the judgment file that the superior court found all the issues for the defendant, and adjudged the writ insufficient. If, therefore, any of the grounds assigned for quashing it were valid, there was no error.

The first ground was that the defendant was no party to the proceedings had in 1904. This is immaterial, since its succession to the rights, franchises, and obligations of the Connecticut Railway & Lighting Company came at a later date.

The third, fourth, and fifth grounds were that the condition requiring the completion of the extension by November 15, 1904, merely limited the time within which the Connecticut Railway & Lighting Company could have constructed it, and that, this time having expired, the defendant had no right to complete the construction, and could not be commanded to complete it. The Connecticut Railway & Lighting Company could not have set up as against the state that it had not completed the extension by November 15, 1904, as an excuse for not subsequently proceeding to complete it. No one can profit by his own wrong. The writ alleges that all its rights, duties, and obligations passed to the defendant in 1907. The latter stands, therefore, as to this matter in the shoes of its lessor.

The sixth ground is that "no request or demand has ever been made of the respondent to complete the construction of said line." A motion to quash serves the purpose of a general demurrer, and cannot be supported by allegations of fact. But if the averment is to be construed as importing that the writ shows no request or demand, a sufficient answer is that it directly alleges a refusal to complete the work, which is enough, so far as a motion to quash is concerned. *Brainard v. Staub*, 61 Conn. 570, 575, 24 Atl. 1040.

The seventh ground is that the laws of the state, and not the mayor and aldermen of Waterbury, control the use by the public of the defendant's street railway and the interest of the public in its operation. This claim has been already discussed in connection with the second of the grounds set up in the motion; but it may be added that the writ is entitled the "*State of Connecticut ex rel. The City of Waterbury v. The New York, New Haven & Hartford Railroad Company*," and is a proceeding in which the state as the party plaintiff is seeking to enforce its laws.

The eighth ground assigned is that the General Assembly in 1905 validated and confirmed the location and construction of the railway, as located and constructed in the highways described in the original petition to the city authorities "through Baldwin street to its intersection with Chapel-street at Baldwin Hill or Piedmont street." In an amendment of its charter in the year named (14 Sp. Laws, p. 704), it is provided that "the location and construction of all tracks, switches, cross-overs, fixtures, poles, wires, and appurtenances heretofore located and constructed by said company, or any of its underlying or constituent companies, now controlled and operated by said company, are hereby validated and confirmed, as at present existing, for the use, benefit, and enjoyment of said company; and it is also authorized to carry persons, goods, and property over any or all of its lines of railway, any charter provision to the contrary notwithstanding." The state in this action is not challenging the right of the defendant as lessee of the Connecticut Railway & Lighting Company to hold, maintain, and operate so much of the railway route from East Main street to Pearl Lake Road as was located and constructed in 1905. Its complaint is that, whereas part of that route has been constructed and is being operated, that part running through Chapel street to the Pearl Lake Road has not been. This assumes that what has been done is lawful so far as it goes, and simply insists that a franchise to lay a railway on a certain route which has been in part executed shall be wholly executed.

The ninth ground is laches. The defendant did not acquire title until a day not specified in 1907. The application for the writ of mandamus was made January 17, 1908. There is clearly no laches apparent as respects the defendant, unless it can rely on a delay to proceed against its predecessor in title. But if so, and if laches is ever available in defense to such an action by the state, a delay of three years in bringing before the courts a controversy of this nature called for no explanation in the first instance on the face of the writ.

It follows that the motion to quash was wholly without merit.

In the argument in this court the defendant has set up a claim, not made in the motion to quash, that mandamus does not lie to compel the performance by a private corporation of any particular act unless it be a corporate act specially commanded by law. As this objection strikes at the foundation of the action, we think it proper to consider it. Gen. St. 1902, § 3824 (see Pub. Acts 1907, p. 808, c. 219), provides that the mayor and common council of each city shall have in the first instance exclusive control over the placing of street railway tracks in the city streets, and of changes in grade of such railway, and, if any railway company shall fail to obey their orders in those respects, "may proceed

by a writ of mandamus to compel such company, at its own expense, to carry out such orders." Such writs have been frequently issued. *Hartford v. Hartford Street Railway Co.*, 73 Conn. 327, 47 Atl. 330; *State v. Same*, 76 Conn. 174, 56 Atl. 506. The procedure may be by a writ in the name of the city. There is no reason why it may not also be by a writ in the name of the state on the relation of the city, or in the name of the state alone. The state can always proceed in such an action to enforce a legal duty created by an authority to which it has intrusted the power to create it. When it invested the city of Waterbury with power to make orders of the kind now in question, it charged those against whom such orders might be directed with the duty of obeying them. Their obligation was therefore one imposed by law. *Bassett v. Atwater*, 65 Conn. 355, 363-365, 32 Atl. 937, 32 L. R. A. 575.

There is error. The judgment is reversed, and the cause remanded to be proceeded with according to law. The other Judges concurred.

(75 N. H. 163)

KELLAND v. JOS. W. NOONE'S SONS CO.
(Supreme Court of New Hampshire. Hillsborough. Jan. 5, 1909.)

1. MASTER AND SERVANT (§ 153*)—INJURIES TO EMPLOYÉ—WARNINGS—DUTY OF MASTER.

An employé who had never before worked in a mill or on machinery was set at work on a sizing machine four or five days after his employment began; his work being to put the cloth into the machine. He was told not to go behind the machine when it was running, but the man who worked with him habitually went there when the cloth was not running evenly about the rolls. About two weeks later he was told by his employers to go behind the machine while it was running, and smooth out the wrinkles in some cloth which had become bunched up. It was so dark behind the machine that he could not see the floor, and, when he stepped in, he slipped and fell, and, there being no guard roll on the machine, his hand came in contact with the rolls, and was crushed. The floor back of the machine was uneven and slippery. The employé did not know the condition of the floor or appreciate the danger, while his employers did. *Held*, that the employers were negligent in failing to notify him of the condition of the floor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 315; Dec. Dig. § 153.*]

2. MASTER AND SERVANT (§ 230*)—INJURIES TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE.

Though an inexperienced servant knew that, if he went back of a sizing machine in obedience to a command, there was danger of his hand being crushed between the rolls of the machine, he was not guilty of contributory negligence precluding recovery for an injury to his hand caused by his slipping on the floor, and his hand coming in contact with one of the rolls, where he did not know of the condition of the floor, and he had seen a fellow employé go in there frequently without injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 694-696; Dec. Dig. § 230.*]

3. WITNESSES (§ 414*) — COMPETENCY — KNOWLEDGE—EVIDENCE TO SHOW.

In an action for injuries to a servant whose hand was crushed in a machine on his slipping on a slippery and uneven floor back of the machine, evidence as to the condition of the floor at a time previous to the accident, being relevant to the issue of its condition at the time plaintiff was injured, was admissible to show that the witnesses who testified as to the condition of the floor at the time previous to the accident had an opportunity to know about the matter as to which they testified.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1287; Dec. Dig. § 414.*]

4. TRIAL (§ 48*)—RECEPTION OF EVIDENCE—IMPROPER USE OF.

Where evidence introduced by plaintiff is relevant to one of several issues in the case, the fact that such evidence produced the verdict is not alone cause for reversal, unless it is shown that an improper use was made of the evidence by plaintiff, and that the verdict resulted from such improper use.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 120; Dec. Dig. § 48.* *Evidence*, Cent. Dig. § 425.]

Transferred from Superior Court, Hillsborough County; Peaslee, Judge.

Action by William J. Kelland against the Jos. W. Noone's Sons Company for personal injuries while in defendants' employ. From the denial of defendants' motion for direction of a verdict in their favor and from adverse rulings as to admission of evidence, defendants bring exceptions. Exceptions overruled.

When the plaintiff began work for the defendants on February 10, 1904, he had never been in a mill or worked around machinery. After working four or five days in the fulling room, he was set at work on the sizing machine, which consists of an iron frame in which are two iron rolls five feet long and fourteen inches in diameter. The plaintiff's work was to put the cloth about to be sized into the machine. He was told not to go behind the machine when it was running, but the man who worked with him habitually went there whenever the cloth was not running evenly through the rolls. A part of the cloth with which the lower roll was covered came off on March 1st. While the defendants were replacing it, the cloth used for the purpose wrinkled or bunched up. Instead of stopping the machine and smoothing out the wrinkles, they told the plaintiff to go behind the machine and do it. He started to do as he was told, but it was so dark behind the machine that he could not see the floor, and, when he stepped in, he slipped and fell. His hand came in contact with the rolls, was drawn between them, and was crushed. The floor back of the machine was uneven and slippery. The defendants excepted to the denial of a motion for the direction of a verdict in their favor, and also to the admission of evidence tending to show the condition of the floor when it was remov-

ed in 1906, and the absence of a guard roll at the back of the machine.

Sargent, Remick & Niles and Edmund S. Cook, for plaintiff. Doyle & Lucier, for defendants.

YOUNG, J. 1. The plaintiff says that the condition of the floor behind the sizing machine and the want of a guard roll was the cause of his injury. The test to determine whether it can be held that the defendants were in fault for this condition of their premises is to inquire whether it was a normal one, and if it was not, and they did and he did not appreciate the danger incident to going behind the machine because of it, whether they did what the ordinary man would have done to notify him of the danger. They concede it can be found that the condition of their premises was abnormal, and that they did and he did not appreciate the risk incident thereto; but they deny that they can be found to be in fault in respect to notifying him of the danger. All they did for that purpose was to tell him, when they set him at work on the machine, not to go behind it when it was running; so the real question on this branch of the case is whether it can be said from the fact that they told him not to go behind the machine that he ought to have known the floor was wet and uneven, and that there was no guard roll at the back of the machine. If it can be said that he ought to have known from that fact that if his hand got caught in the machine it would be crushed, it cannot be said that he ought to have known the floor was in such condition that he would probably get his hand between the rolls if he went behind the machine. In short, although the plaintiff knew what would happen if his hand was caught between the rolls, it cannot be said that he knew of the condition of the floor which made it probable that his hand would be caught. Consequently it can be found that the defendants were in fault; for it is the master's duty to notify his servants of all the dangers of the service peculiar to the way he maintains so much of his premises as are intended for their use of which he does, and they do not, know.

2. Was the plaintiff guilty of contributory negligence? Whether or not the ordinary man will pursue a particular course of action depends to a great extent on his knowledge of the situation and of the risks he will run if he pursues it. If he thinks the danger is slight, he may pursue a given course, although he would not think of so doing if he appreciated the risk incident thereto. It is necessary, therefore, in order to determine what the ordinary man would have done if he had been sent behind the machine

as the plaintiff was, to consider the situation, as it existed just before the accident, from the plaintiff's point of view. He knew that if he was caught between the rolls he would be crushed, and that he had been told not to go behind the machine when it was running. It must be held, therefore, that he knew there was danger of his being crushed if he went there. But he did not know why it was dangerous to go there. For all he knew, the only risk in going behind the machine was that incident to his accidentally doing something which would bring him in contact with the rolls. He did not know that the floor back of the machine was in such a condition that he would be likely to come in contact with the rolls if he did not use great care. He may well have thought the risk was very slight, since he had frequently seen the man who worked with him go behind the machine to smooth out cloth they were sizing. It cannot be said, therefore, that the plaintiff was guilty of contributory negligence; for the test to determine that question is to inquire whether the risk he supposed he was running was so great that all fair-minded men will agree that the ordinary man would not have encountered it. *Goodale v. York*, 74 N. H. 454, 69 Atl. 525; 29 Cyc. 518, 519; 7 Am. & Eng. Enc. Law, 392, 393; 37 Cent. Dig. tit. "Negligence," § 86.

3. The plaintiff was not permitted to use the evidence in respect to the removal of the floor in 1906 to prove the defendants' fault. All the use he was allowed to make of it was to show that the witnesses who testified as to the condition of the floor at that time had an opportunity to know about the matter as to which they testified. It is conceded that the condition of the floor at that time is relevant to the issue of its condition at the time the plaintiff was injured. Since this is so, the exception to its admission raises no question of law. *Curtice v. Dixon*, 74 N. H. 386, 68 Atl. 587.

4. One of the issues was whether the condition of the defendants' premises of which the plaintiff complained was normal. It is obvious that evidence that the guard roll on the back of the machine was not in use at the time of the accident was relevant to that issue. Therefore, if it is true, as the defendants contend, that this evidence produced the verdict, that fact alone does not furnish cause for a reversal. *Lambert v. Hamlin*, 73 N. H. 138, 59 Atl. 941. To justify such a proceeding, it should appear that the plaintiff made an improper use of the evidence, and that the verdict resulted therefrom.

Exceptions overruled.

PEASLEE, J., did not sit. The others concurred.

(109 Md. 429)

GOTTLIEB-KNABE & CO. OF BALTIMORE CITY et al. v. MACKLIN et al.

(Court of Appeals of Maryland. Jan. 18, 1909.)

1. MUNICIPAL CORPORATIONS (§ 722*)—LEASE OF PUBLIC PROPERTY—VALIDITY.

Baltimore City Charter, art. 4, § 1, authorizes the mayor and city council to purchase and hold property, and dispose of the same for the benefit of the city. Section 13 provides that nothing in the article shall prevent the mayor and council from disposing of any building or land no longer needed for public use, if such disposition be approved by the finance commissioners, by uniting in the conveyance thereof, nor from renting for a fixed term any of such property on approval of the finance commissioners. *Held*, that a lease of such city property reciting the ordinance and its approval, under which the lease was made, is valid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1528; Dec. Dig. § 722.*]

2. MUNICIPAL CORPORATIONS (§ 722*)—USE OF PUBLIC PROPERTY — "FIXED AND LIMITED TERM."

Baltimore City Charter, art. 4, § 13, authorizing the mayor and council to lease for a "fixed and limited term" any city property not needed for public use, does not prevent the leasing of such property to be used for public entertainments.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1528; Dec. Dig. § 722.*]

3. MUNICIPAL CORPORATIONS (§ 722*)—USE OF CITY PROPERTY—ULTRA VIRES.

A lease by the mayor and council pursuant to Baltimore City Charter, art. 4, § 13, of city property not needed for public use to the field officers, to be used as an armory of the state militia, is not rendered ultra vires by the subsequent concurrent action of the lessors and lessees in permitting such armory to be sublet for public entertainments on a division of the proceeds.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1528; Dec. Dig. § 722.*]

4. CONSTITUTIONAL LAW (§ 278*)—DUE PROCESS OF LAW—USE OF PUBLIC PROPERTY.

The temporary and casual use of unused public property for public entertainments to avoid loss of revenue on such unused property, and thereby lighten the general burden of taxation, is not an unconstitutional invasion of the rights of citizens engaged in the business of entertaining, as depriving them of property without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 763; Dec. Dig. § 278.*]

Appeal from Circuit Court of Baltimore City; Thos. Ireland Elliott, Judge.

Bill for injunction by Gottlieb-Knabe & Co. of Baltimore City and others against Charles F. Macklin and others. From a decree dismissing the bill on demurrer, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

Carroll T. Bond and Wm. L. Marbury, for appellants. Albert Gill and John Philip Hill, for appellees.

PEARCE, J. The mayor and city council of Baltimore own a lot of ground on Fayette street in said city, improved by a building constructed and used for a number of years as the Western Female High School of said city, but in 1896 its use for this purpose was abandoned, and during the same year the mayor and city council, through its then comptroller, Charles D. Fenhagen, acting under ordinance No. 155 of said mayor and city council, leased said lot and building to certain persons then constituting the field officers of the Fourth Regiment Infantry, Maryland National Guard, and their successors in office, "for the purpose of an armory for said regiment, for the term of five years, from March 11, 1896, for the sum of one dollar per annum rent," and in further consideration of the performance of certain covenants contained in said lease, as to which covenants no question arises. The successors of the field officers named in said lease are the defendants in this case, the present field officers, other than the mayor and city council, and are lessees holding over under said lease. The plaintiffs, Gottlieb-Knabe Company of Baltimore City, and Germania Maennerchor of Baltimore City, are both private corporations under the laws of Maryland, owning and maintaining buildings, rented by them for profit, for concerts, exhibitions, entertainments, and public meetings; are both substantial taxpayers in said city, the first-named plaintiff being the owner of the building on Mt. Royal avenue known as "The Lyric," and the latter being the owner of a large building and hall on West Lombard street in said city, both of which buildings have been long used for the above-mentioned purposes. The bill charges that the "present field officers, by and with the consent and concurrence of the mayor and city council, for the purpose of providing money for the said Fourth Regiment, in addition to that appropriated by the state, in maintaining that branch of the militia, and for adding to the revenues of the city, have entered into contracts for the rental of the said armory building for concerts, meets, and other gatherings by organizations of private citizens desiring such use of said building, and have heretofore actually rented said building for said purposes, and have entered into contracts for still further rentals of that character, in the months of October, November, and December, 1907, and January, 1908, under an agreement that part of said rentals shall be paid to said field officers, and part to the mayor and city council." The bill further charges that still other contracts of like character are being sought by other organizations, none of which have any connection with any branch of the State Militia, or with the municipality of Baltimore, but are exclusively devoted to private purposes, and intend to de-

vote said armory, when so rented to them, exclusively to concerts, entertainments, etc., for the private profit of said organizations. The bill further charges that such use of said armory is an unauthorized and unlawful use of the property of the taxpayers, and endangers the said property, and the equipment and personal property of the state, for which said building is provided, as a storehouse; that such rentals for such private purposes deprive the plaintiffs and others owning like property of opportunity to rent their buildings for similar purposes, and of deriving from them income which would otherwise be assured, and if allowed will deprive the plaintiffs of profitable customers of long standing—one of which, the Harmonie Singing Society, is now advertising numerous entertainments to be held in said armory; that it is impossible for plaintiffs, and others in like situation, to enter into competition with said defendants, they being exempt from all taxes and cost of maintenance, while plaintiffs are not only subjected to these charges upon their properties, but are compelled, as taxpayers, to bear their proportion of what is devoted to the maintenance of said armory; that protest against this alleged injustice has been made to the Governor of the state by whom said protest was referred to the adjutant general of the state, who has replied that he is without power to act in the premises. The prayer of the bill is for an injunction restraining the defendants, their agents, and officers, and their successors in office, from letting or renting the said armory, or any part thereof, for the use of meetings, concerts, exhibitions, or entertainments to any person or persons, organization or organizations, other than the officers or organizations of the Militia of the State of Maryland, and for such other and further relief as their case may require. A preliminary injunction was issued, and both defendants demurred to the bill on the ground that no case was stated therein entitling either plaintiff to relief in equity, and on the hearing, the demurrer was sustained, the injunction was dissolved, and the bill of complaint dismissed. This case has been argued by all the counsel with much ability, and by the distinguished counsel for the appellants with unusual fullness and earnestness. If the matter could be reduced to a question of public policy properly determinable by this court, our conclusion might perhaps be different, though we are not to be understood as so stating. The inquiry, however, is one of power, and it is not claimed that the renting complained of can be restrained unless the act is *ultra vires*.

After a careful examination and consideration of the briefs in the case, we think the questions necessary for determination may be reduced to two: (1) Had the city the right to rent this building as it did? (2) If it had such right, what is there, if anything, in the character of the field officers, as lessees, to effect their power of subletting in the man-

ner and for the purposes which they have been, and are, doing?

1. By section 1, art. 4, Pub. Loc. Laws (City Code) the mayor and city council are expressly authorized to purchase and hold real, personal, and mixed property, and "dispose of same for the benefit of the city as hereinafter provided." By section 13 of the same article it is declared: "Nothing contained in this article shall prevent the mayor and city council of Baltimore from disposing of any building or parcel of land no longer needed for public use; provided that such disposition shall be approved of by the finance commissioners by their uniting in the conveyance thereof, and shall be made at public sale and be provided for by ordinance; nor from the renting for fixed and limited terms of any of its property not needed for public purposes, on approval of the commissioners of finance." Under this section absolute disposal must be provided for by ordinance, and must be at public sale, and the finance commissioners must unite in the conveyance as the evidence of their approval. There is no limitation upon the power of renting for fixed and limited terms, except the approval of the finance commissioners, the mode of approval not being specified. The lease to the field officers in this case, however, recites the fact that it was made in pursuance of Ordinance No. 155 of the mayor and city council, approved May 12, 1893, so that it appears to have been made in accord with the strictest construction of section 13 of article 4.

In *Davidson v. Mayor and City Council*, 96 Md. 509, 53 Atl. 1121, under an ordinance of the mayor and city council of Baltimore, a lot was acquired and a building erected thereon for the use of English-German School No. 1, and it was so used for a number of years, when the board of school commissioners of the city determined to use it for a colored high school, which change of use certain taxpayers of the city sought to restrain by injunction. In refusing the injunction on appeal this court, referring to section 1 of the city charter, *supra*, said: "By the first and second sections of that instrument all the property of the city is vested in them, with full power of disposition of it in the manner and terms therein provided. Under the lease the mayor and city council became the owner of the premises, and by reason thereof had full power to designate from time to time the uses to which it could be put. * * * The terms of the charter, and the acts of assembly, if there were any, determine what should be the measure of their power and duty. * * * It could not have been intended that for all time the premises could be used only for the uses of that school. If it could be available for no other use than that specifically mentioned, it could well happen that after the location had ceased to be available for the specified use, and there was no power in the corpora-

tion to designate any other employment of the premises, the property would remain idle and worthless, and become a mere incumbrance on the city." This case is cited to show the broad and emphatic language used in considering the power of the city to determine the uses to which its property of that description can be put, though the case did not involve the precise question here presented of property no longer needed for public uses. But, as we shall see later, there are abundant authorities from other courts of high repute sustaining the lease to the field officers in this case.

We have not overlooked, though we cannot agree with, the ingenious argument of the appellants by which they seek to take this case out of the operation of section 13 of the charter. They contend that "letting" for entertainments for one or more evenings, however definitely ascertained, is not a "renting for a fixed and limited term." We think that it is apparent that the meaning and purpose of the requirement that the renting allowed should be for a fixed and limited term—and with the approval of the finance commissioners—was that no such indefinite or renewable contracts should be made as would interfere with the probability of an early absolute disposal of unused property of the city, no argument being required to show that when real property or buildings belonging to the city are no longer available for its public uses, the financial interests of the city demand that the cost of maintenance be gotten rid of as promptly as possible by absolute sale; and we are of opinion that the term "renting" as here used embraces the power to let or hire the use for a single evening, or any number of evenings, whether consecutive or not. A liberal construction of such a charter power is required to enable the city, in the interest of its general taxpayers, to minimize the loss of revenue upon its unused property.

Again the appellants contend that this building is not "property not needed for public use," as those words are used in section 13, because it is, as they say, "in the custody and regular use of a branch of the government as its only habitation." But why is it in such use and custody? Clearly only because the city, its owner, does not need it for any of its own public uses. Can it be supposed that if the city could adopt it to any substantial and valuable public uses of the municipality, it would so recklessly neglect its duty to the taxpayers as to rent it to the field officers, as they did, for \$1 a year and a covenant to maintain an insurance for \$10,000? The question answers itself, and must satisfy any one who will consider it impartially, that it is now, notwithstanding its occupancy under the terms of this lease, as clearly unused property, so far as the city is concerned, as it was before this lease was made.

Referring now to the authorities, which

we have said are abundant to sustain this lease, we cite the following: In *French v. Quincy*, 3 Allen (Mass.) 9, the town erected a town hall on a lot held under a deed conveying the title for that specific use, with condition for reverter to the grantor or his heirs on breach of condition as to use. The building was so constructed as to contain in the first story a bank, a clothing store, and a lockup, and in the second story a hall for town meetings, also used as a theater and for entertainments and dances. Upon a writ of re-entry it was held that the town, having authority to construct the building, and not having occasion to use parts of it for the time being, is not obliged to keep them unoccupied, but may derive a revenue from them by renting them, notwithstanding this interfered with the business of the plaintiff's tavern. In *Bates v. Bassett*, 60 Vt. 531, 15 Atl. 200, 1 L. R. A. 166, the town owned an old hall, not needed or used for any town purposes. Being dilapidated, it was repaired at a cost of \$2,500, and the apartments rented for various purposes. The court said: "The town had no right, as a primary purpose, to erect a building to rent, but if, in the erection of a hall for its proper municipal purposes, it conceives that it will lighten its burdens to rent part of its building, whereby an income is gained, no sound reason is suggested why it may not do so." In *Stone v. Oconomowoc*, 71 Wis. 155, 36 N. W. 829, plaintiff, who was a large taxpayer, and owned a hall in the city used for lectures, theatrical performances, dances, etc., sought to restrain the city from leasing its auditorium for the same purposes. The charter gave the city power to purchase and hold for use of the city any estate, real or personal, and to sell, lease, and convey the same, and to control and manage any other property of the city. The relief was refused, the court holding the injury to the plaintiff to be too remote and consequential to be the basis of an action, and hence *damnum absque injuria*. In *Bell v. Platteville*, 71 Wis. 139, 36 N. W. 831, where a similar question was decided in the same way, the court quoted with approval the language of Lord Chancellor Selborne in *Attorney General v. Great East. R. W. Co.* L. R., 5 App. Cas. 473, in which he said: "The doctrine of *ultra vires* ought to be reasonably, and not unreasonably, understood and applied, and that whatever may be fairly regarded as incidental to, or consequential upon, those things which the Legislature has authorized ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*"; and in the same case the Wisconsin court took occasion to say (referring to the cases of school districts, so much relied on by the appellants in the case now before us): "The cases relating to powers of school districts cannot be regarded as an authority for limiting the powers of cities as claimed, since their powers are very much more re-

stricted, being at most quasi corporations, or corporations sub modo only." The same view has been held in the federal court, in *The Maggie P. (C. C.)* 25 Fed. 203. In that case the city of St. Louis through its harbor master pumped out a sunken steamer, under a contract with the owner, and filed a libel for these services. The vessel owner raised the question whether the making of such a contract by the city was not outside the scope of municipal power. The court, through Mr. Justice Brewer, sustained the libel, after careful consideration, saying: "When a city has in its possession instrumentalities, and hires employes for the purpose of discharging some public duty, I see no reason why, when the exigencies of public duties do not require the use of those instrumentalities and employes, it may not make a valid contract to use them in some private service." This is the exact principle announced by Judge Bartol in *Rittenhouse v. Baltimore*, 25 Md. 336, in which he says: "Where the corporation appears in the character of a mere property holder, and enters into a contract with reference to such property, as any private citizen or other proprietor might do, or where it engages in an enterprise not necessarily connected with, or growing out of its public capacity, as a part of the local government, then all of its rights and liabilities are to be measured and determined by the same rules as govern mere individual persons or private corporations." The court, also in the same case, laid down the doctrine repeated and emphasized in *St. Mary's Indus. School v. Brown*, 45 Md. 326, and *Davison v. Baltimore City*, 96 Md. 513, 53 Atl. 1121, that the taxpayer cannot invoke the restraining power of a court of equity unless it be shown that the municipal corporation and its officers are acting ultra vires, and where such unauthorized acts may affect injuriously the rights and property of the parties complaining. Many other cases to like effect might be cited, but they may be found collected in 20 Enc. Law (2d Ed.) 1187, and notes.

Before passing from this branch of the case we will refer briefly to three cases principally relied on by the appellants in opposition to the views we have expressed and the cases we have cited, but which we regard as in no way impairing the authority of the latter. In *Alleghany County v. Parrish*, 93 Va. 619, 25 S. E. 882, the Code authorized purchase of land for the erection of a courthouse, clerk's office, and jail, and required the residue to be planted in trees and kept as a place of meeting for the people. The county court let to Parrish a part of the courthouse grounds for the erection of a law office, but afterwards brought suit in ejectment to compel its removal. Parrish filed a bill in equity to quiet title, and the bill was dismissed on demurrer. It is obvious that here the use of the property, outside of the prescribed buildings was irrevocably fixed by the Code until

altered by the Legislature. There was no property unused, or not needed, for the public use to which it was dedicated, and consequently it was beyond the power of the county to override the legislative mandate that the whole residue be kept for a meeting place for the people. In *Nerlien v. Village of Brocton*, 94 Minn. 361, 102 N. W. 867, a taxpayer and dealer in flour, feed, and grain sought to restrain the use of the town hall for a similar business, and was granted the relief sought. The facts developed were that the town hall was in use as such; that one Bohmer was president of the village council, and that the whole of the space in the building was not actually necessary for public use; that Bohmer for four years had been engaged in retailing flour at the hall in competition with the plaintiff, but without paying, or agreeing to pay, anything for the use of the hall, and there was evidence that the plaintiff's business had been damaged by this competition. It was also shown that the village bailiff acted as clerk for Bohmer and conducted the business. The court found that the members of the council knew of, and permitted, the conduct of the business, and that they were thus derelict in their duty in permitting their president to prostitute his office by diverting the public property from its public use, exclusively to his own private gain. The element of fraud which permeated the case not only justified, but required, the granting of the injunction. In *Sugar v. City of Monroe and Tom Stewart & Co.*, 108 La. 677, 32 South. 961, 59 L. R. A. 723, the plaintiffs were taxpayers and owners and licensees of an opera house in Monroe, and sought an injunction to restrain the city from using its municipal school building as a theater. A bond issue had been voted for the erection of certain improvements, including \$20,000 for a school building. The city added \$50,000, raised in some other manner, and built a fire house. Upon its completion, the city, under cover of a pretended lease to the janitor of the school, undertook to use the auditorium as a theater. The court said: "The so-called lease is a flimsy contrivance which deserves but little notice. The firm of Tom Stewart & Co. had no existence when the lease was signed, and we think has none now. Tom Stewart had been plaintiff's property manager at their theater, and was later made janitor of the school, but the entire management of the auditorium as a theater was in the chairman of the committee of the city finances." The court also said: "The case was not materially different from what it would have been if the mayor and city council had originally proposed to devote the \$20,000 voted for a school building to the construction of a theater, and had been enjoined from so doing." Referring to *Worden v. New Bedford*, 131 Mass. 23, 41 Am. Rep. 185, in which it was held "that while a city could not erect a building for business purposes, but, having a city hall built in good faith,

and used for municipal purposes, it has a right to allow it to be used incidentally for other purposes, either gratuitously, or for a compensation," the court, in the Louisiana Case above, adds: "We find no reason to dissent from the views thus expressed, and have little doubt they were appropriate to the case decided. We do not wish to be understood as going to the extreme of holding that the city authorities may not make such casual and incidental use of the building in question, not inconsistent with, or prejudicial to, the main purpose of its erection, as they may deem advisable, nor as holding that changed conditions in the future may not justify them in devoting it to some other purpose."

It having been shown that in making the lease now under consideration the city acted as a mere property holder, and entered into the contract with reference to the demised property as any private proprietor might do, it follows that the doctrine of *ultra vires* cannot be invoked, unless it has in some way been imported into the case by the subsequent concurrent action of the mayor and city council and the field officers, in permitting the use of the armory for such engagements as have been already described, for the joint financial benefit of the city and the field officers, one-third to the city and the residue to the field officers.

We have read and considered with care the elaborate argument of the appellant, covering 26 pages of their brief, relating to the organization of the militia of the state and the powers and rights of the field officers in this case, and it is doubtless true, as contended, that they are mere governmental agencies, without corporate organization or powers; but we cannot perceive that this is at all material to be considered. Indeed it would seem to follow from that fact that all power over that property, not capable of exercise by the field officers, remains unimpaired in the city. The armory has not ceased to be the unused property of the city because the state has appropriated money to fit it up and maintain it as an armory during its occupancy as such under the lease. It may be, though it is not necessary so to decide, that the field officers alone, under the lease, could not, against the will, or without the consent, of the city, authorize its use in the manner now under consideration. But they certainly control its use as an armory, and the city as certainly owns the reversion in the property, together with all control over its use which has not by that lease been vested in the field officers; and, when the city and the field officers, together representing the absolute ownership and unqualified control of the property, consent and agree, as the record shows they have done, to this extended use of the property for a further valuable consideration, equitably apportioned between them by their own agreement, we can per-

ceive no defect of power to carry such agreement into execution, and it ought not in our judgment to be denied upon any mere technical ground, or any refinement of reasoning, however skillful. This is not like the case of the Veterans' Seventh Regiment v. Field Officers' Seventh Regiment, 60 Hun, 578, 14 N. Y. Supp. 811, cited by the appellants where the veterans sought to quiet their title to a part of the armory let to them by the field officers by debarring the latter from repudiating their lease and reasserting their former title. It is certainly immaterial to these plaintiffs if the lease to the field officers was a valid lease, whether the powers thereby granted are, or are not, extended by a subsequent valid agreement.

But the appellants still further contend that the hiring out of the public property for such entertainments as the record shows is an unconstitutional invasion of the rights of citizens engaging their property in that business, in that it is a deprivation of liberty and property without due process of law, and they have specially requested us to express an opinion upon this branch of the argument. This is not the case of a municipal corporation perverting the functions of government by deliberately and indefinitely engaging in business for profit, and entering into competition with its taxpayers, from whom it exacts a license which it does not itself pay. It is but the temporary, casual, and incidental use of unused public property, done in the practice of a public economy to avoid loss of revenue upon such unused public property, and to lighten thereby the general burden of taxation. Such being in our view the case before us, we cannot sustain the constitutional objections of the appellants.

Decree affirmed, with costs to the appellees above and below.

(109 Md. 513)

WALTER v. BALTIMORE ELECTRIC CO.
et al.

(Court of Appeals of Maryland. Jan. 13, 1909.)

1. ELECTRICITY (§ 14*)—TRANSMISSION ALONG HIGHWAYS—DUTY.

Aside from any contractual relation, those maintaining electric wires along highways must use a high degree of care commensurate with the danger to protect persons lawfully using the highways.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. § 14.*]

2. ELECTRICITY (§ 19*)—LIGHT WIRES—STREETS—INJURY TO PEDESTRIAN—PRIMA FACIE NEGLIGENCE.

That a wire of an electric lighting company strung over a street fell upon and injured a pedestrian prima facie shows negligence of the company, placing the burden on it to show that it was not negligent.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

Appeal from Superior Court of Baltimore City; Henry D. Harlan, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by Harry B. Walter, infant, by next friend, against the Baltimore Electric Company and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded for new trial.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

Charles F. Stern and Thomas G. Hayes, for appellant. Vernon Cook, for appellees.

SCHMUCKER, J. The question presented by this appeal is a narrow one. It is whether the fact that a wire of an electric lighting company strung over the public street of a city, fell upon and injured a person passing along the street of itself affords sufficient prima facie proof of negligence on the part of the company to cast upon it the burden of overcoming that presumption. There is evidence in the record which, for the purpose of this inquiry, must be taken to be true that, as the equitable plaintiff, a boy eight years old, was passing along Harford avenue, a public street of Baltimore city, he swung himself around a pole standing in the pavement, when he came in contact with a hanging wire charged with electricity, and badly burned his head and his hand. The evidence does not show the existence of any sudden or unforeseen cause for the falling of the wire, nor show with certainty whether it fell before or at the time of its coming in contact with the boy. He brought this suit for damages for his injury against the appellee and two other companies, all of whom were declared against as owners of the wire, but the appellee admitted at the trial below that it was the owner of and controlled the wire, and the case was not pushed against the other defendants. At the trial in the court below the case was taken from the jury at the close of the plaintiff's evidence, by the granting of the defendant's prayer, for want of legally sufficient evidence to warrant a recovery. From the judgment for the defendant resulting from that ruling, the plaintiff appealed.

The recent wide-spread adoption of overhead wires upon public streets for the transmission of high tension electric currents for supplying light and power has been followed by numerous injuries to persons who have come in contact with broken and fallen wires. The series of damage suits flowing from these accidents have called for frequent consideration by the courts of the reciprocal rights and duties of the public and the owners of those dangerous instrumentalities. The courts agree that outside of any contractual relation the very nature of the business of transmitting such currents along highways imposes upon those engaged in it the legal duty to exercise, for the protection of all persons lawfully using the highways, the high degree of care commensurate with the danger incident to the proximity thereto of the wires charged with their invisible but

deadly power. *W. U. Tel. Co. v. State, Use Nelson*, 82 Md. 293, 33 Atl. 763, 81 L. R. A. 572, 51 Am. St. Rep. 464; *Brown v. Edison Electric Co.*, 90 Md. 400, 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442; *Newark Elec. Light & P. Co. v. Ruddy*, 62 N. J. Law, 505, 41 Atl. 712, 57 L. R. A. 624; *Sub. Elec. Ry. Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700; *Postal Tel. Co. v. Jones*, 133 Ala. 217, 32 South. 500; *Mangan's Adm'r v. Louisville Elec. L. Co.*, 122 Ky. 476, 91 S. W. 703, 6 L. R. A. (N. S.) 459; *Wittleder v. Cit. Elec. & S. Co.*, 50 App. Div. 478, 64 N. Y. Supp. 114. It has been held in different cases that electric companies are not insurers of the public using the streets over which their wires are strung on poles, and are therefore not liable for all injuries resulting from contact with their wires, irrespective of the circumstances under which they occur. What they are liable for is the exercise of that degree of care which the law imposes upon them in view of the dangerous character of their wires and the rights of the public in the highways over which they are suspended. In *Nelson's Case*, supra, we said, in defining the measure of responsibility of the defendant companies to the plaintiff in the use by him of a highway over which their wires were strung: "The privileges so granted [to the defendant companies] thus to encumber the public highway with appliances so likely to become dangerous to the public safety unless properly employed and controlled imposed upon them, and each of them, the duty of so managing their affairs as not to injure persons lawfully on the streets. They owed it to Nelson that his lawful use of the street should be substantially as safe as it was before the telegraph and railway plants had so occupied it. It was their plain duty, not only to properly erect their plants, but to maintain them in such condition as not to endanger the public. It follows from this that if the property of the defendants was not in proper condition, and by reason thereof Nelson was injured, these facts alone, in the absence of other evidence to show that the defect originated without the fault of the companies, afford a prima facie presumption of negligence. In such cases the doctrine of *res ipsa loquitur* ('a simple question of common sense' [Whittaker's *Smith on Neg.* 423]) fairly applies."

It is true that in *Nelson's Case* the wire which did the harm had been hanging down for about two weeks, during at least a portion of which time it had been charged with a current of electricity, but in many adjudicated cases and text-books it has been held that the mere fact that a live electric wire falls down upon a public street over which it has been suspended, and injures a person lawfully there, is prima facie evidence of negligence on the part of the owner of the wire. *Newark E. L. & P. Co. v. Ruddy*, supra; *Hebert v. Lake Chas. I. L. & W. Co.*, 111 La. 522, 35 South. 731, 64 L. R. A. 101, 100 Am.

St. Rep. 505; Snyder v. Wheeling Elec. Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922; Denver Con. Elec. Co. v. Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 586; Boyd v. Portland Gen. Elec. Co., 40 Or. 126, 66 Pac. 576, 57 L. R. A. 619; Thomas v. W. U. Tel. Co., 100 Mass. 156; Jaggard on Torts, 864; 2 Cooley on Torts (3d Ed.) 1426; Joyce on Electric Law, § 606; Elliott on Roads and Streets, § 826. Some of these authorities rest the position taken by them upon the familiar doctrine asserted in Scott v. London & St. R. Docks Co., 3 Hurlst. & C. 596: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." The same proposition was asserted in the well-known case of Byrne v. Broadley, 2 Hurlst. & C. 722, which was relied on by us in Nelson's Case, and was recognized by us in cases for injuries caused by a brick falling from a house abutting on a highway in Murray v. McShane, 52 Md. 217, 36 Am. Rep. 367, Decola v. Cowan, 102 Md. 551, 62 Atl. 1026, Strasburger v. Vogel, 103 Md. 85, 63 Atl. 202, and in the case of crosses falling from a moving railway car on which they were being transported in Howser v. C. & P. R. R. Co., 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332. The exceedingly dangerous character of live electric wires lends force to the strict application of this rule of law to accidents occurring through contact with such wires when out of proper condition or of their proper place.

In view of the exceedingly dangerous character of electric light and power wires, and the peril to which their suspension over the public streets exposes the public who constantly traverse and use the streets, we think it both just and reasonable to hold that the injury of a person upon the surface of the street by contact with a hanging or fallen wire of that character, in itself, if unexplained, affords sufficient prima facie evidence of negligence on the part of the owner of the wire to entitle the plaintiff to go to the jury in an action for damages for the injury. In our opinion the evidence offered by the appellant as plaintiff in the case before us was sufficient to raise such a prima facie presumption of negligence against the appellee company as to call for an explanation from it, and therefore sufficient to carry the case to the jury, and that the learned judge below erred in granting the defendant's prayer. Of course, upon a retrial of the case, the company as defendant will be permitted to rebut the presumption of negligence, and show by any lawful evidence, if it can do so,

that it has fully discharged its duty to the public in the erection and maintenance of its wires, and upon the merits of the case as it shall then be presented the jury can determine.

The judgment appealed from will be reversed, and the cause remanded for a new trial.

Judgment reversed, with costs, and case remanded for new trial.

(109 Md. 377)

PLEASANTS v. McKENNEY et al.

(Court of Appeals of Maryland. Jan. 13, 1909.)

1. WILLS (§ 432*)—PROBATE—WILL CONTEST—JURISDICTION OF ORPHANS' COURT.

The judgment of the orphans' court in a contest of the validity of a will is a judgment in rem of a court of competent jurisdiction directly upon the subject-matter of the controversy, which conclusively determines the question at issue as to all persons, whether parties or not.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 432.*]

2. WILLS (§ 318*)—PROBATE—WILL CONTEST—HEARING—SUBMISSION OF ISSUES TO JURY—EFFECT OF FINDINGS.

The purpose of sending issues to a court of law for trial in a will contest pursuant to Code Pub. Gen. Laws 1904, art. 93, § 254, being to advise the orphans' court of the facts, while the jury's findings on the issues submitted may not determine the validity of the will, they are conclusive upon the orphans' court, and, when they necessarily determine the invalidity of the will, the judgment must conform thereto.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 752, 754; Dec. Dig. § 318.*]

3. WILLS (§ 318*)—PROBATE—TRIAL—SUBMISSION OF ISSUES TO JURY—EFFECT OF SUBMISSION.

When issues are sent to a law court by the orphans' court in an action to contest the validity of a will, the law court can only submit the issues for determination without regard to whether they are properly presented in the orphans' court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 752; Dec. Dig. § 318.*]

4. WILLS (§ 263*)—PROBATE—CONTEST—PARTIES—EXECUTOR.

While the executor was a proper party to proceedings to contest the validity of the will before the issuance of letters, he was not a necessary party thereto, either in his capacity of executor or of administrator pendente lite.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 263.*]

5. EXECUTORS AND ADMINISTRATORS (§ 111*)—ACTIONS—WILL CONTEST—COSTS OF DEFENDING WILL.

While an executor is a proper party to proceedings to contest the validity of a will, he must defend the will at his own expense, where the contest occurs before the issuance of letters.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 451; Dec. Dig. § 111.*]

6. WILLS (§ 336*)—PROBATE—WILL CONTEST—TRIAL—WAIVER OF IRREGULARITIES.

Where an executor, though he filed his answer to the caveat in a contest of the will, was dismissed in May, 1907, and made no effort to be reinstated as a party, even when the issues

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were made and submitted to a jury five months thereafter, and objected for the first time after verdict in the law court was rendered and renewed his objections in the orphans' court, but his petition therein, filed in April, 1908, did not state that he only recently learned of his dismissal, or that it was obtained by fraud, he cannot object to the proceedings after his dismissal even if they were irregular; a mere general allegation that the proceedings were collusive being insufficient.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 330.*]

7. APPEAL AND ERROR (§ 790*)—DISMISSAL—DELAY IN TRANSMITTING RECORD—AFFIDAVIT.

A motion to dismiss an appeal because of delay in transmitting the record will not be considered, where it does not appear from the affidavits filed whether the delay was caused by the register or by appellant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 790.*]

Appeal from Orphans' Court of Baltimore City; Myer J. Block and Harry C. Galther, Judges.

Petition by Richard H. Pleasants against William O. McKenney and others, praying that the orphans' court refrain from receiving or acting upon findings on issues submitted to a jury in a will contest. From an order dismissing the petition, and refusing probate, pursuant to the findings, petitioner appealed. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and HENRY, JJ.

Richard H. Pleasants and John E. Semmes, for appellant. J. Cookman Boyd, for appellees.

WORTHINGTON, J. Mrs. Ellen McKenney, of Baltimore city, died on March 9, 1907, leaving a paper writing, dated June 25, 1897, purporting to be her last will and testament, in which paper writing Richard H. Pleasants, the appellant, was named as executor. On March 15, 1907, Mr. Pleasants exhibited and filed this alleged will in the orphans' court of Baltimore city for the purpose of probate. Three days later—that is, on March 18, 1907,—before the alleged will had been admitted to probate, a formal caveat was entered thereto by Mrs. McKenney's two sons, William O. McKenney and George J. McKenney. The caveat alleged, among other things, that the paper writing dated June 5, 1897, purporting to be the last will and testament of Ellen McKenney, was not the last will and testament of Ellen McKenney, but that said Ellen McKenney died intestate. There were also allegations of fraud, undue influence, want of mental capacity, and want of proper execution of the alleged will. The appellant and Mrs. Emma Hedlan, the only surviving daughter of Mrs. Ellen McKenney, were made caveatees, and by citation from the court required to answer the premises. It may be well here to state that, by the pro-

visions of the alleged will, a share of Mrs. McKenney's property was given to her only daughter, Mrs. Emma Hedlan, a legacy of \$100 to a Mrs. Mary L. Foley, and of the residue one half was given to her son William O. McKenney, above named, absolutely, and the other half to Edward I. Hedlan, in trust for the benefit of her son George J. McKenney for life, and after his death to be divided amongst his children. On April 10, 1907, the appellant, Richard H. Pleasants, as attorney for the executor, filed his answer to the caveat, denying that Ellen McKenney died intestate, but averring that she duly and properly executed the paper writing purporting to be her will, dated June 25, 1897, when of sound and vigorous mind and body and fully capable of executing a valid deed or contract. On May 18, 1907, the attorneys for the caveators filed the following order: "Mr. Register: Enter the petition and caveat of William O. McKenney and George J. McKenney, as against Richard H. Pleasants, dismissed." On May 27, 1907, the joint and several answer of Emma Hedlan, Mary L. Foley, and Edward I. Hedlan, trustee, was filed, neither admitting nor denying the allegations of the caveat, but submitting their rights to the protection of the court, and consenting to the passage of such order in the premises as should be proper. On October 15, 1907, issues were framed in the orphans' court of Baltimore city, and sent to the superior court of that city for trial before a jury. By order of the orphans' court, William O. McKenney and George J. McKenney were made plaintiffs at the trial of the issues, and Emma Hedlan, Mary L. Foley, and Edward I. Hedlan, trustee, defendants at such trial. The issues were six in number, and of the following purport:

(1) Was the paper writing dated the 5th day of June, 1897, purporting to be the last will and testament of Ellen McKenney, signed by her, or some other person in her presence, and by her expressed direction, and attested and subscribed in the presence of two or more creditable witnesses?

(2) Was the same read to her or by her, or known to her at or before the time of the alleged execution thereof?

(3) Was the execution thereof procured by fraud?

(4) Was the execution thereof procured by undue influence?

(5) Was she then of sound and disposing mind?

(6) Was said paper writing, dated June 5, 1897, and purporting to be the last will and testament of Ellen McKenney, revoked by her subsequent to the execution thereof?

The issues were submitted to the jury in the superior court on March 20, 1908, and a verdict rendered in favor of the mental capacity of Mrs. McKenney and of the due execution of the paper writing of June 5, 1897,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

also finding no fraud, or undue influence or want of mental capacity, but that said paper writing purporting to be the last will and testament of Ellen McKenney had been revoked by her subsequent to the execution thereof. The appellant, as will be seen, was not a party to these proceedings, but on March 23, 1907, three days after the rendition of the verdict, he filed a motion in the superior court requesting it "not to certify the findings of the jury to the orphans' court." Notwithstanding these objections, the findings of the jury were finally transmitted to the orphans' court on April 4, 1908. On the same day—that is, on April 4, 1908—the appellant filed a petition in the orphans' court praying that court "not to receive or act upon the findings of the jury," for the following reasons, in brief:

(1) Because the findings were had in reference to a paper writing dated June 5, 1897, while the paper filed purporting to be the last will and testament of Ellen McKenney was dated June 25, 1897.

(2) Because the issues sent to the superior court were not raised by the pleadings.

(3) Because the omission of the name of Richard H. Pleasants, executor, as a party to the proceedings, at the trial of the issues in the superior court, was a fatal omission.

(4) Because there was no real contest in the superior court as the answer of the defendants as caveatees, neither admitting nor denying the allegations of the caveat, raised no issues whatever.

(5) Because the appellant had been eliminated by a dismissal of the caveat as to himself, and all the proceedings thereafter were had without notice to him, and that the entire proceedings were the result of collusion.

On April 20, 1908, the caveators filed their answer, denying the right of the appellant to be considered a party in the cause, or as being entitled to object to any proceedings had or to be had therein, alleging that the error in the date of the paper passed upon by the jury was merely a clerical error, and, as the paper of date June 25th was offered in evidence, the findings of the jury were upon that prayer, that the issues were properly framed upon the pleadings in the orphans' court, and that the parties to the caveat were the proper parties, and denying that there was no real contest. On April 23, 1908, Emma Hedlan, Mary L. Foley, and Edward I. Hedlan, trustee, filed their answer to the petition of the appellant, denying that he had any standing whatever to be heard in the orphans' court in the premises, averring that all the necessary and proper parties were parties to the proceedings in the superior court, admitting that they had been advised that upon the undisputable facts of the case the paper writing of date June 25, 1897, had been revoked, and denying all and singular the other allegations of the appellant's petition. The petition and answers were

all sworn to, but, so far as the record discloses, no testimony in support of the allegations of either the petition or of the answers thereto was adduced. Subsequently on June 29, 1908, all the parties to the caveat proceedings, to wit, Emma Hedlan, Mary L. Foley, Edward I. Hedlan, trustee, George J. McKenney, and William McKenney, moved to dismiss the appellant's petition (1) because the petitioner had no interest in the controversy; (2) because no letters testamentary had been granted to the said Richard H. Pleasants. On the 31st day of July, 1908, the orphans' court passed an order dismissing the appellant's petition, and, acting on the findings of the jury to the effect that the paper writing propounded as and for the last will and testament of Ellen McKenney had been revoked by her subsequently to its date, refused probate thereof. From this action of the orphans' court, the petitioner, Richard H. Pleasants, brings this appeal.

It should be here stated that pending the caveat proceedings the appellant was appointed administrator pendente lite of the estate of Ellen McKenney, deceased, though no claim of right to participate in the caveat proceedings seems to have been made on that ground.

While the briefs of the counsel for the respective parties present several questions for our consideration which were elaborately discussed at bar, we think we need only consider one of these questions, and that is whether or not the appellant either in his individual capacity or as administrator pendente lite was a necessary party to the proceedings connected with the caveat of the alleged will. In this connection it should be remembered that a contest in the orphans' court, involving the validity of a paper writing purporting to be a will, is a proceeding in rem in which all persons interested may appear and be heard upon the question, and that the order of the orphans' court is the judgment of a court of competent jurisdiction directly upon the subject-matter in controversy. *Worthington v. Gittings*, 58 Md. 542. When a decision is made between opposing parties in such a contest, it is a judgment in rem conclusively establishing either the validity or invalidity of the alleged will. *Emmert v. Stouffer*, 64 Md. 543, 8 Atl. 293, 6 Atl. 177. The purpose of sending issues to a court of law for trial under Code Pub. Gen. Laws 1904, section 254 of article 93, is to enable the orphans' court to advise itself of the real facts of the case. These when found by the jury are conclusive, and the orphans' court has no discretion, but must enter the judgment in conformity with the finding of the jury. *Sumwalt v. Sumwalt*, 52 Md. 338. The proceedings are, however, all the while within the probate powers of the orphans' court. *Warford v. Calvin*, 14 Md. 532. Though the jury may find affirmatively or negatively on the questions submitted, yet such finding may not

determine the validity of the will, for there may be facts outside of the verdict and not inconsistent therewith which will decide the question, but, when the jury find a fact which necessarily determines the invalidity of the will, the orphans' court are imperatively required to enter up judgment in conformity thereto, and the granting of any other issue would be a wholly useless and nugatory act. *Pegg v. Worford*, 4 Md. 385; *Price v. Taylor*, 21 Md. 356. When issues are sent by the orphans' court to a court of law, the province of the latter court is simply to submit to the jury the determination of the issues without reference to whether they were properly presented by proceedings in the orphans' court. *Cooke v. Cooke*, 29 Md. 538. Whether all persons interested in the will are actual parties or not, the finding of the jury is binding and conclusive upon them as to all questions covered by the issues actually submitted to the jury for its determination. *Worthington v. Gittings*, supra. There is no doubt but that a person named as the executor of a paper writing purporting to be a will has such an interest in the proceedings relating to its probate as entitles him to be made a party to any contest in regard thereto, but, where a caveat is filed and the contest takes place before probate, the person named as executor must, if he desires to defend the will, do so at his own cost and expense. *Townshend v. Brooke*, 9 Gill, 90; *Gorton v. Perkins*, 63 Md. 589, 3 Atl. 291. He cannot therefore be regarded as a necessary party to such proceedings in his individual capacity, where the contest takes place before letters testamentary have been granted to him.

As to the necessity of the appellant's being made a party to the proceedings as administrator pendente lite, this court in a recent case in a very satisfactory opinion by Schmucker, J., held that: "It is not the duty in this state of an administrator pendente lite to conduct at the expense of the estate a litigation to establish an alleged will of the decedent or to defend caveats to papers purporting to be wills. The contest in such litigation is between the next of kin and the parties claiming under the alleged wills." *Harrison v. Clarke*, 95 Md. 313, 52 Atl. 514. So that neither in his own right nor as administrator pendente lite was the appellant a necessary party to the litigation concerning the validity of the alleged will. It is true that in his own right as the person named as executor he had such an interest in the subject-matter of the litigation as entitled him, if he desired to defend the alleged will, to be made a party to the proceedings, but although he filed his answer to the caveat as attorney for the executor, and was therefore in the case as an attorney as well as in his own right, yet from the date of his dismissal on May 18, 1907, till October 15, 1907, when the issues were made up and sent to the

superior court for trial, he made no effort to have himself reinstated as a party to the litigation, although it would seem that by the exercise of ordinary vigilance he would have discovered the fact of his dismissal before the issues were made up. And even after the record was transmitted to the superior court, and the trial was proceeded with there, he seems to have stood by and allowed the case to be conducted to a conclusion in that court, and then, after verdict rendered, for the first time, interposed objections to further proceedings in the case. Whilst courts are ever ready to aid vigilant suitors, they will not encourage laches. These objections, being unavailing in that court, were renewed by his petition filed in the orphans' court a few days later; that is, on April 4, 1908. In this petition it is not alleged that he then only recently obtained knowledge of his dismissal as a party defendant, but only that after his dismissal the proceedings "were had without notice to him."

Had he promptly upon discovering the fact of his dismissal filed his petition in the orphans' court, setting forth that such dismissal had then only recently come to his knowledge, and that the same had been accomplished and suppressed by fraud and collusion, he would upon proof of these facts have been entitled to be reinstated as a party defendant, and to have participated in all the subsequent litigation respecting the subject-matter of the controversy; and, notwithstanding the finding of the jury, the orphans' court would under such circumstances have been justified in rejecting such finding, and in sending the issues to be retried before a jury with the appellant as a party defendant to the proceedings. But his petition filed on April 4, 1908, not only does not state when the fact of his dismissal first came to his knowledge, but neither does it allege fraud, and, though it contains the statement that "the entire proceedings were the result of collusion," yet it does not set forth with sufficient particularity of what the collusion consisted, nor is there any proof whatever to sustain the charge. Even if the proceedings be irregular in any respect, in the absence of fraud and collusion clearly alleged and proven, the appellant had not after the finding of the jury any standing in court to impeach them or call them in question. *McCambridge v. Walraven*, 88 Md. 378, 41 Atl. 928; *Worthington v. Gittings*, supra.

After carefully examining the record in the case and the authorities cited by counsel, we can find no ground for reversing the order of the orphans' court, dismissing the appellant's petition and rendering judgment on the verdict of the jury.

We have not considered the motion to dismiss the appeal, because it does not clearly appear from the affidavits filed whether the delay in transmitting the record was attributable to the fault of the register or of the

appellant, and we therefore express no opinion in regard to the legal question intended to be raised by such motion.

Order affirmed, with costs to the appellees.

(109 Md. 465)

OLIVER & BURR v. NOEL CONST. CO. OF BALTIMORE CITY.

(Court of Appeals of Maryland. Jan. 13, 1909.)

1. CONTRACTS (§ 188*)—BUILDING CONTRACTS—SUBCONTRACTS.

A subcontractor for part of the work of erecting a building must be held to have contracted to do his work according to the specifications of which he knew, according to which, as provided in the original contract, the work was to be done.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 808; Dec. Dig. § 188.*]

2. SET-OFF AND COUNTERCLAIM (§ 56*)—EFFECT OF PLEA.

A plea of set-off does not admit the correctness of plaintiff's account; the effect of the general issue filed being to deny the whole claim.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. § 127; Dec. Dig. § 56.*]

3. FRAUDS, STATUTE OF (§ 23*)—ORIGINAL UNDERTAKING.

Where defendant sublet part of its construction contract to C., which, in turn, sublet it to plaintiff, plaintiff's oral agreement with defendant, on fault being found with its work, and payment refused, that if defendant would pay C., so that it could pay plaintiff, plaintiff would hold defendant harmless against any loss it would thereby sustain, was not one of guaranty or suretyship, but a valid original undertaking.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR.

Failure of an instruction to specify the time from which interest might be allowed is not ground for reversal; it being reasonably certain no injury resulted.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4219; Dec. Dig. § 1064.*]

Appeal from Baltimore City Court; George M. Sharp, Judge.

Action by Oliver & Burr, a corporation, against the Noel Construction Company of Baltimore City. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

Rignal W. Baldwin and Richard M. Duvall, for appellant. R. Howard Bland and J. Kemp Bartlett, for appellee.

BURKE, J. This is the plaintiff's appeal from a judgment entered against it in the Baltimore city court. The declaration contains the common counts only, to which the defendant pleaded the general issue pleas upon which issue was joined. Subsequently, by leave of court, the defendant filed a plea of set-off to which a replication was filed and issue joined. An itemized account was filed with the narr., by which it appears that the

suit was brought to recover the sum of \$2,151.21 alleged to be due the plaintiff by the defendant on account of certain work which will be presently alluded to. It appears from the bill of particulars filed by the defendant with its plea of set-off that the plaintiff is indebted to it in the sum of \$4,162.75. The trial resulted in a verdict in favor of the defendant for \$934.82, upon which final judgment was entered. It is from this judgment that the appeal before us is taken. The questions of law raised upon the record are simple; but there is very great conflict in the testimony.

Only one bill of exceptions is brought up by the appeal, and that relates to the ruling of the court on certain prayers presented at the close of the whole case. With the weight of evidence and the credibility of the witnesses we have nothing to do, as those matters were exclusively for the jury, and, if the case was fully and fairly submitted to the jury under the granted prayers, the judgment must be affirmed. It is not necessary in order to dispose of the case to indulge in a minute discussion of the evidence. It will be sufficient to consider its general purport and effect. The record shows that in 1902 Edgar M. Noel and Daniel W. Thomas entered into a contract with the United States government for the construction of certain buildings at the Naval Academy at Annapolis. This contract was assigned to the Noel Construction Company, the appellee, a corporation organized to finance the work. This work was to be done in accordance with elaborate and detailed specifications furnished by the government. The Noel Construction Company sublet the contract for the fireproofing of the cadets' quarters building to the Columbian Fireproofing Company of Pittsburg, which, in turn, sublet their contract to Oliver & Burr, the appellant, a New York corporation, and this last-named company proceeded under the contract to do the work. The contract of the Pittsburg company which was sublet to the appellant was for the metal partitions on certain floors of the cadets' building. Later the government decided to raise the roof of this building and add a fourth floor. The contracts for the metal lathing and hung ceiling were made directly between the appellant and appellee. On October 9, 1903, the appellant wrote to the appellee proposing "to furnish and put in place all the metal furring required by the plans and specifications of Mr. E. Flagg, architect for the cadets' quarters building at Annapolis, Md., including paragraphs 875 to 877, inclusive, and all other paragraphs therein referred to for the sum of seventy-five hundred (\$7,500) dollars; subject to contract that may be mutually agreed upon." This proposal was accepted by the appellee in a letter to the appellant of that date. By letter of October 31, 1903, the appellant proposed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to furnish and erect partitions on the top floor of this building for the sum of \$5,900, and the suspended ceiling for \$4,700. This offer was accepted by letter of February 18, 1904. The appellant at the time these contracts were made was engaged in doing the same character of work on the building under his contract with the Pittsburg company, and he proceeded with the work under all the contracts. The contract for the work of plastering to be done in this building was sublet by the general contractor to Barwell & Cantlin, and the manner in which their work was done presented, as will be seen, one of the important questions of fact for the consideration of the jury. As the main questions in this controversy concern the steel studding and lath partitions and the plastering, it is necessary at this point to refer to the parts of the specifications which provide for that work.

A question was made during the trial as to the duty of the appellant to do certain painting for which the defendant claimed an allowance in his plea of set-off. This question was raised by the plaintiff's eighth prayer, which was, however, abandoned in this court, and it will not be necessary to consider the paragraph of the specifications providing for that work. The paragraphs of the specifications relating to metal and lath partitions and to the plastering are as follows:

"(838) The partitions for toilet and bath-rooms in basement of wings and in ground floor of stair towers, and partitions in roof space over Memorial Hall, extending from top of ceiling light up to skylight curb, are to be constructed of iron or steel studding and metal bath for 2 in. solid plaster finish. Studding to consist of 1 in. or $\frac{3}{4}$ in. steel channels as height or location may require, spaced 10 in. on centers and secured at bottom and top to the concrete, iron or other construction by clamps or angles, and properly braced or stiffened where so required. The partitions inclosing basement stairs in the two stair towers are to extend from ground floor up to and properly finish against bottom of stair string above."

"(888) All plastering, except as hereinafter otherwise specified, is to be best three coat work of lime mortar mixed in proper proportion to give the best results. The mortar for scratch and brown coats is to be gauged with Portland cement using one half of a barrel of cement to each cubic yard of mixed mortar for brick, terra cotta, block and concrete surfaces, and not less than three quarters of a barrel for lath surfaces."

The plaintiff must be held to have undertaken to do all the work contracted for upon the building in accordance with the specifications. Mr. Oliver was aware of the specifications, and was no doubt familiar with their requirements; otherwise it would have been impossible for him to bid intelligently upon the work. Besides, his proposal of October 9, 1903, was to do the work in accordance

with the plans and specifications. It would be most unreasonable to suppose that it was in contemplation of either party that the work could be done in disregard of the plans and specifications, because they both knew that work so done would not be accepted. Mr. Albert Oliver, the president of the appellant company, was the only witness offered in chief in support of the plaintiff's case, and he gave testimony tending to prove that the plaintiff had done the work embraced in the account filed with the declaration, and that the defendant was indebted to the plaintiff in the full amount claimed, to wit, \$2,151.21. He testified that the whole trouble rose from the plastering done by Barwell & Cantlin, that the plaintiff had had nothing to do with the plastering, and that he had warned the plasterers that they were spoiling the work.

The defendant offered evidence tending to prove the following facts: That the work done by the plaintiff under its contract with the Pittsburg company was not done according to specifications and had been condemned by the government, and that this was known to the plaintiff, and that the defendant withheld payments to the Columbian Company, which, in turn, withheld payments to the plaintiff; that the plaintiff, being badly in need of money which it claimed was due by the Columbian Company, agreed with the defendant over the telephone on May 9, 1904, that, if it would pay that company so that it could pay the plaintiff, the plaintiff would hold the defendant harmless against any loss it would sustain; that the Oliver & Burr Company would become responsible to the defendant for any damage it might sustain; that it did pay the Columbian Company upon the faith of this promise, and that that company paid the plaintiff; that this agreement had reference to the work done by the plaintiff under its subcontract with the Columbian Company, and was confirmed by letter of the plaintiff dated May 9, 1904. It further offered evidence tending to prove that the plaintiff in doing the work referred to in the agreement had not observed the requirements of the specifications, and that the work was entirely unsatisfactory and was condemned, and that in consequence thereof the defendant was subjected to a loss greatly in excess of the plaintiff's claim; that it sustained certain other items of loss set out in the bill of particulars filed with its plea of set-off. It further offered evidence to prove that the plastering was done in strict conformity to the requirement of the specifications which has been herein quoted relating to that work. In rebuttal Mr. Oliver denied that he had made the agreement to be responsible for loss resulting from work done under the contract with the Columbian Company, and also disputing certain other allowances claimed by the defendant, and repeated his former statement that the whole trouble was due to the plastering. In this outline of

the evidence is seen the issues of fact which the jury were to decide as well as the legal questions concerning which the court was asked to advise them.

The plaintiff offered 16 prayers. The court granted the plaintiff's first and thirteenth prayers, and the defendant's sixth prayer. It amended the defendant's seventh prayer, and granted it as modified, and refused all the other prayers. To the granting of the two prayers on behalf of the defendant, and in refusing its other prayers, the plaintiff excepted. The jury were told by the plaintiff's first prayer that if they found from the evidence that the plaintiff undertook to provide the materials and erect the steel studding and lathing for the partitions on the ground floor, and the first, second, third, and fourth floors in the cadets' quarters building, and the hung ceilings and extras mentioned in the evidence according to the specifications therefor, also offered in evidence, and if they shall find said specifications and for the prices mentioned in the plaintiff's proposals and the account offered in evidence, and that said work was performed and materials furnished in all respects according to said specifications, that the defendant accepted said work and paid the whole of said contract prices except the balance \$2,151.21, as shown by said account, then the plaintiff is entitled to a verdict of said balance with interest in the discretion of the jury from the time said work was fully completed, less such sum, if any, as the jury may find the plaintiff agreed to deduct from its \$5,900 proposal as testified to by the witness Noel, and any damage the jury may find resulted to the defendant from the withdrawal of the letter referred to in the letter of May 9, 1904, written by Albert Oliver to the defendant, if the jury shall find said letter, and that it contained the agreement between the parties, and such sums as are charged in said account of the plaintiff and which the jury may find were disallowed by the United States government, provided if the jury shall find the total amount the defendants are entitled to by way of set-off exceed the amount of the present claim, then the jury are at liberty to find for the defendant for the amount of such excess. By its thirteenth prayer the jury were instructed that the defendant was bound to establish by a preponderance of evidence the alleged agreement set up by the defendant as having been made by it with the plaintiff through the witness Noel over the telephone, and, if the minds of the jury are left in a state of equipoise, then the defendant is not entitled to recover anything by reason of said agreement under its plea of set-off in this case. We are of opinion that, by the plaintiff's first and thirteenth prayers and the defendant's seventh prayer, the whole case was fairly submitted to the jury. Under these prayers all the issues of fact raised by the pleadings were open to discussion before the jury, and the

plaintiff under them was given a full opportunity to present all its contentions to the jury. The proposition announced in the plaintiff's second prayer is more fully and correctly stated in its first. Its third prayer contains an hypothesis of fact of which there is no evidence, viz., that the defendant made no objection to the work. Its fourth, fifth, and sixth are too general and indefinite. They contain no instructions to the jury as to the effect of the construction contended for, under the facts of the case, upon the rights of the parties. It by no means follows as a legal conclusion that the plaintiff was entitled to recover, even if the constructions of the specifications stated in the prayers be correct. They contain no certain or definite guide for the jury. The subject-matter of the seventh prayer is fully covered in its first. The eighth prayer was abandoned. The ninth prayer erroneously assumed that the plaintiff was not bound under the contract of February 18, 1904, to comply with the specifications. The tenth prayer asserted that the effect of the plea of set-off is an admission of the correctness of the plaintiff's account. This is maintained notwithstanding the fact that the general issue pleas filed by the defendant deny the whole claim. The eleventh prayer is open to the same objection as the fourth, fifth, and sixth, and was besides calculated to mislead the jury. The twelfth prayer asserted that there was no legally sufficient evidence in the case to entitle the defendant to recover any damages under the agreement of May 9, 1904. As we have heretofore shown, there was abundant evidence upon this point. The fourteenth, fifteenth, and sixteenth prayers are based upon a misapprehension of the nature of the agreement of May 9, 1904. They treat this contract as one of guaranty or suretyship; but, if it existed at all, it was an original undertaking on the part of the plaintiff to reimburse the defendant for losses which it might sustain on account of the work mentioned, provided the defendant would do certain things which the evidence tended to show it did do. Its object was to protect the defendant in case it surrendered its claim against the Columbian Company for the benefit of the plaintiff, which it did, and the plaintiff was paid the money which that company was withholding. When the object of the agreement, its subject-matter, and the surrounding circumstances are considered, there can be no doubt that the agreement was a valid original undertaking. There can, we think, be no possible objection to the defendant's seventh prayer. It merely told the jury that if they found that the plaintiff's work was not performed according to the specifications, and should find that by reason of the failure of the work to conform with the specifications the defendant suffered loss or damage, then the defendant was entitled to an allowance against the plaintiff for such loss. By the appellee's sixth prayer the jury were instructed that, in

case they found for the defendant, they were at liberty in their discretion to allow interest. It is objected to this prayer that it does not fix the date from which they might calculate the interest. Upon the facts contained in the record, there is no doubt that the prayer is defective in this respect, as there is no evidence as to when the several items in the set-off became due; but, when the amount of the verdict and all the facts are considered, we are not satisfied that this defect resulted in any injury to the appellant. The court will not reverse a judgment for an error of this nature where it is reasonably certain, as it is in this case, that the appellant has not been injured by the erroneous ruling. This case, involving many disputed questions of fact, was fairly tried in the court below, and submitted to the jury under instructions which allowed them to consider fully all the contentions of the respective parties, and from an examination of the whole record we see no good reason why the judgment which was entered as the result of a long trial should be disturbed, and it will therefore be affirmed.

Judgment affirmed, with costs.

(109 Md. 341)

WILLNER v. SILVERMAN et al.

(Court of Appeals of Maryland. Jan. 12, 1909.)

1. TORTS (§ 10*)—MALICIOUS INTERFERENCE WITH BUSINESS OR OCCUPATION.

Any malicious interference by a single individual, or by a number of individuals conspiring together, with the business or occupation of another, followed by damage, is an actionable wrong.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig. § 10.*]

2. MASTER AND SERVANT (§ 20*)—TERMINATION OF RELATION—RIGHT OF MASTER.

Employer, or employé, where no contract right is involved, may lawfully terminate the relation at any time, and for any cause, but either cannot interfere without cause with the occupation of the other.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 19; Dec. Dig. § 20.*]

3. TORTS (§ 10*)—INJURY TO BUSINESS.

Injury to the business of another, accomplished by threats or coercion, constitutes a ground of action for damages, though there is no remedy against fair and honest competition.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig. § 10.*]

4. TRADE UNIONS (§ 1*)—RIGHT TO ORGANIZE.

Employés may combine in unions for lawful purposes, but must employ lawful methods for the attainment of such purposes.

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. ASSOCIATIONS (§ 1*)—RIGHT TO FORM.

Employers may combine in associations for lawful purposes, but must employ lawful methods for the attainment of such purposes.

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 1; Dec. Dig. § 1.*]

6. TORTS (§ 10*)—INTERFERENCE WITH OCCUPATION.

Where an employé of a member of an association of clothiers, organized primarily to discipline employés, wrote and circulated through the association a letter which falsely recited that a cutter in the employ of the member had been discharged because of his attempts to disorganize the employés, and which stated that the association should back up the member in the matter, and refuse the cutter employment and make an example of him, the cutter, sustaining damages in consequence of the letter, could sue the employer therefor.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig. § 10.*]

7. TORTS (§ 28*)—INTERFERENCE WITH OCCUPATION—TRIAL.

Whether a discharged employé of a member of an association of clothiers, organized primarily to discipline employés, was damaged because of inability to obtain employment in consequence of a letter, written and circulated through the association by a son of the member, held, in an action against the employer, for the jury.

[Ed. Note.—For other cases, see Torts, Dec. Dig. § 28.*]

8. TORTS (§ 27*)—INTERFERENCE WITH OCCUPATION—EVIDENCE—ADMISSIBILITY.

In an action by a discharged employé for damages for failure to obtain work in consequence of a letter, written and circulated by a son of the employer, evidence that one not a member of an association of which the employer was a member refused to give the employé employment after hearing that he had been blacklisted was admissible, though the information was communicated by the employé himself.

[Ed. Note.—For other cases, see Torts, Dec. Dig. § 27.*]

9. PRINCIPAL AND AGENT (§ 159*)—LIABILITY TO THIRD PERSON—WRONGFUL ACT OF AGENT.

Where the son of a member of an association of clothiers, organized primarily to discipline employés, wrote and circulated through the association a letter concerning a discharged employé of the member, but there was nothing to show that the member either authorized or ratified the act, and there was nothing to show that the member was responsible on the ground of the agency of the son, the member was not responsible for the damages sustained by the employé in consequence of the letter.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 159.*]

10. EVIDENCE (§ 471*)—OPINION EVIDENCE—ADMISSIBILITY.

Where the actuary of an association testified that he had no knowledge of a letter having been issued from his office, and stated the routine of the office in such matters, the court properly sustained an objection to a question calling for his opinion as to whether the letter was issued out of his office.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.*]

11. EVIDENCE (§ 317*)—HEARSAY EVIDENCE.

In an action by a discharged employé for damages sustained in consequence of being unable to obtain employment because of a letter written and circulated by his employer, testimony of the employé as to what reason the various persons to whom he applied for employment gave for their refusal to employ him was inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

12. EVIDENCE (§ 317*)—HEARSAY EVIDENCE.

One who was in another's office, while a telephone conversation was in progress between the latter and a third person could not testify as to such conversation, based on what was repeated to him at the time.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 317.*]

13. APPEAL AND ERROR (§. 1177*)—DISPOSITION OF CAUSE ON APPEAL.

Where, in an action against several defendants, the evidence was legally insufficient to authorize a recovery against some of the defendants, but sufficient to authorize a recovery against one defendant, and the court rendered judgment for all defendants, the judgment must be reversed, and the cause remanded for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4620; Dec. Dig. § 1177.*]

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by Joseph Willner against Harris Silverman and others, individually and trading as Harris Silverman & Sons. From a judgment for defendants, plaintiff appeals. Reversed and remanded for new trial.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, and HENRY, JJ.

Thomas Mackenzie and John P. Poe, for appellant. S. H. Lauchheimer and William S. Bryan, Jr., for appellees.

HENRY, J. This is an action on the case brought by the appellant, the plaintiff below, against the appellees, the defendants below, grounded on a declaration containing four counts, the first three of which allege, in substance, that the defendants, after discharging the plaintiff from their employment, maliciously conspired or contrived to injure him by blacklisting him, and writing a letter containing false statements to the members of an association, known as the "Clothiers' Board of Trade of Baltimore City," and requesting such association members to refuse employment to the plaintiff, while the fourth count sets out at length the details of the grievance complained of, omitting the charge of conspiracy. The defendants filed the general issue plea, and the verdict, under the instruction of the court, being for the defendants, the plaintiff entered an appeal to this court.

The appellant was a cutter of cloth in the establishment of Harris Silverman, one of the appellees, in Baltimore city, and on December 19, 1905, was discharged; his employer sending for him on the afternoon of that day to come to his office, and saying to him: "Willner, you are a disorganizer and an agitator. I cannot use you any longer. Here is your envelope"—which contained wages up to date. When Willner asked why he said that, Mr. Silverman replied, "Because you told a man, who has worked for me before, and who left me and started in again—I hired him yesterday—you told him to ask for more mon-

ey." Willner said: "Mr. Silverman, I did not tell him to ask for more money. I merely said to him, 'Cosman, is that true what a fellow tell me that you started in again for \$2.75.' He said 'Yes.' I said 'Charlie, I am surprised at you.'"

It seems that the man, Cosman, who had been hired the preceding day, in consequence of this conversation with the appellant demanded an increase of wages to \$3 per day, which was granted. On the day of the discharge Moses Silverman, son of Harris Silverman, and one of his employes, wrote the following letter to the Clothiers' Board of Trade, an organization comprising in its membership about 20 clothing dealers of Baltimore, including Harris Silverman, one of the appellees; it being one of the rules of said association that an employe discharged by one member should be refused employment by all other members: "Baltimore, December 19, 1906. Mr. Sylvan Hayes Lauchheimer, Local—Dear Sir: We desire to call your attention to Mr. Jos. Willner, a cutter who was formerly in my employ. We would request you to see that he is refused employment in all association houses in which he may apply for a position. He was the shop chairman of my cutting room, and in addition to this, he has been a source of trouble. In other words, he has been trying to disorganize my rule. We took on a cutter yesterday at a certain price and when he went to work this morning, he told him to insist on more money, otherwise we suppose they would have made it unpleasant for him. He came down and stated his demand to which we acceded, but thought we would be better off by discharging Mr. Willner, who was the cause of the disturbance. We think it no more than right that the association should back us up in this matter, and refuse this man employment, as we would like to make an example of him. Yours truly, [Signed] Harris Silverman & Sons." Evidence was offered tending to prove that this letter was duly received by the Clothiers' Board of Trade, and that copies of the same were made by the clerk, according to routine, and promptly delivered to the various members of the association.

Willner, on the morning after his discharge, started out to secure other employment, and continued his efforts, without success, until January 4th, following, when he was employed by M. Lauchheimer & Sons, one of the members of the Clothiers' Board of Trade. In his search for work the plaintiff made application to 8 different clothing firms in Baltimore, 6 of them being members of the aforesaid association. At the conclusion of the plaintiff's testimony, the defendants offered two prayers; the first asking the court to instruct the jury that there was no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendants, and the second asking for an instruction that there was no evidence legally

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sufficient to entitle the plaintiff to recover against Harris Silverman and Louis Silverman. Both of these prayers were granted, to which action the plaintiff excepted, and these exceptions constituting the eleventh and twelfth bills will be first discussed.

Preliminary thereto, it may be well to announce as a principle of law that any malicious interference with the business or occupation of another, if followed by damage, is an actionable wrong. Such interference may be by a single individual, or by a number of individuals conspiring together, but it is the damage which constitutes the gist of the action, and not the conspiracy; the latter being a matter of aggravation, if proven, as affecting the means and manner of redress. We find no Maryland case that goes to the extent of sustaining the position contended for by the appellant to the effect that the "blacklisting" of discharged employes by a combination of employers is in itself actionable, without proof of damage. In the case of *Walker v. Cronin*, 107 Mass. 562, it is stated that to maintain an action of this character it is necessary for the plaintiff to prove: "(1) Intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting." An employer, where no right of contract is involved, may lawfully discharge an employe at what time he pleases, and for what cause he chooses, while, on the other hand, an employe may sell his labor to whomsoever he desires, at such wages as he is willing to accept, and may quit such employment at his pleasure, yet neither has the right to interfere, without cause, with the business or occupation of the other. While the law does not furnish a shield against the effects of fair and honest competition, yet injury to the business of another, if accomplished by threats or coercion, constitutes a ground of action for damages on the part of the person so injured. In furtherance of their common welfare and in settlement of their oftentimes conflicting interests, both employers and employes stand upon a plane of perfect equality before the law, enjoying the same freedom and amenable to the same restrictions. Both may combine in unions or associations, but such associations, like individuals, must employ lawful methods for the attainment of lawful purposes. This was not always so, as appears from the account of the progress of trade unions, as given in the second volume of McCarthy's "History of Our Own Times," referred to by the appellant's brief. Looking at the subject in retrospect, it is difficult to understand how the conditions and sentiments therein described could obtain lodgment in public opinion, or receive sanction in the courts, for it is now clearly settled that the same law which permits the organization of employers, and inter-

poses to protect manufacturers or merchants from the violence of "strikes," or the "intimidation of boycotts," is also vigilant to see that the right and opportunity to work, which is the most valuable asset of the laboring man, as well as the privilege of organization, shall not be unjustifiably interfered with by employers, acting either as individuals or in combinations. *Barnes v. Typographical Union*, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018; *Walker v. Cronin*, 107 Mass. 562; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Robertson v. Parks*, 76 Md. 135, 24 Atl. 411; *Klingel's Pharmacy v. Sharp & Dohme*, 104 Md. 231, 64 Atl. 1029, 7 L. R. A. (N. S.) 976, 118 Am. St. Rep. 399; 8 Cyc. 650.

About the first element for recovery in the plaintiff's case we have no difficulty. While the letter of December 19th, aforesaid, is not couched in extravagant language, yet it does not state the facts of the case with entire accuracy, and the concluding sentence of the letter is some evidence of malice on the part of the writer, and the circulation of such letter through the instrumentality of the Clothiers' Board of Trade was an actionable wrong, provided damage resulted therefrom. On this latter point, we think that the receipt of the letter of December 19th, by the members of the Clothiers' Board of Trade, a body of men engaged in a like business, and associated together partly, if not primarily, for the purpose of disciplining employes, are facts affording some evidence from which the jury might infer that the refusal of employment to the plaintiff was because of the rule of the association and the request for its enforcement by the defendants. Furthermore it is in evidence that one Brown, not a member of the Clothiers' Board of Trade, refused the plaintiff employment after hearing that the applicant had been blacklisted. Although this information was communicated to Brown by the plaintiff himself, under circumstances which at least leaves it doubtful as to whether he was actuated by a high moral sense, or by a collusive purpose, with Brown, who was his personal friend, to aid in the prosecution of a contemplated lawsuit against these defendants, yet it was evidence of injury, the weight of which it was for the jury to decide.

The question next arises, who of the appellees is responsible for the wrong alleged in the narr. The uncontradicted testimony shows that the firm of Harris Silverman & Sons was not in existence at the time the above-quoted letter was written, nor was there any evidence whatever to show that Louis Silverman had any connection with the case. Therefore as to the firm of Harris Silverman & Sons, which did not come into existence until January 1, 1906, and as to Louis Silverman individually, it is clear that there was no right of action. Concerning Harris Silverman, there is no evidence legally sufficient to show that he either authorized, or subsequently ratified, the action of his son in writing the letter. The only circum-

stances from which it could be inferred that he had knowledge of the letter, and took no steps to repudiate it, is that, being a member of the Clothiers' Board of Trade, a copy was delivered to him, along with the other members, but this is opposed by the equally logical inference that the clerk might not have deemed it necessary to deliver to Silverman what was practically a copy of his own letter. Harris Silverman was a witness for the plaintiff, and in reply to a question as to whether he wrote the letter, said: "Positively not. I have no knowledge of it; don't know a thing about it, sir." This is a broad answer, but even if held to be merely responsive to the question concerning the writing of the letter, it was easy for the plaintiff to have followed the question up by a direct question as to when, if ever, the letter came to his knowledge. This the plaintiff failed to do, and we think has left the testimony in too vague and indefinite a shape to provide a basis for the jury to infer a subsequent notice and ratification of the letter by Harris Silverman. Nor is there any ground for holding the father responsible on the ground of the agency of the son, Moses Silverman. The latter testified that he was an employé, who occasionally wrote letters of minor importance, but not on subjects of serious business. The letter in question was clearly not about a routine matter, but was outside of the usual course of business, about which, according to the only testimony in the case, the son would have no authority to take any steps whatever. Holding these views, we think the second prayer of the defendants was properly granted by the court.

Moses Silverman admits writing the letter in question, and, under the fourth count of the narr, but not under the other counts, the plaintiff has a right of action against him. The first prayer of the defendants was therefore improperly granted, and the judgment on that account should be reversed, and the cause remanded for a new trial.

There remain some minor matters to be considered. The seventh exception was waived by the appellant, and the third, fourth, eighth, ninth, and tenth exceptions, relating to the refusal of the court to admit in evidence a copy of the letter of December 19th (which letter was subsequently admitted at a later stage of the proceedings), it was conceded were not vital, and it is not necessary to discuss them. This leaves open for consideration the first, second, fifth, and sixth exceptions.

The first exception relates to the refusal of the court to permit the plaintiff to ask Mr. Lauchheimer, the actuary of the Clothiers' Board of Trade, the following question: "I will ask you now to tell candidly to the jury whether you have any doubt that letter [referring to the Lauchheimer letter] was issued out of your office over your signature, over your typewritten signature?" The witness had already stated that he had no

knowledge of the said letter having been issued from his office, and had testified as to what was the routine of the office in such matters, and we do not think that the circumstances called for an expression of opinion from him. The facts in connection with the letter and of the witness' knowledge of it were already in evidence, and it was for the jury to say from these facts whether or not the letter was issued, and, if so, by what authority.

The second exception was to the propriety of a question as to whether the directors of the Clothiers' Board of Trade directed the transmission of copies of the Silverman letter to the members of the association. The ruling of the court in admitting the question was harmless, if erroneous, and therefore not necessary to be considered.

While on the stand, in his own behalf, the plaintiff was asked this question: "What reason, if any, was given by the various people to whom you applied for their refusal to employ you?" An objection to this question was sustained by the court, and this action constitutes the plaintiff's fifth bill of exception. In this ruling we think that the lower court was correct. An answer to the question would have fallen within the limits of hearsay evidence. Neither the parties applied to, nor the association, of which a majority of them were members, were parties to the suit, and their replies would not have been admissible against the defendants. The parties themselves should have been called to the stand to testify on this point.

The sixth exception was to the refusal of the court to allow plaintiff to testify to a telephone conversation between Silverman and Lauchheimer, the plaintiff being in the latter's office while the conversation was in progress, and claiming that it was repeated to him at the close. The authority cited by the appellant does not sustain the position taken by him. In the case cited (*Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901) the operator of the telephone had been expressly directed by one of the parties to call up a person at a distant point, and to converse with such person, asking the questions and repeating the replies as they were given to him, and the court held that the operator was the agent of both parties, and that in a subsequent suit between the parties the one who had requested the operator to talk for him could testify to what was repeated to him at the time by such operator. There is no such circumstance in the present case, and it would have been clearly hearsay to have permitted the plaintiff to tell the conversation. 16 Cyc. folio 1196, and note. Although in our opinion, the evidence, as set forth in the record, is legally insufficient to entitle the plaintiff to recover as against Harris Silverman and Louis Silverman individually, or against the firm of Harris Silverman & Sons, yet as the judgment is an entirety which cannot be affirmed as to some, and reversed as

to other defendants, we must, for error in granting the defendants' first prayer, simply reverse the judgment and remand the case for new trial. *East Baltimore Lumber Co. v. K'Nessett Israel Aushe S'Phard Congregation et al.*, 100 Md. 689, 62 Atl. 575, and cases therein cited.

Judgment reversed, with costs to the appellants, and cause remanded for new trial.

(109 Md. 260)

**WILLIAM MARTIEN & CO. v. MAYOR
AND CITY COUNCIL OF
BALTIMORE.**

(Court of Appeals of Maryland. Jan. 12, 1909.)

**1. BROKERS (§ 53*)—RIGHT TO COMMISSIONS—
NEGOTIATING PURCHASE.**

Plaintiffs, to recover under their agreement to negotiate the purchase for defendant of land for a certain commission on the amount of the purchase, must show that through their efforts and negotiations defendant became the purchaser; which is not the case where their efforts to get a price from the owner, which defendant would accept, failed, and long after their negotiations and dealings with him had ceased, and they and defendant had abandoned hope of reaching an agreement with him, he, on learning that defendant was to commence condemnation proceedings for the land, made an offer to defendant, which was accepted, to submit to arbitration the price at which defendant should take the property.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 74; Dec. Dig. § 53.*]

**2. BROKERS (§ 82*)—ACTION FOR COMMISSIONS—
EVIDENCE.**

Under the declaration claiming commissions only on property purchased by defendant, evidence of negotiations by plaintiffs in regard to other property is inadmissible.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 82.*]

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by William Martien & Co. against the Mayor and City Council of Baltimore. Judgment for defendant, and plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, and HENRY, JJ.

John Philip Hill, for appellants. S. H. Lauchheimer, for appellee.

THOMAS, J. The declaration in this case charges that on or about the 17th of May, 1906, the defendant, the mayor and city council of Baltimore, through its agent, the sewerage commission of Baltimore, entered into a contract with the plaintiffs, "whereby the plaintiffs, who are real estate brokers, were employed to negotiate the purchases of certain lands lying near Back river, in Baltimore county, Md., and the plaintiffs were to receive from the defendant a commission of 1¼ per cent. of the aggregate amount of the defendant's purchases of the said land, less whatever the plaintiffs might be able to ob-

tain from the vendors of such land in excess of 1¼ per cent. of the aggregate amount of defendant's purchases of said land; that the plaintiffs entered upon the performance of said contract, and fully performed and discharged all their duties and obligations thereunder; that the aggregate amount of the purchases of said land by the defendant was \$205,000; that, by reason of the purchases, there became due and owing by the defendant to the plaintiffs the sum of \$2,562.50, but the defendant has not paid the same." The defendant pleaded never promised as alleged, and never indebted as alleged, and during the trial of the case, which resulted in a verdict in favor of the plaintiffs for \$62.50, non pros., and judgment for defendant for costs, two exceptions were reserved by the plaintiffs, one to the rulings of the court on the evidence, and the other to the action of the court on the prayers, and on plaintiffs' special exception to defendant's sixth prayer.

The court, by granting the defendant's first prayer, instructed the jury that there was no evidence in the case "legally sufficient under the pleadings to entitle the plaintiffs to recover any commission on the amount paid for the Willis lot, mentioned in the evidence," and, unless there was error in granting this instruction, it will not be necessary for us to consider any of the other prayers in the case. Acts 1904, p. 620, c. 349, provided for the appointment, by the mayor of Baltimore city, of a commission to be known as the "Sewerage Commission of Baltimore City," who should have in charge the construction of a sewerage system for the city, with power to make in the name of the mayor and city council of Baltimore all contracts germane to the scope of its duties under the act, and authorized the mayor and city council, acting by and through the agency of said commission, to acquire by purchase, gift, or condemnation any land or property necessary for the construction or workings of such system. The appellants, William Martien and James C. Martien, co-partners doing business under the firm name of William Martien & Co., real estate brokers of Baltimore city, knowing that the sewerage commission had to acquire a large lot or tract of land needed in the construction of the proposed sewerage system, began in the latter part of 1905 or early in 1906 to write to the commission, making suggestions as to the character of the land in several directions from the city which in their judgment would be desirable or suitable, and stating that they had for some time been taking an active interest in the sewerage work of Baltimore, and had collected a great deal of important data which would be useful and valuable to the commission; that what they had done in the interest of the commission had been done gratuitously, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tendering their services as real estate brokers whenever the commission should decide to purchase. After having written a number of letters of the kind on the 15th of May, 1906, Gen. Leary, chairman of the commission, wrote plaintiffs in reply that the commission was not prepared at that time to enter into the purchase of real estate for the purpose of the commission, but as soon as the commission was informed of the recommendation of the advisory engineers the matter would be taken up by the commission, and that he should be glad at that time to give the plaintiffs an interview on the subject.

James C. Martien, one of the plaintiffs, states: That on the 16th of May, 1906, Mr. Hendricks, the engineer, called at plaintiffs' office, and requested them to call at the sewerage commission's office that afternoon. That, when they went to the commission's office, Gen. Leary and Mr. Hendrick were there, and they awaited the arrival of the mayor, Mr. Timanus. That, while waiting for the mayor, they were questioned by Gen. Leary regarding their business experience, and upon the arrival of the mayor they were told that the commission had decided to purchase a large tract of land. That it was a matter "that would have to be handled very expeditiously and only with the utmost confidence," and that it was a matter of vast importance to the commission to acquire this land. They wanted to know if the plaintiffs could handle the matter without outside help, and, upon being assured by the plaintiffs that they could, they wanted to know what commissions plaintiffs would charge, and the plaintiffs told them $2\frac{1}{2}$ per cent. commissions. That they said that it was a "matter of considerable magnitude, a deal of large proportions"; that the land they wanted "contained about one square mile of territory"; and that they thought that the commissions ought to be less, and requested the plaintiffs to name a lower rate. That plaintiffs told them that they were not willing to charge less than $2\frac{1}{2}$ per cent., but thought they could collect their commissions in a number of instances from the land owner. That they said to the plaintiffs that that would not be satisfactory, as the plaintiffs would then be representing the land owners, and they preferred plaintiffs to represent the city. That plaintiffs then told them that they thought they could render the city better service by seeking to collect their commissions from the landowners. That if they were "to go in to acquire a large tract of land, and not make an attempt to collect a commission from the land owners, they would immediately suspicion some big corporation was behind the transaction, and their prices would be higher than if we attempted to collect commission from them." That the gentlemen representing the commission then agreed that the plaintiffs should collect the commissions, if possible, from the landowners, and plaintiffs said they would

guarantee to collect at least 50 per cent. of the commissions from the landowners, if the city would pay the other 50 per cent., and the commission agreed to that. That they then requested plaintiffs to reduce to writing the terms of the agreement, which they did, as follows: "Baltimore, May 16, 1906. Sewerage Commission of Baltimore—Gentlemen: In the matter of the purchase of property for you we hereby agree to negotiate the purchase on a basis of commission not exceeding one and one-quarter per cent on the amount of the aggregate purchases. From our previous experience we do not anticipate the commission will amount to the above. Very truly yours, William Martien & Company. The foregoing terms are accepted by the commission. Peter Leary, Jr. Chairman. May 17th, 1906." That, after plaintiffs signed this contract, Mr. Hendrick then showed them a small sketch of the property desired by the commission, which they said contained about one square mile. That they did not know who owned the property, but the mayor said that "Mr. Willis was a property owner in that section." That these gentlemen then turned the plaintiffs over to Mr. Hendrick, to whom plaintiffs were to make their reports as they progressed in the work. That the next day Gen. Leary told them that the commission had accepted the contract formally, and had noted the acceptance on the contract, and the plaintiffs then asked him to give them a copy of the contract, which he did. That, after the contract was executed, plaintiffs, in order to find out who the owners of the land were, had to go to Back river and take a launch, and run down the river, and inquire of the man in charge of the launch as they went along the names of the landowners on either side of the river. The man showed them the lines of the Willis property, and gave them information about other properties, including the property of Mr. Jacob Norris. That they stopped on their return up the river at the Norris property, and called on Mr. Norris, and questioned him about the sale of the property. That they made daily reports to the commission of their progress. That they were instructed not to call on Mr. Willis until Mr. Hendrick said so, but to gather information regarding property values, and, when plaintiffs felt prepared to see him, to report to Mr. Hendrick, and this they did on the 21st of May, and Mr. Hendrick told them then to call on Mr. Willis. That plaintiffs went to see Mr. Willis the next day, and told him that they had come to see him in regard to his property. That Mr. Willis said his property was not for sale. That plaintiffs told him that they were not willing to accept that as his answer; that they were there to negotiate for his property, and desired to deal with him for it. That he insisted that he did not want to sell it, and they told him he might have to sell it, and that then Mr. Willis said: "Well, now if you represent any one having the pow-

er of eminent domain, such as a railroad company, and can make me sell the property, I am not as foolish as that, and I will talk to you about my property." That plaintiffs told him that their client had "the right of eminent domain," and that he said then he would talk to them, and told them that his property contained about 600 acres. He did not know the correct area. That he estimated that he had about 5,000 feet on Back river, and about 1,000 feet on Eastern avenue, and about 500 acres of inland property. That he estimated his front on the river to be worth about \$1 a foot, and his front on Eastern avenue at \$2 a foot, and the 500 acres at \$200 an acre, and said that he would take \$250,000 for the property. That plaintiff asked him if he could get a plat of his property for them, so that they "could get down to correct dealing with him on his property," as it was not satisfactory to deal on roughly estimated acreage or frontage, and he said Bouldin had made surveys at different times of portions of the property, and that he would see him. That plaintiffs made a written report of this interview with Mr. Willis to the commission on the 22d of May. That on the 24th of May they went to see Mr. Willis again to see if he had gotten a plat of the property, and he said that Bouldin was to proceed at once to prepare a plat of his property, and that, as soon as he got hold of it, he would let them have it. That they then talked to him about the value of property in that section, quoting sales at different places, and told him he should name a different price for his property, but he still insisted that it was worth \$250,000, "and that was his price for it." That plaintiffs reported to the commission that same day, and they told them to continue negotiations with him. That on the 25th of May they reported to the commission the result of negotiations on the other properties involved, and were then told by Gen. Leary that they thought they could assist the plaintiffs in their negotiations with Mr. Willis, and that they thought it was desirable for them to "see him, and show their hand, and explain the purpose for which the property was wanted. That the fact they would see him would not interfere with us, but would aid us. That this was a large city improvement, and Mr. Willis was a prominent city official, closely affiliated with the administration, and the fact of their seeing him they thought would tend to aid in the purchase of the property." That he requested plaintiffs to see Mr. Willis and arrange for him to meet the commission at the city solicitor's office the next afternoon. That the plaintiffs called on Mr. Willis, and told him that their principals desired to see him in regard to the property, and to meet him at the city solicitor's office Saturday afternoon. That they did meet, and that, after the meeting, plaintiffs were informed by the commission that the statement Mr. Willis made to them was identically the same he had made to the

plaintiffs, and that they did not see how it was possible for them ever to reach an understanding with Mr. Willis in regard to the property. That afterwards plaintiffs saw Mr. Willis again, and told him that they would like very much to reach an understanding with him in regard to his property, "and desired to negotiate further." That they asked him to give them another price, and he refused to do it saying: "You are seeking to buy. I am not seeking to sell. It is your place to make an offer." That plaintiffs reported to the commission on the 15th of June, and tried to get from them authority to make Mr. Willis an offer, but they thought it was entirely useless, as their ideas and Mr. Willis' were so far apart that they did not see how it was possible to reach an understanding with him. That this was the end of plaintiffs' negotiations with Mr. Willis.

Mr. Willis, who was called as a witness by plaintiffs, states: That the plaintiffs came to see him several times at his office and once at the property. That they asked him how much land he had, and he told them about 500 acres, and that, if they represented somebody who had the right to take the property, he would take \$250,000 for it. That when he met the members of the sewerage commission at the city solicitor's office at the time mentioned by James C. Martien, he told those gentlemen the same thing he had told the plaintiffs. That the matter was not taken up again for sometime afterwards, and until he learned that they were about to proceed with condemnation proceedings in Baltimore county. That he was told by people in Baltimore county that they had been employed to go ahead, and that he then addressed a letter to Gen. Leary, having first seen Mr. Hendrick, "and told him that I realized that the city had a right to take it. That it was by the grace of the state I owned it, and by its grace it could be taken away from me, and that the only thing we could dispute about would be the price. I did not dispute the right of the city to take it. The only thing about which we could honestly differ in connection with it would be the price. I proposed to settle it by a gentlemen's agreement rather than to trust to the condemnation juries of Baltimore county. He seemed to think well of that, but said he would have to submit it to his commission, which was done. The commission approved of it, and an agreement was prepared to submit it to arbitration, the agreement was signed, the arbitrators were appointed, the commission met and decided the case. I remember Gen. Leary saying he wanted the paper drawn so there could be no delays in the matter and wanted it final. If they had said \$10 to me, I would have been bound to have taken it. I did not get as much as I thought I ought to have gotten, and do not think so now; but I am man enough to live up to a gentlemen's agreement when I make one."

It further appears from the evidence produced by plaintiffs that the agreement to submit to arbitration was executed on the 7th of February, 1907, and that the price fixed for the Willis property by the arbitration was \$200,000. The only evidence offered by the defendant was the deed for the property from Mr. Willis to the city.

By the terms of the written contract entered into by the plaintiffs and the sewerage commission in behalf of the city, the plaintiffs undertook to negotiate the purchase by the city of the property desired for the use of the commission, for which services they were to receive not more than $1\frac{1}{4}$ per cent. of the aggregate amount of the purchases. In other words, the plaintiffs were employed as real estate brokers by the commission, representing the city, to negotiate the purchase of the property needed by the commission, and were to receive as compensation for such services not more than $1\frac{1}{4}$ per cent. of the entire amount of the purchases so made. Now, in order to recover under this contract, which is clear and definite, it was necessary for the plaintiffs to show that the city, through their efforts and negotiations, in pursuance of the terms of the contract, had become the purchasers of certain property for the use of the commission. The evidence in the case, which we have set out at length, and all of which was produced by the plaintiffs, shows conclusively that all negotiations and dealings between the plaintiffs and Mr. Willis ceased before the 15th of June, 1906, and that the efforts of the plaintiffs to negotiate the purchase of his property by the city had utterly failed; that both the plaintiffs and the sewerage commission had abandoned all efforts to secure, and all hope of ever reaching, an agreement with Mr. Willis in regard to the purchase of the property, and that it was not until a long time thereafter, and until after Mr. Willis had heard that condemnation proceedings were about to be instituted for the purpose of condemning his property, that he went to the commission himself, and offered to submit the matter to arbitration rather than undergo a condemnation proceeding. Under such circumstances, the acquisition of the property by the city, whether it be regarded as a purchase within the meaning of the terms of the contract or not, was not in any sense the result of the negotiations of the plaintiffs. The right of the plaintiffs to compensation was dependent upon the result of their negotiations. If they failed, and by reason thereof the city was required to resort to other means of acquiring the property, upon what possible grounds can the plaintiffs expect to recover? They did not render the service, viz., "negotiate the purchase," for which the city agreed to compensate them. Their effort to do so may be commendable, but their failure defeats their right to recover.

In the early case of *Keener v. Harrod*, 2

Md. 70, 56 Am. Dec. 706, the court said: "We understand the rule to be this: That the mere fact of the agent having introduced the purchaser to the seller or disclosed names by which they came together to treat will not entitle him to compensation," unless it appears that such introduction or disclosure was the foundation on which the negotiation was begun and conducted, and the sale made. And in the very recent case of *Walker v. Baldwin & Frick*, 106 Md. 634, 68 Atl. 31, this court said: "All the cases agree that the disclosure of the purchaser's name and the putting of him in communication with the defendant by the plaintiff must not only be the foundation upon which the negotiations were begun, but upon which it was conducted and the sale ultimately made. * * * The broker must be shown to be the procuring cause of the sale. The intervention of the plaintiff in beginning the negotiations and their subsequent culmination in a sale will not suffice unless these negotiations were the ultimate cause of the sale." In other words, to entitle a broker to recover commissions for the sale or purchase of property, he must not only show his efforts or negotiations to accomplish the sale or purchase, but he must show that the sale or purchase was accomplished as the result of such efforts or negotiations. As the plaintiffs in this case failed to show that the property was acquired by the city as a result of their efforts and negotiations, there was no error in the instruction of the court to the effect that under the pleadings and evidence the plaintiffs were not entitled to recover commissions on the amount paid for the Willis lot. Many other cases in this state might be cited, including the case of *Blake v. Stump*, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 108, referred to by counsel for appellant, in support of the rule we have stated, but they are all so entirely in accord with the early case of *Keener v. Harrod*, supra, and the late case of *Walker v. Baldwin*, supra, from which we have quoted, that we deem it unnecessary to make further reference to authorities. Nor is it necessary to discuss the cases referred to by the appellant further than to say that we do not understand them as opposing the view we have expressed. There is no doubt as to the meaning of the term "negotiate" in the contract in this case. If we accept the definition in *Palmer v. Ferry*, 72 Mass. 420, cited by appellant, viz., that "To negotiate means to conclude by bargain, treaty or agreement," and apply it to the contract in this case, the plaintiffs contracted "to conclude by bargain, treaty, or agreement" the purchase of the property, and it is their failure to do so in this case that defeats their right to recover. The evidence objected to and excluded by the court in the first exception was evidence to show the negotiations of the plaintiffs in regard to property other than that purchased by the city. The plaintiffs in their declaration claim commis-

sions only on the property purchased, and do not make claim to any other commissions. Therefore this evidence was not admissible under the pleadings, to which the court was bound to look in determining the admissibility of evidence.

Finding no error in the rulings of the court in the first exception or in granting defendant's first prayer, it becomes unnecessary to consider the other questions presented by the record, and we must affirm the judgment below.

Judgment affirmed, with costs.

(109 Md. 327)

UNITED RAILWAYS & ELECTRIC CO. v. RILEY.

(Court of Appeals of Maryland. Jan. 13, 1909.)

1. CARRIERS (§ 348*)—STREET RAILROADS—INJURIES TO PASSENGERS—DANGEROUS POSITIONS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Where, in an action for injuries to a street car passenger while standing on the rear platform by a collision, defendant pleaded contributory negligence, and plaintiff's testimony contained evidence from which the jury could have found contributory negligence, the court erred in charging that, if the jury found the facts stated in plaintiff's prayer, plaintiff was entitled to recover, unless "defendants showed" either that the injury did not result from its negligence, or that the accident could have been avoided by the exercise of ordinary care on plaintiff's part.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1403-1407; Dec. Dig. § 348.*]

2. CARRIERS (§ 331*)—STREET RAILROADS—INJURIES TO PASSENGERS—DANGEROUS POSITIONS—PERSON ON PLATFORM.

Plaintiff boarded a standing street car at night while the car was either standing still or had not moved perceptibly. Plaintiff was injured by the car being struck by a runaway car from behind, while plaintiff was either in the act of entering or while he had stopped on the platform momentarily with a view to going inside as soon as the car started, or with the intention of remaining on the platform. *Held*, that plaintiff was not negligent, nor did he assume the risk of the collision by being on the platform after having an opportunity to go inside the car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1378; Dec. Dig. § 331.*]

3. CARRIERS (§ 323*)—INJURIES TO PASSENGERS—"ASSUMED RISK."

The doctrine of assumed risk in its application to the relation of carrier and passenger involves the doctrine of contributory negligence, since, unless the position voluntarily taken by the passenger exposes him to obvious and patent dangers or such as he is required to anticipate, he cannot in case of injury be charged with negligence or to have assumed the risk.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1346; Dec. Dig. § 323.*]

For other definitions, see Words and Phrases, vol. 1, pp. 589-591; vol. 8, pp. 7584, 7585.]

4. CARRIERS (§ 348*)—STREET RAILROADS—INJURIES TO PASSENGERS—INSTRUCTIONS.

Where plaintiff was injured by a rear-end street car collision, while he was standing on the rear platform of the car that was struck,

and testified that he got on the platform and took the position he was in, as he was about to enter the car, and before he could get inside the accident happened, the court properly refused to charge that if plaintiff took an exposed and dangerous position on the car, and was injured by reason thereof, he could not recover.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1403-1407; Dec. Dig. § 348.*]

5. DAMAGES (§ 172*)—PERSONAL INJURIES—SPECULATIVE DAMAGES—EVIDENCE.

In an action for injuries to plaintiff, evidence that before the accident plaintiff had an arrangement to go into business and intended to do so was inadmissible.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492; Dec. Dig. § 172.*]

6. DAMAGES (§ 166*)—PERSONAL INJURIES—EVIDENCE—MARRIAGE AFTER INJURY.

In an action for injuries to plaintiff, evidence that plaintiff was married after the accident was inadmissible.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 478, 479; Dec. Dig. § 166.*]

7. APPEAL AND ERROR (§ 1053*)—REVIEW—EFFECT OF ERROR.

Where, in an action for injuries, the jury were properly instructed as to the measure of damages, error in permitting evidence that plaintiff was married after the accident was not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4180; Dec. Dig. § 1053; Trial, Cent. Dig. § 977.]

Appeal from Baltimore City Court; George M. Sharp, Judge.

Action by V. Russell Riley against the United Railways & Electric Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

J. Pembroke Thom and Joseph C. France, for appellant. William Colton, for appellee.

THOMAS, J. V. Russell Riley, the appellee and plaintiff below, who lived at 648 Columbia avenue, in Baltimore city, when returning from a visit to some friends in Pikesville, late at night on December 15, 1905, got off one of the cars of the appellant at the corner of North and Linden avenues to take a Johns street car going to Columbia avenue. It was cold, and he went into a drug store and got some cigars and walked up North avenue, smoking, while waiting for his car, but not seeing one, and seeing a Madison avenue car standing near Wegner's restaurant or saloon, several doors below the corner, he hurried and got on it, and while he was on the rear platform of the car it was struck from the rear by what is called in the evidence a "runaway car," with no one in charge of it, and when running rapidly on the same track in the same direction as the car he was on, and he sustained injuries which necessitated the amputation of one of his legs a few inches below the knee, and this suit is brought to recover for such injuries.

The grounds of the defense were that he was guilty of contributory negligence in standing on the platform of the car, and that he assumed the risks to which his position exposed him. The trial resulted in a verdict and judgment in favor of the plaintiff for \$10,000, from which judgment this appeal was taken.

The record contains three exceptions to the rulings of the court on the evidence, and one exception to the granting of the plaintiff's two prayers, the rejection of the defendant's first, second, third, fifth, sixth, seventh, ninth, tenth, and eleventh prayers, and the overruling of defendant's special exception to plaintiff's prayers. The only exceptions, however, relied on and pressed in this court, are the exceptions to the ruling of the court on the evidence, and to the granting of plaintiff's first, and the rejection of defendant's sixth, ninth, tenth, and eleventh prayers.

Plaintiff testified: That "he ran to get on the car and got on, but, before he could throw his cigar away or get inside, some one jumped on the rear end of the car, and hollowed and pulled the bell, and before he knew it there was an awful crash. The car was still when he got on. His position was on the back platform of the car facing the motorman, looking inside the car, about to walk in. He did not have time to throw his cigar away or get inside the car before some one jumped on and hollowed, and at the same time rang the bell, and before he knew it there was a crash." And on cross-examination he said he ran back of the car and got on because it was the last car that night going down, and that he still had the cigar with him; that he did not have time to take any position, and had just gotten on the car, was standing facing—"I was looking inside the car"—that he was standing on the platform looking inside the car; that he guessed he was smoking; that he could not tell how many people were in the car; that he saw the conductor, who was standing up in the front part of the car; that no one else was there that he knew of; that the conductor was not on the back platform or at the back door; that he did not have time to see how many people were in the car, which was not crowded, and that "he guessed there was plenty of room inside"; that he had been around cars a good deal in Baltimore for 10 years, but never knew of any notice or sign in the cars warning people against standing on the platform because it was dangerous, and that "those so doing assumed the risk," but that he had seen signs prohibiting smoking inside the car, and that he knew how to read; that he did not know whether it was Rosenheim who hollowed, but that somebody hollowed, and at the same time jumped on and pulled the bell; that "everything was all confusion at the time," and that he, plaintiff, was "about opposite the door then, about

going inside the car," and that he knew nothing about the runaway car until it struck the car he was in.

Plaintiff's witness Herford says that the car plaintiff was on was standing on Madison avenue, in front of Wegner's saloon, the fourth door from the northeast corner of Madison and North avenues, and that he saw some one get on the car ahead of the plaintiff who went inside the car, and was about to take his seat when the accident happened; that the conductor was in the front part of the car, and had something in his hand, and witness thought he was writing; that he saw the runaway car pass the northwest corner, and saw plaintiff on the platform of the car that was struck; that he saw a man who came out of Wegner's saloon, get on after plaintiff, and that after witness hollowed he jumped off; that plaintiff could have gotten inside the car and taken a seat; that Rosenheim got on the car a few minutes after plaintiff; that plaintiff was standing on the left-hand side of the platform of the car facing the motorman; that witness hollowed loud, and Rosenheim, the man who got on the car after the plaintiff, jumped off, but he could not say positively how long Rosenheim was on the car before he jumped off; that he imagines that it was not more than a couple of minutes "if it was that much"; that it was a very short time.

Plaintiff's witness Zimmerman stated that he came out of Wegner's saloon and saw a car coming down Madison avenue which stopped, and that he stepped on the car, and at the same time plaintiff got on the car; that he, witness, went inside the car, and, as he was about to take a seat on the right side, he looked around, and saw plaintiff standing on the left-hand side of the rear platform, holding onto the rail; that the conductor was in the front part of the car, writing something in a little book, but that there was no one else in the car, and that about half a minute later he heard some one jump up on the car and ring the bell, and he saw him jump off again, and that then the crash came, and witness found himself in the front part of the car where the conductor was; that the car that he was on was at a standstill when he got on it, and, after it was struck, it went to about the middle of the square; that there was plenty of room inside the car; and that it was probably half a minute after the plaintiff got on the car before Rosenheim got on the car and pulled the bell, and that in the meantime plaintiff was standing on the platform holding to the rails, but that he "didn't know whether he was smoking or not."

Plaintiff's witness Brenner stated that he and Rosenheim came out of Wegner's saloon; that Rosenheim was waiting to go downtown, and that he was going east on North avenue; that they saw the car coming, and Rosenheim left him on the south side of the street,

and he presumed he got on the car, and witness had gotten "diagonally across" Madison avenue when he heard a shout, and, looking back, saw plaintiff standing on the platform, and Rosenheim pulling the bell rope, and before he could realize what happened he saw another Madison avenue car coming, and there was a crash which carried both cars as far as the middle of the block; that the crash came immediately after pulling the bell, and the car was either still or had very little headway; that after the accident the platforms of the two cars were apparently smashed, and there was a tangle of the iron grating and the brake, "and plaintiff was down among them."

The plaintiff produced other witnesses whose testimony was to about the same effect as the evidence above stated, from which the jury could have found that at the time of the accident the car on which plaintiff was injured was either standing still or had just started, and that plaintiff was standing on the rear platform of the car; that there were very few people in the car; that the plaintiff had an opportunity to go inside the car; and that, if he had done so, instead of remaining on the rear platform, he would not have received the injuries for which he now seeks to recover.

Defendant proved by its witness Glenn that he was conductor on one of the defendant's cars, and saw the accident in which the plaintiff was injured; that he had been at work on the street cars for 14 or 15 years previous to the accident; that he took the car plaintiff was on from the place of the accident back to the barn; that that car and all other cars of the defendant had posted on them a sign forbidding people to ride on the steps or rear platform of the car, and stating that those who did so did it at their own risk; that these notices had on them, in big red letters at the top, the word "Warning."

Plaintiff's first prayer is as follows: "If the jury believed that the plaintiff was a passenger on one of the defendant's cars, and whilst being carried therein was injured by a collision between that and another of the defendant's cars while moving on the same track, then the presumption is that the injury resulted from the negligence of the defendant, and the plaintiff is entitled to recover, unless the defendant shows that the said injury did not result from its negligence, or that the accident could have been avoided by the exercise of ordinary care on the part of the plaintiff." By this instruction the jury were told that, if they found the facts stated in the prayer, the plaintiff was entitled to recover, unless the defendant showed either that the injury did not result from its negligence, or that the accident could have been avoided by the exercise of ordinary care on the part of the plaintiff. In other words, that the jury in determining whether the in-

jury resulted from the negligence of the defendant, or the accident could have been avoided by the exercise of ordinary care by the plaintiff, were confined to the evidence produced by the defendant. As was said in the case of *Lewis v. B. & O. R. R. Co.*, 38 Md. 588, 17 Am. Rep. 521: "The question in this and in all cases of the like kind is whether the injury complained of was caused entirely by the negligence or improper conduct of the defendant, or whether the plaintiff so far contributed to the same by his own negligence or want of ordinary care and prudence that, but for such negligence or want of care and prudence, the injury would not have happened. In the first case, the plaintiff would be entitled to recover—in the latter he would not, unless the defendant, by the exercise of care and prudence, might have avoided the consequences of the plaintiff's negligence." While an injury may be sustained under such circumstances as, when shown, give rise to the presumption of negligence on the part of the defendant, the testimony adduced to show these circumstances may also disclose such evidence as will justify the court in saying, or the jury in finding, that the plaintiff was guilty of such contributory negligence as defeats his right of recovery. Without meaning to say as a matter of law that the testimony produced by the plaintiff shows that he was guilty of contributory negligence, it does contain evidence from which the jury could have found that the plaintiff had the opportunity to go inside the car, and that, instead of doing so, he remained on the platform, and that under the circumstances disclosed by this evidence he was negligent, and that but for such negligence on his part he would not have been injured. Notwithstanding the jury may have so found, yet under the instructions contained in the plaintiff's first prayer they were required to find for the plaintiff, unless the defendant showed that the injury did not result from its negligence, or that it could have been avoided by the exercise of ordinary care on the part of the plaintiff. In the case of *Phil. & W. R. Co. v. Hand*, 101 Md. 238, 61 Atl. 285, this court, in condemning a prayer which told the jury that they "were not entitled to presume that the plaintiff was guilty of negligence, but that fact, if relied upon by the defendant, must be proved by the defendant by preponderating testimony," said: "Contributory negligence will defeat a plaintiff's action. It can, therefore, make no possible difference whether that negligence is proved by the plaintiff or by the defendant. It is its existence, and not the party by whom its existence is proved, that is material. It is the thing itself that defeats the action, and not the mere accident that it happens to be proved by the one or the other of the opposite parties. It is just as complete a bar to the action when its presence is revealed in the evidence introduced by the plaintiff as it is when disclosed in the testimony adduced by the defendant. Inas-

much, then, as the negligence of the plaintiff directly contributing to the happening of the injury sustained bars a recovery, it would seem a priori to follow that it is absolutely of no consequence by which party to the suit that negligence is proved. Consequently it was error to instruct the jury that to be a defense such negligence must be proved by the defendant."

Appellee's counsel cites and relies upon the case of *N. Balto. Pass. Ry. Co. v. Kaskell*, 78 Md. 517, 28 Atl. 410, where a similar prayer was approved by this court. While plaintiff's first prayer in *Kaskell's Case* does conclude by requiring the defendant to show contributory negligence, etc., the facts of that case are entirely different. There the plaintiff was injured by reason of having his hand around the window post of the street car. The car on which he was riding left the track, and finally came in contact with a box car of the Western Maryland Railroad, mashing the plaintiff's hand. Plaintiff's evidence was that the car was crowded, passengers were standing in the aisle, and the car was jolting so that the passengers with difficulty retained their seats, and that he had to take hold of the window under the circumstances to hold himself on; while the defendant's testimony was that, before and at the time of the accident, he had been sitting with his elbow resting on the window sill, with his hand "clasped around the post of the window, the back of his hand being outside the car." Therefore, according to plaintiff's evidence, he was forced by reason of the defendant's negligence to take hold of the window, and he was not guilty of contributory negligence, while defendant's evidence tended to show that he was. Under such circumstances, plaintiff's evidence showing that he was free from blame, it was necessary for the defendant to show that he was negligent and the instruction as applied to the record in that case is not at all in conflict with the views we have expressed in regard to plaintiff's prayer in this case.

The defendant asked the court, by its ninth prayer, to instruct the jury that, "where there is ample room inside the car, a passenger who, for his own convenience, stands upon the platform, assumes all the risk of being upon the platform," and that if they found that the plaintiff had a reasonable opportunity to go in the car, but failed to do so, and that he was injured in consequence thereof, their verdict should be for the defendant; and by their tenth prayer that if they found that he "got upon the car, passed the doorway and took a position upon the platform, * * * then he assumed the risks incident to such position," and, if they further found that he was injured by reason of his being in such position, their verdict should be for the defendant; and by their eleventh prayer that the platform of the car is a more dangerous place than the inside of the car, and if they found that the plaintiff was standing on the

platform of the car after he had a reasonable opportunity to go inside, and that he was injured because of his position, their verdict should be for the defendant. In other words, these prayers asked the court to say as a matter of law that if the plaintiff was on the platform of the car after having had an opportunity to go inside the car, and was injured in consequence of his being there, he was guilty of contributory negligence, and cannot recover. In the case of *Yorktn. T. R. v. Cason*, 72 Md. 377, 20 Atl. 113, where the plaintiff was riding on the front platform of a street car, contrary to the rules of the company, which he knew, or ought to have known of, and fell from the car and was injured, the court, after citing the case of *Balto. City Pass. Ry. Co. v. Wilkinson*, 30 Md. 232, as holding "that a regulation forbidding passengers to get on and off any car by the front platform was reasonable, and that knowingly to violate it was conclusive evidence of negligence on the part of the passengers," said: "Had he been inside the car, where he ought to have been, the injury would not have been sustained. His own voluntary choice placed him in an exposed position, and that position rendered the injury possible. It was a position not provided for him to occupy, and even a careless observer must know that it was the most dangerous one to take. He thought proper to make an experiment under circumstances of peril open and known to him, which he could have reasonably avoided, and it is no injustice that he is required to bear the consequences of his own act." In the case of *State, Use of Miller, v. Western Md. R. Co.*, 105 Md. 33, 65 Atl. 635, where the party killed was voluntarily riding on the platform of a railroad car at the time of the accident, the court held the rule to be well settled "that, if a person voluntarily takes an exposed position upon a train, he himself incurs the special risk of that position. In this case the risk was so obviously dangerous that a prudent man would not think of incurring it."

* * * In the case at bar, if the deceased had gone into the passenger or baggage car, and not remained on the bumper or platform, he would not have been killed. He voluntarily selected a place of danger, and remained there until he was killed." In both of these cases the court held that the conduct of the party injured as to which the proof was clear, and as to the nature of which there was no room for ordinary minds to differ, amounted in law to contributory negligence. And there are numerous cases elsewhere which hold that a party who rides on the platform of a train or a rapidly moving street car, in the absence of some good excuse for so doing, is guilty of negligence, and among them is the case of *Thane v. Scranton Traction Co.*, 191 Pa. 240, 43 Atl. 136, 71 Am. St. Rep. 767, referred to by the appellant, where the Supreme Court of Pennsylvania, recognizing that the previous decisions of that court had established the rule that standing on the plat-

form of a moving railroad train was negligence per se, but that standing on the platform of an ordinary horse car was not negligence per se, but raised a question for the jury, and held that "the increase speed upon electric passenger railway lines, with its resultant danger, now approximates to that of steam railroads," and that where a passenger, without any special reason for doing so, remains on the platform of a moving trolley car, he is guilty of negligence per se.

The general rule as stated by 3 Hutchinson on Carriers (3d Ed.) § 1174, is that: "Where the question whether the negligence of the passenger did, in fact, proximately and naturally contribute to the injury depends for its determination upon conflicting testimony, it must be submitted to the jury as a question of fact. And although the facts have been ascertained, if they are such that fair-minded men might honestly come to different conclusions as to the injury sustained by the passenger having been contributed to by his own carelessness or imprudence, the question of his contributory negligence must be determined as one of fact by the jury." And from the decisions of this court it may be said that "unless there is some prominent and decisive act in regard to which there is no room for ordinary minds to differ," and unless the conduct of the plaintiff relied on as amounting in law to contributory negligence is established by clear and uncontradicted evidence, the case should not be withdrawn from the jury, and that, "when the nature of the act relied on to show contributory negligence can only be determined by all the circumstances attending the transaction, it is within the province of the jury to characterize it." *McMahon Case*, 39 Md. 449; *Lake Roland Co. v. McKewen*, 80 Md. 593, 31 Atl. 797; *Cooke v. Baltimore Trac-tion Co.*, 80 Md. 551, 31 Atl. 327; *Baker v. Md. Coal Co.*, 84 Md. 19, 35 Atl. 10; *Winkel-man & Brown Co. v. Collo-day*, 88 Md. 91, 40 Atl. 1078; *Strauss v. United Ry. Co.*, 101 Md. 497, 61 Atl. 137. In this case there is not only a conflict of evidence as to the conduct of the plaintiff relied on as constituting contributory negligence, but the nature of the act, so relied on, can only be determined by considering all the circumstances attending the accident, and it was for the jury to say under all the circumstances whether the plaintiff in being on the platform, after he had had an opportunity to go inside the car, was guilty of contributory negligence. According to the evidence, the car was either standing still, or, if it had started, it had not "moved perceptibly," and the plaintiff was either in the act of entering the car when the accident happened, or had stopped on the platform momentarily, or for the short time mentioned in the evidence, with a view of getting inside as soon as the car started, or with the intention of remaining there. Under such circumstances, the court would not be warranted in saying

as a matter of law that he was guilty of contributory negligence, or that in being on the platform, after having had an opportunity to go inside the car, he assumed the risks of the collision which occurred, and these prayers were therefore properly refused. In the case of *Strauss v. United Ry. Co.*, supra, this court said: "If the manner in which he (plaintiff) stood be not fixed by clear and uncontradicted evidence, the court cannot say as a matter of law that the appellant was guilty of contributory negligence. Again, what danger then existed against which by the exercise of ordinary care he ought to have guarded himself. He should not be required to predicate danger, unless there was something in the situation known to him, or which he could have known by the exercise of reasonable care, from which he was or ought to have been warned of his peril. Here it seems he stood up at the time the speed of the car was about to be increased. He should have known that when that happened certain irregularities of motion would be experienced. It cannot be doubted that he was reasonably prudent in taking an upright position as against the usual expected increase of speed. But the only evidence is that the lurch of the car was 'sudden, unexpected, and unusual.'"

The doctrine of assumed risks or waiver of right of action, which has most frequent application to the relation of master and servant, while theoretically distinct, in its practical application to ordinary negligence cases between passengers and carriers, not affected by any contractual relation other than the implied contractual obligations between them, necessarily, it would seem, involves the doctrine of contributory negligence; for, unless the position voluntarily taken by a passenger exposes him to dangers that are obvious and patent, or such as he knew of, or by the exercise of ordinary care ought to have anticipated, he cannot in justice in case of resultant injury be held guilty of contributory negligence, or to have assumed the risk of an injury he had no reason to anticipate, or to have waived his right of action therefor. On the other hand, if the danger to which he voluntarily exposed himself was obvious and patent, or such as he knew of, or by the exercise of ordinary care ought to have anticipated, and injury follows in consequence thereof, then he was guilty of contributory negligence, and must be held to have assumed the risk of his position. And that is what the learned judge meant in *Strauss' Case*, which is in entire accord with the views expressed in *Casey's Case* and in *Miller's Case*.

By the defendant's sixth prayer the court was asked to instruct the jury that if the plaintiff took an exposed and dangerous position on the car, and he was injured by reason of his taking such position, he could not recover. This prayer entirely ignores the plaintiff's own testimony that he got on the platform and took such position as he was about

to enter the car, and before he could get inside the accident happened, and was therefore properly refused.

We find no errors in the rulings of the court on the other prayers, or defendant's special exceptions to plaintiff's prayers, the exceptions to which were not pressed in this court. The evidence excepted to in the first and second exceptions was the testimony of the plaintiff that, before the accident, he had an arrangement to go into business, had intended to go into business. This evidence was doubtless offered for the purpose of enhancing the damages by showing that, before the accident, he had good business prospects, which he lost in consequence thereof, and was clearly inadmissible. In the recent case of Winslow Elevator & Mach. Co. v. Hoffman, 69 Atl. 394, Judge Burke, in quoting from 13 Cyc. 59, states the rule to be that: "When a new business or enterprise is floated, and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation."

The evidence that the plaintiff had married after the accident, excepted to in the third exception, is evidence of the same character as the evidence held to be inadmissible in Stockton v. Frey, 4 Gill, 420, 45 Am. Dec. 138, and Pennsylvania Co. v. Roy, 102 U. S. 541, 20 L. Ed. 141, and there was error in permitting it to be given, but we must not be understood as saying that it was such an error as would justify this court in reversing the judgment on that ground alone; the jury having been properly instructed as to the measure of damages. B. & O. R. Co. v. Shipley, 31 Md. 368; B. O. R. Co. v. Hauer, 60 Md. 459.

For the errors in the ruling of the court in the first, second, and third bills of exception, and in granting plaintiff's first prayer, the judgment must be reversed, and the case be remanded for a new trial.

Judgment reversed, with costs, and case remanded for a new trial.

(109 Md. 285)

REITER v. STATE.

(Court of Appeals of Maryland. Jan. 15, 1909.)

FOOD (§ 8*)—STATUTORY PROVISIONS—PURETY—SALE OF "CONDENSED SKIMMED MILK."

Acts 1900, p. 868, c. 532, § 138f (Code Pub. Gen. Laws 1904, art. 27, § 235), prohibits the manufacture or sale of condensed or preserved milk unless manufactured from pure and unadulterated milk, from which no part of the cream has been taken, or unless the proportion of milk solids therein shall be equivalent to a certain percentage of milk solids in crude milk. Section 233 provides that milk from which a part of the cream has been taken shall be deemed adulterated and unwholesome, but forbids a construction of the sections so as to prohibit the

sale of pure skimmed milk when labeled and sold as such, or the addition of sugar to the manufacture of condensed milk, and sections 232 and 234 prescribe the standard for pure milk and the penalty for violating the statute. *Held*, that the primary purpose of section 235 was not to prevent fraud, but to prohibit the sale of articles deemed unhealthful by the Legislature, and the sale of "condensed skimmed milk," an article made from milk from which the cream had been taken, and containing little or no butter fat, was prohibited by the statute, and the fact that such an article was unknown or not manufactured when the statute was enacted was immaterial.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 8.*]

Appeal from the Criminal Court of Baltimore City; John J. Dobler, Judge.

Nicholas Reiter was convicted of selling condensed skimmed milk in violation of the statute, and he appealed. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS, and HENRY, JJ.

R. E. Lee Marshall and Arthur Geo. Brown, for appellant. Eugene O'Dunne and Isaac Lobe Straus, Atty. Gen., for the State.

THOMAS, J. Section 235 of article 27 of the Code of Public General Laws of 1904 (Acts 1900, p. 868, c. 532, § 138f) provides that: "No condensed or preserved milk shall be manufactured sold or exchanged, or offered or exposed for sale or exchange, unless the same be manufactured from or out of pure, clean, healthy, fresh, unadulterated and wholesome milk from which the cream has not been removed either wholly or in part, or unless the proportion of milk solids of same shall be in quantity the equivalent of twelve and fifty one-hundredths per centum of milk solids in crude milk, and of which milk solids three and fifty one-hundredths per centum shall be butter fats. No person shall manufacture, sell or exchange or offer or expose for sale or exchange any condensed or preserved milk unless the same be put up, packed or contained in packages with the name of the manufacturer of the said milk distinctly branded or stamped thereon." The appellant, Nicholas Reiter, of Baltimore city, was indicted under this section of the Code for having unlawfully sold, offered for sale, and exposed for sale condensed and preserved milk, which had been manufactured from and out of milk which was not then and there pure, clean, healthy, fresh, unadulterated and wholesome, and from milk from which the cream had been theretofore removed. The indictment contains five counts, charging in different language the same offense, and to this indictment the defendant filed the following plea:

"And now comes the said Nicholas Reiter; and says: That the state ought not further to prosecute the said indictment nor any one

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the counts thereof, and for plea to each of said counts says that he is a citizen of the state of Maryland and a resident of the city of Baltimore, and that he was at the times mentioned in said indictment, since has been, and now is regularly engaged in carrying on wholesale and retail grocery business in the city aforesaid under the firm name of Nich. Reiter & Co., said firm being a copartnership and composed of the copartners as follows, to wit: Nicholas Reiter and Ambrose J. Reiter. That in the conduct of said business, said firm regularly had and kept in stock, and offered for sale and exposed for sale, certain cans marked and labelled in manner and form as follows, to wit:

SKIMMED
Square H Brand
Condensed
MILK

"That the said cans so marked and labelled as aforesaid contained in a condensed or solid form a certain product of pure cow's milk, commonly known in commerce and in trade as 'skimmed milk condensed' or 'condensed skimmed milk.' That the said condensed skimmed milk contained in said cans, as aforesaid, was and is pure skimmed milk from which a considerable portion of the water has been removed by process of evaporation, and the same skimmed milk was and is obtained from pure cow's milk by removing therefrom all, or the greater part of, the cream contained therein. That all the milk used to make the skimmed milk so condensed in said cans as aforesaid was and is pure, clean, healthy, fresh, unadulterated, and wholesome milk within the meaning and intent of the laws of the state of Maryland, and in order to produce the said skimmed milk which was and is used to make the condensed skimmed milk manufactured and sold as the 'Square Brand Condensed Skimmed Milk,' as aforesaid, the manufacturer and proprietor of said brand merely removed and removes the cream from the aforesaid pure, wholesome, and unadulterated milk by a mechanical process and device known as centrifugal separation. That after and in consequence of the removal of the cream as aforesaid a product of milk was and is thereby obtained which was and is recognized and classified as an article of good consumption known and designated as skimmed milk, and the said skimmed milk so produced, as aforesaid, was and is pure skimmed milk within the meaning and intent of the laws of the state of Maryland. That as a necessary result of removing the cream from the said milk, as aforesaid, all or the greater part of the butter fat was and is likewise removed from said milk, so that skimmed milk contains little or no butter fat, and the skimmed milk sold by the traverser as 'Square Brand Condensed Skimmed Milk' as in said indictment charged con-

tained not more than 1 per cent. of butter fat. That, after obtaining pure skimmed milk by separating and removing the cream from pure milk as aforesaid, the said pure skimmed milk was and is condensed by evaporating therefrom a considerable quantity of its water fluid, and certain proportion of pure cane sugar was and is added thereto for the purpose of preserving and keeping the same pure. That so prepared and produced as aforesaid the skimmed milk condensed or condensed skimmed milk was and is put in cans and sold to the trade and to the public generally as 'Square Brand Condensed Skimmed Milk.' That the product of milk commonly known as 'condensed milk' is classified and defined in science and in trade as pure milk from which a considerable quantity of water has been evaporated and to which sugar has been added, and the product of milk known as 'condensed skimmed milk' is classified and defined in science and in trade as skimmed milk from which a considerable portion of water has been evaporated, and to which sugar has been added. That the can of condensed skimmed milk as sold by the traverser as in said indictment charged was sold by the defendant on the 19th day of August, 1908, to Charles Knell, in response to a request for a can of condensed milk square brand and the contents of said can was condensed skimmed milk manufactured and produced from pure skimmed milk as aforesaid, and plainly and conspicuously labelled and marked as condensed skimmed milk, with letters ranging in size from approximately three-quarters of an inch square to one-half of an inch square and the skimmed milk condensed in said can contained the following constituents, to wit: 74.90 per cent. of total solids; 1.68 per cent. of ash; 12.24 per cent. of milk sugar; butter fat less than 1.10 of 1 per cent.; proteids 15.95 per cent; cane sugar 45.03 per cent. That the process of condensing skimmed milk in cans was first perfected and the manufacture and sale of condensed skimmed milk in cans as an article of commerce and a food product was first begun in or about the year 1907, and prior to that time skimmed milk was not condensed and preserved for sale in small cans as aforesaid. All of which the said Nicholas Reiter is ready to verify.

"Wherefore the defendant prays judgment, and that by the court here he may be dismissed and discharged from the premises specified and contained in each of the said counts of the indictment."

This plea was demurred to by the state, and, the demurrer having been sustained, the traverser pleaded not guilty, was tried, convicted, and sentenced to pay a fine of \$25. The only question presented by the record arises on the ruling of the court on the demurrer to defendant's plea. The contention of the appellant is that "condensed skimmed milk," manufactured as set out in the plea,

is a definite and distinct product of milk, and so recognized and classified in science and trade, that it is a valuable food product which was not known when the act of 1900 was passed, and that it is therefore not covered by section 235 of the Code. The plea admits that the condensed skimmed milk sold by the appellant was manufactured from milk from which the greater part of the cream had been removed, but the appellant insists that it is only the manufacture of condensed milk from milk from which the cream has been removed that is prohibited by the statute, and not condensed skimmed milk, as that product was not known at the time of the passage of the act. A glance at section 235 shows that the intention of the Legislature was not only to prevent fraud and deception from being practiced on consumers of condensed milk by prohibiting the sale of any product of milk, not manufactured from milk of the quality required, under the name of condensed milk, but to absolutely prohibit the sale of condensed milk manufactured out of milk not possessing all the qualities required by the statute. This section does not say that condensed milk of the kind prohibited shall not be sold unless marked and branded as provided, but requires, as one of the means of preventing the sale of condensed milk prohibited by the section, that it shall be packed in the way provided with the name of the manufacturer stamped thereon. In other words, the primary object of this legislation was not to prevent fraud and imposition, but to prohibit the sale of an article deemed by the Legislature either injurious to health or lacking some of the qualities of healthy food. If the language of the act is broad enough to include condensed skimmed milk, there is no force in the contention that the Legislature could not have intended the act to apply to condensed skimmed milk simply because it is an article of food not then known as the Legislature may unwittingly have prohibited the sale of an article of which it had no knowledge, or have purposefully included in the prohibition an article known to it, but as to the value of which as an article of food it was not then fully advised.

It would seem, however, from the other legislation in reference to the sale of milk that the Legislature treated the regulations in regard to milk as including skimmed milk. Section 233 of article 27 of the Code of Public General Laws of 1904, after declaring what milk shall be deemed sophisticated, adulterated or unwholesome, including milk "from which a portion of the cream has been taken," provides: "but nothing in these sections shall be construed as prohibiting the addition of sugar in the manufacture of condensed or preserved milk, or to prohibit the sale of pure skimmed milk, when sold as such, and from cans plainly and conspicuously marked with sign or placard 'Skim-

med Milk,' in capital letters each of a size not less than one inch square." The obvious meaning of that section is that milk from which a portion of the cream has been taken or skimmed milk is "sophisticated, adulterated, or unwholesome" milk, and cannot be sold except in the way provided by the section. So when, by section 235, the Legislature provided that no condensed or preserved milk should be manufactured or sold, unless the same be manufactured from milk "from which the cream has not been removed either wholly or in part," it meant that no condensed or preserved milk manufactured from skimmed milk should be sold, etc. Now, the plea admits that the article sold, called "condensed skimmed milk," was manufactured from milk from which the cream had been removed, or from skimmed milk, and unless we hold that the sole purpose of section 235 was to prevent fraud and imposition upon the consumers of condensed milk by the sale of other articles or products under the name of condensed milk, and that the Legislature did not intend to prevent the sale of articles manufactured from impure or unwholesome milk unless labelled and sold as condensed milk, it seems that the condensed skimmed milk offered for sale and sold by the appellant clearly falls within the prohibition of the statute, the plain object of which was in connection with sections 232, 233, and 234, to prevent the sale of impure and unwholesome milk, including skimmed milk, whether sold as liquid milk or condensed milk, unless sold under the restrictions specially provided. It is true that in one sense condensed skimmed milk is not condensed milk, nor is skimmed milk, in the same sense, milk, but it would require a narrow and unreasonable construction of these several sections of the Code to hold that while they declare skimmed milk—that is, milk from which the cream has been taken—impure milk, and prohibit the sale of it except under the conditions provided, yet by taking a "considerable quantity of water fluid" from it, and adding to it cane sugar, it can be sold without any restrictions whatever, notwithstanding the express provision that no condensed milk shall be sold that is manufactured from milk from which the cream has been removed. That the term "milk" may include in its general meaning milk that is not of the quality required by the Code is illustrated in section 233, where milk from which the cream has been taken—that is, skimmed milk—is excepted, and allowed to be sold in a certain way. In the case of *Commonwealth v. Gordon*, 159 Mass. 8, 33 N. E. 709, the court held that "The word 'milk,' in Pub. St. 1882, c. 57, 'of the inspection and sale of milk,' is shown by section 7 to include milk from which no part of the cream has been removed, and we are of opinion that it is used as a general name, and in a sense broad enough to include cream. The offense under section 5 of hav-

ing in one's possession, with intent to sell, milk to which a foreign substance has been added, is committed by having with that intent cream to which boracic acid has been added." 1 Cyc. 945, note 25. In the case of *Commonwealth v. Smith*, 149 Mass. 9, 20 N. E. 161, the court said: "The complaint is for selling milk not of the standard quality of pure milk; that is, milk containing less than 13 per cent. of milk solids. The defendant had a right to sell skimmed milk, which is not of the standard quality of pure milk from cans marked in a certain manner. If he sold milk not of the standard quality of pure milk, and not sold as skimmed milk from duly-marked vessels, he would be liable on this complaint." Under a statute declaring that milk from which the cream has been removed is impure milk, and prohibiting the sale of impure milk, it would not be a sufficient answer to the charge of violating the statute to say that the article sold was skimmed milk; so, under the sections of the Code referred to, prohibiting the sale of impure condensed milk, that is condensed milk manufactured from milk from which the cream has been removed, an indictment charging the sale of impure condensed milk cannot be effectively met by the plea that the article sold was "condensed skimmed milk."

We cannot therefore accept the view earnestly pressed by the learned counsel for the appellant, but, concurring in the conclusions reached by the court below, must affirm the judgment.

Judgment affirmed, with costs.

(109 Md. 474)

**FELGNER'S ADM'RS v. SLINGLUFF.
SLINGLUFF v. FELGNER'S ADM'RS.**

(Court of Appeals of Maryland. Jan. 12, 1909.)

1. MORTGAGES (§ 295*)—ACQUISITION OF PROPERTY BY MORTGAGEE—MERGER.

Where, prior to a deed by mortgagors to mortgagee, the mortgage had been assigned to a third person, there was no merger of the mortgage, since for that there must be a union of titles in the same person at the same time.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 829; Dec. Dig. § 295.*]

2. MORTGAGES (§ 295*)—ACQUISITION OF PROPERTY BY MORTGAGEE—MERGER.

Though the equity of redemption is acquired by the mortgagee, the mortgage is not thereby necessarily merged, but it depends on mortgagee's intent; and, where it is for his benefit to do so, the presumption is that he intended to keep the mortgage alive.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 819; Dec. Dig. § 295.*]

3. MORTGAGES (§ 378*)—CONCLUSIVENESS—MORTGAGE FORECLOSURE PROCEEDINGS.

The doctrine of res judicata applies to a mortgage foreclosure proceeding under a power of sale as it does to other judicial proceedings.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 378.*]

4. MORTGAGES (§ 378*)—FORECLOSURE—COLLATERAL ATTACK.

A mortgage foreclosure proceeding under a power of sale cannot be attacked collaterally.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1140; Dec. Dig. § 378.*]

5. MORTGAGES (§ 372*)—FORECLOSURE SALE—TITLE ACQUIRED.

Under Code Pub. Gen. Laws 1904, art. 68, § 11, providing that a mortgage foreclosure sale under power of sale shall pass the title which mortgagor had "at the time of recording the mortgage," a sale passes title, though at the time of foreclosure mortgagor may have been without title.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 372.*]

6. MORTGAGES (§ 378*)—FORECLOSURE—EFFECT.

Where a mortgage foreclosure sale was made to perfect what was deemed to be a defective title under a deed from mortgagors or mortgagee, the title thereby acquired by mortgagee did not destroy the equity which one of the mortgagors had under an agreement that the deed should be executed to mortgagee, but that such mortgagor should have the surplus, if any, if the mortgagee should sell the premises for more than his claim.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 378.*]

7. MORTGAGES (§ 378*)—FORECLOSURE—CONCLUSIVENESS—MATTERS CONCLUDED.

A mortgage foreclosure proceeding under a power of sale, confirmed by the court, is not res judicata of a subsequent bill by one of the mortgagors against mortgagee for an accounting, under an agreement to execute a deed to mortgagee, but that such mortgagor should have the surplus, if any, if the premises should be sold for more than mortgagee's claim.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 378.*]

8. MORTGAGES (§ 376*)—ACCOUNTING—EVIDENCE—SUFFICIENCY.

Evidence upon a bill for an accounting, under an alleged agreement by mortgagors to deed the premises to mortgagee, but that one of them should take any balance over mortgagee's claim, held to establish that there was such an agreement.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1132; Dec. Dig. § 376.*]

9. MORTGAGES (§ 376*)—ACCOUNTING—EVIDENCE—SUFFICIENCY.

Evidence held not to show a mistake in the amount of the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 376.*]

10. MORTGAGES (§ 376*)—ACCOUNTING—EVIDENCE—SUFFICIENCY.

Evidence held not to show that mortgagor was entitled to a certain credit.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 376.*]

11. MORTGAGES (§ 376*)—ACCOUNTING.

The mortgagor was properly not charged with the costs of a mortgage foreclosure sale of the premises, where there was no necessity for that proceeding, and under the agreement it should not have been resorted to without consulting mortgagors.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1132; Dec. Dig. § 376.*]

12. MORTGAGES (§ 376*)—ACCOUNTING.

The mortgagor should not be charged with the expenses connected with a supposed defect

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the title, where she was in no wise responsible therefor, and was not consulted about the expenses.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 376.*]

13. INTEREST (§ 17*)—INTEREST UPON INTEREST.

Interest upon mortgage interest notes cannot be allowed, where mortgagee proceeded throughout upon the principle that because of default in an interest note the entire mortgage debt had become due.

[Ed. Note.—For other cases, see Interest, Dec. Dig. § 17.*]

14. INTEREST (§ 17*)—INTEREST UPON INTEREST.

Interest upon mortgage interest notes cannot be allowed, where there was not only no understanding that such interest should be charged, but the contrary is to be inferred.

[Ed. Note.—For other cases, see Interest, Dec. Dig. § 17.*]

15. MORTGAGES (§ 376*)—ACCOUNTING.

Upon a bill for an accounting, under an agreement by mortgagors to deed the premises to mortgagee, but that one of the mortgagors should have the surplus, if any, over mortgagee's claim, an item for advertising a sale, which was withdrawn at mortgagor's request, should have been allowed mortgagee.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 376.*]

16. MORTGAGES (§ 376*)—ACCOUNTING.

A charge for a watchman employed for the protection of the premises, or to prevent the insurance from becoming invalid, should be allowed.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 376.*]

17. PLEDGES (§ 30*)—LIABILITY OF PLEDGEE.

A mortgagee to whom an endowment policy was assigned as additional security should be charged with interest on the amount received on the policy, where he has unnecessarily delayed in its collection.

[Ed. Note.—For other cases, see Pledges, Dec. Dig. § 30.*]

18. MORTGAGES (§ 376*)—ACCOUNTING—INTEREST.

On a bill for an accounting, under an agreement by mortgagors to deed the premises to mortgagee, but that one of the mortgagors should have the surplus, if any, over mortgagee's claim, interest on the balance found due mortgagor should be allowed from the date of an account rendered by mortgagee in response to a request therefor by mortgagor.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 376.*]

Cross-Appeals from Circuit Court of Baltimore City; Thos. Ireland Elliott, Judge.

Bill by Ann M. Slingluff against Edward L. Felgner. Decree for complainant, and, Felgner having died, his administrators appeal, and complainant enters a cross-appeal. Cause remanded for further proceedings, without reversing or affirming.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, HENRY, and WORTHINGTON, JJ.

Vernon Cook, for appellants. J. Kemp Bartlett and William L. Marbury, for appellee.

BOYD, C. J. Mrs. Ann M. Slingluff filed a bill in equity against Edward L. Felgner for an accounting for all sums of money received by him from a property previously owned by her, and prayed for a discovery and a decree in personam against him for such amount as may be found to be due her. The lower court decreed that he pay her the sum of \$3,802.03 and costs, and, Mr. Felgner having died, his administrators were made parties defendant, and entered an appeal from that decree. A cross-appeal was entered by Mrs. Slingluff. On the 26th of September, 1899, Horace Slingluff, husband of the plaintiff, gave a mortgage, in which she joined, to Mr. Felgner for \$22,000, on a property in Baltimore county called "Upton." Mr. Slingluff afterwards took the benefit of the bankrupt law, and on March 27, 1900, the mortgage was foreclosed, and the property purchased by Mr. Felgner. At that time large improvements which Mr. Slingluff had begun were incomplete, and the dwelling house was consequently in bad condition. Mr. Felgner agreed with Mrs. Slingluff that he would complete the repairs which were in course of construction, keep an account of the moneys expended thereon, and, when completed, would convey the property to her, who with her husband was to give Mr. Felgner a note secured by mortgage upon said property. The parties do not materially differ as to the terms of that agreement; the principal difference being that the plaintiff claims it was made before the foreclosure sale of March 27, 1900, and the defendant that it was made shortly afterwards. On May 1, 1901, a deed was executed for the property to Mrs. Slingluff, and Mr. and Mrs. Slingluff gave Mr. Felgner a mortgage of that date to secure a note for \$30,495, payable three years after date and six interest notes for \$913.85 each; one being payable every six months after date. The principal sum included the original mortgage of \$22,000, the repairs made by Mr. Felgner amounting to \$1,896.74, the costs of the foreclosure proceedings \$687.40, including a fee of \$500 to Mr. Dillehunt, who was the attorney who made the sale, and \$2,367.90 interest to May 1, 1901, which, together with an adjustment of taxes, \$17.97, amounted to \$30,495.01. We do not understand the correctness of those sums to be questioned, but the plaintiff claims that there should have been a credit of \$1,400 for rent received from David Hutzler, which will be referred to later. As additional security, Mr. and Mrs. Slingluff agreed to assign to Mr. Felgner an endowment policy of insurance issued on the life of Horace Slingluff for the sum of \$5,000, which at the time, by reason of certain accumulations, had a cash value of something over \$7,000. The Slingluffs also agreed to furnish the dwelling house, to provide a gardener, and do what they could towards securing a good rental. The object of

this was to get the property in a condition that would enable them to dispose of it to the best advantage, in order to pay off the mortgage and have some surplus for the benefit of Mrs. Slingluff, which she claims it was agreed she should have. The insurance policy was assigned to Mr. Felgner, but the trustees in bankruptcy of Mr. Slingluff made a demand for it, and after some litigation the matter was finally compromised by dividing the value of the policy, which resulted in Mr. Felgner receiving \$3,574.15. Mr. Slingluff, who represented his wife, and Mr. Dillehunt, who represented Mr. Felgner, who was his father-in-law, practically agree as to what that agreement was, excepting Mr. Slingluff claims that the rents for 1900 were to go to Mr. Felgner, while Mr. Dillehunt contends that the payment of rents to him was to begin with those of 1901. The rents were derived from the property during the summer season. Mr. Slingluff rented the property to David Hutzler for the summer of 1900 at \$1,400, to Louis Hamburger for the summer of 1901 at \$1,400, and to Levi Greif for the summer of 1902 at \$1,200, and Mr. and Mrs. Slingluff expended money and time with a view to making the property attractive to purchasers.

There were a number of interviews between Mr. Slingluff and Mr. Dillehunt, and considerable correspondence passed between them, some of which will be hereafter referred to; the letter of October 11, 1902, bearing more particularly on the agreement that Mrs. Slingluff was to have the surplus, over and above the claims and expenses of Mr. Felgner, out of a sale of the property. On February 24, 1903, a deed was executed by the Slingluffs to Mr. Felgner for the property embraced in the mortgage, which was duly delivered to Mr. Dillehunt, but he put it in his safe and never recorded it. On April 17, 1903, Mr. Dillehunt, as assignee of the mortgage, reported a sale of the property under the power of sale to the circuit court for Baltimore county, in which report he states that he sold the property on April 8, 1903, to Mr. Felgner for \$24,000. That sale was in due course ratified by the court, an auditor's report was filed and ratified, and the deed was made by Mr. Dillehunt, assignee, to Mr. Felgner on May 13, 1903. Both Mr. and Mrs. Slingluff deny any knowledge of that foreclosure sale until the matters connected with this suit were placed in the hands of Mr. Bartlett, who, they allege, first told them of it, and they claim that they supposed the deed which they executed had passed the title to Mr. Felgner, subject to the agreement which they say then existed. Before this bill was filed Mr. Felgner had sold part of the property to Charles D. Fitzgerald for \$27,500 (as we understand the amount), and the balance to the Western Maryland Railroad Company for \$5,812.50, and the plaintiff claims that the purchase money re-

ceived, the insurance money, and rents more than paid Mr. Felgner, who she alleges was compelled to give her the surplus under the agreement. The defendant denies there was any surplus, but contends that if there was, the foreclosure proceedings preclude any recovery. The first question, therefore, to be determined by us is the effect of those proceedings.

1. We cannot agree with the counsel for Mrs. Slingluff that there was a merger by virtue of the deed of February 24, 1903. A sufficient answer to that contention is that before the deed was made, to wit, on October 31, 1902, the mortgage had been assigned to Mr. Dillehunt. While he undoubtedly took the assignment subject to all equities existing between the mortgagor and mortgagee, the legal title was transferred to him, and hence there was no merger by reason of the deed to Mr. Felgner. The general rule is that "in order for the mortgage to be extinguished by the union of titles of the mortgagor and the mortgagee, such titles must unite in the same person at one and the same time." 20 Am. & Eng. Ency. of Law, 1068. Even when a mortgagee acquires the equity of redemption in his own name, it does not necessarily follow that the mortgage becomes merged and extinguished, but it depends upon the intention of the mortgagee; and, when it is for his benefit to do so, the presumption is that he intended to keep the mortgage alive. *Id.*, 1064; *Poke v. Reynolds*, 31 Md. 106.

2. But notwithstanding there was no merger, and assuming for the present that there was an agreement that the surplus derived from the sale of the property was to go to Mrs. Slingluff, which we will consider later, was the effect of the foreclosure proceedings such as the defendant contends for? It cannot be doubted that the doctrine of *res adjudicata* applies to a mortgage foreclosure proceeding, such as this, as it does to other judicial proceedings, and of course the proceedings taken in reference to the foreclosure of the mortgage cannot be attacked collaterally. Again we must differ from the position taken by the counsel for the plaintiff that, inasmuch as Mrs. Slingluff had no title at the time of the foreclosure, the sale passed no title. The statute expressly provides that "all such sales, when confirmed by the court and the purchase money is paid, shall pass all the title which the mortgagor had in the said mortgaged premises at the time of the recording of the mortgage." Section 11, art. 66, Code Pub. Gen. Laws 1904. If that were not so, and it only passed the title which the mortgagor had at the time of the foreclosure, the mortgagor could deprive the mortgagee of the security by selling the property. The case of *Queen City Bldg. Ass'n v. Price*, 53 Md. 397, cited by the plaintiff, involved an altogether different question. There it was held that the supposed power of sale was invalid, and hence the sale and

the subsequent proceedings were void. It was there said that "the mortgage stood as if no power of sale had been inserted in it," but in this case there is no question about the validity of the power of sale; and, if it could no longer be exercised by reason of the deed, the objection should have been made in the foreclosure case, or if the plaintiff was kept in ignorance of it, by reason of the conduct of the mortgagee, a bill of review, or some appropriate proceeding in that court, was the proper remedy, if it be necessary to have that sale set aside.

3. But is that necessary under the circumstances of this case? The plaintiff is not contending that title to the property did not pass to Mr. Felgner. On the contrary, she contends that it had already passed by the deed. Mr. Dillehunt thus explains in his testimony why the foreclosure proceedings were taken: "After having gotten that deed I was afraid to record it because of the relationship between the mortgagor and mortgagee—I was afraid that somebody would say that they made it under duress, or something of that sort—I was a little fearful of it, and I did not record the deed, and then followed those foreclosure proceedings." He also said he thought at first of having the deed made to him, "so in case there was any trouble, the mortgage then could be foreclosed," but he changed his mind, and thought it looked better to have it made to Mr. Felgner. The object of the foreclosure proceedings is thus clearly shown to have been simply to acquire the title in a way that Mr. Dillehunt thought was free from question, but he does not say that he ever notified either Mr. or Mrs. Slingluff of those proceedings, or of his intention to so proceed, and both of them swore that they were not aware of them. He never told them that he had not placed the deed on record, and Mr. Slingluff testified that when he heard of the sales made by Mr. Felgner, he supposed they were made under the deed. It is difficult to believe that Mr. and Mrs. Slingluff would have executed the deed on February 24, 1903, if they had supposed, or if Mr. Dillehunt had then told them, that he would advertise the property for sale under the mortgage in less than a month, which he did. In Mr. Slingluff's letter of March 1, 1902, he appealed to Mr. Dillehunt not to advertise the property as he was then thinking of doing. He said that they would "be mortified and humbled in the eyes of the community, and all our effort set at naught, and my business injured by having the place advertised for sale at foreclosure proceedings." He offered to make a deed which Mr. Dillehunt was to hold until April 1st, and if they in the meantime paid the interest due, he was to return the deed, and if the interest was not paid by that time, Mr. Dillehunt was to put the deed on record, and they were to give quiet and peaceful possession of the property. No deed was then given, but on

April 4, 1902, \$911.51 was paid, for interest. On October 11, 1902, Mr. Dillehunt wrote a letter to Mr. Slingluff, in which he said: "Inclosed please find deed to be executed by yourself and wife under the agreement. In consideration of Mr. Felgner's forbearance to foreclose the mortgage on Upton you were to give him an absolute deed for the property, he agreeing on his part to allow you to sell the property before March 1st next and pay him his claim and expenses, you to take any balance left. After March 1st next, he will be privileged to sell the property at his own price without any recourse to him by you or your wife or any one else." That deed was not executed for some reason, and was lost, but another one was sent later, which was the one executed February 24, 1903. Mr. Dillehunt was asked whether that deed was drawn in accordance with the letter of October 11th, and replied that it was not. "It was a new agreement, with the same contents in it," "really a renewal of the old agreement, that is what it was." And he admitted on cross-examination that the Slingluffs did not agree on February 24, 1903, that all their rights were to expire on March 1st.

It, therefore, appears from Mr. Dillehunt's own testimony, and the letters, that the object in making the deed was to avoid a foreclosure, and that the foreclosure proceedings were taken in order that the title might be perfected, which Mr. Dillehunt thought doubtful under the deed alone, and not for the purpose of getting rid of whatever rights Mrs. Slingluff had acquired under the agreement. Indeed no other conclusion could be reached without implying that Mr. Dillehunt was guilty of fraud, for he does not pretend that he informed Mr. and Mrs. Slingluff that he would not make use of the deed, or that he had not recorded it. The sale was made under proceedings which had been begun on October 31, 1902—nearly four months before the deed of February 24, 1903—and must have been advertised in about three weeks after the deed was made, as the report shows it was advertised for more than 20 days before the day of sale, which was April 8, 1903. It cannot be pretended that there is anything in the record to suggest, much less prove, any agreement or arrangement between February 24th and the advertisement or sale of the property, by which such rights as Mrs. Slingluff had in the surplus, by virtue of the agreement, were surrendered, or were intended to be surrendered, and it is difficult to imagine a more effectual way of misleading the Slingluffs than was adopted, if such effect must be given the foreclosure proceedings as is now claimed for them. In justice to Mr. Dillehunt we must say that his testimony shows that no such effect was intended, but the sale was made, according to him, to perfect what he deemed would be a defective title under the deed. That being

so, we must hold that the title acquired by Mr. Felgner under the foreclosure sale was not intended to, and did not, destroy the equity, if any, which Mrs. Slingluff acquired under the agreement, and which resulted in the execution of the deed. If the Slingluffs were not aware of the sale, they could not be expected or required, under the circumstances, to object to it, and if they did know of it, they could not be supposed to believe or know that it was intended thereby to give any greater effect to it than Mr. Dillehunt admits, namely, to perfect what he thought was a defective title. They certainly did not have any reason to believe that such equity as they acquired when or before the deed was given was intended thereby to be destroyed. We cannot therefore hesitate to hold that under the peculiar circumstances of this case the plaintiff is not precluded by the ratification of the sale from obtaining the relief sought in this case.

4. The ratification of the audit at first seemed to present more difficulty, in so far as some of the items involved are concerned. But on further consideration we have no doubt about them. If Mrs. Slingluff had either actual or constructive notice of the foreclosure proceedings, as may be conceded, it is clear that if she is right in her contention as to the agreement, it could not have been the intention of the parties that after she and her husband had executed and delivered the deed, with the understanding that she should have the surplus, if any, if the property could be sold for more than the claim of Mr. Felgner, she was to be further subjected to large expenses in perfecting the title, especially without any notice to her of the necessity or desirability of proceedings to accomplish that end. She not only did not contest the proceedings, but if she had actually known of them she might very well have concluded that they did not affect her. She was not claiming the equity of redemption which the law gave her as mortgagor. On the contrary she had surrendered it, as she and her husband believed then, and do not deny now. The sale under the power was to pass the interest she had when the mortgage was recorded, and not such as she acquired afterwards from the mortgagee. If she had filed exceptions to the sale, and the court was of the opinion that Mr. Dillehunt's fears were well founded, it might have very properly overruled the exceptions, on the ground that Mrs. Slingluff could not be financially injured by the proceeding, if her contention as to the agreement was right. And after the sale was ratified the assignee of the mortgage might very well have claimed the right to have an audit made, so as to have the accounts between him and the real owner of the mortgage stated. There was no attempt to secure a decree in personam against Mrs. Slingluff for the balance as shown by that audit, and there could not

have been without service on her, and then a court of equity would not have passed a personal decree against her, if she had established the claim she now makes. It would be a fraud on her which a court of equity would not assist in, if satisfied that her agreement was such as she now claims. After discussing the subject, it is said in Story's Equity Pleading, § 783a: "But a former adjudication, even in a court of equity, will not be a bar to a subsequent bill, unless the case made by the latter and the equity are substantially the same. It is said the grounds of the latter suit must be substantially identical with those of the former." That being so, as it undoubtedly is, and the equity claimed in this case being substantially different, and by no means identical from that determined by the ex parte proceedings in the circuit court for Baltimore county, we are of opinion that they do not preclude the plaintiff from asserting her claim under this bill.

As it was not raised at the argument, we have not deemed it necessary to discuss the question whether the defense of res adjudicata was properly presented in this case, inasmuch as it was not made in the pleadings, or the further question whether section 36, art. 5, of Code Pub. Gen. Laws 1904, would require us to consider that defense, although not raised below. We would only add that it is not altogether free from doubt, as the evidence which might be used for that defense was perhaps admissible for other purposes, and hence we say it is at least doubtful whether section 36, art. 5, would apply. That such defenses should be raised in equity by the pleadings is the general rule. 9 Ency. of Pl. & Pr. 616, and notes; Phelps on Jurid. Eq. § 63; Barroll's Chy. Pr. 129; Wagoner v. Wagoner, 76 Md. 311, 25 Atl. 338. But we will base our decision on the grounds stated above.

5. We come now to the question whether there was such an agreement as the plaintiff claims. It cannot be doubted that there was at one time. After Mr. Slingluff failed, he and his wife on the one hand, and Mr. Dillehunt, representing Mr. Felgner, on the other hand, were endeavoring to arrange so that Mr. Felgner would not lose as mortgagee, and Mrs. Slingluff would eventually get something out of the property. In their effort to accomplish that, she, together with her husband, became responsible for a mortgage of \$30,495, and assigned the policy of insurance which was then supposed to be worth over \$7,000. Mr. and Mrs. Slingluff apparently worked earnestly to pay Mr. Felgner the interest, and to save something for themselves. Mr. Dillehunt was evidently anxious, and feared that his father-in-law might not recover the money which he had loaned for him, and was also kindly disposed towards the Slingluffs. The mortgage was dated May 1, 1901, and the first interest was due November 1, 1901, and by that time Mr. Dillehunt had received \$1,400 from

Mr. Hamburger for rent of the property, which he claims was to be applied to the principal. The letter of Mr. Slingluff of March 1, 1902, admitted that there was interest due, which would seem to corroborate Mr. Dillehunt. In that letter Mr. Slingluff made a proposition to make a deed for the property which Mr. Dillehunt was to hold until April 1st, and if the interest was in the meantime paid, the deed was to be returned; and, if it was not paid, they were to surrender possession. No deed was then made, but the interest was paid on April 4, 1902, to November 1, 1901. On June 30th Mr. Dillehunt wrote to Mr. Slingluff that he would advertise the property in the next issue of the Maryland Journal, but it was not done, and on July 14th he wrote again, saying that Mr. Felgner would wait until September 1st for the interest, which was that due on May 1st. Then on October 11th he wrote the letter inclosing the deed for execution, which we have quoted above. That deed was not executed, and the property was advertised for sale in November, but was withdrawn. Sometime during the fall of 1902 Mr. Slingluff commenced negotiating with Dr. Geer, who was desirous of purchasing the property for use as a sanitarium. Those negotiations continued during that fall and winter, and Dr. Geer agreed to pay \$30,000 for the house and 64 acres of ground. The Slingluffs, who still occupied the property, moved out about June 15, 1903, and Dr. Geer took partial possession, but residents of the neighborhood objected to a sanitarium being there, and Dr. Geer was unable to consummate the sale. Mr. Dillehunt testified that Dr. Geer and Mr. Felgner executed an agreement for the sale of that part of the property, and negotiations were then pending with the Western Maryland Railroad Company for the part it subsequently purchased.

Mr. Dillehunt also testified that Mr. Slingluff had nothing to do with the property after the Geer sale fell through, but Mr. Slingluff denies that, and said that he was negotiating with Mr. Allan McLane at the time Mr. Dillehunt sold the house and 64 acres to Mr. Fitzgerald, which was in November, 1903. Of course Mr. Slingluff had nothing to do with the property after that. But in addition to the testimony of the Slingluffs, and some strong corroborating facts, such as their occupation of the property after the deed was made (and after the foreclosure proceedings also), until the middle of June, when they surrendered it to Dr. Geer, as the expected purchaser, and the admission by Mr. Dillehunt that he did make the agreement to take effect if the Geer sale was consummated, the books of Mr. Felgner show that he kept the account in the name of H. Slingluff down to July 5, 1905. The defendant filed as an exhibit a copy of the account, and as late as July 2, 1906, Mr. Dillehunt furnished a statement of their accounts to Mr. Bartlett, attorney for

Mrs. Slingluff. On July 5, 1905, Mr. Felgner received the purchase money for the portion of the property sold to the Western Maryland Railroad Company, and Mr. Slingluff then asked for a statement. Mr. Felgner replied on November 17, 1905: "Your favor of the 15 inst. addressed to Mr. H. B. Dillehunt was handed to me. In compliance with same, you will please find inclosed a statement of your account, which I hope you will find correct. The calculations were made to July 5th, the date of the settlement of the Western Maryland Railroad for the rest of the property." That statement is headed, "Mr. H. Slingluff in acct. with E. L. Felgner," and begins with amount of mortgage of May 1, 1901 (which is stated to be \$29,095), and concluded with an interest charge as of July 5, 1905, credits him with various amounts including cash, life insurance, rent, interest from C. D. Fitzgerald, cash from Fitzgerald on March 10, 1905, of \$27,120, and cash sale to Western Maryland Railroad of July 5th, \$5,812.50. It is impossible to understand why he would thus have written to Mr. Slingluff and have kept the account with him if the agreement was not such as the plaintiff contends. It was doubtless kept in the name of H. Slingluff by reason of the fact that the original mortgage stood in that name, and not in that of Mrs. Slingluff. There certainly could be no reason for charging the Slingluffs with interest up to the day the last purchase money was received if the understanding was not such as that claimed by the plaintiff. According to his charges and credits there was still a balance, which he carried forward, as follows: "1905, July 5, Balance due me \$1,409.46"—showing that he claimed that they then only owed him that amount, and not the balance found in the audit, as now relied on in this case. We are satisfied that there was an agreement such as was contended for by the plaintiff, and the expectation of getting something out of the property doubtless induced the Slingluffs to assign the policy of life insurance, to spend money and time in making it more salable, to subject themselves to many annoyances, and finally to make a deed for it. We will now consider the items in controversy.

6. The first one we will consider is the Hutzler rent. The theory of the bill is that when the mortgage of May 1, 1901, was given, the plaintiff had paid the rent received from Mr. Hutzler in 1900, which amounted to \$1,400, and hence the mortgage should have been \$29,095, instead of \$30,495. Mr. Slingluff testified that he received the \$1,400 in four equal monthly payments of \$350, and that he indorsed three of the checks so received over to Mr. Dillehunt, and afterwards gave him his individual check for the other \$350. Mr. Dillehunt positively denies having received them, or either of them. But Mr. Slingluff also testified that he did not question the correctness of the amount of the mortgage, but that the Hutzler rent

should have been applied to interest on that mortgage. In answer to the question "On what mortgage?" he replied, "The \$30,000 mortgage," and he further testified, as follows: "On May 1, 1901, when the second mortgage was given, do you now say you owed \$30,495 approximately or not? A. Yes, sir. Q. You do? A. Yes, sir. Q. Do you now claim that \$1,400 from the Hutzler rent should have been deducted from that \$30,000? A. No, sir. Q. You do not? A. No, sir; it was interest on the money in the interim. Q. What interim? A. May, 1901." It is clear, therefore, that his testimony does not support the allegations of the bill. His letter of March 1, 1902, admits that interest was then overdue, which would not have been the case if the Hutzler rent was to be applied to the interest on that mortgage. The statement furnished Mr. Slingluff by Mr. Felgner does begin with "1901, May 1, Amt. of mortgage \$29,095.00," but the mortgage itself shows that the amount was \$30,495; and, inasmuch as the item just below is "Dec. 31, Interest \$1,171.77," it is probable that he was simply using that sum to show on what amount he calculated interest, as Mr. Dillehunt claimed that the \$1,400 received from Mr. Hamburger was to be applied on the principal. But without further discussing this item, it is evident that either Mr. Slingluff or Mr. Dillehunt is mistaken; and, inasmuch as the plaintiff must sustain her claim, and especially as she and her husband executed the mortgage for \$30,495, it would require more satisfactory evidence than we have to show that there was a mistake of \$1,400 made in the amount of it, and we cannot allow that item.

7. Then as to Greif rent: Mr. Slingluff claims that he received that (\$1,200) early in June, 1902, and indorsed a check over to Mr. Dillehunt. The latter positively denies having received it. Here again the letters are important. On June 30, 1902, Mr. Dillehunt wrote to Mr. Slingluff that he would advertise the property in the next issue of the Maryland Journal. On July 1st Mr. Slingluff asked for a postponement until September 1st, and on July 14th Mr. Dillehunt wrote that Mr. Felgner directed him to say that he would wait until September 1st "for the interest on the Upton mortgage," and that if the interest was not paid by that date, he would proceed to sell the property at once. Nine hundred and eleven dollars and fifty-one cents had been paid on April 4th, and if Mr. Slingluff had turned over the \$1,200 check in June, no interest was then due on the mortgage, which had only been running from May 1, 1901. So it is manifest that Mr. Slingluff is mistaken about this item, as the letters conclusively show.

8. There is considerable confusion in the testimony in reference to some of the other items, but we will consider the statement of the judge below attached to his opinion in

determining whether or not he reached a correct result. He excluded all the costs connected with the second foreclosure, and we think properly. There was no necessity for that proceeding, and under the agreement, as we have found it, it should not have been resorted to without at least consulting the Slingluffs. What we have already said will be sufficient to show that we do not think the plaintiff is precluded by the audit from objecting to those items. Nor do we think she should be charged with the expenses connected with the supposed defect in the title, by reason of the omission of the seal of the clerk from his certificate as to the two justices of the peace, who respectively took the acknowledgments and the affidavit to the first mortgage. She was in no wise responsible for the omission, was not consulted about the expenses, and ought not to be made to pay those connected with the effort to correct this supposed defect. That applies to the fee paid counsel, as well as those paid the title company. As Mr. Felgner only required Mr. Fitzgerald to pay 4 per cent. interest on the deferred payments, it would be unjust to charge Mrs. Slingluff with 6 per cent. That was another instance of his acting without consulting her.

It is contended that inasmuch as interest notes were given interest on these notes should be allowed from their maturity. Without determining whether such interest could ordinarily be recovered, it cannot be allowed in this case. In the first place Mr. Felgner proceeded throughout on the principle that, by reason of the default in the payment of the interest note due May 1, 1902, the entire mortgage debt had become due, in accordance with the covenants in the mortgage, as he had the right to do; and then it is made clear by all the accounts filed in the case that there was, not only no understanding between them that interest should be charged on the interest notes, but that the contrary should be inferred: He never made such demand on the mortgagors, and such interest is not claimed in the statement of mortgage claim filed in the foreclosure proceedings. Indeed the interest notes are not even filed—at least are not in the record. So it is clear that interest on the interest notes should not have been allowed.

9. We have now considered all of the questions raised which we thought proper to refer to, excepting the method of stating the account adopted by the court below, and some of the items included or rejected affecting the amount ascertained to be due. The learned judge allowed the taxes for 1901 and 1902 as charged by Mr. Felgner, but only allowed \$135.48 for taxes to November 14, 1903, instead of \$250.07 charged by him as paid for 1903. He did not allow an item of \$60.03, insurance paid that year. The two items charged in the accounts filed amount to \$310.10, but there is a credit of

"Fitzgerald Adjustment of Taxes & Insur. 130.53," which should be deducted, and which leaves a balance on those items of \$179.52. We think that sum, and not \$135.46, should be charged against the plaintiff, making a difference of \$44.06. We are also of opinion that Mr. Felgner should have credit for \$145.36 insurance paid through Mr. Dillehunt, but omitted from the account rendered to Mr. Slingluff because it was overlooked. An item of \$46.50 charged in the account as of January 21, 1903, for advertising should also be allowed, as the evidence shows that sum was paid for advertising sale which was withdrawn at the request of the mortgagors.

There are two items which seem to us should have been charged to the plaintiff, but as the record is not clear as to them, the court below can direct further testimony to be taken, if necessary by reason of the failure of the parties to agree, which, so far as we can see, ought readily to be done. They are the items of \$148.30 charged in the account of Mr. Felgner under date of May 12, 1903, for "Watchman 148.30," and that of \$120, included in the item in the statement by the lower court of amount of sale to Fitzgerald. Mr. Dillehunt said in answer to the question what the first-named item was for "caretaker up there, but that bill must have been paid, and that bill was paid." He was then interrupted by counsel, and his testimony is left in some doubt as to what he meant by that answer, or who paid the bill. Then he went on to say that Mr. Slingluff moved out in June, 1903, and did not say when the bill was paid. There was apparently no occasion for a watchman in May, 1903, or prior thereto, as the house was occupied. We are therefore left in doubt as to that item, but if a watchman was properly put there for the protection of the property, or to prevent the insurance policy from becoming invalid, it should be allowed. In reference to the \$120 spoken of, we understand that the principal paid by Mr. Fitzgerald was \$27,500, but the court below and counsel for Mrs. Slingluff speak of it as \$27,620. The account filed as "Defendant's Exhibit No. 2" shows that some interest was included in the \$27,120 received March 10, 1905, and the two interest payments credited in that account, as well as the other one rendered to Mr. Slingluff, were each for \$540, which is 4 per cent. on \$27,000 for six months; \$500 having been paid on account of principal November 14, 1903. These two items, therefore, would seem to be proper charges against the plaintiff; but, as there may be some question about them, we will authorize the lower court to take further

testimony as to them, although as at present advised, we would allow both of them. On the other hand, we are of opinion that the defendant should be charged with interest on the amount received on the life insurance policy for one year. It was not actually received until March 4, 1904, but it was due in December, 1902, on a policy which had been made payable to the Slingluff trustees and Mr. Felgner. There was no valid reason for delaying the collection of it so long, and it could with ordinary diligence have been readily arranged in two months. Interest on the \$3,574.15 should therefore be added to that sum as a credit to the plaintiff.

Interest on the balance found to be due the plaintiff in accordance with this opinion should be allowed from November 17, 1905, the date of Mr. Felgner's letter inclosing the account in response to the request of Mr. Slingluff for a statement, instead of from June 1, 1906, as allowed by the lower court. We think the method followed by the judge correct, under the circumstances of this case; that is to say, of allowing interest to November 14, 1903, the date of the sale to Mr. Fitzgerald, and making other charges, and allowing credits to that time, so as to ascertain the balance. What we have already said will relieve us of further discussing that question. If Mr. Felgner proposed to charge Mrs. Slingluff with 6 per cent. interest on the amount of the deferred purchase money until paid, he should at least have consulted her about his arrangement with the purchaser.

We have thus at great length discussed many of the points raised, and have given the whole case due consideration. Inasmuch as the amount due under the conclusions we have reached, and whether there will be any material change from the amount fixed by the decree below, are left in doubt until the two items above left open are settled, we will remand the case, without reversing or affirming the decree, for further proceedings in accordance with this opinion. We will require the administrators of the estate of Edward L. Felgner to pay two thirds of the costs in this court, and Mrs. Slingluff to pay the remaining third; the costs below to be determined by the lower court.

Cause remanded for further proceedings in accordance with this opinion, without reversing or affirming the decree, the administrators of the estate of Edward L. Felgner to pay two thirds of the costs in this court (including the transcript and printing of the record) and the remaining third of said costs to be paid by Ann M. Slingluff; the costs below to be determined by the lower court.

(110 Md. 32)

PHILADELPHIA, B. & W. R. CO. v.
GREEN.

(Court of Appeals of Maryland. Jan. 13, 1909.)

1. CARRIERS (§ 247*)—"PASSENGERS."

One who, for the purpose of waiting for a train on which he is to take passage, enters the waiting room of the carrier, is a passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 987; Dec. Dig. § 247.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5219, 5220; vol. 8, p. 7748.]

2. CARRIERS (§ 814*)—ASSAULT OF PASSENGER BY CARRIER'S EMPLOYÉ—DECLARATION.

A count of a declaration showing that plaintiff, a passenger of defendant, while in its waiting room, was assaulted by an employé of defendant in charge of the waiting room, shows, as is necessary, that the wrong was done by the carrier's servant while acting within the scope of his duties.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1273; Dec. Dig. § 814.*]

3. CARRIERS (§ 314*)—ASSAULT OF PASSENGER BY CARRIER'S EMPLOYÉ—DECLARATION.

The count of a declaration seeking to make defendant carrier liable from the mere fact that plaintiff, while a passenger of defendant, was assaulted, arrested, and imprisoned "by an officer or agent of said defendant and in its employ," is insufficient in not showing the employé was acting in the scope of his duties.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1273; Dec. Dig. § 314.*]

4. DAMAGES (§ 91*)—PUNITIVE DAMAGES—GROUNDS.

That an unlawful act was done deliberately and with unnecessary violence is not enough to authorize punitive damages, but the act must have been done with evil motive or intention.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.*]

5. DAMAGES (§ 157*)—PUNITIVE DAMAGES—EVIDENCE.

Had there been a count properly charging defendant with liability for the false arrest and imprisonment of plaintiff by B., an employé of defendant, evidence of the treatment received by plaintiff in the lockup, and his suffering from being put in a cold, wet, and uncomfortable cell, would have been admissible, certainly on the question of punitive damages, B. having been in control of the jail and known its condition when he placed plaintiff in the cell.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 157.*]

6. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Though it was subsequently, and by other means, proved that B. had arrested other people and placed them in the lockup, defendant had a right to stand on his exception to admission of the testimony of M. that B. had made other arrests during his employment by defendant and prior to his arrest of plaintiff, which had no tendency to prove the fact, sought to be established thereby, that B. was acting within the scope of his duties as employé of defendant when he arrested plaintiff; this not falling within the rule that there will be no reversal, because clearly there was no injury, where competent evidence, after being excluded, was admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4172; Dec. Dig. § 1052.*]

7. CARRIERS (§ 817*)—INJURY TO PASSENGER BY EMPLOYÉ—CAPACITY IN WHICH EMPLOYÉ WAS ACTING—EVIDENCE.

The question of the jury being in what capacity B. was acting when he assaulted a passenger, whether as a servant of defendant or as a peace officer, under what he regarded as a valid appointment and qualification, testimony to show that B. was a public officer, the validity of the appointment being entirely collateral, should not have been stricken out.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 317.*]

8. TRIAL (§ 260*)—INSTRUCTIONS.

Defendant having gotten the full benefit of all the defenses to which it was entitled under its granted prayers, refusal of its other prayers was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

Appeal from Circuit Court, Kent County; Wm. H. Adkins and Phllemon B. Hopper, Judges.

Action by Henry M. Green against the Philadelphia, Baltimore & Washington Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and HENRY, JJ.

Marion De K. Smith, for appellant. Omar D. Crothers, for appellee.

BURKE, J. This is an action for assault and battery and false arrest and imprisonment, brought by Henry M. Green against the Philadelphia, Baltimore & Washington Railroad Company. The suit was instituted in the circuit court for Cecil county, and was removed to the circuit court for Kent county. It was tried in that court upon a declaration which contained two counts. The first count charged that the defendant is a corporation owning and operating a railroad for the carriage of passengers for hire between certain points in this state, and, for the accommodation of persons intending to become passengers on its road, it had provided a waiting room near its tracks in the city of Havre De Grace; that the plaintiff entered said waiting room on the 5th of March, 1907, for the purpose of taking passage on one of the defendant's trains, and that, while in said waiting room for the purpose aforesaid, one of the defendant's agents, officers, or employes, then and there in charge of said waiting room, then and there, with force and arms, did violently assault and unlawfully and maliciously did cast and throw the plaintiff upon the floor of said waiting room, and did then and there beat, wound, and ill treat the plaintiff, etc. The other count, which is called in the record an "additional count," and which will be so designated in this opinion, after setting forth introductory averments similar to those stated in the first

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

count, charged that while the plaintiff was in the waiting room of the defendant on the night of March 5, 1907, for the purpose of taking passage on one of the defendant's trains to Elkton, Md., "an officer or agent of the said defendant, and in its employ, violently assaulted the plaintiff, and falsely arrested and imprisoned the plaintiff in the jail of the city of Havre De Grace aforesaid, in consequence whereof the said plaintiff suffered great distress of mind and severe bodily harm and injury, and his reputation in the community where he lives has been greatly injured thereby." The defendant demurred to each of these counts. The court overruled the demurrers, and issue was joined upon the defendant's plea of not guilty, and the case proceeded to trial, which resulted in a verdict and judgment in favor of the plaintiff for \$1,000. The defendant has brought this appeal.

The record contains four bills of exception reserved by the defendant during the course of the trial. Two of these relate to the admission of evidence, one to the action of the court in striking out certain testimony, and one to the ruling of the court upon the prayers and certain special exceptions submitted at the close of the whole testimony. The record contains more than 500 pages of testimony, and upon the vital questions of fact involved is very conflicting. We are not required to enter upon a minute examination and analysis of this irreconcilable testimony for the purpose of discovering the real facts of the occurrence to which it relates, or of deciding upon which side is found the preponderance of the proof. It was exclusively within the province of the jury to determine these questions. It is sufficient, in order to dispose of the legal questions raised on the record, to give a general outline of the evidence adduced by the parties to sustain their respective contentions. The plaintiff offered evidence tending to prove the following facts: That he was a member of an amateur dramatic club, composed of young people of both sexes of the town of Elkton, formed for the purpose of giving entertainments to raise funds for the benefit of Washington Camp of the Patriotic Order Sons of America; that on the 5th of March, 1907, about 24 members of this club went from Elkton to Havre De Grace by defendant's train, and gave an entertainment at night in the opera house at that place; that after the close of the exhibition the plaintiff, with other members of the company, went to the station of the defendant about 10 o'clock p. m. to take a train back to Elkton; that while he was occupying one of the benches in defendant's waiting room, and behaving in a quiet and orderly manner, he observed Milton Baldwin, an officer of the defendant, approach Earnest Moore, another member of the theatrical troupe, seize him and pull him from the bench upon which he was sitting

in the waiting room, throw him upon the floor, and place his knee upon his breast; that he stepped over to Baldwin and asked him what Moore had done and what he was going to do to him, and that Baldwin, without replying, struck him over the shoulders with an officer's club, knocking him to the floor; that he got up, went back to his seat, and sat down; that afterwards, while standing in the station with his hands in his pockets, Baldwin directed Richard Kelley, a deputy sheriff of Havre De Grace, to arrest him; that Kelley did arrest him and handcuff him to Moore, and both he and Moore were taken by Baldwin and Kelley to the jail in Havre De Grace, and locked up; that Baldwin had the key to the lockup, and personally placed plaintiff and Moore in the cell; that the cell in which they were confined was cold, wet, and uncomfortable, and that they were detained therein until the afternoon of March 6th, when they were discharged; that in consequence of the wet and unfit condition of the cell the plaintiff contracted a severe cold, and was confined in his house for several days in charge of a physician. The evidence offered in behalf of the plaintiff tended to show that he was not smoking in the waiting room, and that he was conducting himself in a proper manner, and that the treatment to which he was subjected by Baldwin was utterly unwarranted and was a gross outrage upon him. The evidence on the part of the defendant tended to show that while the members of the troupe were in the station or waiting room on the night mentioned, waiting for a late train to take them back to Elkton, the plaintiff and Earnest Moore began smoking cigarettes in the main waiting room, in violation of the rules and regulations of the railroad company; that these rules were indicated by "No Smoking" signs hung upon the walls of the room; that the plaintiff and Moore were warned by Baldwin not to smoke, and upon the refusal of Moore to stop smoking Baldwin attempted to eject him from the room; that Moore assaulted Baldwin and was placed under arrest; that the plaintiff seized Baldwin by the shoulders and got upon his back to prevent him from putting Moore out of the room, and for the assault and interference Baldwin caused the arrest of the plaintiff and placed him in the lockup, where he remained until the next day. Baldwin was an employé of the defendant. He had formerly had charge of the flower gardens along the line of the road from Philadelphia to Washington, and later was put in charge of the freight house at Havre De Grace. A few months before the matters complained of in this case he was appointed night watchman at the new passenger station of the defendant at Havre De Grace. He had charge of the grounds, station, furnace, and baggage at night. He had strict orders to stop smoking in the waiting room, and it was his duty to stop any general disor-

der around the station. Shortly after his appointment as night watchman he was appointed by the mayor of Havre De Grace as a special officer of the Pennsylvania Railroad, and qualified as such before a justice of the peace, and was given a certificate of his appointment, and thereafter acted as such officer under that appointment. These are all the facts that need be stated to enable us to dispose of the questions presented by the appeal.

Assuming the plaintiff's evidence to be true, the principal question in the case is whether the defendant is liable for the acts of Baldwin complained of in the declaration. The statement of the rules of law upon this question will necessarily determine the legal sufficiency of the declaration. By the undisputed evidence the plaintiff was a passenger of the defendant at the time the alleged trespasses were committed. He had entered a room provided by the defendant company for the accommodation of passengers to wait for a train to take him to his home. This, under all the authorities, establishes the relation of carrier and passenger. The rule is well settled that a person is a passenger who enters upon the depot grounds for the purpose of taking passage on the train of the carrier. The fare does not have to be paid, nor the train entered; but the person must merely enter within the control of the carrier at the depot through the usual channels of business, with the intention of becoming a passenger by either paying fare before or after entering the train. *B. & O. R. R. Co. v. Chambers*, 81 Md. 384, 32 Atl. 201. As a passenger he was entitled to protection against all wrongs done by the employes of the defendant, and for such wrongs done by them whilst they were engaged in and about the performance of their prescribed duties the master would be liable. The plaintiff was required to show, as a condition precedent to his right to recover, first, that the wrongs sued for were done by an agent or employe of the defendant; secondly, that the employe was acting at the time within the scope of his employment. Without legally sufficient evidence tending to establish these two facts, no case of this nature should be submitted to the jury, and, when submitted, no verdict against the defendant should be rendered unless the jury are satisfied of the existence of these essential facts. These principles are too firmly settled by the decisions in this court to admit of dispute. *Carter v. Howe Machine Company*, 51 Md. 290, 34 Am. Rep. 311; *Central Railway Company v. Peacock*, 69 Md. 263, 14 Atl. 709, 9 Am. St. Rep. 425; *Deck v. B. & O. R. R. Co.*, 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399; *B., C. & A. Ry. Co. v. Twilley*, 106 Md. 445, 67 Atl. 285; *Tolchester Co. v. Scharnagl*, 105 Md. 199, 65 Atl. 916; *B., C. & O. Ry. Co. v. Ennalls* (not yet officially reported) 69 Atl. 638. It has become a common practice for certain corporations to have some of their employes appointed as special officers to protect their property

and to maintain order upon trains and around the station. In such cases the question as to the capacity in which the servant was acting at the time of committing the wrong sued for is for the jury to decide. We said in *Deck's Case*, supra, that the question as to whether the act of the servant complained of is within the scope of his duty while acting in the furtherance of his master's business is generally to be determined by the jury as a matter of fact, and not by the court as a matter of law.

In *Scharnagl's Case*, supra, where a passenger had been assaulted, arrested, and imprisoned by a servant of the defendant company, and who was also a commissioned officer of the state, we said, in discussing the liability of the company for the acts of its servant, that, "the relation of passenger and carrier being shown to exist between the appellant company and Joseph Scharnagl, the law imposed upon the carrier a primary duty to protect him during the existence of that relation, and, if he were unjustifiably assaulted or arrested or imprisoned while that relation continued by the servants or agents of the carrier, while acting within the scope of their duty, the carrier would be liable."

In *Central Railway Company v. Peacock*, supra, it is said: "The Supreme Court of the United States, in *New Jersey Steamboat Company v. Brockett*, 121 U. S. 645, 7 Sup. Ct. 1039, 30 L. Ed. 1049, decide unequivocally that the carrier of passengers must protect his passengers from the violence of the carrier's employes, as also from that of other passengers; but there is nothing in the decision in conflict with the doctrine that, to render it liable, the employe must be at the time acting in the employment of the railroad, and within the line of his duty, and the decision assumed that the party injured is a passenger when injured; for that was the fact in the case."

Tested by these rules, the first count of the declaration is sufficient, as it shows that the trespasses were committed upon a passenger by an employe in charge of the waiting room of the defendant company. This, under the authorities cited, sufficiently shows that the wrongs sued for were done by a servant of the defendant acting within the scope of his duties. The demurrer to that count was properly overruled.

The additional count is clearly bad. It seeks to make the company liable from the mere fact that the plaintiff was assaulted, arrested, and imprisoned "by an officer or agent of said defendant and in its employ" while he was a passenger. This, under *Peacock's Case*, supra, and other cases, is not sufficient, and, therefore, the demurrer to that count should have been sustained, and for this reason the plaintiff's first prayer should not have been granted.

The plaintiff's second prayer would have been proper had there been in the case a good count under which the plaintiff could have recovered for the false arrest and imprison-

ment complained of; but as there was no such count in the declaration, it was error to have granted that prayer.

The plaintiff's third prayer is upon the subject of damages, and that part of the prayer which states the rule for the allowance of exemplary damages is bad. It advised the jury that they might allow exemplary damages if they found the "unlawful act was done deliberately and with unnecessary violence." It appears to be well settled in this state that mere deliberateness and unnecessary force or violence is not the test of punitive damages. This court, in the case of *P. W. & B. R. R. Co. v. Hoeflich*, 62 Md. 307, 50 Am. Rep. 223, has stated the rule under which punitive damages may be allowed in cases of this kind. In discussing a prayer substantially like the one we are considering, Judge Robinson said: "The force and deliberation with which the wrongful act is done are not necessarily the tests by which the question of punitive damages is to be determined. On the contrary, to entitle one to such damages, there must be an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act. It is in such cases as these that exemplary or punitive damages are awarded as a punishment for the evil motive or intent with which the act is done, and as an example, or warning, to others. But where the act, although wrongful in itself, is committed in the honest assertion of a supposed right, or in the discharge of duty, or without any or bad intention, there is no ground on which such damages can be awarded." In *Phila. Wilm. & Balt. Railroad Company v. Quigley*, 21 Howard, 202, 214, 16 L. Ed. 73, Mr. Justice Campbell says: "Wherever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in a spirit of mischief, or of criminal indifference to civil obligations." And in the still later case, in the same court, of *Milwaukee Railroad Company v. Arms et al.*, 91 U. S. 489, 493, 23 L. Ed. 874, Mr. Justice Davis said: "Redress commensurate to such injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done willfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. * * * The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages." We might multiply the cases on this subject if necessary, all concurring that exemplary damages are

awarded as a punishment for the evil motive or intention with which the unlawful act is done, and as a warning or example to others. There was error in the ruling embraced in the first exception, as there was no count in the declaration upon which the plaintiff was entitled to recover for the alleged false imprisonment. Had there been such count, the evidence embraced in this exception would have been properly admissible. It is true that ordinarily a defendant could not be held liable for the manner in which public officials treat persons committed to their custody; but under the facts in evidence the suffering endured and the treatment received by the plaintiff in the lockup would have been proper for the jury to consider. Baldwin is shown to have had control of this jail, and knew its condition when he placed the plaintiff in the cell, and if the master was responsible, under the rules stated for the acts of the servant, we see no good reason why the evidence as to the condition of the cell would not have been admissible. It would have been clearly competent, under the authority of *Hoeflich's Case*, supra, upon the question of punitive damages. There was reversible error in the rulings in the second and third exceptions. The witness Morrison was asked whether Baldwin had made other arrests during the time of his employment by the defendant and prior to March 5, 1907. The purpose of this evidence, it is said, was to show that Baldwin was acting within the scope of his duty at the time he arrested the plaintiff. It is difficult to see how this testimony can have the slightest tendency to prove the facts sought to be established. When these arrests were made, or under what circumstances, or whether Baldwin had authority to make them, does not appear, and the admission of such testimony was calculated to do the defendant substantial injury. It is said, however, that the defendant was not damaged by the admission of this testimony, because it was subsequently proved that Baldwin had arrested other people and placed them in the lockup. This class of testimony does not fall within the principle, so often announced, that the court will not reverse the judgment where competent evidence favorable to the plaintiff's case has been first excluded, and afterwards admitted, because in such cases it is apparent that no injury has been done. The defendant in this case has a right to stand upon his exception to the admission of the testimony. Why the court struck out the testimony offered to show that Kelley and Baldwin were public officers is not shown by the record. Baldwin was, however, acting as a special officer under the belief that he was properly appointed. The validity of his appointment was an entirely collateral matter. The real question was in what capacity he was acting at the time of the assault alleged, whether as a servant of the defendant, or as a peace officer under what he

regarded a valid appointment and qualification. This was a question for the jury, and the evidence stricken out should have remained in the case as reflecting upon that question. For this reason, the plaintiff's special exceptions to the defendant's fifth and sixth prayers should not have been granted. The defendant's special exceptions to the plaintiff's third prayer were properly overruled, as there was evidence, if believed by the jury, which would have authorized them in their discretion, under proper instructions, to award exemplary damages. There was no error in refusing the defendant's fifth and sixth prayers, as it got the full benefit of all the defenses to which it was entitled under its granted prayers. This disposes of all the questions presented by the appeal.

For errors committed in overruling the demurrer to the additional account of the declaration, and in granting the plaintiff's first, second, and third prayers, and in the rulings covered by the first, second, and third exceptions, the judgment will be reversed.

Judgment reversed, with costs, and new trial awarded.

(109 Md. 271)

COULSON et al. v. MAYOR, etc., OF CITY OF BALTIMORE.

(Court of Appeals of Maryland. Jan. 13, 1909.)

1. MUNICIPAL CORPORATIONS (§ 966*)—TAXATION—BLOCKS—"INTERSECTING BOUNDARY."

A turnpike road may be treated as an "intersecting boundary" within the annexation act (Acts 1888, p. 113, c. 98), as amended by the Fouts act (Acts 1902, p. 198, c. 130), defining a block of ground for taxation purposes to be an area bounded by intersecting avenues, streets, or alleys, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2046; Dec. Dig. § 966.*]

2. TAXATION (§ 204*)—EXEMPTIONS.

Landowners claiming the benefit of laws under which a partial exemption from taxation is conferred on certain conditions must bring themselves fairly within such laws.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 323; Dec. Dig. § 204.*]

3. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTIONS.

A trial judge is presumed to have decided questions of fact correctly.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762; Dec. Dig. § 931.*]

4. MUNICIPAL CORPORATIONS (§ 966*)—TAXATION—"BLOCK OF GROUND"—IMPROVEMENT OF STREET.

The annexation act (Acts 1888, p. 113, c. 98), as amended by the Fouts act (Acts 1902, p. 198, c. 130), defines a block of ground for taxation purposes to be an area bounded by streets, etc., opened, graded, kerbed, and otherwise improved from kerb to kerb by pavement by some substantial material, etc. A particular avenue was opened, graded, and kerbed on both sides, and has properly paved gutters. The space occupied by car tracks, and two feet outside of them was paved. The remaining strips lying

between the gutters and the paving along the tracks which are six or seven feet wide have substantial bases and a pike macadam condition. *Held*, that the avenue is improved within the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2046; Dec. Dig. § 966.*]

For other definitions, see Words and Phrases, vol. 1, p. 809.]

Appeal from Circuit Court of Baltimore City; James P. Gorter, Judge.

Bill by George T. Coulson and others against the Mayor and City Council of Baltimore. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and HENRY, JJ.

S. S. Field, for appellants. Edgar Allan Poe, for appellees.

BURKE, J. The appellants are owners of property situated on Pennsylvania avenue, Baltimore city, and embraced in the territory annexed to the city of Baltimore by Acts 1888, p. 113, c. 98. It was taxed at the full city rate for the year 1907, and the city collector presented bills to the appellants demanding payment of the taxes, and notified them that, unless the bills were paid within 30 days from July 1, 1908, he would take legal proceedings to enforce the collection of the taxes. The appellants, contending that their property under Acts 1888, p. 113, c. 98, known as the "Annexation Act," as amended by Acts 1902, p. 198, c. 130, called the "Fouts Act," is liable only to the 60-cent rate for city purposes, filed their bill of complaint in the circuit court for Baltimore city for an injunction against the mayor and city council and Henry W. Williams, city collector, to restrain them from demanding and collecting from the plaintiff any greater sum for city purposes than the 60-cent rate. The court passed an order upon the bill requiring the respondents to show cause why an injunction should not issue as prayed. The defendants demurred to the bill, but the court overruled the demurrer. They then answered, and averred that the property of the plaintiffs was liable for the year 1907 to the full city rate of \$1.97½, and not for the rate of 60 cents as claimed in the bill. A general replication was filed, and testimony was taken in open court before Judge Gorter, who by consent of the parties, visited the property and inspected the condition of Pennsylvania avenue at the place in question. On the 10th of August, 1908, he passed a decree dismissing the plaintiffs' bill. The record presents for consideration two questions: (1) Can a turnpike road be treated as an intersecting boundary under the acts mentioned above? (2) Is the Reisterstown turnpike road, one of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

boundaries of the block in question, "opened, graded, kerbed, and otherwise improved from kerb to kerb by pavement, macadam, gravel, or other substantial material," as required by the Foutz act.

The block does not exceed 200,000 superficial square feet, and it is admitted that the decree must be affirmed if the turnpike road may be used as one of the boundaries of the block, and if it is improved as required by the Foutz act. This court has had occasion frequently and so recently to consider the acts of assembly relating to taxation in the annexed territory of Baltimore city that it is unnecessary to discuss them anew in this opinion. We could not state more clearly than we have already done the principles which should guide the city in the imposition of taxes in the annexed district. *Sindall v. Mayor and City Council*, 93 Md. 526, 49 Atl. 645; *Mayor, etc., v. Rosenthal*, 102 Md. 298, 62 Atl. 579; *Hiss v. Mayor, etc.*, 103 Md. 620, 64 Atl. 52; *Mayor, etc., v. Gall*, 106 Md. 684, 68 Atl. 282; *Shaefer v. Mayor, etc.*, 107 Md. —, 68 Atl. 138. After much that has been said calculated to create in a public mind a misapprehension of what this court has so plainly decided and to create the impression that some injustice has been done the city by these decisions, it was gratifying in this case to hear the learned city solicitor declare that in no case decided by this court had the city been denied the taxes to which it was rightly entitled. The facts of this case are few. The property of the plaintiffs is situated in a block of ground bounded by Pennsylvania avenue, Lynnbrook avenue, Woodbrook avenue, and Fulton avenue. These avenues, except Pennsylvania avenue, are public and paved avenues of the city, and there is no claim made that they are not improved as required by the Foutz act. The block is improved by more than six dwelling houses, but the exact number and character of the houses in the block are not shown by the record. The block has the advantage of city lights. Pennsylvania avenue in front of the plaintiffs' property is owned by the Reisterstown Turnpike Company, and it is contended that this turnpike road cannot be treated under the law as an intersecting boundary, because, it is argued, that by the true construction of the acts mentioned none but public streets, avenues, and alleys can be used as intersecting boundaries. In support of that position the appellants rely upon the case of *Valentine v. Hagerstown*, 86 Md. 486, 38 Atl. 931. That case was fully considered in *Sindall's Case*, supra, in which this court held that it was not essential to the right of the city to impose the full tax rate that the streets and avenues bounding the block should be public as claimed by the appellants in this case. We regard that case as decisive of this question. The reasons why the *Valentine Case* cannot control the decision of the question here presented are fully

stated by Judge McSherry in the *Sindall Case*, on pages 530 and 532 of 93 Md., pages 646, 647 of 49 Atl. Although it was expressly decided in that case that private streets might be used as boundaries of the block, Acts 1902, p. 198, c. 130, which was passed shortly after that decision for the purpose of mitigating some of its supposed hardships, contains nothing to show the slightest intention to change the law of that case in the respect indicated. It defined the terms "landed property," and "block of ground," and declared how the streets should be improved, but did not require that they should be public as distinguished from private.

2. The only remaining question in the case is this: Is Pennsylvania avenue, which we have held can be legally treated as one of the boundaries of the block, "opened, graded, kerbed, and otherwise improved from kerb to kerb by pavements, macadam, gravel, or other substantial material"? The plaintiffs are claiming the benefit of certain provisions of law under which a partial exemption from taxation is conferred upon certain given conditions. To secure this exemption the proof must bring the case fairly within the terms of the acts by which the exemption is granted. We said in *Sindall's Case*, supra, that the provision at the end of section 19, c. 98, p. 127, Acts 1888, "was a restriction on the power of the municipality to levy more than a designated rate of taxes on property annexed to the city limits, until a prescribed condition is complied with. Like every other exemption from taxation it must be strictly construed. The taxing power is never presumed to be surrendered, and therefore every assertion that it has been relinquished must, to be efficacious, be distinctly supported by clear and unambiguous legislative enactment. To doubt is to deny an exemption."

Pennsylvania avenue is opened, graded, and kerbed on both sides. It has gutters on both sides properly paved. And there are car tracks in the center of the avenue, and the space between the tracks and two feet on the outside thereof is paved. The dispute in the case relates to the character of the roadbed between the outside of the gutters and the paving along the car tracks; the width of this space being six or seven feet. Its condition and its construction were largely questions of fact, to be decided by the judge before whom the case was heard. There is a presumption that he decided these questions rightly, and upon the facts appearing in the record we are not prepared to reverse the decision. The only witnesses produced to support the allegations of the bill were Messrs. Coulson, Schneider, and Flater, three of the plaintiffs, and the evidence given by them is to the effect that the portion of the roadbed mentioned gets muddy in places after a rain and in dry weather it gets dusty. They, however, admit that this

roadway cannot be called a dirt road, or a country road, and that at times broken stones are deposited in the road for the purpose of filling holes which make their appearance therein from time to time. And there is testimony that at some places there is no stone at all, at least so far as the naked eye can see. Mr. Payne, an employé of the city, examined the condition of the road on more than one occasion, and testified that Pennsylvania avenue at the intersection of Fulton avenue corresponds with the grade of Fulton avenue as repaved; that the grade is a nice grade up to the crown of the hill, which is close to Lynnbrook avenue; that he found the street kerbed both on the north and south side; that the gutter is paved and that there is about 18 inches of cobble between the gutter stone and out from the gutter stone; that between the car tracks it is paved, and that there is a space on the sides of the car track of about six or seven feet between the paving extending from the gutter and the paving extending from the car track on both sides of the street. He testified that in 1903 he made a report on that block and reported that in his judgment it was a macadam street, that it has the pike macadam

condition, and that there is a solid, substantial base, even where the holes were, and when it had been somewhat cut up the south half of the street was in a very good condition, and that he could not see any fault that could be fairly found with it. This court has never hesitated to restrain the collection of taxes levied upon annexed property in disregard of the provisions of the acts we have referred to; but it has never resorted to a forced and strained construction to accomplish that result. We think the situation and the character of the plaintiffs' property and the surrounding conditions are such as to fairly warrant the imposition of the full city rate. These annexed tax cases must of necessity be disposed of upon the facts of each particular case. All this court can do is to announce, as we have repeatedly done, the rule by which the appeal tax court should be governed. The decision of each particular case coming here must depend upon our determination as to whether there has been a fair and just application of that rule to the facts of the particular case as they are shown by the record.

Decree affirmed, with costs.

(109 Md. 211)

MERCHANTS' & MINERS' TRANSPORTATION CO. v. EICHBERG et al.**EICHBERG et al. v. CENTRAL OF GEORGIA RY. CO.**

(Court of Appeals of Maryland. Jan. 12, 1909.)

1. CARRIERS (§ 182*) — LOSS OR INJURY TO GOODS—CONTRACTS—PRESUMPTIONS.

It will be presumed that when letters passed between shippers and a carrier's freight traffic manager setting forth the rates at which the goods would be carried, and the time within which any claim for damages would be settled, were written, the parties contemplated the issuing of bills of lading containing the provisions of the contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 578; Dec. Dig. § 132.*]

2. CARRIERS (§ 163*)—LIMITATION OF LIABILITY—DAMAGES—BURDEN OF PROOF.

Under a bill of lading providing that negligence should not be presumed against the carrier, the burden was on the shipper to show, not only injury to the goods, but negligence causing such injury, where a higher rate was charged for carriage under the common-law liability as insurer.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 725; Dec. Dig. § 163.*]

3. CARRIERS (§ 189*)—RATES OF FREIGHT—INSURANCE OF SAFETY.

In the absence of a contract to the contrary, a carrier of goods is an insurer, but, since they may be injured or destroyed by causes not due to the carrier's negligence, the carrier is as much entitled to be paid a premium for insurance of safe delivery as for labor and expense of carrying them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 859; Dec. Dig. § 189.*]

4. CARRIERS (§ 131*)—LIMITATION OF LIABILITY—NEGLECT—BURDEN OF PROOF.

While a carrier cannot contract against its own negligence, it can contract so as to put the burden of proving negligence on one suing therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 674; Dec. Dig. § 151.*]

5. CARRIERS (§ 159*) — LOSS OR INJURY TO GOODS—DAMAGES—CLAIMS—WAIVER.

A provision of a bill of lading requiring any claim for loss or damage to be made in writing within 30 days after delivery was waived by the carrier, for its agent raised no objection on that ground to a claim filed after that time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 714; Dec. Dig. § 159.*]

6. CARRIERS (§ 158*)—LIMITATION OF LIABILITY—DAMAGE—MEASURE.

In an action for damage to goods shipped under a bill of lading providing that any loss or damage should be computed at the value of the property at the time and place of shipment, damages should be assessed according to such provision.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 708; Dec. Dig. § 158.*]

7. CARRIERS (§ 153*)—LIMITATION OF LIABILITY—DAMAGES—WAIVER OF PROVISION.

In an action against a carrier for damages to a shipment, the parties may waive a provision of the bill of lading that the amount of any damage should be computed at the value of the property at the time and place of shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 708; Dec. Dig. § 158.*]

8. CARRIERS (§ 130½*) — INJURY TO GOODS—JOINT LIABILITY.

An action for damage to a shipment was properly brought in tort jointly against the railway company and the transportation company which contracted to ship the property.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 568; Dec. Dig. § 130½.*]

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by Maurice H. Eichberg and Monte L. Hirsch, copartners as the Paper Mills Company, against the Merchants' & Miners' Transportation Company and the Central of Georgia Railway Company. From a judgment for plaintiffs, the transportation company appeals, and from a judgment for the railway company plaintiffs appeal. First mentioned judgment reversed and new trial awarded; other judgment affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

William S. Bryan, Jr., for plaintiffs. Charles A. Marshall and John J. Donaldson, for defendants.

WORTHINGTON, J. This is an action of tort brought in the superior court of Baltimore city by the appellees, trading as the Paper Mills Company, against the Merchants' & Miners' Transportation Company and the Central of Georgia Railway Company, as joint defendants, to recover for damages alleged to have been sustained by the plaintiffs through the negligence, improper conduct, lack of skill and care, and wrongful action of the defendants, and each of them, in transporting a large quantity of wrapping paper and paper bags, and also certain machinery from Atlanta, in the state of Georgia, to Baltimore, in the state of Maryland. The case was before this court at the October term, 1907, upon the question of the sufficiency of the service of process on the Central of Georgia Railway, one of the defendants, and some of the facts are set out in the report of that appeal in Central Ry. Co. v. Eichberg, 107 Md. —, 68 Atl. 690. The service of process having been held sufficient, the case proceeded to trial in the court below against both defendants, and a judgment in that court for \$9,734.78 was obtained against the Merchants' & Miners' Transportation Company alone, the Central of Georgia Railway Company obtaining a judgment in its favor under an instruction of the trial court. The unsuccessful contestants in both instances have appealed to this court.

We will first consider the appeal of the Merchants' & Miners' Transportation Company. The learned judge in the court below by granting the plaintiffs' first prayer practically decided that the whole contract of carriage between the parties is contained exclusively in the two letters, one of date of June 12, 1906, and the other of date of June 25, 1906, which passed between the plaintiffs'

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and Mr. C. S. Hoskins, freight traffic manager of the Merchants' & Miners' Transportation Company, and which are printed in the record. But we think the true contract is to be found in these two letters, or rather in the one of date of June 25, 1906, and in the bills of lading issued to the plaintiffs by the Central of Georgia Railway Company taken and considered together. The letters set forth merely the rates at which the goods will be carried, and the time within which any claim for damages would be settled. It may well be assumed that, when these letters were written, the well-known usage and custom of issuing bills of lading with the several shipments were within the contemplation of the parties. Indeed, the plaintiffs in their letter of June 12th refer to the "clean B-L of the Central of Georgia for evidence" as to the condition in which the shipments would leave Atlanta, thus clearly indicating that they had in mind the receipts usually issued by carriers when goods are accepted by them for carriage. A similar view was held by the Court of Appeals of New York in the case of *Donovan v. Standard Oil Company*, 155 N. Y. 112, 49 N. E. 678, where the court said: "This instrument [the bill of lading] must be read with the letter referred to under which the plaintiffs entered into the general arrangement in order to ascertain the full extent of their duties and obligations as carriers." Having decided that the bills of lading form part of the contract of carriage, it becomes our duty to construe certain portions of them, which give rise to the controversy in this case. The clause which gives rise to the most important question is contained in the eleventh section of these bills of lading, and is as follows: "Nor shall negligence be presumed against any carrier."

The question is: How does this clause effect the burden of proof? We think it must be given its full force; that is to say, the burden is upon the plaintiffs to show not only the injury, but also the negligence that caused the injury. The common-law presumption of negligence where damage merely is shown is negatived by the express stipulation of the contract. It will not suffice to prove merely that the goods were delivered to the carrier in good condition and received by the consignee in a damaged condition, but negligence causing the injury must be proven. In the absence of contract, the law makes the carrier an insurer, and, as the goods it carries may be injured or destroyed by many causes not due to its own negligence or want of care, the carrier is as much entitled to be paid a premium for its insurance of their safe delivery at the place of destination as for the labor and expense of carrying them there. *Riley v. Horne*, 15 E. C. L. 551. While the carrier may not contract against its own negligence (1 *Hutchinson on Carriers*, § 450), it may contract so as to put the burden of proving the negligence upon the plaintiff. It was so held in the case of *N. J. S. N. Co. v. Bank*,

6 How. 384, 12 L. Ed. 465, which was followed by our predecessors in the case of *Bankard v. B. & O. R. R.*, 34 Md. 197, 6 Am. Rep. 321. In the former case Mr. Justice Nelson, speaking for the Supreme Court, said: "The respondents having succeeded in restricting their liability as carriers by special agreement, the burden of proving that the loss was occasioned by the want of due care or by gross negligence is upon the libelants, which would be otherwise in the absence of any such restriction." In the case at bar, the contract of carriage provided that, if the shippers elected not to accept the reduced rates for transportation and the conditions contained in the bills of lading, they should give notice to the agent of the receiving carrier in writing, and by paying a somewhat higher rate the carrier's common-law liability would attach except as limited by the laws of the United States and of the several states, so far as any such statutes applied. The plaintiffs deliberately chose the reduced rate and thereby assumed under the conditions of the bills of lading which they accepted the burden of proving negligence against the carriers in case any loss or injury to the goods should occur in the course of the transportation, and it is not for this court to relieve them of the burden which they thus assumed. As regards the stipulation in the bill of lading requiring any claim for loss or damage to be made in writing within thirty days after the delivery of the property, we think that such stipulation was waived by the carrier, whose agent with full knowledge raised no objection to the claim on that ground. 5 Am. Eng. & Law (2d Ed.) 322-325.

No objection is made to the granting of the plaintiffs' second prayer concerning the measure of damages, except on the ground that there is not sufficient evidence to go to the jury as to the market value of the goods at Baltimore, in either an injured or uninjured condition, on their arrival in that city. We think the evidence in this respect too meager, but, as there is a provision in the bill of lading to the effect that "the amount of any loss or damage for which any carrier becomes liable shall be computed at the value of any property at the place and time of shipment under this bill of lading," the measure of damage should be in accordance with this provision, that is, their value should have been ascertained at Atlanta as of the days and times of shipment. It was so held by this court in the case of *McCoy v. Erie R. R. Co.*, 42 Md. 498, under a similar provision in the bill of lading in question in that case. Of course, the parties may waive this provision in the present case, if they so desire. We think the proceedings were properly brought in tort jointly against both carriers. *B. & O. R. R. Co. v. Pumphrey*, 59 Md. 399; 1 *Poe Pldg.* §§ 296, 526, 528; *Mershon v. Hobensack*, 22 N. J. Law, 380. As to the appeal of the Paper Mills Company from the action of the trial court in dismissing the

suit as against the Central of Georgia Railway Company, we think such action was proper. The plaintiffs had closed their case without offering any evidence whatever of negligence on the part of this defendant, and by the contract of carriage under which the goods were shipped no negligence could be presumed against it from the mere fact that the goods which had been delivered to it in good condition were received at their destination from the terminal carrier in a damaged condition.

For these reasons we think there was error on the part of the learned judge in the court below in granting the plaintiffs' first and second prayers, and in refusing to grant the defendant's second, eighth, and ninth prayers, and we must therefore reverse the judgment in No. 51, but, as the plaintiffs may be able upon a second trial to adduce evidence of negligence, we will award the plaintiffs a new trial as to the Merchants' & Miners' Transportation Company.

Judgment in No. 62 reversed, with costs and new trial awarded. Judgment in No. 63 affirmed, with costs to the appellee.

McMAHON v. CREAN et al.

(Court of Appeals of Maryland. Dec. 9, 1908.)

Appeal from Baltimore Court of Common Pleas; Henry Stockbridge, Judge.

Action by Frederick J. Crean and others against Peter McMahon. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

Thomas G. Hayes, for appellant. Frank Driscoll and S. S. Field, for appellees.

PER CURIAM. This is an action of ejectment, brought for the recovery of a parcel of land lying in Baltimore city. The judgment being against the defendant, he has appealed. As one of the questions raised in the case concerns the proper method to be pursued by the city in the sale of land for nonpayment of taxes, it is of public importance that this should be speedily settled.

Among other defenses interposed by the defendant as a bar to the suit was a tax deed for the land in question, made by the mayor and city council to him dated March 19, 1884. It is admitted that the suit must fail if the appellant acquired a good title under the tax sale and deed mentioned. The court below held that the defendant took no title under the tax sale, first, because the preliminary notice given was insufficient, and, secondly, because the place of sale was not that authorized by law. The property was sold at the Exchange Sales-room, but in the opinion of the court below the property could only be sold either on the

premises or at the courthouse door of the city. Some additional reasons have been urged against the defendant's title. It is insisted that he took no title under the deed, because the deed to the city for which he acquired title was not made by the collector who made the sale. We hold that the proceedings under which the tax sale was made show a sufficient compliance with all the prerequisites of the law regulating tax sales in Baltimore city, and that the defect urged against the deed, upon which the defendant relies, has been cured by subsequent legislation. We decide that the defendant has shown a good title to the land sued for, and that the judgment must be reversed, without awarding a new trial. An opinion will be filed stating the reasons upon which this conclusion rests.

Judgment reversed, with costs, without awarding a new trial.

(109 Md. 653)

McMAHON v. CREAN et al.

(Court of Appeals of Maryland. Jan. 13, 1909.)

1. TAXATION (§ 730*)—TAX TITLE—NATURE AND EFFECT.

A valid tax title clothes the owner not merely with the title of the person assessed for the taxes for which the property was sold, but with a new and complete title under an independent grant from sovereign authority, which bars and extinguishes all prior titles and incumbrances and equities of private persons.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1463; Dec. Dig. § 730.*]

2. TAXATION (§ 614*)—DELINQUENT TAXES—POWER OF SALE.

A tax collector's authority to sell land for the nonpayment of delinquent taxes is a naked power, specially conferred by statute, which must be substantially complied with in order to create a valid title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1263; Dec. Dig. § 614.*]

3. TAXATION (§ 685*)—TAX SALES—VALIDITY—BURDEN OF PROOF—STATUTES.

Acts 1874, p. 744, c. 483, § 51, relating to tax sales, requires the collector to report the sale and the proceedings in relation thereto to the courts, which after examination and notice shall confirm the sale, if no sufficient cause be shown against such ratification, and the purchaser on payment of the price obtains a good title to the property sold. *Held*, that a decree of confirmation under such section is not conclusive evidence of the validity of the sale, but is effectual only to cast the burden of proof on the party resisting the same.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1375; Dec. Dig. § 685.*]

4. TAXATION (§ 658*)—TAX SALES—NOTICE.

Baltimore City Code 1879, § 44, provides that no sale shall be made by a tax collector until he has first given to the person in arrears, etc., a statement of the indebtedness, and not less than 30 days' notice of his intention, if the tax is not paid, to enforce payment thereof. *Held*, that where a collector's report stated that, on each of the bills for taxes delivered to the life tenant in possession of property sold there was printed a notice that if the bill was not paid within 30 days from delivery, it "would be subject" to distraint or execution, but the record of the tax proceedings contained two of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the bills as exhibits, on the face of which was printed a notice that, if the bill was not paid within 30 days from delivery, payment "would be enforced" by distraint or execution, it would be presumed that the notice printed on the bills was identical with that delivered to the owner, rather than with the notice stated in the report, and that the notice was therefore sufficient.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 658.*]

5. TAXATION (§ 655*)—TAX SALES—PLACE OF SALE.

Acts 1878, p. 362, c. 227, providing for tax sales in Baltimore city, but containing no provision as to the place where such sales were to be held, was in irreconcilable conflict with Code 1878, art. 11, § 49, requiring tax sales to be on the premises or at the courthouse door, and hence sales in Baltimore could be legally held at such place in the city as the collector in his discretion might select.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 655.*]

6. TAXATION (§ 746*)—TAX SALES—COLLECTOR'S DEED—EXECUTION.

A tax collector of the city of Baltimore had no power to execute a tax deed to the mayor and city council for property sold to the city by his predecessor.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 746.*]

7. TAXATION (§ 770*)—TAX DEEDS—CURATIVE ACTS.

Where a tax collector of the city of Baltimore executed without authority a tax deed to the mayor and city council on December 7, 1883, for property sold to the city by his predecessor, such conveyance was validated by Acts 1904, p. 504, c. 281, § 2, providing that whenever any property in the city of Baltimore has been sold for taxes pursuant to law, by one city collector, and the sale has been reported, but the deed has been executed and delivered by the collector's successor in office, the conveyance shall be valid.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 770.*]

8. CONSTITUTIONAL LAW (§ 98*) — VESTED RIGHTS.

An owner's right in property sold at a tax sale having been divested by the sale pursuant to which a void deed was executed, Acts 1904, p. 504, c. 281, § 2, validating such deeds, was not invalid as impairing the owner's vested rights.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 98.*]

Appeal from Baltimore Court of Common Pleas; Henry Stockbridge, Judge.

Suit by Frederick J. Crean and others against Peter McMahon. Judgment for plaintiffs, and defendant appeals. Reversed, and new trial ordered.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

Thomas G. Hayes, for appellant. Frank Driscoll and S. S. Field, for appellees.

BURKE, J. This is a suit in ejectment instituted in the court of common pleas by four of the children of Charles and Catherine Crean, deceased. The plaintiffs claim title to the lot sued for under the will of Edward Burns, who died seised thereof in 1862. The

lot was a leasehold, subject to an annual ground rent of \$240. The title to this leasehold was acquired by Edward Burns under an assignment from Benjamin V. Richardson. The property is located on the west side of Market Space in Baltimore city, and at the time of the death of Edward Burns was improved by two brick houses, known as Nos. 40 and 42 Marsh Market Space. Burns bequeathed the property to Charles and Catherine Crean during their lives, and, immediately after the death of the survivor, "unto the living issue of the aforesaid Charles and Catherine Crean, share and share alike, absolutely." Charles Crean died in 1884, and Catherine, the surviving life tenant, in 1889. The state and city taxes on this property for the years 1876, 1877, and 1878, being in arrears and unpaid, it was sold on October 15, 1879, for nonpayment of these taxes by Charles Webb, the collector of city and state taxes. The sale was made at the Exchange Building, on Second street in the city of Baltimore, and was sold to the mayor and city council of Baltimore in fee for \$1,025. The sale was reported by Mr. Webb, the collector, to the circuit court for Baltimore city, and was by that court finally ratified and confirmed on the 22d day of September, 1882. The property was conveyed to the mayor and city council of Baltimore by Henry S. Taylor, collector, by deed dated December 7, 1883, and on March 19, 1884, by deed of that date, the city, in consideration of the sum of \$1,300, granted and conveyed the property to the defendant in this suit, who paid the full purchase price and took possession of the property on the date of the deed, and has been in continuous possession to the present time. At the date of the purchase of the property by the defendant the property was in bad condition and was not tenantable, and, in order to put it in condition to be rented, Mr. McMahon was obliged to spend from \$1,600 to \$1,800 for necessary repairs. The improvements placed by him upon the property were destroyed by the great fire of 1904, and the property was rebuilt by the defendant at a cost of about \$5,000. The case was tried below before the court, without the intervention of a jury, and resulted in a verdict and judgment in favor of the plaintiffs, and the defendant has brought this appeal.

In per curiam filed December 9, 1906 (71 Atl. 995), we said: "It is admitted that the suit must fail if the appellant acquired a good title under the tax sale and the deed mentioned. The court below held that the defendant took no title under the tax sale: First, because the preliminary notice given was insufficient; and, secondly, because the place of sale was not that authorized by law. The property was sold at the Exchange Salesroom, but, in the opinion of the court below, the property could only be sold either on the premises, or at the courthouse door of the city. Some ad-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ditional reasons have been urged against the defendant's title. It is insisted that he took no title under the deed because the deed was not made by the collector who made the sale. We hold that the proceedings under which the tax sale was made show a sufficient compliance with all the prerequisites of the law relating to tax sales in Baltimore city, and that the defect urged against the deed upon which the defendant relies has been cured by subsequent legislation. We decide that the defendant has shown a good title for the land sued for, and that the judgment must be reversed without awarding a new trial." That judgment was accordingly entered. Assuming for the moment the validity of the proceedings under which the tax sale was made, and that the deeds of December 7, 1883, and March 19, 1884, operated to pass the legal title to the property first to the mayor and city council, and then to the defendant, it cannot be questioned that the last-named deed afforded the defendant a complete bar to recovery in this suit. We said in *Textor v. Shipley*, 86 Md. 438, 38 Atl. 933, that "the title of the defendant is founded upon and derived from the tax sale (*Burroughs on Taxation*, 346; *Hussman v. Durham*, 165 U. S. 147, 17 Sup. Ct. 253, 41 L. Ed. 664; *Hefner v. Northwestern Ins. Co.*, 123 U. S. 751, 8 Sup. Ct. 337, 31 L. Ed. 309), for, although he did not purchase at the tax sale, his grantor, the city, did." In *Hefner v. Insurance Company*, supra, it is said: "If the tax deed is valid, then from the time of its delivery it clothes the purchaser, not merely with the title of the person who had been assessed for the taxes and had neglected to pay them, but with a new and complete title in the land, under an independent grant from the sovereign authority, which bars and extinguishes all prior titles and incumbrances of private persons, and all equities arising out of them." *Hill v. Williams*, 104 Md. 604, 65 Atl. 413; *Hill v. McConnell*, 106 Md. 574, 68 Atl. 199. Before the passage of Acts 1872, p. 670, c. 384 (Code Pub. Gen. Laws 1904, art. 81, § 53), which required "the collector to report the sale together with all the proceedings had in relation thereto to the courts for confirmation," a sale made by a collector for taxes could only be supported upon it being made to appear affirmatively that all the provisions of the statute authorizing the sale had been strictly complied with. The power of sale vested in a collector of taxes is a naked power, specially conferred by statute, to be exercised under a proceeding ex parte in its character, and the effect of which is to divest a citizen of his property without his consent, and often without his actual knowledge. It was therefore established, as an indubitable principle, that a purchaser, who claimed under a power of this nature, should show affirmatively and positively the regularity of the proceedings upon which his title depended. *Alexander v. Walter*, 8 Gill, 239-260, 50 Am. Dec. 688; *Williams v. Peyton*, 4 Wheat.

77, 4 L. Ed. 518; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221.

But to relieve the purchaser of this onus, and to give encouragement to purchasers at tax sales, the statute now in force (Acts 1874, p. 744, c. 483, § 51) provides that the collector shall report the sale, and the proceedings in relation thereto, to the courts mentioned in the act; and the court, to which such report shall be made, shall examine the said proceedings, and if the same appear to be regular, and the provisions of law in relation thereto have been complied with, shall order notice to be given by advertisement, etc., to show cause, if any they have, why said sale should not be ratified and confirmed; and, if no sufficient cause be shown against the ratification, "the said sale shall, by order of said court, be ratified and confirmed, and the purchaser shall, on payment of the purchase money, have a good title to the property sold." This statute confers upon the court designated a special and limited jurisdiction, which attaches upon the report of the collector; and, though the sale may be confirmed by the court, the order of confirmation operated only to relieve the purchaser of the onus of proof, and to cast the onus of showing the illegality of the proceedings upon the party resisting the sale. The effect, therefore, of the order of ratification is only prima facie in support of the sale, not conclusive; the sale, under the order of confirmation, affording evidence of a good title, until successfully assailed by evidence showing illegality in the proceedings upon which it is founded. *Guisebert v. Etchison*, 51 Md. 478. Until such proof is offered by the assailing party, the sale, if ratified and confirmed, stands good and effective, by operation of statute. *Stewart v. Meyer et al.*, 54 Md. 465-467.

It is only necessary that there shall be a substantial compliance with the tax law under which the sale was made. *Guisebert's Case*, supra; *Textor v. Shipley*, supra. The court will presume that the collector has discharged his duty, and no presumption will be invoked against the validity of the proceedings. But where it appears by the record, or by proof, that material and substantial provisions of the law have not been observed in making the sale, it will be treated as utterly null and void. Under the public local law of Baltimore city (*City Code* 1879, § 44) no sale could be made by the collector for the payment of taxes until he has "first given to the person or persons so in arrears, or has left at his, her, or their residence, or last known residence, or if neither can be found on the premises, a statement of his, her or their indebtedness, and not less than thirty days' notice of his intention if the bill is not paid within the time named, to enforce payment thereof."

In this case the property was assessed to Mrs. Crean, one of the life tenants, and the bills for taxes setting forth the amount of

the taxes due on the property to the state and city, and specifying the years for which they were due, were delivered to her. It is true that in the report of the collector it is stated that on each of the bills delivered to her there was printed a notice stating that if this bill is not paid within 30 days from delivery it will be subject to distraint or execution. Such a notice would be insufficient, because it is not such as the law requires, and if nothing else appeared by the record we would be constrained to hold the sale void; but looking at the whole record of the tax proceedings, it is apparent that this statement in the report of sale is erroneous, as two of the tax bills filed as exhibits with the report of sale contain a notice, printed in red ink across the face of each bill, to the effect that, if the bill is not paid within 30 days from the delivery, payment thereof will be enforced by distraint or execution. These exhibits are copies of the entries in the assessment books of the city, and, as we understand the report, they are identical with the bills delivered to the owners. If, however, there should be any doubt upon this point, it should be resolved in favor of the validity of the sale, in the absence of satisfactory proof that this notice was not given. We are of opinion that these tax bills and the notices printed thereon show the character of the preliminary notice given by the collector, and are sufficient to gratify the requirements of the law in this respect.

As to the place of sale. The property was sold at the Exchange Salesroom. This was held by the learned judge below to be a defect which rendered the sale void. He held that under article 11, § 49, of the Code of 1878, the only places at which tax sales in the city of Baltimore could be made were either on the premises, or at the courthouse door of the city. It has not been the custom in the city to make tax sales at either of these places, nor has it been the understanding of the city authorities that the law imposed such a requirement. Such a construction would unsettle many tax titles. This consideration, it is true, should not control the action of the court if it appears that a plain mandate of the law has been disregarded; but the court should not be insensitive to the serious consequences which would inevitably result from such a construction. In making this sale the collector proceeded under Acts 1878, p. 362, c. 227, which made provisions for the sale of ground in Baltimore city for nonpayment of taxes. That act provided that "whenever it shall become necessary to sell any part or parcel of ground in the city of Baltimore, improved or unimproved, for the payment of taxes or assessment of any nature or kind whatever, levied or charged, the collector shall first give notice by advertisement published once a week for four successive weeks in two of the daily newspapers published in said city, one of which

shall be in the German language, that he will sell at public auction on the day in said advertisement mentioned; said notice shall state the name of the person, when known, to whom such parcel of ground is assessed, the amount of taxes due on the same, and what improvements, if any, are on said parcel of ground; and in any such notice it shall be sufficient to describe the parcel of ground as located upon whatever official plat of the city the said mayor and city council of Baltimore shall from time to time adopt and designate for that purpose." This act contained no direction as to the place of sale, but left that, we think very properly and wisely, to the judgment and discretion of the city collector. A comparison of the terms of this act with the section of the Code of 1878 mentioned above will show the most irreconcilable conflict. This, in connection with the evident purpose of the legislation to provide by local law a different procedure for the sale of land in Baltimore city for the nonpayment of taxes, is sufficient, upon familiar principles of statutory construction, to show that the place of sale named in the general law was not intended to control sales made under Acts 1878, p. 362, c. 227. We are therefore of opinion that the tax sale was valid, and its ratification by the court vested in the purchaser, the mayor and city council of Baltimore, under the statute, "a good title to the property sold." Under the authority of the case of *Taylor v. Forrest*, 96 Md. 529, 54 Atl. 111, Henry S. Taylor, collector, had no power to execute a deed to the mayor and city council for the property sold by his predecessor, Mr. Webb; but this defect has been cured by section 2, c. 281, p. 504, of the Acts of 1904. This section provided that whenever any property in the city of Baltimore has been sold for taxes, pursuant to law, by one city collector, and such sale has been reported by the city collector who made the sale, but the deed for such property has been executed and delivered by the successor in office of the city collector who made the sale and report as aforesaid, such conveyance shall be as valid to all intents and purposes as it would have been if made by the city collector who made and reported the sale. It would have been a perfectly valid exercise of power by the Legislature to have authorized the successor in office of the city collector to make the deed, and this act which validates the deed of such collector cannot be said to violate any of the vested rights of the owner. His rights in the property were divested by the tax sale. Instead of designating some particular person to execute a deed to the purchaser for the property sold, the act merely validates the deed already executed. We see no possible objection to this.

For the reasons assigned, we reversed the judgment, without awarding a new trial.

(100 Md. 248)

FISHER v. WAGNER et al.

(Court of Appeals of Maryland. Jan. 13, 1909.)

1. WILLS (§ 775*)—LAPSE—DEATH OF DEVISEE OR LEGATEE.

Independent of statute, a devise or legacy lapses on the death of the devisee or legatee before the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1997; Dec. Dig. § 775.*]

2. WILLS (§ 7*)—ESTATES ACQUIRED—CONTINGENT ESTATE OF INHERITANCE.

Contingent estates of inheritance as well as springing and executory uses and possibilities, coupled with an interest where the person to take is certain, are transmissible by descent, and are devisable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 11; Dec. Dig. § 7.*]

3. COURTS (§ 93*)—RULES OF DECISION.

A court will not intentionally overrule a case, especially one affecting titles to property without mentioning it.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 93.*]

4. WILLS (§ 7*)—CONSTRUCTION—DEVISABLE INTERESTS.

Testator divided his estate equally among his two sons, R. and D., and two daughters, A. and M., the shares of the daughters to be held in trust for them for life with remainder to their children, and declared that in case A. should die without leaving a child or descendants or in case she left a child or descendants, who subsequently died under 21 years of age and without issue, one-third of her share should go to R. absolutely. A. died without leaving issue and R. predeceased her. *Held*, that R.'s interest in A.'s share was devisable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 11; Dec. Dig. § 7.*]

5. WILLS (§ 449*)—CONSTRUCTION AGAINST INTESTACY.

The courts are inclined to so construe a residuary clause in a will as to prevent partial intestacy, unless there is an apparent intention to the contrary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.*]

6. WILLS (§ 587*)—CONSTRUCTION—ESTATES DEVISED.

A testator having a transmissible and devisable estate under his father's will which gave him a third of a devise on the death of the devisee without issue gave specific property to his wife, and then gave "all the rest and residue, * * * real, personal and mixed of which I may die possessed" in trust for his wife and any child he might leave, with power of the trustee to invest and change investments. The testator had reason to believe that he would get the benefit of the devisee's share. *Held*, that testator disposed of the interest acquired under his father's will on the death of the devisee without issue; the words "of which I may die possessed" not limiting the broad language used.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 587.*]

Appeal from Circuit Court of Baltimore City; Charles W. Hensler, Judge.

Suit by Richard D. Fisher individually and as executor of Robert A. Fisher, deceased, and as administrator of Samuel W. Fisher, deceased, against Mabel Wagner and others, for the construction of the will of Robert A. Fisher, deceased. From a decree con-

struing the will, complainant appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and HENRY, JJ.

James M. Ambler and Randolph Barton, for appellant. Joseph Packard, for appellees.

BOYD, C. J. Richard D. Fisher, in his own right, as executor of Robert A. Fisher and as administrator of the estate of Samuel W. Fisher, filed a petition asking the court to ascertain and declare the true meaning and effect of the will of Robert A. Fisher, and to guide and direct him in the administration and distribution of the fund referred to in the petition. The questions for our determination arise in this way: James I. Fisher, by his will, dated November 13, 1866, and admitted to probate August 14, 1877, directed that, after setting aside his wife's dower and thirds, the residue of his estate should be divided equally among his four children, Robert A., Richard D., Aminta E., who afterwards married Charles Green, and Mary M. Wagner, but provided that the shares of his two daughters should be held in trust for them for life, with remainder to their children. Mrs. Wagner died several years ago, leaving four children, who are of age and are parties to this proceeding, and Mrs. Green died on the 16th day of March, 1908, without leaving issue.

The portion of the will of James I. Fisher material to this case is as follows: "But in case my said daughter, Aminta E., shall depart this life without leaving a child or children, or descendant or descendants of a child of hers, living at the time of her death, or in case she should leave a child or children, or descendant or descendants thereof, living at her decease, and such child or children and descendant or descendants shall all subsequently depart this life under twenty-one years of age and without issue living at the time of his, her or their respective deaths, then in trust that the said last-mentioned one-fourth part or share of the said rest, residue and remainder of my estate and property aforesaid shall be disposed of in manner following: One equal third part thereof shall go to and I do hereby give, devise and bequeath the same to my son, Robert A. Fisher, above named, his heirs, executors, administrators and assigns, absolutely and forever," etc. Robert A. Fisher, after leaving to his wife, Emily P. Fisher, all the household furniture and plate of which he might die possessed, disposed of his estate by will dated February 3, 1877, as will be hereafter shown. He died on the 4th day of February, 1881, without leaving children, and his wife, whom he married in 1871, died in 1893. When he made his will, he was 44 years of age, had some property in his own right, and his fa-

ther, who was then nearly 80 years of age, possessed an estate of about half a million dollars. His wife was 10 years his junior, and, to use the language of the petition, "although the only issue of their marriage so far had been an infant, whose premature birth in April, 1873, cut short its chance of life, he and his wife were both in good health and still in the prime of life, and there was no reason to anticipate that they should have no other children for whom to make provision in his will." James I. Fisher, his father, died on July 30, 1877, and Robert A. served with Richard D. and their mother as one of the executors of and trustees under James I. Fisher's will, and was familiar with its provisions, including that creating the trust for the benefit of Aminta E. Green. The only child of Mrs. Green, which was born in December, 1871, died on March 28, 1878, having never shown any promise of health or strength. At the time of its death Mrs. Green had been married nearly nine years, was in the forty-third year of her age, while her husband was then 70 years old, and the petition alleges that Robert A. Fisher, therefore, knew for some time before his own death that "one-third of the remainder after his said sister's life estate under her father's will was for all practical purposes sure to come ultimately to him or his representatives." The Safe Deposit & Trust Company of Baltimore was substituted as trustee in place of Mr. Richard D. Fisher, and now has a fund in hand ready for distribution.

The appellees contend (1) that the interest in the contingent remainder created by the will of James I. Fisher, above quoted, which would have been taken by Robert A. Fisher, if he had survived the happening of the contingency, could not pass by any will made by him; and (2) that, if it could, the language used by him in his will was not adequate to transmit this interest. If the views of the appellants are correct, the fund will go to the children of Richard D. Fisher, while, if those of the appellees prevail, one-half will go to him and the other half to the children of Mrs. Wagner. The latter are the appellees; the court below having determined by its decree "that no interest in the contingent remainder limited in the will of James I. Fisher upon the death of Aminta E. Green passed under the will of Robert A. Fisher, and that he died intestate thereof, and the same vested in the next of kin of said Robert A. Fisher living at the death of said Aminta E. Green." The answer of the appellees admits the facts alleged in the petition, but the inferences sought to be drawn from those alleged in paragraphs 4 and 5 and the argument based thereon they leave to the judgment of the court. It is proper to say that the proceeding is entirely friendly, and the respective parties seem to be wholly free from those feelings which so often exist, and are sometimes made manifest by the

record in cases involving controversies over estates, although the arguments of counsel were exceptionally able, and the rights of the parties under the law fully and thoroughly presented according to their respective contentions.

As there was no appeal from the decree of August 3, 1908, declaring that Stanley K. Green has not "by virtue of being the adopted son of Aminta E. Green any right, title, or interest as one of the next of kin or heirs at law of Robert A. Fisher, brother of the said Aminta E. Green, in or to any part of the property now held" by the trustees, we are not called upon to pass on that, but would add that as the act of 1892, which provided for the adoption of children in Maryland and giving such adopted children certain rights, was passed some years after the death of James I. Fisher, there would seem to be no doubt that Stanley K. Green was correctly advised, as he in effect stated in his answers that he was not entitled to any interest in the fund in controversy.

1. As Mrs. Green died without leaving any issue, if Robert A. Fisher had survived her, he would undoubtedly have taken a share in the remainder left Mrs. Green, under the clause of his father's will above quoted, but the question is whether he had such an estate, right, or interest in that share as he could dispose of by will. The contingency attached to his taking it did not in any way relate to his capacity to take, and there was no contingency as to who was to take, but Robert A. Fisher was distinctly named as the one. The learned counsel for the appellees argued that the distinction made by some authorities between the case of a person designated to take a remainder upon the happening of a future contingency and that of persons who belong to a class which is to take in the same event is highly artificial. Such distinction, however, has not only been recognized in this state, but it seems to us to be a logical one. If a testator names a person who is to take upon the happening of a contingency, it is altogether different from naming a class of persons who are to take. If, for example, he names A. as the subject of his bounty, on the happening of a certain contingency, it is known who is to so take, but if he leaves his estate, upon the happening of a contingency, to the survivor of B., C., and D. or to such of the children of A. as may then be living, it cannot be said in advance who will take if the contingency happens. It does not seem to be altogether logical to say that Robert A. Fisher had no interest because he died before the happening of the contingency, but that his heirs or next of kin as such can take. Independent of statute, if a legatee or devisee named in a will dies before the testator, his heirs or next of kin would not take, and the devise or the legacy would lapse, because he did not live until the time when such devise or legacy would be effective, and so it would seem to

be logical that, if he took nothing because he died before the contingency happened, the heirs or next of kin ought not to take. In 1 Roper on Legacies, c. 10, § 4, p. 596, after stating that if the substituted legatee dies before the contingency happens, upon which he is to succeed to a legacy, his representative will be entitled to it so soon as the event takes place, it is said: "Suppose, then, a bequest be made to A., but if A. died under 21, or without leaving issue or children, to B., although B. happened to die before A., B.'s personal representative would be entitled to receive the legacy upon the happening of the contingency on the ground of its being vested in right in B. previously to his decease"—and there are many other authorities to the same effect.

But as the counsel for the respective parties differ as to the construction of some of the decisions of this court, and as there may be some apparent, although not in our judgment real, conflict between some of those decisions, it will be well to review them at some length. In *Snively v. Beavans*, 1 Md. 208, the will gave to Mrs. Watkins certain lands for her life, and at her death to go to two sons. In the event of the sons' death without issue before their mother, she was to have the power of disposing of all she took under the will, and it provided: "I will and devise, in the event of the death of my sons, Thomas and Edgar, before they are twenty-one years of age, that my brother, Greenbury M. Watkins, shall have their whole estate, by paying to my wife, Ellen, one thousand dollars." It was said by the court: "It is well settled that an executory interest of this kind is transmissible, and will go to the representative of the legatee, if he dies before the contingency happens. 2 *Fearne on Rem.* 529. It is a contingent interest which vests in right, though not in possession." Again it was there said: "If Greenbury M. Watkins had died before the sons, his contingent interest in their estate would have passed to his representatives, to be enjoyed if the contingency happened." In *Hambleton v. Darrington*, 36 Md. 434, Mrs. Watson devised and bequeathed all the residue of her estate to Zachariah Woollen in trust, to pay to her mother, sister, and brothers certain annuities, and the residue of her income to her son, Henry, for life, and upon certain contingencies (among others, his living after his sister ceased to be single or leaving issue) she devised to him, his heirs, executors, and administrators, absolutely, not only the income, but also the entire principal of the rest, residue, and remainder of her estate, with this proviso: "But in case of the decease of my son Henry before my said sister ceases to be single, or if my two brothers above named, or either of them, survives him, then in case my said son shall not have issue or descendants, I give, devise and bequeath to my said friend Zachariah Woollen, his heirs, execu-

tors, administrators, and assigns, absolutely not only the income of my estate, above intended for my said son, but also the entire principal of said rest, residue and remainder of my estate." Zachariah Woollen died before Henry Watson, but after he (Woollen) had made a will. This court held that he took a descendible and devisable estate, and in the opinion made the following quotations: "'All estates which are transmissible, either by operation of law or by act of owner, are held devisable. This, it has been long held, extends to a possibility, if it is not a mere naked expectation, but be coupled with an interest.' *Redfield on Wills*, pt. 1, p. 388, 389; *Fearne on Con. Rem.* 371. 'All contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an interest, where the person to take is certain, are transmissible by descent, and are devisable.' 4 *Kent's Com.* 261. 'Where the testator bequeaths his personal estate to A., and if he shall die without issue to B., there is such a vested interest in B., if he survive the testator, that although he should die in the lifetime of A., the estate will pass under a devise from him, or will go to his personal representatives, in the event of A. dying without issue.' *Barnes v. Allen*, 1 *Browne C. C.* 181; *Perry v. Woods*, 3 *Ves.* 204, 206; 2 *Redfield on Wills*, p. 627, § 51." That case is exactly in point, and, unless overruled, which we will consider later, is the law of this state. In *Buck v. Lantz*, 49 Md. 439, there was a deed of trust, which conveyed real and personal property to a trustee, in trust, for the use of the grantor, during her life, and after her death for the use of her daughter, Margaret Buck, during her life, and after her death then in trust as to the remainder for such child or children of her daughter as she might leave, but, if the daughter died without leaving descendants surviving her, then in trust to convey the remainder to Mary Harwood, a sister of the grantor. The sister survived the grantor, but died before the daughter, who afterwards died unmarried and without issue, having made a will by which she devised and bequeathed all the property to which she might be entitled at the time of her death to her aunt. It was held that the limitation over of the remainder to the sister of the grantor, after the death of the daughter, without leaving descendant surviving her, was a contingent remainder, which passed upon the death of the sister to her heirs, in whom it became vested upon the happening of the contingency.

It is contended by the appellees that this is one of the cases which overruled *Hambleton v. Darrington*, supra, but we do not so understand it. It is true the court said: "If Mary Harwood had outlived Margaret Buck, the younger, there is no doubt that the contingent remainder thus limited would have become an absolute estate vested in her im-

mediately upon Margaret's death without issue living at that time. But Mary Harwood having died during the lifetime of the tenant for life, so that the estate could not vest in her, it is contended that her heirs have no title to the estate." But the court went on to quote from 4 Kent's Com. 262, that "contingent and executory, as well as vested interests, pass to the real and personal representatives according to the nature of the interest, and entitle the representatives to them, when the contingency happens"; and again from Barnitz's Lessee v. Casey, 7 Cranch, 469, 8 L. Ed. 403, that: "It is very clear that contingent remainders and executory devises at common law are transmissible to the heirs of the party to whom they are limited if he chance to die before the contingency happens." It was not necessary in that case to determine whether they were devisable, for Mary Harwood had made no will, but the court did not say or intimate that such estates as are transmissible are not devisable, as had been held in *Hambleton v. Darrington*. Our testamentary laws provide that any lands, etc., which can be conveyed, or descend to or devolve upon heirs, or other representatives, and all personal property which might pass by deed, etc., can be disposed of by will, and hence it might be argued from them that an estate which is transmissible is devisable. In discussing the question who were the heirs of Mary Harwood entitled to the estate, the court said: "It is clear that those only can take who were in esse at the time when the contingency happened and the estate fell into possession. That did not occur until after the death of Margaret Buck. She could not, therefore, be heir, or take or transmit any interest in the estate by will or otherwise." But that does not reach the question in this case. The rule is that only the heirs of the contingent remainderman who are in esse when the contingency happens and the estate falls into possession can take, and, as Margaret Buck was not then in esse, she was not an heir, and, of course, she could not take or transmit any interest in the estate by will or otherwise, but that does not affect the other rule that an estate which is transmissible is devisable. That clearly means devisable by the designated remainderman, and it does not mean that it is devisable after the contingency happens, for then it is no longer a remainder, but has become the absolute property of the remainderman, unless, of course, there be some other provision in the instrument creating it which may affect it. Judge Grason delivered the opinion in *Buck v. Lantz*, and sat in *Hambleton v. Darrington*, and Judges Bartol, Miller, and Alvey sat in both cases. Surely, if they had intended to overrule *Hambleton v. Darrington*, they would have said so.

In *Demill v. Reid*, 71 Md. 175, 17 Atl. 1014, the testator devised real estate to his son in trust, for the use and benefit of his

grandson for life, and from and after the decease of the grandson, then in trust for the child or children of the grandson, if he left any, but, if he died without leaving a descendant, or if he left descendants who subsequently died under lawful age and without issue, then to the children of the testator's son. The court held that the will "created a contingent remainder, with a double aspect, and not an executory devise," and "where there is an ultimate limitation upon a contingency to a class of persons plainly described, and there are persons answering the description in esse when the contingency happens, they alone can take." The testator died in 1860, the grandson died in 1866, without leaving issue, and the son had died in 1887. The son had six children, three of whom were living at the time the case was heard. One died in 1875, intestate and leaving no descendants. Another died in the lifetime of her father, leaving an only child who also died in the lifetime of the father, leaving no issue, and another died in 1874, leaving four daughters who were still living. The question was whether those four daughters took the interest which their mother would have taken had she survived the life tenant, or did it all go to the three children of the son who did survive the life tenant? The court said: "As a general rule, a contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens"—referring to *Fearne*, 364. Judge Miller then quoted from 4 Kent's Com. 261, that "it is settled that all contingent estates of inheritance, as well as springing and executory uses, and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent, and are devisable and assignable." The court referred to the fact that the doctrine was vigorously criticised by Mr. Bingham in his book on descents, but said it had been recognized by this court in several cases by which the court felt bound, and added: "The rule by its terms applies where the person to take is certain—that is, where an individual is named or definitely described as the party to take when the contingency happens—and of this the case of *Hambleton v. Darrington*, 36 Md. 435, affords an illustration. Of like character are the other Maryland cases to which reference has been made. *Snively v. Beavens et al.*, 1 Md. 208; *Buck v. Lantz*, 49 Md. 444." The court then put this inquiry, "Now does this rule apply to a case where there is a limitation by way of contingent remainder to children as a class, and where there are those of the class answering the description, and capable of taking at the time the contingency happens and the estate arises and becomes vested?" and held that the expression "'children of the testator's son' did not include the issue of a child in being at the death of the tes-

tator, but who died before the happening of the contingency." This case, therefore, clearly recognized the rule that where the person to take is certain, contingent estates of inheritance, as well as springing and executory uses, etc., are transmissible by descent, and are devisable and assignable, and that, too, in a case in which it was considering a will which created a contingent remainder with a double aspect—where there were "two contingent fees not limited to take effect the one upon or after the other, but the one to take effect to the entire exclusion of the other, and the falling out of the contingency is to decide which of the two is to take effect." It further clearly recognized the distinction between a case where an individual is named, or definitely described as the party to take, and one where there is a limitation to a class, and it also demonstrated that *Hambleton v. Darrington* was not overruled by *Buck v. Lantz* by citing it as an illustration of the rule above stated, and also citing *Buck v. Lantz*. The case of *Larmour v. Rich*, 71 Md. 369, 18 Atl. 702, throws no light on the subject. The court held that by the terms of that will the remainder given to the children of the testator's daughter did not vest until the death of the parent. In *Reid v. Walbach*, 75 Md. 217, 23 Atl. 472, it was again said, "Contingent estates of inheritance will pass by descent and are also devisable"—citing *Spence v. Robins*, 6 Gill & J. 513, 26 Am. Dec. 587, and *Hambleton v. Darrington*, supra. Nor does *Garrison v. Hill*, 79 Md. 75, 28 Atl. 1062, 47 Am. St. Rep. 363, affect the question. There, as in *Buck v. Lantz*, the will under discussion was that of the life tenant, and not of the contingent remainderman. As the remainderman died before the contingency happened, without leaving a will, under the rule above referred to, only such heirs could take as were in esse when the contingency happened, and, as it happened at the time of the death of the testatrix, of course she was not an heir, and she could not dispose of the remainder by her will. The rule which declares that contingent estates of inheritance will pass by descent and are also devisable (which is again announced in *Garrison v. Hill*) means that they are devisable by the contingent remainderman, as we have seen, but, of course, his will does not take effect on such remainder until the happening of the contingency. If it does happen, and he has willed it, then his devisee takes the interest he would have had if he had been then living. That is clearly the meaning of the cases on the subject.

Great reliance is placed by the appellees on *Lee v. O'Donnell*, 95 Md. 538, 52 Atl. 979, and it is contended that it overruled *Hambleton v. Darrington*. In the first place, it might be said that this court would not intentionally overrule a case, especially one which would affect titles to property, without even mentioning it, but there was not

only no such intention, but in our judgment it does not in any way have such effect. After stating the facts fully, and the contention of the widow and administratrix of Louis Courtney O'Donnell, who was one of three grandchildren named by the testator as contingent remaindermen, the court said: "The obvious answer to this contention is that, according to the clearly expressed intention of the testator, the estate did not vest, or become the property of Louis Courtney O'Donnell, her husband, who died intestate on May 27, 1885, until the death of the life tenant, Oliver O'Donnell, who did not die until the 15th of November, 1901." Then, after quoting the part of the will which made the trust for the benefit of his grandson, Oliver O'Donnell, during his life, and referring to the provision for the remainder which began by saying, "and from and immediately after the decease of my said grandson, Oliver O'Donnell, in trust," etc., the opinion proceeded: "Here the use of the words 'from and immediately after the death,' taken in connection with the other parts of the will, fixed the period or point of time with reasonable certainty at which the estate should vest and become the property of his other grandchildren. The testator plainly states the contingency which shall first happen before the property should take effect and vest in the grandchildren named in the will, and that was the death of Oliver O'Donnell, without issue. The husband of the appellant, Nina O'Donnell, having died in the lifetime of the life tenant before the time fixed for the contingent remainder to vest in him (she) is not therefore entitled to share in the distribution of his property under the 16th article of the will, either in her right as widow or as his administratrix"—citing *Larmour v. Rich*, 71 Md. 384, 18 Atl. 702, *Cox v. Handy*, 78 Md. 108, 27 Atl. 227, 501, and *Nowland v. Welch*, 88 Md. 51, 40 Atl. 875. The court then considered the remaining question, whether trust created by the will determined at the death of the life tenant. It is obvious that the opinion was based on the construction of the will, which the court held showed the intention of the testator to be that the contingent remainderman should not take until after the death of the life tenant—relying on the language quoted above, taken in connection with other parts of the will.

There is another part of the will that strongly sustains the conclusion reached. It is that part which provided that, in the event of the death of any of the three grandchildren under 21 years of age and without issue, the "share of him or her or them so dying shall go to and become the property of the survivors or survivor of them absolutely" etc., and in case all three of them died under 21 and without leaving issue, then the will provided that the said share "shall go to and become the estate and property of all my other children then living and all the descendants or descendant then living

of such of them as may be then dead," etc. It was therefore impossible to tell until the death of the life tenant who was to take—consequently the person to take was not certain, and hence the rule as announced in *Hambleton v. Darrington* and followed in *Demill v. Reid* and other cases did not apply. That was sufficient to prevent the widow and administratrix from being entitled to share in the interest which would have gone to Louis Courtney O'Donnell, if he had been living at the death of the life tenant. Then, again, Louis Courtney O'Donnell did not make a will, and hence, as decided in *Buck v. Lantz*, only such as were his heirs in esse at the time of the happening of the contingency could take. His daughter, Louisa Courtney O'Donnell, was his only heir, and, as such, she did take what her father would have taken if he had survived Oliver O'Donnell. There is certainly nothing in *Reilly v. Bristow*, 105 Md. 326, 66 Atl. 262, which in any way conflicts with what we have said, or that can be said to sustain the construction placed on *Lee v. O'Donnell* by the appellees. On the contrary, it tends to sustain the position contended for by the appellants, although it is not necessary to now determine whether it went to the extent the appellants contend for it.

We have thus at such great length reviewed many of our own decisions because there seemed to be some misapprehension as to the law on the subject before us in this state. Our conclusions are that *Hambleton v. Darrington* has not been overruled by this court, and that Robert A. Fisher took a transmissible and devisable estate under the will of his father as the person to take was certain, and there was nothing in the will of James I. Fisher which indicated his intention that such interest or right as a contingent remainderman may have before the happening of the contingency should be postponed until the death of the life tenant. It is proper to add that the whole will is not before us, but we assume that, if there had been anything in it affecting the question, it would have been inserted in the record.

We will not further discuss authorities outside of the state, but will cite some not already mentioned, which more or less reflect upon the questions before us. 2 Wash. on Real Prop. (6th Ed.) § 1557; 2 Minor's Inst. 361; 2 Williams on Executors, 888, 889; Pinbury v. Elkin, 1 P. Williams, 564; Peck v. Parrott, 1 Ves. Sr. 236; Robertson v. Fleming, 57 N. C. 387; Heard v. Read, 169 Mass. 216, 47 N. E. 778; Loring v. Arnold, 15 R. I. 428, 8 Atl. 335; Chess' Appeal, 87 Pa. 362, 30 Am. Rep. 361; Hennessey v. Patterson, 85 N. Y. 91; Dunn v. Sargent, 101 Mass. 336; Collins v. Smith, 105 Ga. 525, 31 S. E. 449. In this last case a number of authorities are cited.

2. The next question is whether the language used in the will of Robert A. Fisher was sufficient to, and did, include this re-

mainder. After giving to his wife certain household furniture and plate, he made this bequest: "I give, devise and bequeath unto my brother, Richard D. Fisher, all the rest and residue of my estate, real, personal, and mixed, of which I may die possessed, in trust," etc. That expression was certainly broad enough to include all that he could devise and bequeath, unless the words "of which I may die possessed" so qualify the rest of the clause as to prevent this remainder from passing. There is nothing else in the will or circumstances surrounding it which would indicate an intention on the part of the testator to die intestate as to any property he could devise or bequeath, but the contrary is manifested. It was said in *Barnum v. Barnum*, 42 Md. 311: "There is always a strong disposition in the courts to construe a residuary clause so as to prevent an intestacy with regard to any part of the testator's estate, unless there is an apparent intention to the contrary." And the court referred to Sir William Grant's statement that "it must be a very peculiar case indeed in which there can at once be a residuary clause and a partial intestacy, unless some part of the residue be not well given." In *Dulany v. Middleton*, 72 Md. 76, 19 Atl. 146, Judge Alvey quoted from *Booth v. Booth*, 4 Ves. 407, that "every intendment is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property." As indicating the extent to which this court has gone, even when the testator did not know he had the property which was involved, see *Stanard v. Barnum*, 51 Md. 451, *Dalrymple v. Gamble*, 68 Md. 523, 13 Atl. 156, and *Lindsay v. Wilson*, 103 Md. 252, 63 Atl. 566, 2 L. R. A. (N. S.) 408.

A number of cases reflecting upon the meaning of the term "of which I may die possessed" can be found in the books. In *Thomas v. Blair*, 111 La. 678, 35 South. 811, it was held that the expressions "all my property" and "all the property I possess" were equivalent. In *Brantly v. Kee*, 58 N. C. 332, "all the property I now possess" was held to mean all that the testator "owned," and "therefore included estates in remainder." In *Loring v. Arnold*, 15 R. I. 428, 8 Atl. 335, "all interest and estate in all real estate in Rhode Island" passed upon contingent remainder. In *Whitehead v. Gibbons*, 10 N. J. Eq. 250, "all the rest and residue of my estate, real, personal and mixed, wherever it may be situated or found that I may die possessed of," etc., held to embrace everything that the testator had a right to dispose of not specifically devised or bequeathed. In *Laughlin v. Norcross*, 97 Me. 33, 53 Atl. 834, by "all the estate, real, personal and mixed, wherever found, and however situated, whereof I die seized and possessed," it was held that "the testator evidently meant to include all kinds of rights that were transmissible." See, also, *Cruger*

v. Heyward, 2 Desaus. (S. C.) 422; Heard v. Read, 169 Mass. 216, 47 N. E. 778; Collins v. Smith, 105 Ga. 525, 31 S. E. 449; Woodman v. Woodman, 89 Me. 128, 35 Atl. 1037; Davenport v. Coltman, 9 M. & W. 494; Hemingway v. Hemingway, 22 Conn. 472. And in *Reilly v. Bristow*, supra, the estates of Annie H. Griffin and Frederick H. Griffin were not only vested in possession, but such interests as they might have from their father's estate depended entirely upon a contingency which had not yet been determined when that case was heard, but this court held that their wills would each pass either a third of the whole or a third of the two-thirds under discussion. Frederick's will was, "I devise and bequeath my estate, real and personal," but his sister's was "I give, devise and bequeath all of my property of whatever kind I am possessed, real, personal or mixed," and whether their father died intestate as to any part of the remainder depended upon the contingency whether his three children left children. We are, then, of the opinion that the expression "of which I may die possessed" did not limit the broad language of the testator used in that clause. Nor do we think that the rest of the will indicates an intention not to include such an interest as this. Several years before his death the testator had reason to believe that he would get the benefit of Mrs. Green's share, as he was presumably familiar with the terms of his father's will, and, as he was making provision for his wife and any child or children that he might leave, there is every reason to believe he intended to include everything he could dispose of by will. The mere authority given the trustee to "invest" his property, with power to change said investments, cannot be held to mean that he intended to exclude this remainder, because that could not in its then condition be invested by the trustee. The trust might have lasted years after the contingency happened.

We will reverse the decree, but will order the costs above and below to be paid out of the fund, as both sides have requested that to be done, whatever our conclusion might be.

Decree reversed, and cause remanded in order that a decree may be passed in accordance with this opinion, the costs, above and below, to be paid out of the fund remaining in the hands of the Safe Deposit & Trust Company of Baltimore, substituted trustee.

(109 Md. 304)

MARYLAND, D. & V. RY. CO. v. BROWN.
(Court of Appeals of Maryland. Jan. 12, 1909.)

1. WITNESSES (§ 248*)—EXAMINATION—RESPONSIVENESS OF ANSWERS.

Where a locomotive engineer, who had had no training as a mechanical engineer experienced in the construction of locomotives, was

asked to describe the type of a locomotive, his answer, "I cannot exactly tell what type she was; the only thing I can tell you is that she was old and worn out when they [the railroad company] got her"—was fairly responsive to the question, importing that the engine was of an old type.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 248.*]

2. APPEAL AND ERROR (§ 1052*)—REVIEW—HARMLESS ERROR—UNRESPONSIVE ANSWER OF WITNESS.

The answer was not prejudicial to defendant, where the next witness, an employé of defendant, testified without objection that the engine was an old one, of about the type used on a certain railroad many years ago.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1052.*]

3. DAMAGES (§ 173*)—ADMISSIBILITY OF EVIDENCE—LOSS OF EARNING CAPACITY.

In a personal injury action, where plaintiff had testified that in consequence of his injuries he was unable to pursue his former occupation, or to perform as hard work as before, evidence of what income he had been able to earn and had received since the injury, and what work he had been able to do, was admissible to show the effect of his injury on his earning capacity.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 400; Dec. Dig. § 173.*]

4. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—ADMISSIBILITY OF EVIDENCE—CUSTOM.

In an action by a locomotive engineer against a railroad company for injuries caused by a collision of his engine with a wild engine, which escaped while left standing on a side track with steam up, evidence of the custom at that place as to caring for engines when brought in and not in actual service was inadmissible, since the custom would only be that of defendant, which might be either careful or negligent.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.*]

5. MASTER AND SERVANT (§ 205*)—ASSUMPTION OF RISK—MASTER'S INDIVIDUAL METHODS.

A servant does not assume the risk attending the work as conducted in accordance with his master's individual methods, but only those risks which cannot be obviated by the exercise of ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 205.*]

6. CUSTOMS AND USAGES (§ 5*)—REQUISITES—GENERALITY.

To make a standard test of duty as to caring for live locomotives left standing on side tracks when not in actual service by showing the custom among railroad companies, a general custom prevailing among well-conducted railroads must be shown.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 4; Dec. Dig. § 5.*]

7. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS.

Questions asked an engineer after he had stated how he had disposed of his engine when he came in from a certain run, whether it was the practice down there for engineers, when they bring their locomotives in, to do just what he did at that time, and whether or not an engineer was expected to report the condition of his engine if it was in bad condition when he brought it in, were improper because leading.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 240.*]

8. EVIDENCE (§ 158*)—SECONDARY EVIDENCE.

The question whether an engineer was expected to report the condition of his engine, if it was in bad condition when he brought it in, in effect asked for a rule of the railroad company, and the best evidence would have been the rule itself.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 158.*]

9. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR—EXCLUSION OF TESTIMONY.

The exclusion of an answer to the question was not prejudicial to defendant, where the witness testified that he received instructions to report the condition of the engine, and that he reported to the repair shop that it was all right for service.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

10. EVIDENCE (§ 539*)—OPINION EVIDENCE—EXPERTS.

An assistant master mechanic of a railroad, familiar with the construction of a particular locomotive, having testified that it was in good condition at the time of an accident caused by its running wild, was competent to testify that when its reverse bar was in the center, as it appeared to have been left just before the accident, the locomotive could not move because the ports through which the steam enters the steam chest were closed, and the opening of the throttle would not open them.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 539.*]

11. WITNESSES (§ 37*)—COMPETENCY—KNOWLEDGE OF FACTS—CAUSE OF ACCIDENT.

In an action against a railroad company for injuries from a wild engine, testimony of defendant's assistant master mechanic as to how the accident occurred was properly excluded, where it did not appear that he had seen the engine from the time of its arrival until the accident, nor that it was within his sight when it escaped.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.*]

12. TRIAL (§ 91*)—RECEPTION OF EVIDENCE—STRIKING OUT TESTIMONY—NECESSITY OF EXCEPTION.

Where testimony is admitted without exception, it cannot be stricken out at the close of the testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 242; Dec. Dig. § 91.*]

13. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—EVIDENCE—COMPETENCY—PHYSICAL CONDITION.

A defect in the working of a locomotive throttle, being in its nature continuous, unless repaired, and it being within the power of the railroad company owning it to show repairs, if any are made, the court, in an action against a railroad company for injuries to a servant from an engine running wild, acted within its discretion in refusing to strike out evidence, admitted subject to exception, that the throttle of the engine causing the injury on August 6th was in a defective condition in the preceding July, where defendant offered no evidence of repairs.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 916; Dec. Dig. § 270.*]

14. NEGLIGENCE (§ 127*)—EVIDENCE—COMPETENCY—CONDITIONS PREVIOUS OR SUBSEQUENT TO ACCIDENT.

Whether proposed proof of conditions prior to the occurrence under inquiry is admissible does not depend upon the time of their exist-

ence, but upon their relevancy to the issue and the capability of explaining it, and its admissibility, as well as the requirement of proof of absence of intervening change in conditions, rests in the discretion of the court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 248; Dec. Dig. § 127.*]

15. TRIAL (§ 253*)—REQUESTED INSTRUCTIONS—IGNORING ISSUES.

In an action by a locomotive engineer against the railroad company for injuries from collision with a wild engine, where the declaration embraced three counts, one charging negligence in selection and retention of co-employees, and the others negligence in failing to provide proper tools, etc., and to properly inspect its equipment, charges that, inasmuch as the evidence showed that defendant had employed competent employees, the verdict must be for defendant, were properly refused as withdrawing the entire case from the jury, but referring only to a question raised by the first count, and ignoring those raised by the others.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

16. TRIAL (§ 191*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

In an action by a locomotive engineer against a railroad company for injuries from a collision with a wild engine which escaped from a side track, where there was evidence tending to show that the engine causing the injury, when placed on a side track shortly before the accident, was not in good condition, and it was a question for the jury under the evidence whether the starting of the escaped engine was due to defendant's negligence either in purchasing a defective engine, failing to inspect it, or to watch it on the side track, prayers asserting that the engine when placed on the side track just before the accident was in good condition, and that there was no evidence that the engine as it was so placed was defective in such a way that it would start off, were properly refused as assuming facts which were for the jury to find.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.*]

17. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY—DUE CARE OF MASTER.

In an action by a locomotive engineer against a railroad company for injuries from a collision with a wild engine, where it appeared that the engine had been left on an upgrade side track with sufficient steam up to be able to move up the grade; that a hostler who acted as watchman of the engines had numerous other duties, and there was no evidence of any system of rules, either for inspection of engines or for their safe custody while under steam on a side track, whether defendant exercised due care to prevent the escape of the engine was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

18. MASTER AND SERVANT (§ 110*)—INJURIES TO SERVANT—FAILURE TO FURNISH SUITABLE APPLIANCES.

If a railroad company allowed a locomotive, which was unsafe for the uses to which it was put by the company, to escape from a siding and run unmanned upon the main track, where it collided with a train operated by an employee of the company as engineer, and injured him as a direct result of the company's negligence, and while he was in the exercise of due care, he was entitled to recover for his injuries.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 110.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

19. MASTER AND SERVANT (§ 101*)—INJURIES TO SERVANT—LIABILITY OF MASTER.

A railroad company is not an insurer of the lives or limbs of its employes, but is only bound to exercise ordinary care for their protection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 136; Dec. Dig. § 101.*]

20. TRIAL (§ 253*)—INSTRUCTIONS—PRAYERS—IGNORING ISSUES.

In an action by a locomotive engineer against a railroad company for injuries from a collision with a wild engine, where a defect in the engine was alleged as a possible cause of its escaping, a prayer if the jury find that the escaped engine was standing on the siding in charge of defendant's employes, and ran away by reason of the neglect or carelessness of the employes, defendant should recover, was properly refused as ignoring the alleged defect in the engine.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 253.*]

21. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—ACTIONS—PRAYERS—MISLEADING REQUESTS.

A prayer that a master is bound to use reasonable care to procure sound machinery and appliances for his employes, but is not bound to keep such machinery and appliances free from defects, was properly refused as misleading, as ignoring the nondelegable duty to provide safe tools and equipment.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

22. TRIAL (§ 260*)—REQUESTED INSTRUCTIONS—PRAYERS EMBRACED IN CHARGES GIVEN.

A prayer fully covered by a charge given is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

23. TRIAL (§ 253*)—REQUESTED INSTRUCTIONS—IGNORING EVIDENCE.

In an action by a locomotive engineer against a railroad company for injuries from a collision with an escaped locomotive, where there was evidence tending to show that a defective throttle was the cause of the escape, a prayer that if an employe of the company placed the escaped engine on a siding, chocking its wheels, closing its throttle valve, etc., and leaving it in charge of two hostlers, on an upgrade, and it could get onto the main track only by running through two switches, defendant should recover, unless sufficient hostlers were not supplied to watch the engine, was properly refused as ignoring evidence of the defective throttle, as well as the theory of the application of external force starting the engine.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 253.*]

24. MASTER AND SERVANT (§ 295*)—INJURIES TO SERVANT—ACTIONS—PRAYERS.

In an action by a railway engineer for injuries from a collision with an escaped engine, a prayer that if plaintiff while in defendant's employ had run the engine which escaped, and discovered that it was defective (the throttle bar being worn so that it opened when the hand was removed), and notwithstanding such discovery he remained in the employ, and was subsequently injured by the engine which ran away because of the defect, he could not recover, was properly refused, since he could well assume that such a patent defect would be discovered under any reasonable system of inspection, and be promptly remedied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

Appeal from Baltimore Court of Common Pleas; George M. Sharp, Judge.

Personal injury action by James H. Brown against the Maryland, Delaware & Virginia Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Plaintiff offered the following prayers:

"(2) The jury are instructed that it is the duty of the employer to use due and reasonable diligence, having respect to the nature of the service of the employed, to provide suitable appliances and instrumentalities for doing the work. And if the jury find from the evidence that at the time of the accident and injury to the plaintiff, he was in the service of the defendant as a locomotive engineer, driving a locomotive to which a train of cars was attached from Rehoboth Beach, Del., to Love Point, Md., and whilst so engaged on the 6th day of August, 1905, a collision occurred between said engine, so driven by the plaintiff and another engine unmaned, the property of the defendant, and running wild on the same track on which the plaintiff was operating his engine, and that by reason of such collision the plaintiff was injured, and that such collision occurred because said runaway engine was unsafe and unfit for the uses and purposes to which it was applied by the defendant under all the evidence in this case, then if the jury further find that the plaintiff was without negligence or want of care on his part in the premises directly contributing to the happening of the accident and injury, and that such accident and injury to the plaintiff was directly caused by the negligence and want of care in the premises of the defendant, the plaintiff is entitled to recover." Granted.

"(3) If the jury shall find a verdict for the plaintiff, then in estimating the damages they are to consider his health and condition before the injury complained of, as compared with his present condition in consequence of said injury, and how far, if at all, it is calculated to disable him from engaging in those employments for which, in the absence of such injury, he would have been qualified, and also the physical and mental suffering, if any, to which he was subjected by reason of said injury, and to allow him such damages as in the opinion of the jury will be a fair and just compensation for the injury which he has sustained." Granted.

Defendant offered the following prayers:

"(1) The defendant prays the court to instruct the jury that there is no evidence in this case legally sufficient to show that the defendant failed in any legal duty owing by the defendant to the plaintiff, and that therefore, under the pleadings and evidence, their verdict must be for the defendant." Refused.

"(2) The defendant prays the court to in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

struct the jury that there is no evidence in this case legally sufficient to entitle the plaintiff to recover, and that therefore under the pleadings and evidence herein the verdict must be for the defendant." Refused.

"(3) The defendant prays the court to instruct the jury that if they find that the locomotive called in the testimony 'runaway locomotive' was standing on the siding on the day the injuries were sustained by the plaintiff, as testified to by the defendant's witnesses, and that the said locomotive was in charge of the defendant's employes, as testified to by the defendant's witnesses, and that the said locomotive ran away, and that the said running away was occasioned by the neglect or carelessness on the part of those placed in charge of the same by the defendant, then their verdict must be for the defendant." Refused.

"(4) The defendant prays the court to instruct the jury that if they shall find that the plaintiff was in the employ of the defendant in July, 1905, as engineer, and that as such engineer he ran engine No. 1, as testified to by him, and that in running said engine, he discovered that she was defective in the manner testified to by him, and that, notwithstanding such discovery, he remained in the employ of the defendant until August 6, 1905, and that on said last-mentioned day he was injured in the manner testified to by the plaintiff and his witnesses; that engine No. 1 ran away by reason of the defect aforesaid—the plaintiff is not entitled to recover under the pleadings and evidence, and their verdict must be for the defendant." Refused.

"(5) The defendant prays the court to instruct the jury that if they shall find that on August 6, 1905, the plaintiff was in the employ of the defendant in the capacity of engineer, and that late in the afternoon of said day was bringing, in said capacity, one of the defendant's trains to Love Point, and if they shall further find that engine No. 1, on August 6, 1905, was in good order; that on the morning of that day she was moved by the witness Exeter to the water tank, and then returned to the side track; that after reaching said track, said witness turned off the steam by closing the throttle valve, put the reverse bar in the center, chocked her wheels, and then left her in charge of the hostlers; that said hostlers were competent employes; that said engine stood on said side track until late in the afternoon of August 6th—then their verdict must be for the defendant, notwithstanding they may further find that late in said afternoon said engine started off in the manner testified to by the plaintiff's witnesses, and collided with the defendant's train aforesaid, on which plaintiff occupied the position of engineer, thereby injuring the plaintiff." Refused.

"(6) The defendant prays the court to in-

struct the jury that if they find from the evidence that the plaintiff sustained the injuries testified to by the plaintiff's witnesses, and that the injuries were caused by a defective condition of the locomotive called in the testimony 'runaway locomotive,' and if they find that the said defective condition was due to a latent or hidden defect not discoverable by any reasonable or ordinary inspection, then their verdict must be for the defendant." Granted.

"(7) The defendant prays the court to instruct the jury that an employer is bound to use reasonable care to procure sound machinery and appliances for his employes, but it is not bound to keep such machinery and appliances free from defects." Refused.

"(8) The defendant prays the court to instruct the jury that if they find from the evidence that the injuries to the plaintiff were the result of an inevitable accident, then their verdict must be for the defendant." Granted.

"(9) The defendant prays the court to instruct the jury that if they find from the evidence that the plaintiff sustained the injuries, as testified to by the plaintiff's witnesses, and that the injuries were caused by a defective condition of the throttle valve of the locomotive called in the testimony 'runaway locomotive,' and if they find that the defective condition of the throttle was due to latent or hidden defects not discernible by any reasonable or ordinary inspection, then their verdict must be for the defendant." Refused.

"(10) The defendant prays the court to instruct the jury that inasmuch as the evidence shows that on August 6, 1905, the plaintiff was employed by the defendant in the capacity of engineer in running its engine, and inasmuch as the evidence further shows that on the morning of August 6, 1905, the witness Exeter, also in the employ of the defendant in its machine shops, placed engine No. 1, then in good condition, on the side track at Love Point, turned off the steam by closing the throttle valve, put the reverse bar in the center, chocked her wheels as testified to by him, and then left her in charge of the hostlers who were competent employes, and that said engine stood on said side track until late in the afternoon of the 6th day of August, and that said side track ran upgrade towards and entered the roundhouse track by a switch, and that the roundhouse track entered the main track by a switch, and that said engine in order to get on the main track had to run through said two switches, their verdict must be for the defendant under the pleadings and evidence." Refused.

"(11) The defendant prays the court to instruct the jury that inasmuch as the evidence shows that engine No. 1 was placed on the side track by the witness Exeter, her steam shut off by the closing of her throttle

valve, her reverse bar in the center, and her wheels chocked, and inasmuch as there is no evidence to show that engine No. 1 was defective in such a way that she could start off in the condition and under the circumstances in which she was placed by the witness Exeter on said side track, and inasmuch as the evidence shows that the defendant employed competent employes, and placed them in charge of said engine, their verdict must be for the defendant under the pleadings and evidence in this case." Refused.

"(12) The jury are instructed that the defendant is not an insurer of the lives or limbs of its employes, but is bound to use ordinary care for their protection; that the plaintiff, when he accepted employment with the defendant, assumed all risks ordinarily incident to the business as conducted by the defendant; that among such risks is the negligence of co-employes; that Exeter and the two hostlers are co-employes of the plaintiff, and if the jury find that engine No. 1 ran away by reason of the negligence of said Exeter and the two hostlers, or any of them, the plaintiff is not entitled to recover, and their verdict must be for the defendant, provided that the jury shall find that the defendant used ordinary care and caution in supplying a sufficient number of hostlers to watch and attend engine No. 1 placed on the side track in question, under the conditions and circumstances testified to by the plaintiff's witnesses." Granted.

"(13) The jury are instructed that the defendant is not an insurer of the lives or limbs of its employes, but is bound to use ordinary care for their protection; that the plaintiff when he accepted employment with the defendant assumed all risks ordinarily incident to the business as conducted by the defendant, which he knew, or could have known, by the use of ordinary care, and if the jury shall find that the witness Exeter on August 6, 1905, placed engine No. 1 on the side track; that he chocked her wheels as testified to by him; that he closed her throttle valve and put the reverse bar in the center, and then left her in charge of two hostlers, as testified to by him; that said side track ran upgrade to and joined the roundhouse track by a switch, and that the roundhouse track joined the main track by a switch, and that said engine No. 1 could only get into the main track by running through said two switches; that engine No. 1 stood as so placed until late in the afternoon of August 6th, their verdict must be for the defendant under the pleadings and evidence in this case, unless the jury shall find that the defendant did not use ordinary care and caution in supplying a sufficient number of hostlers to watch and attend to her." Refused.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, and WORTHINGTON, JJ.

Ralph Robinson and Edward Duffy, for appellant. William Colton, for appellee.

PEARCE, J. The appellee, who was employed by the appellant as an engineer to operate certain of its trains over its railroad between Love Point in Queen Anne county, Md., and Rehoboth, Del., brought this action to recover damages for injuries received by him in a head-on collision between the engine and passenger train which he was running at the time and another engine with a tender and coal car attached, which was unmanned and running wild on the same track; the railroad being a single track road. The collision occurred about 8 o'clock in the evening of August 6, 1905, at a point a few miles from the Western terminus of the road at Love Point, and almost immediately after crossing Kent Island Narrows, the stream which separates Kent Island from the mainland of Queen Anne county. In crossing this stream the plaintiff had reduced the speed of his engine and train to about 10 miles an hour in accordance with standing instructions, and was just getting under headway again when he and his fireman caught sight of the runaway engine about two engine lengths away, when it was impossible to do anything to avert the collision or break its force, and the result was that the plaintiff was thrown from his engine unconscious, and was severely injured; that he was not able to do anything for over a year, and incurred a bill for medical services of \$100; that he was scalded, cut on the head, and had his teeth knocked out, and still suffers much and constant pain; that he attempted, after the lapse of a year, to run a train on defendant's road, and did so for about a month, when he was unable to stand it, and was obliged to give it up, and took up firing for the United Railways & Electric Company at the Pratt Street Power House, which is much lighter work than running a train. His wages as engineer were \$80 a month, and his pay as fireman for the United Railways was \$2.25 per day, and he began that work in June, 1907. Before that he kept a livery stable, but made not over \$1 a day at that, and he only kept this stable about six months in all. The engine he was running at the time of the collision was known as No. 3, and it was properly manned and lighted. The runaway engine was known as No. 1, and was unlighted and unmanned. The jury found a verdict for the plaintiff for \$3,000, and from the judgment on that verdict the defendant has appealed.

There are 12 bills of exception in the record, of which 11 are to rulings on evidence, and 1 to the ruling on the prayers. There are three counts in the declaration. The first count charges, as the cause of the plaintiff's injuries, that the defendant did not exercise due and ordinary care in the selection, employment, and retention of reasonably com-

petent and proper co-employees with whom the plaintiff was required to work. The second count charges the defendant with negligence in failing to provide reasonably safe and proper tools and equipment for the performance of the work required of its servants, and exposed him to unnecessary risk and danger while so employed, in that while running his own train on defendant's road on August 6, 1905, his said train, because of the unfit and unsafe condition of another train on said road, collided with said last-mentioned train, and he was injured in consequence thereof. The third count charges that the defendant neglected to exercise due and ordinary care in the inspection of the equipment of the railroad, in and about which the plaintiff was required to work, in consequence of which the plaintiff's train collided with an unmanned and wild engine on the same track, causing the injuries complained of.

The first exception arose in this way: The plaintiff, after testifying to the facts of the collision, said that he had run engine No. 1 before the collision, and, being asked what was her condition at that time, replied that she was not in very good condition. The defendant moved to strike out that question and answer, and the court said, "You will have to bring it nearer than that—say within a week or so." Plaintiff's counsel replied, "I will cover that," and the court said, "It will be admitted, subject to exception." The plaintiff then testified as follows: "I think it was in July I ran her, the latter part of July to the best of my recollection. It was in bad shape; it was an old engine, and when you ran her on the road, and you happened to take your hand off the throttle, her throttle bar would work open. The throttle bar is what gives her life; it is what makes her move. When it opens it puts her in motion." The court here asked, "Why did it open?" and he replied, "The throttle was old and worn out, and the spring was weak to the best of my judgment." He was then asked to describe the type of engine No. 1, and answered, "I cannot exactly tell what type she was; the only thing I can tell you is that she was old and worn out apparently when they got her." Defendant moved to strike out the last answer as not responsive to the question, and the court refused the motion. We do not think it can be said this answer was not fairly responsive to the question. This man was not a mechanical engineer trained or experienced in the construction of locomotives. He was a farmer first, then foreman of a force for the defendant, and in 1905 became one of its locomotive engineers. His answer imported that it was an old type, being, as he added, worn out when the defendant got it. Moreover, this answer could not work any injury to the defendant, because the next witness, John F. Hess, a fireman of defendant, and assistant machinist, testified without objection that it

was "an old engine, about the type used and operated on the Philadelphia, Wilmington & Baltimore Railroad many years ago." There was therefore certainly no reversible error in this exception. The second, third, and fourth exceptions all relate to proof of the plaintiff's earning capacity as affected by his injuries, and may be considered together. Having previously described his injuries, and stated that in consequence he was unable to pursue his former occupation, or to perform as hard work as before, he was asked in the second exception what income, if any, he had derived from any source since the accident. He replied that he was not able to do any work until June, 1907, when he went to firing for the Electric Railways at a power house, which is light work. In the second exception he was asked what he received for this work, and he replied \$2.25 a day. In the third exception he was asked what income, if any, he had before June, 1907, and he replied only from a livery stable he kept for about six months, which gave him a bare living, about \$1 a day. It was certainly proper for the jury to know how his injuries affected his earning capacity, and there could be no better evidence of this than a comparison of what he had testified were his earnings at the time of his injury, with those he was capable of earning and did receive afterwards. It was the privilege of defendant, upon cross-examination or otherwise, to show, if it could, that he did, or could with proper effort, have earned more than he testified, and we can perceive no error in these rulings.

The fifth, sixth, and seventh exceptions relate to the exclusion of evidence offered by defendant as to its custom in the conduct of its business. The defendant's assistant master mechanic, Louis Exeter, being called for the defendant, testified that on the morning of the accident he repaired the injector of engine No. 1, which the hostler reported out of order, and that when this was done she was in first-class order; that he then backed her to the siding from the main track to the roundhouse, chocked her, put a bar in the center, and left her; that he looked at her again about 5:30 that evening, and her throttle bar and reverse bar were all right, and she was in first-class condition for service; that the duties of a hostler are to clean and fire the engines, and keep them steamed and watered, and to be around the roundhouse and watch the locomotives; that some hostlers look after 5, some after 10, and some as many as 30, engines, but on that day, at that time, there was only one to look after. He was then asked, "Is he expected to stay on the engine?" This was objected to, but was answered "No," after objection was made, and on motion this was stricken out. This was the fifth exception. He was then asked, "What is the custom down there as to locomotives when they are brought in, what is

done with them, what is done as to their steam, and how is their steam kept?" This was the sixth exception. He was further asked, "What was the custom as to railroad companies leaving engines in the yard when they are not in actual service, with steam on them?" and this is the seventh exception. It would hardly be necessary to cite authority to sustain the rulings on the fifth and sixth exceptions, since the usage or custom there inquired into was merely the custom of the defendant. Its custom might be either careful or negligent, and, in itself, could not aid the jury in determining whether the defendant was or was not negligent in its management of live engines left standing on a side track. That was to be properly determined from the evidence as to how that engine was cared for, under such instructions as should be sought and granted by the court. The servant does not assume the risk attending the work as conducted in accordance with his employer's individual methods. *Labatt on Master & Servant*, § 53, p. 137. He assumes only those which cannot be obviated by the exercise of ordinary care. *Id.* § 2, p. 4. The question which gave rise to the seventh exception is not in our opinion properly framed. It is not proposed to show a universal, or even a general, custom prevailing in railroad management. It is so vague as to leave it in doubt whether it was intended to apply to all, or only to some, of the vast number of railroads in this country. It does not limit the question to well-conducted railroads, and would permit the jury to adopt a standard of care based upon the custom of other roads, whether careful or negligent. The requirement that the inquiry as to usage or custom in such cases should refer to well-conducted railroads was emphasized in *Benson v. N. Y., N. H. & H. R. R.* by the Supreme Court of Rhode Island, 23 R. I. 147, 49 Atl. 691, and also in *L. & N. R. R. v. Jones* by the Supreme Court of Alabama, 130 Ala. 473, 30 South. 592. In the latter case the court said: "A charge proposing to make a standard test of duty by the usage of eight railroad companies was invasive of the province of the jury." We find no error in these rulings.

The eighth and ninth exceptions present the same question substantially, and differ but little in principle from the exceptions just considered. James E. Willey, one of the defendant's locomotive engineers, had testified that he ran No. 1 from Rehoboth to Love Point the day before the accident; that the throttle did not leak, and he had no trouble with it, and he then stated what he did with this engine when he came in from that run. He was then asked, "Is it the practice down there for engineers, when they bring their locomotives in, to do just what you have done in this case?" and again he was asked, "State whether or not an engineer is expected to report the condition of his engine, if it is in bad condition when he

brings it in." Both questions were objected to, and the witness was not allowed to answer. What has been said of the three preceding exceptions is applicable to these, and in addition thereto both are leading questions. The last really asks for a rule of the company, and the best evidence would be the rule itself, to be followed by proof of compliance on that occasion with the rule. Notwithstanding this ruling, however, the record shows that after it was made this witness testified "that witness received, and his instructions were, to report the condition of the engine, and that he reported it to the repair shop," and the record also shows that before the eighth exception he testified without objection that "he reported her condition was all right for service," so that the defendant received the full benefit of the question in the ninth exception.

Marion F. Young testified for defendant that he was its assistant master mechanic, and saw engine No. 1 when she was delivered to defendant in May or June, 1905, and that she was in good condition at the time of the accident. He then testified at considerable length as to the construction of engine No. 1, using a sectional blue print of a similar locomotive for the purpose of illustration, and testifying that when the reverse bar is in the center (as Exeter had testified he left it when the engine was placed on the side track), the locomotive could not move because the ports through which the steam is let into the steam chest are closed, and that the opening of the throttle would not open the ports. He was competent to so testify, and the testimony was proper for the jury. He was then asked, "Do you know how this accident happened?" and, the plaintiff objecting, he was not permitted to answer, and this constitutes the tenth exception. We have carefully examined the testimony of this witness to discover the foundation for this question. There is not a particle of evidence when this witness saw this engine or examined it, between its arrival and this accident. The only evidence is that he examined the steam pipes of this engine after the accident, leading to the throttle, and they were in good condition. He said, "She was not just old junk, and that the company was keeping some of the crossheads and valves which they may use some day." There was no evidence that he was near the engine, or that it was within his sight when it escaped. But the defendant contends that he should have been allowed to answer this question, "both because he may have been present at the time No. 1 left, or because he found out the reason she left by an examination of her after the accident." If he was present when she escaped, that fact should have been affirmatively shown, as the foundation for the question, though we are not to be understood as saying that this alone would be a sufficient foundation without a full statement

of all that he saw at the time of the escape, and we cannot agree that this post mortem examination of an engine wrecked by such a collision could enable this witness to testify that he knew the cause of the accident. It is perhaps possible that as an expert machinist he might form some opinion of the cause of the accident, but we are not prepared to say that the expression of such an opinion would afford the jury any rational basis for a conclusion by them, and in our opinion the ruling was correct. At the close of all the testimony the defendant moved to strike out the testimony of the plaintiff, as to the condition of the engine in July, 1905, and the defect in the throttle bar, all of which was admitted subject to exception; also to strike out the testimony of John A. Roe, the fireman on plaintiff's train at the time of the accident, to the same effect as Brown's, relating to the condition of the throttle. The record shows that Roe's testimony was not admitted subject to exception, and therefore cannot be stricken out. Nor do we think the testimony of either should be. We think this testimony brings the inquiry sufficiently close to the accident in point of time, if there is no other objection to its admission. The defendant contends that proof of defect before an accident cannot be received without offer of proof to show that the thing remained in the same condition down to the moment of the accident.

In discussing this subject Mr. Wigmore, in volume 1, § 437, of his work on Evidence, says: "That no fixed rule can be prescribed as to the time, or the conditions, within which a prior or subsequent existence is evidential is sufficiently illustrated by the precedents from which it is impossible (and rightly so) to draw a general rule. They may be roughly grouped into two classes—those in which the evidence has been received without any preliminary showing as to the influential circumstances remaining the same in the interval (thus leaving it to the opponent to prove their change by way of explanation in rebuttal), and those in which a preliminary showing is required. Whether it should be required must depend entirely on the case in hand, and it is useless to look to or wish for any detailed rules. * * * The matter should be left entirely to the trial court's discretion." This is in accord with what was said in *Brooke v. Winters*, 39 Md. 509, that "whether the proposed proof of facts subsequent to the suit were admissible or not did not depend upon the time of their existence before or after the suit, but upon their relevancy to the issue and their capability of explaining it. The mere fact that such evidence referred to circumstances subsequent to the suit did not, per se, render it collateral and inadmissible." We think the discretion of the court was not abused, or mistakenly exercised, in refusing to strike out this evidence. Such a defect is in its nature con-

tinuous unless repaired. If repaired, it was in defendant's power to show such repair, and this it did not do. The witness Exeter testified that he repaired the injector, but he discovered no defect in the throttle, and made no repairs upon it. The witness Young, who succeeded Exeter as assistant master mechanic, made no repairs and discovered no defect. They both denied the existence at any time of such defect, and their denial went to the jury with the plaintiff's affirmation. Young testified that he had known this engine a long time when she was in the service of the Philadelphia, Wilmington & Baltimore Railroad, and that she was built in 1881. She was purchased from that company for defendant by Mr. Stratner, who was defendant's master mechanic at the time of trial also, but he was not produced as a witness. Upon a review of the whole situation we cannot doubt the refusal to strike out this testimony was correct.

This brings us to the ruling on the prayers of which the plaintiff offered 3, and the defendant 13. The plaintiff's first prayer was refused, and is not in the record, and his second and third were granted; the defendant's special exceptions thereto being overruled. The defendant's sixth, eighth, and twelfth prayers were granted, and its first, second, third, fourth, fifth, seventh, ninth, tenth, eleventh and thirteenth were refused, and the defendant excepted to the overruling of its special exceptions to plaintiff's second and third prayers, and to the granting of these prayers, and also to the rejection of its own refused prayers. We are told in the plaintiff's brief that his first prayer was founded on the doctrine of *res ipsa loquitur*, but that prayer is not before this court.

The defendant's first and second prayers asked the court to instruct the jury that the plaintiff could not recover under the pleadings and evidence. The defendant's tenth and eleventh prayers attempt to recite the evidence as undisputed, and assert that the verdict must be for the defendant under the pleadings and evidence, thus withdrawing the case from the jury. If the first count in this declaration, which charges negligence in the selection and retention of reasonably competent co-employees, were the only count in the declaration, this question would be raised, but the second count charges negligence in failing to provide proper tools and equipment, and the third count charges negligence in failing to properly inspect its equipment. The tenth and eleventh prayers should have been confined to the first count. Moreover, both these prayers are defective in assuming facts which it was for the jury to find. The tenth prayer asserts that engine No. 1, when placed on the side track on August 6th was "in good condition," whereas there was evidence tending to show it was not in good condition. The eleventh prayer asserts that "there was no evidence to show that engine No. 1 was defective in such a way that she

could start off, in the condition and under the circumstances in which she was placed on the track by Exeter." We think, notwithstanding Exeter's testimony on that point, that it was still a question for the jury whether the actual starting, which was proved, was due to the negligence of the defendant either in the original purchase of a defective engine, in the failure to make proper inspection, or to keep a proper watch on the engine while standing on the track, and these prayers were in our opinion properly rejected.

The defendant relies, chiefly to sustain its first and second prayers, upon the language adopted in *South Baltimore Car Works v. Schaefer*, 96 Md. 105, 58 Atl. 665, 94 Am. St. Rep. 560, where there was merely a sudden and unexplained breaking of a piece of machinery, and the court held that in an action by a servant against the master this did not justify the presumption of negligence on the master's part, "when there is no evidence that defects in it could have been discovered by inspection, or that due care had not been exercised in its selection," and the court said: "To punish the defendant because it cannot explain the cause of the break is not to punish it because it has done wrong, but because it does not know what we wish to find out." But in the case before us the plaintiff had offered evidence tending to show a defect which, if it existed when the engine was purchased, could have been discovered by a proper examination, or which, if it was brought about after the purchase, could have been discovered by any proper system of inspection. In *Moran's Case*, 44 Md. 283, where an employé was injured by an explosion occasioned by the defective and worn-out condition of the boiler, the master was held liable for the negligence of its master mechanic, to whom had been delegated the power to select and purchase the engine. *Stratner*, in that capacity, purchased this engine, and he was not called to state what examination, if any, he made by which the defect, if it then existed, could have been discovered, though it had been purchased only about two or three months before, and there was testimony that she was at least 24 years old. Exeter himself testified that she was "very old." John F. Hess, an extra machinist of defendant, testified that she was an old engine of a type operated many years ago on the Philadelphia, Wilmington & Baltimore Railroad, and he also testified that the leaking of the throttle might start an engine, "because the escape from the steam through the lubricator in such case could gain access to the cylinder." This was in direct conflict with Exeter's testimony on that point. In *Crawford v. United Railways, etc., Co.*, 101 Md. 417, 61 Atl. 291, 70 L. R. A. 489, this court said: "It is not enough that the master employs competent servants. * * * He must exercise reasonable care and supervision over them, and see that they do their

duty. And when the business of the master is such that the safety of one servant depends upon the way in which other servants do their work, it is the duty of the master to adopt, promulgate, and enforce reasonable and sufficient rules to protect and promote the safety of its employés exposed to danger." There is no evidence of any system of rules here, either for inspection of engines or for their safe custody while under steam on a side track.

This case has its parallel in the case of *Southern Pac. Ry. v. Lafferty's Adm'x*, 57 Fed. 536, 6 C. C. A. 474, 15 U. S. App. 195, where a brakeman was killed in a collision with another engine of defendant, which in some unexplained way escaped from a side track to the main track, but the present case is stronger because of the evidence of a defect which might have caused the engine to start. The court said that if live engines, "if put in motion of themselves, or by the act of careless, thoughtless, or evil-disposed persons," should escape on the main track, "they would in the very nature of things expose to unusual peril and hazard all the employés of the company in charge of other engines and cars upon the main track," and that it was for the jury to determine as a question of fact whether the employment of Riley as a watchman, with the additional duties imposed upon him, was a reasonable precaution upon the part of the company. The evidence in this case is that the hostler who acted as watchman of the engines had other numerous duties assigned him, and in *Lafferty's Case*, supra, the court left it to the jury to determine whether one man, no matter how competent, careful, and trustworthy, could properly guard the two engines spoken of in that case while performing the duty of wiping them and putting them in order.

A very strong and well-reasoned case is referred to in *Lafferty's Case*, supra, viz., *Smith v. N. Y., Susq. & West. R. R.*, 48 N. J. Law, 7, where a railway company was held liable for injuries caused by a collision resulting from the movement of certain cars, which had been left on a siding in such a situation that a wrongdoer could readily throw them on the main line. It is true that the action in that case was by a passenger; but, while recognizing the general distinction, the court in *Lafferty's Case* found the citation in point. In that case the railroad company left a loaded car, coupled with two empty cars, at a safe distance on a siding inclined towards the main track, with the brakes all set, and a railroad tie placed beneath the wheels of the loaded car. These cars got upon the main track, but there was no direct evidence as to what caused them to move. In the case before us the grade was up from the side track, but the engine was under steam and able to move upgrade. In the *Smith Case* Chief Justice Beasley was asked to charge "that if the jury are satisfied from the evidence that on Sunday evening the stone car with which the

passenger car afterwards came into collision on that evening had been made fast by means of a bar and brakes, at a safe distance from the main track, and incapable of motion towards the same, without the removal of the bar and brakes and the application of external force, and there was no want of due diligence in stopping the train, then the defendant is not guilty of negligence, and there can be no recovery." Also he was requested to charge "that when an obstruction is placed upon a railroad by a stranger, by accident or design, the company is not liable for the consequences, unless its agents have been remiss in not discovering it." He refused both instructions, and sent the case to the jury, giving as his reason therefor that "each of them, if adopted, committed the court to the doctrine that the action could not be supported if the cars in question were so securely fastened that but for the intervention of extraneous force they would not have got upon the main track, or that they would not have done so without the unlawful action of human agency. * * * Such a question is essentially one for the jury. The judge could not be properly called upon to pass any opinion as to the sufficiency of the means employed, nor that such means were legal if they would have held the cars in position, without the application of external force."

Upon these principles and authorities we think the defendant's first and second prayers were properly refused. The plaintiff's second prayer required the jury to find that engine No. 1 was unsafe and unfit for the uses to which it was applied by the defendant under all the evidence, and that the plaintiff was not guilty of any want of due care on his part, and embraced all the other requisites of recovery. The special exception thereto for the want of evidence that it was unsafe and unfit for the uses to which it was applied was properly overruled, and the prayer was properly granted. The plaintiff's third prayer was the usual damage prayer, and it follows from what we have said in discussing the second, third, and fourth exceptions that the special exception thereto, on the ground that there was no evidence to sustain it, was properly overruled, and that the prayer was properly granted.

The defendant's sixth prayer, which was granted, gave it the benefit of the defense of a latent defect in the engine not discoverable by any reasonable or ordinary inspection. Its eighth, which was granted, gave it the benefit of the theory of inevitable accident, and its twelfth, which was also granted, instructed the jury properly that the company was not an insurer of the lives or limbs of its employes, and was only bound for ordinary care

for their protection. It also instructed the jury that the plaintiff assumed all risks ordinarily incident to the business as conducted by the defendant. We have already intimated that this proposition is too loosely stated, and we must not be understood as sanctioning it.

The defendant's third prayer wholly ignored the alleged defect in the engine as a possible cause of its escaping, and was properly refused. From what we have said in discussing the defendant's first and second prayers, it follows that the defendant's fifth prayer was properly refused. Its seventh prayer ignored the nondelegable duty to provide safe tools and equipment, and, if granted, must have misled the jury. The defendant's ninth prayer was fully covered by the granted sixth prayer, and there was no error in refusing it.

The defendant's thirteenth prayer is in part the same as the twelfth, but it also instructed the jury that if they found Exeter placed the engine on the side track in the manner testified to by him, and left her in that condition, on an upgrade, and that she could only get on the main track by running through two switches, then their verdict must be for the defendant, unless they found sufficient hostlers were not supplied to watch said engine. That ignores the evidence as to the defective throttle, as well as the theory of the application of external force starting the engine, and it would have been error to grant it.

The defendant's fourth prayer is based on the theory that if the plaintiff knew of the alleged defect in the engine the day that he ran her, and notwithstanding such knowledge continued in the service of defendant until the accident happened, then he was not entitled to recover. He could, however, well assume that such a patent defect would be discovered under any reasonable system of inspection, and would be remedied promptly. The prayer should have required the jury to find that he knew such defect continued to the day of the accident. Had he himself used this engine at the time of the accident without examining to see if the defect still existed, and had been injured in consequence, there might be some ground for the granting of a prayer going to the extent we have suggested. But we are not prepared to extend the principle invoked to the facts of this case.

We shall request the reporter to set out all the prayers in the case, that there may be no misapprehension as to their disposition.

We think the granted prayers gave the defendant all to which it was entitled, and that the case was fully and fairly presented by them to the jury.

Judgment affirmed, with costs to the appellee above and below.

(104 Me. 333)

VICTORIA ACETYLENE CO. v. CUSHING.
(Supreme Judicial Court of Maine. Sept. 10, 1903.)

APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

The plaintiff by defendant's order set up an acetylene gaslight machine in the defendant's mill on 30 days' trial. If the machine was satisfactory to the defendant, he agreed to pay \$325 for it. The plaintiff brought an action to recover the price. At the trial of the action the defendant contended that he rejected the machine as being unsatisfactory and gave notice thereof within the 30 days to one Waldron, who was both the selling and the collecting agent of the plaintiff. The verdict was for the defendant, and the plaintiff filed a general motion for a new trial. *Held*, that the issue presented to the jury was one of fact only, and the verdict is their determination of that issue, reached after deliberation over conflicting testimony and varying inferences arising from the circumstances and conduct of the parties, and that no sufficient reason appears for disturbing the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

(Official.)

On Motion from Supreme Judicial Court, Androscoggin County.

Action by the Victoria Acetylene Company against Andre R. Cushing. Verdict for defendant. Motion by plaintiff for a new trial overruled.

Action of assumpsit, upon a special contract, to recover the sum of \$325 as the purchase price of an acetylene gaslight machine which by the defendant's order had been set up in his lumber mill, on 30 days' trial. Plea, the general issue.

Argued before EMERY, C. J., and WHITEHOUSE, PEABODY, CORNISH, and KING, JJ.

Oakes, Pulsifer & Ludden, for plaintiff. Newell Skelton, for defendant.

KING, J. The plaintiff set up an acetylene gaslight machine in defendant's lumber mill upon the following order:

"You may set up one of your 100 light machines on 30 days' trial; for which, if it is satisfactory to me, the price will be \$325.00 to be paid by a long time note at 6 per cent. The Victoria Acetylene Co. to pay freight to Island Falls." This is a retrial of an action to recover the price. Each trial has resulted in a verdict for the defendant. The first verdict was set aside on a motion for a new trial on the ground of newly discovered evidence. The case is now before the court on plaintiff's general motion to set aside the second verdict.

From an examination of the record, we think the evidence reasonably establishes that the machine was set up and started August 11, 1903; that the lights at first flickered and globes were obtained and adjusted August 21st or 22d, which practically reme-

died that objection; that when the machine was recharged, as required every few days, the lights would run low for some time, and also varied in brilliancy at other times, so that they were not sufficiently even and steady for the safe and convenient operation of the mill; that the defendant was notified that his insurance would be canceled because the machine had been installed at the mill, and one policy, at least, was canceled and not continued; that the defendant was not satisfied with the machine and disconnected it, and at some time so notified Mr. Waldron, who was both the selling and collecting agent of the plaintiff.

The crux of the issue, however, was whether the defendant seasonably notified Waldron of his dissatisfaction. Upon this point the evidence was much in conflict. The defendant contended that he so notified him "September 3d or 4th," but Waldron testified that he was not notified until some time in December "near Christmas." Each party introduced other evidence tending to support his position. It is not deemed necessary to point out here any detailed analysis of the record, and we suggest the following observations only to indicate how conflicting was the testimony offered, on the one side and the other, in support of this vital point in the case, and the inferences that might be drawn therefrom.

Defendant testified in substance that on the 26th of August Mr. Holyoke, the insurance agent, met him in Houlton, and notified him that the insurance must be canceled; that he returned to the mill and disconnected the machine on the 28th of August, after which time it was not used; that he saw Mr. Waldron at Ft. Kent on September 3d or 4th, and told him that the insurance was ordered canceled, that the machine had been disconnected, and he should not keep it.

As tending to corroborate the defendant on this point, Mr. Holyoke testified that he did find the defendant at Houlton on August 26th, and notified him that all of the insurance must and would be canceled, and requested the return of the policies, which was delayed, but "at a later date, after being informed that the machine had been disconnected, two of the policies were continued and allowed to go in force again at the beginning."

William D. Fraser, defendant's foreman, testified that the machine was disconnected "about the latter part of August or the very first days of September," and was not used after that. Mr. Theriault of Ft. Kent testified that Mr. Waldron was in Ft. Kent between the 1st and 5th of September.

Against this evidence the plaintiff presented:

(1) The testimony of Waldron, in substance, that the first time he saw the defendant after the machine was installed was on

October 15th at the defendant's mill; that the machine was then in operation, and the defendant expressed no objections to it, but was satisfied with it and said as soon as he got his insurance adjusted he would settle for it; that he next saw him in November at Ft. Kent, when defendant said he preferred to give a check rather than the note and would send check the next week; and that the last time he saw defendant was in December "near Christmas," on the train, when he told him for the first time that he should not keep the machine.

(2) The circumstance that on August 14th defendant sent an order for one-half ton of carbide (a material used in the machine) which order was returned unfilled because no check accompanied it, and that between October 12th and 17th defendant sent a check for \$70 with an order for one ton of carbide which was shipped to and received by him at the place of his mill.

The fact and circumstances of the purchase of this ton of carbide constitute the newly discovered evidence upon which the motion to set aside the first verdict was based.

In its brief the plaintiff says: "We claim that the evidence in regard to the running of the machine after the time of the 30 days' trial had elapsed, especially in view of the order for the carbide in October, is so overwhelmingly in favor of the plaintiff that the decision ought to be set aside." Therein the pith of the plaintiff's motion is stated. The purchase of the ton of carbide does appear to be an unusual transaction, viewed even from the standpoint of the defendant's position, and a natural inference to be drawn from it is, perhaps, that the defendant was influenced by some additional motive other than the necessity to repay Theriault the 200 pounds borrowed of him, as explained by defendant; but the weight and effect of this transaction as tending to prove or disprove the question whether the machine was disconnected as the defendant claimed, or was run until at least October 15th, was for the jury. They have passed upon it, and apparently decided that notwithstanding that transaction the machine was not run as Waldron claimed it was.

There are also other important portions of the evidence which present sufficient reasons why the verdict should not be disturbed. The testimony fairly discloses that the machine would consume from 12 to 15 pounds of carbide per day. The defendant had borrowed of Theriault 200 pounds which would last from August 11th to 28th, the period during which the defendant says the machine was used, but not much longer. No more carbide was bought, and no more was borrowed.

Where, then, did the additional 500 to 700 pounds of carbide come from, if the machine

was run until at least October 15th? This question is not answerable from the record. But the plaintiff states that its theory "is that the defendant must have received more carbide from Theriault than he testified to." But the testimony as to the quantity borrowed is not equivocal, but direct and uncontradicted, being given not only by the defendant, but also by his foreman, Fraser, and by Theriault, of whom it was borrowed.

Unless the jury disregarded that testimony as false, and assumed an opposite fact without evidence, they could not have reasonably decided that the machine was operated by the defendant as the plaintiff claimed.

The issue presented to the jury was one of fact only, and the verdict is their determination of that issue, reached after deliberation over conflicting testimony and varying inferences arising from the circumstances and conduct of the parties. It is the opinion of the court from a careful examination of the record that no sufficient reason appears for disturbing the verdict.

Accordingly the entry must be:

Motion overruled.

(104 Me. 355)

PATTERSON v. SUPREME COMMANDERY UNITED ORDER OF GOLDEN CROSS OF THE WORLD.

(Supreme Judicial Court of Maine. Sept. 12, 1908.)

1. INSURANCE (§ 713*)—MUTUAL BENEFIT INSURANCE—MEMBERSHIP.

The by-laws of the defendant fraternal beneficiary organization prescribe the following steps to be taken by one desiring to become a member of the society: He makes a written application. His application is balloted upon. If the applicant is "elected to receive the degrees," he is then examined in respect to his physical condition by the subordinate commandery medical examiner. If the result of this examination is favorable, he is initiated into the commandery with ritualistic ceremonies, having first paid certain fees and dues, including one assessment to the benefit fund. The application and medical examination are then forwarded to the supreme medical director of the organization for his approval or disapproval. If he approves, the application is returned to the subordinate commandery by him, and is sent by the proper officer to the supreme keeper of records, and the initial assessment for the benefit fund, paid by the applicant before initiation, together with assessments, paid by members, generally on the 1st day of the following month, is forwarded to the supreme treasurer on or before the 10th day of the month. But the by-laws provide that no rights of membership in the order shall accrue by initiation, nor shall the applicant or his beneficiary possess any claim on the benefit fund, nor shall a benefit certificate be issued to the applicant, until said application has been approved by the supreme medical director, and shall have been sent by the keeper of records of the subordinate commandery to the supreme keeper of records. All the requirements hereinbefore mentioned having been performed and complied with, the applicant shall be received

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

into membership in the order. The plaintiff was the intended beneficiary of one Patterson, who made application for membership in a subordinate commandery and pursued the several steps above mentioned, and on September 27, 1906, was duly initiated. His application and medical examination were forwarded to the supreme medical examiner, who on the next day, September 28th, approved the same. But earlier in the same day, Patterson was accidentally killed. *Held*, that the approval of the application by the supreme medical director was a condition precedent to beneficial membership, and, as such approval was not had in the lifetime of the applicant, he never became a beneficial member and his beneficiary has no claim on the benefit fund.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 713.*]

2. INSURANCE (§ 724*)—MUTUAL BENEFIT—MEMBERSHIP.

The failure of the subordinate commandery to return or tender back the assessment advanced by Patterson does not estop the defendant from making this defense. Since Patterson never was a beneficial member, it did not lie in the power of any of the defendant's officers by acts or omissions to make him a member in effect.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 724.*]

(Official.)

Report from Supreme Judicial Court, Knox County.

Assumpsit by Flora E. Patterson against the Supreme Commandery of the United Order of the Golden Cross of the World. Case reported to the law court for determination. Judgment for defendant.

Action of assumpsit by the plaintiff to recover the sum of \$500, the same being the amount of certain life insurance for which Hollis L. Patterson, a son of the plaintiff, had made application in the defendant order; the plaintiff being the beneficiary named in the application. The said Hollis L. Patterson was accidentally killed before his medical examination was finally approved and before any certificate of insurance had been issued to him.

When the action came on for trial, an agreed statement of facts was filed, and the case was then reported to the law court to determine, upon the agreed statement, "the legal rights of the parties and all questions of law arising therefrom, and to render final judgment in accordance therewith."

The case fully appears in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, PEABODY, SPEAR, and BIRD, JJ.

Rodney I. Thompson, for plaintiff. Frank B. Miller, for defendant.

SAVAGE, J. The defendant corporation is a fraternal beneficiary organization, having a lodge system with ritualistic ceremonies of initiation of members, and carried on for the sole benefit of members and their beneficiaries, and not for profit. It is the supreme body, having under it grand commanderies

and subordinate commanderies. It provides under its charter and laws, by assessments on members, a benefit fund, out of which death benefits are paid to the designated beneficiaries of deceased members. The assessments are collected and forwarded to the supreme treasury by means of the machinery of the subordinate commanderies. Membership is acquired by making application to a subordinate commandery and pursuing the steps prescribed by the laws of the society. These steps, so far as material to this case, are as follows: The application is balloted upon. If the applicant is "elected to receive the degree," he is then examined in respect to his physical condition by the subordinate commandery medical examiner. If the result of this examination is favorable, he is initiated into the commandery with ritualistic ceremonies, having first paid certain fees and dues, including one assessment to the benefit fund. The application and medical examination are then forwarded to the supreme medical director of the organization for his approval or disapproval. If he approves, the application is returned to the subordinate commandery by him, and is sent by the proper officer to the supreme keeper of records, as the supreme secretary is styled, and the initial assessment for the benefit fund paid by the applicant before initiation, together with assessments paid by members generally on the 1st day of the following month, is forwarded to the supreme treasurer on or before the 10th day of that month.

The laws of the organization expressly provide, however, that "no rights of membership in the order shall accrue thereby"—that is, by initiation—"nor shall the applicant or his beneficiary possess any claim on the benefit fund, nor shall a benefit certificate be issued to the applicant until said application has been approved by the supreme medical director, and shall have been sent by the noble keeper of records" (of the subordinate commandery) "to the supreme keeper of records. All the requirements hereinbefore mentioned having been performed and complied with, the applicant shall be received into membership in the order."

One Hollis L. Patterson on September 26, 1906, made application for membership in Ivanhoe commandery, one of the defendant's subordinate commanderies, located at Rockland, and named his mother, the plaintiff in this action, as the beneficiary of his death benefit. He was elected. He successfully passed the required medical examination by the local medical examiner. He paid the regular monthly assessment of 41 cents, and commandery dues amounting to 75 cents, and on September 27th was duly initiated in Ivanhoe Commandery. His application and medical examination were forwarded to the supreme medical examiner, who on the next day, September 28th, approved the same.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

But earlier in the same day Patterson was accidentally killed. Nothing further seems to have been done by any one. Patterson was not reported to the supreme officers as having been admitted or initiated. No benefit certificate was ever issued. The assessment of 41 cents which Patterson paid was not, as we infer from the agreed statement, reported or forwarded to the supreme treasurer, but remained in the hands of the subordinate commandery. It has never been returned or tendered.

This action is brought to recover \$500, the amount of death benefit for which application was made. It is resisted on the ground that Patterson never became a beneficial member of the order, that the terms and conditions of membership which were necessary to be performed before he would be a beneficial member were not all performed in his lifetime, and that at the time of his death there was no contractual liability on the part of the defendant.

We think this contention must be sustained. The defendant, if liable at all, must be liable as upon a contract—a contract of insurance. The terms and conditions of the contract of this defendant with its members are to be found, in part at least, in its Constitution and laws. It had a right to impose terms and conditions upon those who sought membership. All applications must be held to have been made subject to those terms and conditions. In this case, one of those terms and conditions was that the approval of the application by the Supreme Medical Director should be a condition precedent to beneficial membership, and that until such approval neither the applicant nor his beneficiary should have any claim on the benefit fund. This was the *sine qua non*. The election was not sufficient, nor was a satisfactory medical examination by the local examiner. The initiation was not enough. It was a step, but it was only a step. It gave the applicant a certain status, as, if his medical examination was finally disapproved, the laws of the order gave him the option of remaining as a social member. Approval of the application by the supreme medical director was made essential. It was probably a wise requirement; but, whether it was or not, it was one which the defendant had a right to make.

Patterson died before his application was so approved. The intended contract was not completed in his lifetime. At the time he died the defendant was under no liability to his beneficiary. Cases in point are *Matkin v. Sup. Lodge, K. of H.*, 82 Tex. 301, 18 S. W. 306, 27 Am. St. Rep. 886; *Bruner v. Brotherhood of American Yeomen*, 136 Iowa, 612, 111 N. W. 977; *Sup. Lodge Knights and Ladies of Honor v. Johnson*, 82 Ark. 512, 99 S. W. 834.

But the plaintiff contends that the right to

make this defense has been waived or lost on account of the failure to return or tender back the 41 cents which was paid as an assessment for the benefit fund. We do not think so. There are many cases which hold that, when a forfeiture has arisen by reason of the failure of the member to pay an assessment within the prescribed time, the receipt and retention of the assessment afterwards by the proper officer is a waiver of the forfeiture. But here there was no forfeiture by a member. Patterson had no beneficial interest or right to be forfeited. He never was a beneficial member. And after his death we do not think it lay in the power of any of the defendants' officers by any acts to make him a member in effect. *Swett v. Citizens' Mut. Rel. Soc.*, 78 Me. 541, 7 Atl. 394. If not, how could that result be effected by failure to act. Certainly not. As none of the elements of an estoppel exist, it is unnecessary to inquire whether the defendant could be estopped under any circumstances. Nor is it necessary to inquire whether the 41 cents, conditionally paid by Patterson, but never in the supreme treasury, should be returned to Patterson's estate by those who hold it.

Judgment for the defendant.

(104 Me. 360)

STATE v. YATES et al.

(Supreme Judicial Court of Maine. Sept. 12, 1908.)

1. NAVIGABLE WATERS (§ 44*)—WAY—ACCRETION.

The terminus of a street laid out at Old Orchard in 1871 was "high-water mark." Since 1871 high-water mark at this point in Old Orchard has been moved by accretions about 88 feet seaward. *Held* (1) that when high-water mark changed, and the land above high-water mark gradually extended seaward by accretion, the public easement which was attached to it originally at high-water mark went with it, and the street has ended at all times at high-water mark, wherever it has been.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 271; Dec. Dig. § 44.*]

2. EMINENT DOMAIN (§ 127*)—COMPENSATION—EXTENSION OF EASEMENT BY OPERATION OF LAW.

That, although the fee of the land made by accretion belongs to the defendants, they are not deprived of their property in it, and of a just compensation, by this extension of the street. The original compensation awarded is presumed to have been full and just. It covered all damages to the defendants' estate, and for all time, including such damages as might be occasioned later than the taking by an extension of the easement by operation of law.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 348; Dec. Dig. § 127.*]

(Official.)

Report from Supreme Judicial Court, York County.

Frederick C. Yates and others were indicted for creating a nuisance by obstructing a way. Defendants pleaded not guilty, and an

agreed statement of facts was then filed, and the case reported to the law court for decision. Judgment for the state.

Indictment for creating a nuisance by obstructing a way at Old Orchard, York county. The indictment contains two counts. The first count charges that the defendants "on the first day of October in the year of our Lord one thousand nine hundred seven, at Old Orchard, in said county of York, did unlawfully and injuriously erect, maintain, and continue a nuisance, to wit, a certain platform attached to the Old Orchard pier which obstructed a certain public highway known as Old Orchard street, in said Old Orchard." The second count charges that the defendants "on the first day of October, A. D. 1907, did unlawfully and injuriously erect and build and cause to be erected and built in and upon the lower easterly side of said Old Orchard street a certain wooden structure, to wit, a platform, thereby obstructing said highway and endangering travel thereon, and thereby erecting, maintaining and continuing a nuisance against the peace of said state, and contrary to the form of the statute in such case made and provided." The defendants pleaded not guilty. An agreed statement of facts was then filed, and by agreement the case was reported to the law court for decision.

The material facts are stated in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, PEABODY, SPEAR, and BIRD, JJ.

Frederick A. Hobbs, Co. Atty., for the State. George F. & Leroy Haley, for defendants.

SAVAGE, J. The defendants stand indicted for creating a nuisance by obstructing a way. The case comes up on report. It appears that in 1871 a way, known as Old Orchard street, was laid out in Old Orchard, beginning "at the north corner of Ebenezer O. Staple's field, thence running south 41 degrees 15 minutes east 76 rods or to high-water mark." The street was built, and has since been constantly used, by the public. At the time the street was laid out it was exactly 76 rods from the point of beginning to high-water mark on Old Orchard beach. This street was connected with the sea, which is a great natural highway. But since 1871 high-water mark at this point in Old Orchard has been moved by accretions about 88 feet seaward. The defendants own a lot of land on the shore bounded westerly by Old Orchard street. They claim to own the fee to the center of the street, and we assume that they do own it. The obstruction complained of is on the 88-foot strip of land made by accretion since 1871, and is in front of that half of the way as originally laid out, of which the defendants claim the fee.

It is settled law that the owner of land bordering on a stream, a lake, or the sea, which is added to by accretion—that is, by the gradual and imperceptible accumulation or deposit of land by natural causes—becomes thereby the owner also of the new made land. It follows that the defendants owning to the center of the street as originally described have gained title by accretion to so much of the added land as lies in front of their half of the street, and that the obstruction is on land of which they own the fee. *Banks v. Ogden*, 2 Wall. 57, 17 L. Ed. 818. So far there is no controversy.

But the state contends that as far and as fast as the ground in front of high-water mark as it was in 1871 has been added to by accretion, so far and so fast has the public easement extended seaward by operation of law, that the definite terminus of the street in 1871 was "high-water mark," and that it continued to be and is now at "high-water mark," wherever that may be. In short, it is contended that the end of the street has kept pace with the receding high-water mark, and hence that the locus of the obstruction is within the street. We think that this contention must be sustained.

The cases involving this precise question are very few, if there are any, but the trend of judicial thought appears in many decided cases, some of which we cite. In *People v. Lambier*, 5 Denio (N. Y.) 9, 47 Am. Dec. 273, the court said that in case of accretions from natural causes, while the alluvial additions would become the property or the owner of the land against which the deposit is made, "it would hardly admit of a question that in such a case a public street leading to navigable waters would keep even pace with the extension of the land so as to preserve an unbroken union between the easement on land and that on such navigable waters." This expression was doubtless a dictum when used, but it was restated and approved by the same court in *Mark v. Village of West Troy*, 151 N. Y. 453, 45 N. E. 842. In the last-named case the court stated specifically that the rule held good "whether the change in the land be due to natural causes, or to the voluntary act of the owner of the land." In *Newark Lime & Cement Mfg. Co. v. Mayor and City Council of Newark*, 15 N. J. Eq. 64, where a highway had been laid out to a river as determined at the trial by a survey, the court said: "The survey carries the highway to the river, and wherever the river is found there the highway extends. If the shore is extended into the water by alluvial deposits, or is filled in by the proprietor of the soil, the public easement is, by operation of law, extended from its former terminus over the new made land to the water." In *Hoboken Land & Improvement Co. v. Mayor, etc., of Hoboken*, 36 N. J. Law, 540, the same doctrine was restated with approval. In *Dana v. Craddock*, 66 N. H. 593, 32 Atl. 757, it was

held that a highway laid out to "a spike on the margin of the lake" goes to the lake in all stages of the water. The court said: "The road extends to the changeable margin of the water, whether that line is moved by natural causes by the construction of a wharf." See, also, *Re Riverside Park Extension*, 27 Misc. Rep. 673, 58 N. Y. Supp. 963; 1 Farnham on Waters, 326.

There are in the books many cases of ways by dedication bordering on waterways. While ways by dedication are not strictly analogous to ways by statutory location, since the construction to be given to dedication depends upon the intent of the person dedicating, as a question of fact, and the construction of a statutory laying out is a question of law, still the cases touching dedicated ways are useful as illustrations of the reasons which underlie the legal rule in statutory cases. It is said that, when a highway to a waterway is acquired by dedication, the presumption is that the intent was that the way would reach the water so as to enable the public to enjoy the navigation of the stream. The result is that, if the adjoining land is gradually extended into the stream, the highway will follow the extension and continue to reach the water. And it will extend over natural accretions *ipso facto*. 1 Farnham on Waters, 673; *Saulet v. Shepherd*, 4 Wall. 502, 18 L. Ed. 442; *Cook v. Burlington*, 30 Iowa, 94, 6 Am. Rep. 649; *Freedom v. Norris*, 128 Ind. 377, 27 N. E. 869; *Lockwood v. N. Y. & N. H. R. R. Co.*, 87 Conn. 387; *Mayor of Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. 547; *Godfrey v. Alton*, 12 Ill. 29, 52 Am. Dec. 476.

The principles declared in the cases we have cited seem to be consonant with reason. Here is the case of a street laid out to connect with the sea, a continuous way on land and water. The apparent purpose of extending the street to high-water mark was to make such a continuous way. And yet, unless it be true that the terminus of the street followed "high-water mark" as it might be removed seaward by accretions, we have this curious result. In order to afford the public continuous access to the waterway, it would have been necessary for the authorities to lay out new additions to the street at least as often as the imperceptible accretion by accumulation became perceptible. Such a conclusion is not reasonable.

On the other hand, in the light of judicial reason and expression, we hold that when high-water mark changed and the defendants' land above high-water mark was gradually extended seaward by accretion the public easement which was attached to it originally at high-water mark went with it *pari passu*. The street ended at all times at "high-water mark," which was declared in the laying out to be the terminus.

The defendants contend, however, that this conclusion is in violation of article I, § 21, of the Constitution, which declares that "private property shall not be taken for public uses without just compensation." They say they have received no compensation, and that none has been awarded to them on account of the way which we have said extends over their new made land by virtue of the laying out in 1871. We think this ground is not tenable. When the street was originally laid out, if any damages were sustained, compensation was awarded to and received by the defendants or their predecessors in title or was waived. The law conclusively presumes that the compensation was full and just. It covered all damages to the defendants' estate and for all time. It was made once for all. It covered the damages which were incident to the taking to the limit of the easement as first used. It also covered such damages as might be occasioned later by an extension of the easement by operation of law. These are all presumed to have been estimated in the first place. *Joy v. Grindstone-Neck Water Co.*, 85 Me. 109, 26 Atl. 1052; *Taylor v. P. K. & Y. St. Ry.*, 91 Me. 193, 89 Atl. 560, 64 Am. St. Rep. 216. In fact, when the defendants gained their soil by accretion, they gained it subject to the public easement. They have never owned it free from the easement. So that in no event are they entitled to claim damages for the extension of the street over their newly made land by operation of law.

It follows that the entry must be:
Judgment for the state.

(104 Me. 395)

E. A. STROUT CO. v. HUBBARD.

(Supreme Judicial Court of Maine. Sept. 12, 1908.)

1. BROKERS (§ 86*) — COMPENSATION — EVIDENCE—SUFFICIENCY.

The defendant placed his farm in the plaintiff's agency for sale, and agreed that, if it was sold to any party through the plaintiff's influence by an advertisement or otherwise, he would pay a commission of all that was obtained in excess of \$1,800. He further agreed that, in case he should sell the property to the plaintiff's customer for less than \$2,000, he would pay a commission of \$200. In case the defendant withdrew the farm from plaintiff's agency before sale, the defendant agreed to pay \$20, and if the farm should be sold, either before or after withdrawal, to a customer to whom the plaintiff recommended it, or who had learned that it was for sale, directly or indirectly, through the plaintiff, he would pay a commission of \$200. The defendant withdrew his farm from the plaintiff's agency, and afterwards sold it.

Held, (1) that it would have been competent for the jury to find from the evidence that the purchaser was the plaintiff's customer, and that the farm was sold to a customer to whom the plaintiff or its agents had recommended it, or who had learned that it was for sale, indirectly at least, through the plaintiff's advertisements.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116, 117; Dec. Dig. § 86.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. BROKERS (§ 56*) — COMPENSATION — SUFFICIENCY OF SERVICES.

That a requested instruction to the effect that "if the listed place was sold, either before or after withdrawal, to a customer to whom the plaintiff or its agents in good faith recommended it, then the defendant is liable for a commission of \$200, whether such sale was effected in whole or in part by reason of such recommendation or not," was correct, and should have been given.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85-89; Dec. Dig. § 56.*]

3. BROKERS (§ 56*) — COMPENSATION — SUFFICIENCY OF SERVICES.

That an instruction to the jury to the effect that it was for the plaintiff to satisfy them that the same was by reason of the plaintiff's influence in some way and in some degree, and without which it would not have been sold to the purchaser, injected into the contract an element which the parties did not put into it. It was not necessary for the plaintiff to show that the purchaser was influenced by the plaintiff or its agents in making the purchase, if, in fact, he was the plaintiff's customer.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85-89; Dec. Dig. § 56.*]

(Official.)

Exceptions from Supreme Judicial Court, Kennebec County.

Assumpsit by the E. A. Strout Company against Leslie Hubbard. Verdict for plaintiff, and plaintiff excepts and moves for a new trial. Exceptions sustained.

Action of assumpsit brought by the plaintiff in the superior court, Kennebec county, to recover the sum of \$200 as commission on the sale of a farm under a written contract between the plaintiff and the defendant. Plea, the general issue. Verdict for plaintiff for \$36. The plaintiff excepted to certain rulings made by the presiding justice during the trial, and after verdict filed a general motion for a new trial.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, PEABODY, SPEAR, and BIRD, JJ.

Williamson & Burleigh, for plaintiff. H. H. Patten, for defendant.

SAVAGE, J. Action to recover commissions on the sale of a farm. The plaintiff claimed \$200. The verdict was for the plaintiff for \$36. The case comes up on the plaintiff's exceptions and a motion for a new trial. The evidence is made a part of the bill of exceptions, and, in order properly to inquire into the merits of the exceptions, it is necessary to ascertain the facts to which they relate, or rather such facts, favorable to the plaintiff, as the jury would have been warranted in finding from the evidence.

It is admitted that on November 30, 1906, the defendant made and signed a written contract with the plaintiff of the following tenor, so far as material to this case:

"The E. A. Strout Farm Agency. Boston—New York.

"I hereby place the property, real and per-

sonal, of which a description has been given, in your hands for sale. If the same is sold to any party through your influence by advertisement or otherwise, I will pay to you or your order a commission of all you get in excess of \$1,800, clear to me. In case I should sell the property to your customer for less than \$2,000, I will pay to you or your order a commission of two hundred dollars; or, if the sale exceeds \$2,000, ten per cent. on the full amount of the sale. The commission to be due and payable the day sale is effected.

"Should I withdraw the said estate from your hands before you have effected a sale, I will, in consideration of your having listed the property, pay you forthwith \$20.00 or two per cent. of the asking price, if above \$1,000.

"Should the estate be sold either before or after withdrawal to a customer to whom you or your agents have recommended it, or who has learned that it was for sale, directly or indirectly, through you, your agents or your advertisements, I will pay your commission as agreed."

The plaintiff in two counts has declared on the clauses in the contract whereby the defendant agreed to pay a commission in case he sold a farm to a customer of the plaintiff, or in case he should sell the farm before or after withdrawal to a customer to whom the plaintiff or its agents has recommended it, or who had learned that it was for sale, directly or indirectly, through the plaintiff or its agents or advertisements. The plaintiff did not sue for the \$36, for which the verdict was returned.

At the same time the defendant signed and delivered to the plaintiff's agent a written description of the estate. Thereupon the plaintiff "listed" the defendant's farm. That is to say, it included a condensed description of the farm in a list or catalogue of estates which it had for sale, which it published and sent to its agents in Bangor and Newport in the early part of 1907. It also sent pictures of the buildings from a photograph furnished by the defendant. Afterwards, by a letter dated April 8, 1907, the defendant withdrew his farm from the plaintiff's hands, and a week later sold and conveyed it to one Blanchard for \$1,820.

It was admitted that the plaintiff recommended the farm to Blanchard, obtained an offer of \$1,700 from Blanchard, and brought him to the defendant's house on April 3, 1907. There was testimony that the plaintiff's agent then communicated Blanchard's offer to the defendant, who declined to accept it.

It was also admitted that Blanchard knew that the farm was for sale previous to its being recommended by the plaintiff. The defendant testified that Blanchard asked him in February, 1907, what he would take for the farm, if he would take \$1,500, and that he declined to sell for that price. Blanchard

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

testified that previous to this conversation he knew the farm was "listed"; that is, in the plaintiff's agency, as we interpret the testimony. It also appears that Blanchard had lived only a mile or two away, and knew the farm well.

Further than this, the jury would have been warranted by the evidence in finding that about April 1, 1907, Blanchard called on the plaintiff's agent in Bangor with a view to the purchase of a farm somewhere; that the agent showed him among others the description and picture of the defendant's place; that this agent recommended it, and advised him to see the plaintiff's agent in Newport, who would show him the defendant's farm and another one of which he had heard and to which he was inclined; that he went to Newport, and saw the agent there; that that agent showed him the description of the Hubbard farm, and recommended it; that he then offered \$1,700 for it; that the agent took him to the defendant's house to see if a trade could be made; that while there he and the defendant tried to negotiate a trade; but disagreed upon the price, and that the defendant five days afterwards, disregarding the plaintiff's agents in Bangor and Newport, whom he knew, and with whom thus far he had been in communication, sent his letter of withdrawal direct to the plaintiff's New York office.

From these facts we think it would have been competent for the jury under proper instructions to find that Blanchard was the plaintiff's "customer," and that the farm was sold to a customer to whom the plaintiff or its agents had recommended it, or who had learned that it was for sale, indirectly, at least, through the plaintiff's advertisements. In either case, we are left to inquire whether any right to commissions accrued to the plaintiff by reason of the sale by defendant to Blanchard after the letter of withdrawal. And the answer will depend upon a construction of the contract which the defendant made, and not upon the rights which arise by implication when one leaves his property in the hands of a broker for sale, without mention of specific conditions, as between owner and broker.

The contract was a comprehensive one. It fully protected the rights of the plaintiff in every contingency. It may seem a hard and uneven contract, but it was one which the parties had a right to make, and it must be enforced according to its terms. The first clause in the contract relating to commissions seems to contemplate a sale directly through the plaintiff by its bringing a customer ready and willing to pay a price of \$1,800 or more, in which case the plaintiff was to have all in excess of \$1,800. The next clause contemplates that the defendant might himself sell the farm for any price he pleased to a customer of the plaintiff; that is, one whom the plaintiff had interested in the farm, to whom it had recommended it,

and whom it had produced to the defendant as a purchaser at some price. Such a person would fairly be the plaintiff's "customer." In that case the plaintiff was to be entitled to a commission of \$200, whatever the selling price might be.

There was another contingency, and one which may have happened in this case. After the plaintiff had thus produced a customer, after it had directed his attention to this farm, and perhaps specifically away from others, after it had recommended the farm and advised its purchase, after the customer had begun to nibble at the hook, the defendant might withdraw the farm from the plaintiff's agency, as provided in another clause in the contract, and thus deprive the plaintiff of the \$200 commissions.

This contingency was provided for in the other clause which we have referred to, which was to the effect that if the farm should be sold by the defendant after withdrawal to a customer to whom the plaintiff had recommended it, or who had learned that it was for sale, directly or indirectly through the plaintiff, the defendant would pay a commission of \$200. And under this clause the plaintiff now bases its right to recover.

We have already defined what is meant by "customer" of the plaintiff, as applied to this case. It will be noticed that the defendant agreed in the last-named contingency to pay a commission in case of sale to a customer to whom it had recommended the farm, or who had learned that it was for sale through the plaintiff. The agreement was not limited to a sale to a customer whom the plaintiff had influenced to purchase. These are distinct propositions.

Now, with the case in this situation, and under this contract which we have construed, the plaintiff asked the court to give the following instruction to the jury: "If the listed place was sold either before or after withdrawal to a customer to whom the plaintiff or its agents in good faith recommended it, then the defendant is liable for a commission of \$200, whether such sale was effected in whole or in part by reason of such recommendation or not." The judge declined to give this instruction, but, instead, instructed the jury as follows: "Was Mr. Blanchard influenced in any way by any act, conversation, without which he would not have purchased that place, to purchase it of Mr. Hubbard? He may have looked at the place before, but had he without the influence of the Strout Company or its agents made up his mind to purchase it, or did he without their influence, and without what was said by them, finally purchase this place? And that is the nub of this case, in my opinion, for your determination. * * * It is for the plaintiffs to satisfy you that it was by reason of their influence in some way and in some degree and without which would not have been sold to Mr. Blanchard before they are entitled to a verdict for more than the

\$36 which I have already alluded to." The instruction given injected into the contract an element which as we have seen the parties did not put into it, and an element onerous and prejudicial to the contract rights of the plaintiff. By the contract it was sufficient to show that the plaintiff sowed seed, and the defendant reaped his harvest, where the seed had been sown. It was not incumbent on the plaintiff to trace the development of the seed and the growth of the plant. It was not necessary to show even that the harvest came from the plaintiff's seed; for such was not the contract.

The requested instruction, we think, correctly stated the proper rule under this contract, and it should have been given. As the plaintiff's exception to the instructions given and to the refusal to instruct as requested must be sustained, it is unnecessary to consider the motion for a new trial.

Exceptions sustained.

(104 Me. 330)

LABRECQUE v. HILL MFG. CO.

(Supreme Judicial Court of Maine. Oct. 8, 1908.)

1. MASTER AND SERVANT (§ 102*)—SAFE PLACE IN WHICH TO WORK—CARE REQUIRED.

When a person is employed in a mill to tend and operate a machine, and the relation of master and servant exists between him and his employer, it is the primary duty of the master to use all ordinary care to provide a reasonably safe place in which the servant is required to work, and to provide and maintain reasonably safe and suitable machinery for the servant to operate, so that by the exercise of ordinary care on his part the servant can perform the service required of him without liability to other injuries than those resulting from simple and unavoidable accidents.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 173, 174; Dec. Dig. § 102.*]

2. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—EVIDENCE—SUFFICIENCY.

The plaintiff was employed as an operative in the picker room of the defendant's cotton mill, and, while so engaged, he received a severe personal injury, causing a fracture of his right arm at three different points, and resulting in the amputation of the arm near the shoulder. The plaintiff contended that the injury was caused by the breaking of a defective leather belt connecting two of the pulleys of the machine called an "opener" which he was employed to tend and operate, and that there was a failure of duty on the part of the defendant towards him in allowing a defective belt to be used, and thus exposing him to unnecessary peril while he was himself in the exercise of ordinary care, and without knowledge of the unsuitable condition of the belt. The plaintiff recovered a verdict for \$3,083.81. Under the facts and circumstances which are stated in the opinion, *held*, that the verdict cannot be deemed unmistakably wrong, and that the court would not be warranted in setting it aside.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 954; Dec. Dig. § 278.*]

3. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—EVIDENCE—SUFFICIENCY.

It is an axiom in mechanics that the fact that a belt breaks at a particular point is suffi-

cient evidence that such point is the weakest place in the belt.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950, 951; Dec. Dig. § 278.*]

(Official.)

On Motion from Supreme Judicial Court, Androscoggin County.

Action on the case for personal injuries by David Labrecque against the Hill Manufacturing Company. Verdict for plaintiff, and defendant moves for a new trial. Motion overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff while employed as an operative in the picker room of the defendant's cotton mill, and caused by the alleged negligence of the defendant. Plea, the general issue. The plaintiff recovered a verdict for \$3,083.81. The defendant then filed a general motion for a new trial.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, PEABODY, SPEAR, and BIRD, JJ.

McGillcuddy & Morey, for plaintiff. Oakes, Pulsifer & Ludden, for defendant.

WHITEHOUSE, J. On the 4th day of September, 1906, the plaintiff was employed as an operative in the picker room of the defendant's cotton mill, and while so engaged he received a severe personal injury causing a fracture of his right arm at three different points, and resulting in the amputation of the arm near the shoulder. In a suit brought against the company to recover damages for the injury the plaintiff contended that it was caused by the breaking of a defective leather belt connecting two of the pulleys of the machine called an "opener" which he was employed to tend and operate, and that there was a failure of duty on the part of the company towards him in allowing a defective belt to be used, and thus exposing him to unnecessary peril, while he was himself in the exercise of ordinary care and without knowledge of the unsuitable condition of the belt. The jury returned a verdict in favor of the plaintiff for \$3,083.81, and the case comes to the law court on a motion to set aside this verdict as against the evidence.

In the picker room, where the plaintiff worked, the preparatory processes of manufacturing appear to be carried on. There the bales of cotton are opened and the cotton torn apart, and subjected to some degree of manipulation. It is then run through the machine called the "opener," for the purpose of lightening and cleansing it. The entire machinery of the "opener" comprises a hopper where the cotton is introduced, the feed compartment with two aprons, a "chopper" or comb and a fan, and a beater with a wooden tunnel or hood attached through

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which a draft is forced for the purpose of drawing the cotton into another machine in the room above. The beater is driven by power communicated by means of a belt from a large pulley overhead, and makes about 1,350 revolutions a minute. On the end of the beater shaft is a small pulley four inches in diameter, and the aprons, comb, and fan in the feed compartment are all operated by power transmitted from the small pulley on the beater shaft by means of the belt in question, 2 inches in width, which is alleged to have been defective, to a pulley 18 inches in diameter, with spokes in it revolving on an axle 8 or 4 feet distant from the beater shaft. This feed pulley, 18 inches in diameter, makes 292 revolutions a minute.

It is not in controversy that even with the exercise of ordinary care and skill in the operation of this machinery the cotton running through the "opener" will occasionally become clogged either in the beater or in the tunnel through which the cotton passes from the beater. In such a contingency it may become necessary and proper either to stop all of the machinery constituting the "opener" or to stop only the feed pulley. In the former case a shipper is provided for the purpose of disconnecting the beater from the power overhead. This is known as the "big shipper," and it is equipped with a long wooden handle pendent within the reach of the operative when he is standing on the floor by the side of the machine. By thus "shipping the overhead belt" all parts of the machine may be stopped in about 22 seconds. The small shipper on the lower floor with two iron prongs between which the belt in question passes in running over the feed pulley is operated automatically by a wire rope from the room above, and was not designed to be used to take the belt off of the feed pulley by the operative on the lower floor. Whenever it is deemed advisable to stop the feed pulley without stopping the beater, the operative removes the belt from the feed pulley with his hand while the machine is in motion. By this method the motion of the pulley is stopped in about four seconds. It is not in controversy that, when the plaintiff was employed fourteen months before the accident, he was instructed by Beauchene, the boss of the picker room, both by precept and example, to stop the feed pulley by removing the belt with his hand while the machine was in motion; and it is not in dispute that this had been the practical method of stopping the feed pulley for the entire 15 years during which this machine had been used in the picker room. Overseer Mitchell, testifying for the defense, admits that Beauchene, the boss and belt fixer in that room, was authorized to instruct the operators to stop the feed portion of the machine in that way, and Beauchene himself admits that he told the plaintiff that that was the way to do it, and gave him an illustration of his manner of

doing it by taking off the belt with his own hand while the machine was running at full speed. It is suggested, however, that Beauchene employed both hands to do it, using his left hand to steady the small automatic shipper and his right hand to take off the belt; but Beauchene expressly admits that, if the belt breaks when the operative is in the act of removing it from the pulley, "it will fly just the same whether he is taking it off with one hand or two." Although during the time the plaintiff was running the machine the belt had broken several times prior to the day of the accident, and had been repaired by Beauchene, there is no evidence that it had ever broken before while the operative was in the act of removing it; and during the entire 14 months of the plaintiff's service in operating the machine, whenever it became necessary to stop the feed pulley, the belt was removed by him in essentially the same manner as when he attempted to remove it at the time of the accident, and in every instance without injury to himself or the belt.

In the declaration in the plaintiff's writ it is alleged that at the time of the accident the machine became clogged, and that he attempted to stop it by removing the belt in question from the pulleys with his hand and took hold of the belt with his hand for that purpose; but, while the machine and its pulleys were revolving with great speed, the belt in question "by reason of its worn, weak, defective and unsuitable condition" suddenly broke, and with great force and violence came in contact with the plaintiff's right hand and arm, and pulled his right hand and arm into the revolving pulleys and other parts of the machine, and thereby broke, wounded, and lacerated the arm, so that it became necessary to amputate it between the elbow and shoulder joint.

The plaintiff's account of the accident as given in his testimony, reduced to a narrative form, it is as follows: "I was doing my work on the machine. I noticed the cotton was coming up bad in the tunnel. It was going up rolling and coming down, and I stopped the machine to get it out of the tunnel and see what the matter was. I did the same as usual, as was taught me. I stopped the big strap by the big shipper. Then I did as usual, and went to take off the small one with my hand. While I was pulling it, it broke. When I pulled the strap like this, it broke, and threw my arm this way. I had my left hand on the belt trying to take it off. I was standing a step from the big pulley, where I generally stood. I was right close to it. I took hold of the belt with my left hand. My right hand was right side of me. The belt broke, and I didn't know much of anything afterwards. I heard some noise and it went altogether—the noise and myself who had the accident. It went as rapidly as lightning. I heard something crack, but at the same time I received everything. The

machine was running at that time. It was moderating. I couldn't say how many turns. I heard the strap break, and that is all I saw.

"Q. Did it strike your hand? Did the belt strike or wind around your hand.

"A. That is it. I thought it put me into the pulley. I couldn't see how it put me into the pulley. It went too fast. It put my right arm into the big pulley with spokes in it and broke my arm in three places.

"In taking the belt off, I did nothing to break it. I always took it off the same way. It was the way they told me to take it off.

"As I put my hand on the belt, it broke, and then it twirled and caught my right arm, and pulled me into the pulley.

"I could have stopped the machine when it was clogged by taking hold of the handle of the big shipper, but I couldn't wait. It had to be done immediately. It would have retarded the work. My reason for not waiting was to do the work faster, because we were ordered to do it that way. I took hold of the handle of the shipper because I didn't know (whether the cotton was clogged) in the tunnel or down in the beater.

"The belt broke four or five days before I got hurt, before the last time. I was a little way off. We found it broken. That part of the machine was stopped. The belt had broken before, but a strap may break and be repaired so it will be just as strong as it was before. I didn't bother with the straps because it wasn't my business. I didn't doubt the strap. I thought it was good."

When the plaintiff was injured, he was working on the machine alone. No other person witnessed the occurrence. But it was not in question that immediately after the accident the plaintiff was found lying on the floor near the machine at which he had been at work, apparently unconscious, with his right arm broken in three places, and a cut on his forehead, which was bleeding. The broken belt was lying on the floor near the pulleys, and "seemed to be twisted up in a circle." There was blood on the floor near the belt.

The principles of law applicable to this state of facts are well settled and familiar. They have been so repeatedly stated and critically distinguished and applied in the recent decisions of this court that no elaborate discussion of them is here required. The relation of master and servant existed between the plaintiff and the defendant. It was the primary duty of the defendant to use all ordinary care to provide a reasonably safe place in which the plaintiff was required to work, and to provide and maintain reasonably safe and suitable machinery for him to operate, so that, by the exercise of ordinary care on his own part, the plaintiff could perform the service required of him without liability to other injuries than those resulting from simple and unavoidable accidents.

In *Caven v. Granite Company*, 99 Me. 278, 59 Atl. 285, the plaintiff's death was caused by the breaking of a defective eye in a wire

cable into which the tackle had been hooked designed to support a movable stage. It was contended in behalf of the defense that the plaintiff was charged with the duty of the master to see that that part of the guy was sufficient for the purpose; but, it appearing that this was a part of a completed structure furnished by the defendant for the use of its servants, and that the plaintiff was not expressly charged by the superintendent with any duty respecting it except to select good tackle and secure the guy to its anchorage, it was held that he assumed no risk and was guilty of no negligence. The question is thus treated in the opinion of the court: "If the appliances are of such a character as to be likely to become weak or worn or out of order by time or use, reasonable care requires the master to make examinations or inspections at reasonable intervals, in order that defects may be discovered and remedied. And the servant has a right, so far, to rely upon the presumptions that the master has done its duty in all these respects. The servant on his part is bound to use reasonable care. He is conclusively held to have assumed the risks of dangers which are known to him, and as well those which are incident to his work, and which are obvious and apparent to one of his intelligence and experience. Though he may have the benefit of the presumption that his master has performed its duties, yet he is bound to use his eyes and his mind, and to see the things before him which are obvious. He is chargeable with knowledge of the things and conditions which he sees, or ought, by the exercise of reasonable care, to see. And the master has a right to presume that he will see and guard against obvious dangers. If the servant falls in this respect, he is negligent. But he is not ordinarily bound to examine or inspect appliances, or to discover dangers not obvious. He is not bound to do so, unless charged with that duty by the master, or by the character of his work. He may rely upon the presumption that the master has inspected."

That the belt in question in the case at bar was in fact defective and of insufficient strength to transmit the power and maintain the velocity required of the feed pulley in the machine operated by the plaintiff satisfactorily appears from the testimony in the case considered in connection with the appearance of the belt itself which is exhibited in evidence. The jury so found, and there is a clear preponderance of evidence in support of their finding upon that proposition.

The jury also found that the defendant failed to exercise due care and vigilance in regard to the inspection of this belt, and neglected to provide the machine with a reasonably safe and suitable belt, and it is the opinion of the court that this conclusion cannot justly be declared manifestly wrong. The testimony of Beauchene himself, who was charged with the duty of the master to make the necessary inspection and repair of the

belts in the plaintiff's room, discloses an unexplained neglect of duty on his part to make proper inspection, and a manifest failure to appreciate the nature and extent of the responsibility imposed upon him. He expressly admits in his testimony that he made no inspection to discover defects. He says:

"I leave the belt to run all he can run. I find out if he break I fix him up. If my man find out he want fix, he tell me to fix it.

"Q. Let it go as long as it would until it broke, and then you would fix it? That is right, isn't it, Mr. Beauchene?

"A. Yes.

"Q. You didn't take the trouble to go around and look at the belt and see how it was?

"A. No.

"Q. Now, if you saw a crack in the belt like that, wouldn't you cut that out too?

"A. If I see him, I fix the belt.

"Q. If you saw it, you wouldn't let the belt run that way, would you?

"A. No.

"Q. And that was just the way this belt was running when this belt broke, wasn't it? That is true, isn't it?

"A. Well, it is supposed to be run that way."

This man had worked in a picker room 22 years and had served in the plaintiff's room the last time 4 consecutive years immediately preceding the accident. According to the plaintiff's testimony, the belt broke and was repaired by Beauchene only four or five days before the last break. This is not denied by Beauchene. He only states that he does not remember when he last repaired it. Beauchene then knew that the belt was in use when he took charge of the room four years before, but did not know how much longer it had been there. If he had then given the belt such a careful examination as his duty required him to give it, and compared the patent defects in the other portions of it with the condition of the broken ends, he would doubtless have condemned the belt as no longer safe and suitable for use. The plaintiff had only been there 14 months, and had no knowledge of the age of the belt. He had never been charged with any responsibility in the inspection of belts and never had any experience in testing or specially observing the tensile strength of leather which had become cracked and weakened by time and use. The surface cracks were obvious, but they were not necessarily serious defects. The plaintiff was not sufficiently expert to distinguish at a glance harmless surface cracks from the destructive rents caused by great age and hard usage. He was justified in assuming that the decision of the belt fixer, Beauchene, to continue this belt in use after the repairs made by him four or five days before the accident, was a sufficient guaranty of its strength and fitness. He could properly rely upon the presumption that the duty of the

master had been performed. He says he "did not doubt the belt." He "thought it was good." Under these circumstances, the conclusion of the jury that the plaintiff assumed no risk and was guilty of no negligence in removing the belt as he had been instructed to do and as he had safely done for fourteen months prior to that time cannot be deemed manifestly wrong.

But it is earnestly contended in behalf of the defendant that the plaintiff's account of the manner in which his injuries were received is so improbable and so discredited by the evidence that it ought to be rejected as incredible and essentially untrue. It is argued that the belt did not break in a defective or the weakest place, and that the breaking of the belt did not cause the accident. It is suggested as a more probable theory of the plaintiff's injury that, in his haste to remedy the difficulty caused by the apparent clogging of the cotton in the tunnel, he slipped and plunged his right arm into the feed pulley or under the belt, and that the breaking of the belt was the effect, and not the cause of his accident.

There is unquestioned plausibility in the theory thus suggested, but it appears to be founded wholly upon conjecture, and not upon evidence. It will be remembered that the feed pulley 18 inches in diameter was capable of 292 revolutions a minute, and, allowing for some reduction of speed after disengaging the power overhead, it was doubtless making more than 200 revolutions a minute at the moment of the accident. The plaintiff says: "I did as usual and went to take off the small strap with my hand. While I was pulling it, it broke, and I didn't know much of anything afterwards. * * * It went as rapidly as lightning. * * * The belt broke and then it twirled, and caught my right arm, and pulled me into the pulley. I couldn't see how it took me into the pulley. It went too fast." This is a succinct account of an exciting occurrence which inflicted upon the plaintiff a grievous injury and rendered him unconscious. All the incidents involved in it were comprised within a single instant of time; and it is difficult to conceive how a more definite or precise statement of the manner in which his arm was drawn into the pulley, or a more detailed account of the occurrence could truthfully be given by the victim. This version of the accident given by the plaintiff is not contradicted by any direct evidence in the case, and does not appear to be essentially discredited by circumstances or improbabilities.

With respect to the suggestion that the belt did not break in the weakest place, it is only necessary to observe that the diagonal course of the rupture across the leather and the appearance of the broken ends of the belt are wholly inconclusive evidence both of the cause of the breaking and of the strength of the belt at that point in comparison with other obviously weak places in it.

There is no controlling circumstance to show that all parts of the tense side of the belt which was carrying the load at the moment of the accident were not subjected to an equal strain, and, if so, it is an axiom in mechanics that the fact that the belt broke at a particular point is sufficient evidence that that point was the weakest place in it.

The further suggestion that the plaintiff may have put his hand between the belt and revolving pulley, and thus caused the belt to break, utterly fails to account for the fact that the arm was broken and twisted in three different places extending from the wrist to a point near the shoulder for the reason that the arm would in that event be on the outside of the pulley, and not between the spokes. The condition of the arm when the plaintiff was found by the side of the machine after the accident tends to corroborate the plaintiff's account of his injuries.

It is finally contended that it is impossible that the plaintiff's right arm could have been drawn between the spokes of the pulley by the twirling of the end of a broken belt according to the plaintiff's theory. But in answer to an inquiry the defendant's witness Buchanan, a second hand with 20 years' experience having jurisdiction of the picker rooms, thus testifies:

"Q. Is there any telling what direction a belt will go when there is an accident on the machine and it breaks?

"A. I could hardly tell which way a belt will go.

"Q. If it is around the shaft and in any way it gets caught in the spokes of a pulley, wouldn't that be likely to carry it around with the pulley and twirl it?

"A. If it is caught in the spokes, it would be apt to. I don't see how it could do any other way."

It has been noticed that the plaintiff has not assumed to know or to state precisely how his arm was drawn into the pulley, but it affirmatively appears from his account of the accident that he was in the exercise of ordinary care, and that in some way the breaking of the belt was the proximate cause of his injuries. The jury saw him and judged him. They decided that his description of the occurrence was a truthful statement, and not a fraudulent invention. They found that his account of it was not so inherently unreasonable and improbable and not so overborne by established facts and circumstances that they could not accept it as the basis of their verdict. They rendered their verdict in accordance with it, and the question now presented to the court is "whether this conclusion could be arrived at by fair-minded men by any reasonable inference from the evidence, even though other and contrary inferences might seem to us more reasonable." "To set aside the verdict of a jury is to say that the inference drawn by

the jury is indisputably wrong—that no such inference can fairly be drawn by any fair-minded men, that the contrary inference is not only the more reasonable inference, but is the only reasonable inference." *York v. Maine Cent. R. R. Co.*, 84 Me. 117, 24 Atl. 790, 18 L. R. A. 60. The verdict of the jury in this case cannot be deemed unmistakably wrong, and the court is not warranted in setting it aside.

Motion overruled.

(104 Me. 342)

NORTHPORT WESLEYAN GROVE CAMP-MEETING ASS'N v. ANDREWS.

(Supreme Judicial Court of Maine. Sept. 10, 1908.)†

1. DEDICATION (§ 1*)—NATURE AND ESSENTIALS.

"Dedication" is the intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use. The intention to dedicate is the essential principle, and whenever that intention on the part of the owner of the soil exists in fact and is clearly manifest either by his words or acts, the dedication, so far as he is concerned, is made. If accepted and used by the public for the purpose intended, it becomes complete, and the owner of the soil is precluded from asserting any ownership therein that is not entirely consistent with the use for which it was dedicated.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 8; Dec. Dig. § 1.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1908-1918; vol. 3, pp. 7629, 7630.]

2. DEDICATION (§ 6*)—PURPOSE OF—PUBLIC PARKS.

The doctrine of dedication is applicable to public parks and squares, and the fact of dedication may be established in the same manner as in the case of dedication of streets and highways.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 1; Dec. Dig. § 6.*]

3. DEDICATION (§ 19*)—ACTS CONSTITUTING—SALES WITH REFERENCE TO MAP.

The word "park," written upon a block on a map of real estate, indicates a public use; and, when the owner of such real estate makes conveyances of portions thereof by express reference to such map, such acts on the part of the owner, if unexplained, operate as a dedication to the public use of the block so marked.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 40, 46; Dec. Dig. § 19.*]

4. WORDS AND PHRASES—"PARK."

A "park" may be defined as a piece of ground set apart to be used by the public as a place for rest, recreation, amusement, and enjoyment. The full use and benefit of a park is not realized by the enjoyment only of an open view and the right of passage upon it. The right to enjoy the pleasures and advantages that beauty and ornamentation can afford is also included in the uses and purchases of a public park. (Citing *Words and Phrases*, vol. 6, p. 5176.)

5. DEDICATION (§§ 19, 61*)—ACTS CONSTITUTING—SALES WITH REFERENCE TO MAP.

The plaintiff in 1786 purchased a tract of land for an addition to its camp ground at Northport and caused the same to be laid out into lots for lease or sale with an open space

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Received for publication March 3, 1908.

of about one acre for a park. A plan of the tract and the laying out was made, on which the lots were designated by numbers and the open space or park marked "Bay View Park." Lots were at first leased "in perpetuum," and later others conveyed in fee, by express reference to said plan. The defendant is the owner of $4\frac{1}{2}$ lots adjoining said Bay View Park. The defendant cut certain grass standing and growing in said Bay View Park, contending that this was done by him as one of the public, and an adjoining lot owner for the purpose only of beautifying and improving the said park. The plaintiff then brought an action of trespass quare clausum against the defendant. On the facts, and which are stated in the opinion, *held*: (1) That there was a dedication of the locus by the plaintiff to the use of the public and the adjoining lot owners as a park. (2) That by its dedication of the locus as a park the plaintiff gave up and surrendered its right to exercise any acts of control or possession of it that would hinder the public in the full enjoyment of it as a place of rest, of recreation, of amusement and enjoyment, or that would prevent the public from increasing those enjoyments by its adornment and ornamentation. (3) That the defendant, as one of the public, and an adjoining lot owner, had a right to cut the grass as he did, for the sole purpose of improving the park, and that he was not a trespasser in so doing.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 40, 46, 116, 120; Dec. Dig. §§ 19, 61.*]

(Official.)

Report from Supreme Judicial Court, Waldo County, at Law.

Trespass quare clausum by the Northport Wesleyan Grove Campmeeting Association against Henry H. Andrews. Case reported to the law court for determination. Judgment for defendant.

Trespass quare clausum to recover damages for cutting and trampling down grass on a lot of land in Northport, known as "Bay View Park." Plea, the general issue, with brief statement, as follows:

"That the land described in plaintiff's writ, on which it is alleged that the trespass was committed by the defendant, was dedicated to the use of the public and the adjoining lot owners by the plaintiff as a park long before the date of the alleged trespass and had been improved, graded, fertilized, and sown to grass by the adjoining lot owners; and that the defendant, as one of the adjoining lot owners, had a legal right to enter upon said land and cut the grass thereon for the purpose of improving and beautifying said park and keeping it in proper condition for use for the purposes for which it was designed and had been dedicated; and that the defendant, in the exercise of his legal right, and by request of other adjoining lot owners, entered upon said land at the time alleged in the writ, and mowed the grass thereon, for the purpose only of benefiting and improving said park, and did not injure said park or damage the plaintiff."

Tried at the April term, 1908, Supreme Judicial Court, Waldo county. At the conclusion of the evidence, and by agreement of

the parties, the case was reported to the law court for determination upon the legally admissible evidence.

The case appears in the opinion.

Argued before EMERY, C. J., and SAVAGE, PEABODY, CORNISH, KING, and BIRD, JJ.

William P. Thompson, for plaintiff. Dutton & Morse, for defendant.

KING, J. On report. Action of trespass quare clausum to recover damages for cutting and trampling down the grass on a lot of land in Northport, Me. The defendant justifies under a claim that the locus had been dedicated by the plaintiff to the use of the public and the adjoining lot owners as a park, and that the acts complained of were done by him as one of the public and an adjoining lot owner, and at the request of other adjoining lot owners, for the purpose only of beautifying and improving said park and rendering it more suitable for the use for which it was dedicated.

In 1876 the plaintiff purchased a tract of land for an addition to its camp ground at Northport and caused the same to be laid out into lots for lease or sale, with an open space of about one acre for a park.

A plan of the tract and the laying out was made, on which the lots were designated by numbers, and the open space or park marked "Bay View Park." Lots were at first leased "in perpetuum," and later others conveyed in fee, by express reference to said plan. The defendant is the owner of $4\frac{1}{2}$ lots adjoining said Bay View Park. The only instrument put in evidence, showing title of any of the lots in defendant, is dated May 18, 1881, wherein the plaintiff leases to the defendant "in perpetuum * * *" a certain lot on their camp ground numbered according to the plan made by R. B. Miller of said lots, and bounded as follows: Beginning on the easterly side of Bay View Park at the northerly corner of lot No. 314; thence southerly by said lot and on Bay View Park 25 feet to a vacant lot; thence easterly on said vacant lot 50 feet to a stake and stones; thence northerly, by lot 314, 25 feet to a vacant lot; thence westerly on said vacant lot 50 feet to the place of beginning. Intending hereby to convey to said Andrews lot No. 314 as per said plan.

There is no material conflict of testimony as to the original laying out of the space for a park and its subsequent use as such by the lot owners and the public generally, from which testimony it satisfactorily appears: That at the time of the conveyance of lot 314 to defendant the treasurer of the plaintiff, Mr. Ruggles, who was authorized to make the conveyance, exhibited to him said plan and promised that the park designated thereon was to be graded and kept open as a park; that after several years, nothing ma-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

terial having been done to improve the park, the defendant raised among the lot owners \$100 or more, to which the plaintiff added \$25, and this money was expended by the defendant in grading, fertilizing, and seeding to grass the park; that the lot owners, and the public generally, have used the park since it was laid out for crossing and recrossing it, and as they pleased. The circumstances leading up to the alleged acts of trespass, and explanatory of those acts, are thus stated by defendant: "I seeded it down and kept seeding it down, as I say, on the clay, and putting on year after year a good deal of fertilizer. But Mr. Dickey (the superintendent at time of acts complained of) claimed the grass. He didn't put anything on, as I say, for several years, but claimed the grass, and I was away from home a good deal, and when I would get home the first of July, sometimes away along into July, perhaps the 8th or 10th, that grass wouldn't be cut. And when it was cut, growing so stout, especially on that clay, it left it nothing but stubble, and it would take me all the season to mow it and trim it and work on it to bring it in to make a decent grass plot of it. I worked upon it the rest of the season every year to try to make it look decent, but I urged him, and the others in authority, to have it cut early, but I couldn't get that cut. They did come over on Ruggles' part earlier, but our part it was almost impossible to get it cut before July, and, as I say before, it always looked rough and coarse. He kept cutting it, and I urged him, or tried to reason with him, to let us have it to beautify and fertilize at our own expense and cut frequently, and the rest of the lot owners went to the association, went to the officers, and urged them to let us have it to care for at our own expense; but he was determined not to give it up to us, and I couldn't do anything with him. At last I made up my mind that I would cut it and see what they could do with me."

Mr. Dickey testified that he had made an arrangement with the association whereby he was to have the hay on the park in consideration for certain work he did on the rest of the grounds and trucking, and that there was an understanding that it should be cut twice each year.

The defendant cut the grass on the 18th day of June, 1907, and notified Mr. Dickey that he had done so. "And I told him that I didn't care for the grass, that was not what I was after, and that he might take it off, and that if he didn't take it off I would." This action was immediately commenced.

Was there a dedication by the plaintiff of the locus to the use of the public and the lot owners as a park? We think there was.

"Dedication" is the intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use. The intention to

dedicate is the essential principle, and whenever that intention on the part of the owner of the soil exists in fact and is clearly manifest, either by his words or acts, the dedication, so far as he is concerned, is made. If accepted and used by the public for the purpose intended, it becomes complete, and the owner of the soil is precluded from asserting any ownership therein that is not entirely consistent with the use for which it was dedicated.

Judicial decisions explanatory of the principles upon which the doctrine of dedication rests have so multiplied, and are so uniform in reasoning, that but few citations need here be made. Prof. Dillon says (Dill. Mun. Corp. [4th Ed.] 630): "The subject may be advantageously presented by referring to the leading case of *City of Cincinnati v. White*, 6 Pet. 431, 8 L. Ed. 452, decided by the Supreme Court of the United States, which has been extensively followed by the state tribunals, and is everywhere recognized as a sound exposition of the peculiar doctrines of the law respecting the rights which may be parted with by the owner and acquired by the public under the doctrine of dedication. * * * In its opinion in the case just mentioned, the Supreme Court assert or assent to the following principles: (1) That it is not essential to a dedication that the legal title should pass from the owner. (2) Nor is it essential that there should be any grantee of the use or easement in esse to take the fee, such cases being exceptions to the general rule requiring a grantee. (3) Nor is a deed or writing necessary to constitute a valid dedication. It may be by parol. (4) No specific length of possession is necessary to constitute a valid dedication. All that is required is the assent of the owner of the soil to the public use, and the actual enjoyment by the public of the use for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment."

In that case (*Cincinnati v. White*) the question discussed was the dedication of a public park. It is there said: "And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted."

The following are a few of the cases in which the same principles have been clearly announced: *Hunter v. Trustees of Sandy Hill*, 6 Hill (N. Y.) 411; *Village of Mankato v. Willard*, 13 Minn. 13 (Gil. 1) 97 Am. Dec. 208; *People v. Marin County*, 103 Cal. 223, 87 Pac. 203, 28 L. R. A. 659; *Bates v. City of Beloit*, 103 Wis. 90, 78 N. W. 1102; *Palen v. Ocean City*, 64 N. J. Law, 689, 46 Atl. 774; *Wood v.*

Hurd, 34 N. J. Law, 87-88; Abbott v. Cottage City, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143; Attorney General v. Abbott, 154 Mass. 323, 328, 28 N. E. 346, 13 L. R. A. 251; 2 Dill. Mun. Corp. (4th Ed.) 630 et seq.; Cyc. vol. 13, pp. 448, 453, 455; Bartlett v. Bangor, 67 Me. 460; Heselton v. Harmon, 80 Me. 326, 14 Atl. 286; City of Indianapolis v. Kingsbury, 101 Ind. 200, 51 Am. Rep. 749.

The doctrine of dedication is applicable to public parks and squares, and the fact of dedication may be established in the same manner as in the case of streets and highways. Dill. Mun. Corp. (4th Ed.) 644, and notes; Rhodes v. Town of Brightwood, 145 Ind. 21, 43 N. E. 942; Abbott v. Cottage City, 143 Mass. 521, 523, 10 N. E. 325, 58 Am. Rep. 143, and cases there collected.

"Where the words 'public square' are used on a plat, that is an unrestricted dedication to public use." Dill. Mun. Corp. (4th Ed.) 645. And the same author adds: "The word 'park,' written upon a block on a map of city property, indicates a public use; and conveyances made by the owners of the platted land by reference to such map operate conclusively as a dedication of the block."

In Abbott v. Mills, 3 Vt. 526, 23 Am. Dec. 222, it is said: "Whenever a public square or common is marked out or set apart by the owner, and individuals are induced to purchase lots of land bordering thereon in the expectation held out by the proprietors that it should so remain, or even if there are no marks upon the ground, but a map or plan is made, and lots marked thereon and sold as such, it is not competent for the proprietors to disappoint the expectations of the purchasers by resuming the lands thus set apart and appropriating them to any other use."

Our own court has adopted and applied the same principles. In Bartlett v. Bangor, 67 Me. 460, 464, Walton, J., delivering the opinion of the court, said: "When the owner of land within or near to a growing village or city divides it into streets and building lots, and makes a plan of the land thus divided, and then sells one or more of the lots by reference to the plan, he thereby annexes to each lot sold a right of way in the streets, which neither he nor his successors in title can afterwards interrupt or destroy."

Applying these principles in the case now under consideration, we find all the essential elements of a complete dedication of the locus by the plaintiff to the use of the public and the adjoining lot owners for a park established by the evidence. Here was a dividing of a tract of land bordering on the seashore into small lots for sale, the setting apart of a portion of the tract for a park, the representation of the platting by a plan showing the lots by numbers and the locus as "Bay View Park," the exhibition of the plan to purchasers, the selling of lots by express reference to the plan, the promise that the park should be graded and kept open as such, and its use by the lot owners and the

public generally at their pleasure continuously for a long period of years, during which they have improved and beautified it at their own expense.

An intention on the part of the plaintiff to dedicate the locus to the public use as a park was thus clearly manifested by its acts and statements explanatory of those acts. Upon that intention so expressed the public and individual citizens had a right to act, and did act, purchasing lots with the assurance that they were to have the full benefit and enjoyment of the locus as a public park, and entering upon and using the same for such purpose. The conclusion therefore must be that a complete dedication has resulted.

We think such dedication affords the defendant a justification of his acts complained of.

It is true that the fee of the soil remains in the plaintiff, for a common-law dedication does not pass the fee; but by the dedication the plaintiff is estopped from exercising any use and control of the locus inconsistent with the full use, benefit, and enjoyment of it by the public as a park. The plaintiff's limitations as to its use and control of the locus must therefore be considered and determined with reference to the use for which it was dedicated—a park. In order to carry into effect such intended use, a more enlarged right of control in the public may be required, with a consequently diminished right in the plaintiff, than in the case of some other public uses, such as highways and streets.

A "park" may be defined as a piece of ground set apart to be used by the public as a place for rest, recreation, exercise, pleasure, amusement, and enjoyment. See cases collected under Words and Phrases, vol. 6, p. 5176, title "Park." The full use and benefit of a park is not realized by the enjoyment only of an open view and the right of passage upon it. The right to enjoy the pleasures and advantages that beauty and ornamentation may afford is also included in the uses and purposes of a public park.

Accordingly, by its dedication of the locus as a park the plaintiff gave up and surrendered its right to exercise any acts of control or possession of it that would hinder the public in the full enjoyment of it as a place of rest, of recreation, of amusement and enjoyment, or that would prevent the public from increasing those enjoyments by its adornment and ornamentation.

To maintain this action of trespass *quare clausum* the plaintiff must show that notwithstanding the dedication it still retained the possession and control of the locus sufficiently to have the grass growing thereon remain uncut until it ripened into hay, or at least until it saw fit to cut it. If such possession and control by the plaintiff would interfere with the full enjoyment by the public of the use of the locus as a park, then

it follows that the plaintiff had not such right of possession and control. Whether or not the grass growing upon this park, if left uncut until it ripened into hay, or late in the season, would lessen the benefits and enjoyments which the public could derive from the park, is a question of fact. We think it would, and that the park would be made more suitable for use, and afford more pleasure and enjoyment to those entitled to its use, if the grass were cut earlier and oftener. It must afford less pleasure to travel through tall grass, especially when wet by dews and fogs, than to walk over a closely cut surface; so, too, the coarse and seared stubble of a late cutting is less attractive to the eye than the green of a well-kept lawn.

The municipal authorities might have exercised control over the park and improved it, but they did not. The individual citizens interested in it and entitled to its enjoyment had the right to do that which was reasonably necessary to improve the park and render it more suitable for the uses for which it was intended. *Attorney General v. Abbott*, 154 Mass. 327, 328, 28 N. E. 348, 13 L. R. A. 251; *Heselton v. Harmon*, 80 Me. 326, 14 Atl. 286.

The acts of defendant in cutting the grass were done only for the purpose of improving the park, and in the opinion of the court so resulted.

It would hardly be contended that defendant could be held in trespass for raking dangerous rocks from footpaths over the park, or removing unsightly underbrush, or even cutting and destroying weeds and thistles growing thereon. Wherein is there a distinction in principle between such cases and the one at bar? We think the defendant, as one of the public, and an adjoining lot owner, had a right to cut the grass as he did, for the sole purpose of improving the park, and that he was not a trespasser in so doing.

It is suggested that inconveniences may result by reason of some possible conflict in the ideas of those interested in the park as to what acts would improve and benefit it. That is possible, but not probable. As before mentioned, the municipal authorities may take charge of it under authority to make by-laws and ordinances "for the proper protection and care of public parks and squares." Rev. St., c. 4, § 93, par. 6. If any one does that which will render the locus less suitable or useful as a park, or unlawfully interrupts the rightful enjoyment of it by others, he may be restrained; and it is not probable that rivalry for its improvement in fact will exist to the extent of inconvenience.

It follows that this action is not maintained, and the entry will be:

Judgment for defendant.

(104 Me. 401)

PITCHER v. WEBBER.

(Supreme Judicial Court of Maine. Nov. 5, 1908.)

1. APPEAL AND ERROR (§ 1032*)—HARMLESS ERROR.

It is not enough for the excepting party to show that excluded evidence was legally admissible. He must show that its exclusion was prejudicial to him.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4049; Dec. Dig. § 1032.*]

2. APPEAL AND ERROR (§ 1056*)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

When an issue of fact is determined in favor of the excepting party, the exclusion of evidence offered by him on that issue has not prejudiced him, unless it appears that the excluded evidence tended to increase or diminish in his favor the results of the finding.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4190; Dec. Dig. § 1056.*]

3. APPEAL AND ERROR (§ 1056*)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

In an action for the agreed price of property sold and delivered, it appeared that the jury found that material misrepresentations were made by the vendor in the sale, and that the damages assessed were reduced by reason of such misrepresentations. *Held*, that evidence that such misrepresentations had been made to other parties than the defendant could not affect the question of damages, and that its exclusion was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4190; Dec. Dig. § 1056.*]

(Official.)

Exceptions from Supreme Judicial Court, Androscoggin County.

Action by J. B. Pitcher against Wallace E. Webber. Verdict for plaintiff, and defendant excepts and moves for a new trial. Motions and exceptions overruled. Judgment on verdict.

See, also, 103 Me. 101, 68 Atl. 593.

Assumpsit on account annexed to recover the sum of \$750 for an automobile alleged to have been sold and delivered by the plaintiff to the defendant.

Plea, the general issue, together with a brief statement setting up, as a defense, breach of warranty, no delivery or acceptance, the statute of frauds, and rescission; the defendant also stating in his brief statement that he claimed to recoup certain sums laid out by him on the automobile, and also to recoup "whatever expense he may be put to in the defense of this action, including a reasonable amount for counsel fees and for cost of witnesses, and for such further and special damage as he may be able to prove on the trial hereof."

This case was first tried at the April term, 1907, Supreme Judicial Court, Androscoggin County, and the plaintiff recovered a verdict for \$526.25. On exceptions filed by the defendant, a new trial was ordered. See *Pitcher v. Webber*, 103 Me. 101, 68 Atl. 593. The case was again tried at the January term, 1908, of said court in said county. Verdict

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for plaintiff for \$510. The defendant excepted to various rulings made by the presiding justice during the trial, and also filed a general motion for a new trial.

Argued before EMERY, C. J., and WHITEHOUSE, PEABODY, SPEAR, and BIRD, JJ.

McGillicuddy & Morey, for plaintiff.
George C. Webber, for defendant.

EMERY, C. J. This was an action to recover the agreed price of an automobile alleged to have been sold and delivered. The defendant denied acceptance, but we find in the evidence enough to warrant the verdict that there was an acceptance. The defendant further contended that the automobile was not as represented, and that, if accepted, he effected a rescission by seasonably tendering it back, which tender was refused. There was evidence, however, that the automobile was injured through the negligence of the defendant's servant after it came into his possession, which injuries were not repaired before the tender of redelivery. This evidence warranted the jury in finding there was no effectual rescission, since, to effect a rescission of a sale, the article must be redelivered or tendered back in as good condition as when received, unless injured without the fault of the purchaser.

One other issue of fact in the case was whether the plaintiff's agent made certain material misrepresentations concerning the automobile to induce the plaintiff to purchase. Upon this issue there was evidence in favor of the defendant, but he further offered in evidence the testimony of other persons to the effect that the plaintiff's agent had made similar representations to them about the automobile. This evidence was excluded, and the defendant excepted.

The verdict, however, shows that the defendant was not prejudiced by the exclusion of the evidence offered and excluded. The agreed price was \$750, or at least \$725, in April, 1906. Had there been no misrepresentations, the verdict, if for the plaintiff at all, must have been for that sum and interest from the date of the sale, April, 1906, to the time of the verdict, January, 1908, or more than \$800. The verdict was for \$510 only. To have cut the agreed price down to that sum the jury must have found that material misrepresentations were made; that is, must have found for the defendant upon the issue upon which he offered the excluded evidence.

Granting, arguendo, that the offered evidence would have tended to prove the affirmative of the issue, it is not made to appear that it would, or even might, have reduced the amount of the verdict still more. Whether it would or not is at the most merely conjectural. The verdict being in the defendant's favor upon the issue in question,

and it not being shown that the offered evidence would or even might have effected a result more favorable to the defendant, he clearly was not prejudiced by its exclusion, and is not entitled to a new trial on that account.

Motion and exceptions overruled.
Judgment on the verdict.

(194 Me. 320)

WEBBER HOSPITAL ASS'N et al. v. McKENZIE.

McKENZIE v. MUCHMORE et al.

(Supreme Judicial Court of Maine. Sept. 5, 1908.)

1. WILLS (§ 681*)—COURTS (§ 472*)—CHARITIES (§ 14*)—FAILURE TO NAME TRUSTEE—EFFECT—JURISDICTION—EQUITY COURTS—GIFT TO HOSPITAL.

Although no trustee is named in a will, yet a valid trust once created is never allowed to fail for want of a trustee. The executor may be held to act as trustee, or the court may appoint one.

Allegations as to the misconduct of an executor and trustee cannot be considered by the Supreme Judicial Court sitting in equity upon the construction of a will. Such allegations are within the exclusive jurisdiction of the probate court in the first instance and of the Supreme Judicial Court sitting as the Supreme Court of Probate on appeal in the last instance. A testator's will contained the following residuary clause:

"The balance of my estate and property real and personal and all that shall accrue to said estate, not otherwise mentioned to constitute a fund which when it shall have amounted to seventy-five thousand dollars the income from which to be and for the maintenance of a free hospital in Biddeford, Maine, where the unfortunate may receive good care and skillful treatment.

"If a hospital shall not have been built when the above hospital fund shall have amounted to seventy-five thousand dollars, twenty-five thousand dollars of the principal may be used for building one provided a sufficient sum is guaranteed for its maintenance.

"The above fund to be a memorial to my beloved wife, Eliza P. Webber."

Stella F. Ripley was named as one of the executors in the will without bond, "leaving the other executor to the discretion of the judge of probate." The said Stella F. Ripley duly qualified as executrix under the will, but no co-executor was appointed, and the said Stella F. Ripley settled the estate as sole executrix. No trustee being named in the will, the said Stella F. Ripley upon her own petition was then appointed trustee by the probate court, and afterwards, having married one McKenzie, she surrendered her former letters of trusteeship, and was appointed trustee anew under the name of Stella R. McKenzie. Two Biddeford corporations, the Trull Hospital and the Webber Hospital Association, were claimants for the benefit of the alleged trust fund created by the aforesaid residuary clause. These corporations were not in existence at the time of the execution of the will or at the death of the testator.

Held: 1. That a valid trust was created by the will, and, although no trustee was named in the will, yet a trustee has already been appointed by the probate court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1600; Dec. Dig. § 681; Courts, Dec. Dig. § 472; Charities, Dec. Dig. § 14.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. CHARITIES (§ 4*)—IMPOSSIBILITY OF FULFILLMENT—"FREE."

That the word "free" in the residuary clause is used in the sense of thrown open or made accessible to all open for the public use. It does not prohibit receiving compensation from those able to pay, and at the same time no charge is to be made against those unable to pay.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 8, pp. 2962-2963.]

3. CHARITIES (§ 20*)—GIFT TO HOSPITAL.

That the Trull Hospital is not entitled to the benefit of the trust fund. It is a private enterprise organized with a capital stock under Rev. St. c. 47, governing business corporations, all of the stock being held by the physician in charge and three other members of his family. It is neither a public nor a charitable institution, and does not meet the requirements of the will. Such an institution is not a public charity, even if indirectly it serves charitable ends.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 20.*]

4. CHARITIES (§ 20*)—GIFT TO HOSPITAL.

That the Webber Hospital Association is entitled to the benefit of the trust fund. It was organized under Rev. St. c. 57, governing charitable and benevolent organizations for the admitted purpose of carrying out the provisions of this will. It has a membership of about 850. It is treating patients gratuitously. It comes within the letter and spirit of charitable corporation whose distinctive feature is that it has no capital stock, and no provision for making dividends or profits, deriving its funds mainly from public and private charity and holding them in trust for the object of the institution.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 20.*]

5. EXECUTION OF TRUST.

That, when the principal of the trust estate amounts with its accumulations to \$75,000, the trustee is authorized and directed to pay over semiannually to the treasurer of the Webber Hospital Association for its use the income of the trust fund. When that time arrives, the association may have already built a hospital. If not, the trustee may use \$25,000 of the principal for that purpose, if a sufficient sum is guaranteed by others parties, so that with the income from the remaining \$50,000 its maintenance is assured. If in the future the principal can be properly paid to the association to be held in trust, appropriate proceedings can be had therefor.

(Official.)

Report from Supreme Judicial Court, York County, at Law.

Separate bills by the Webber Hospital Association and others against Stella R. McKenzie, executrix and trustee under the will of Moses W. Webber, deceased, and by Stella R. McKenzie, as trustee, against Charlotte Muchmore and others for the construction of the will of Moses W. Webber, deceased, and the mode of executing the trust, if any, created by the will. Cases reported to the law court for determination. Will construed, and mode of executing the trust declared.

Two bills in equity asking for the construction of the will of Moses W. Webber, late of Biddeford, deceased, and the mode of ex-

ecuting the trust if one was created by the will.

The bill in the first-named case was filed September 5, 1905, and was brought by the Webber Hospital Association, a corporation located at Biddeford, and Charlotte Muchmore, Phoebe Goodwin, and Johanna Murray, heirs at law of the said Moses W. Webber, against the defendant, Stella R. McKenzie, in her capacity as executrix of the aforesaid will "and also in her capacity as trustee of a fund created by and under the provisions of said last will and testament of said Webber, for a hospital in said Biddeford, 'where the unfortunate may receive good care and skillful treatment.'" March 15, 1906, the Trull Hospital, a corporation located at Biddeford, was made a party plaintiff by agreement of all the parties. At the following September term of the Supreme Judicial Court all the plaintiffs, except the Webber Hospital Association and the Trull Hospital, withdrew by consent of the defendant. To this bill the defendant filed a demurrer and answer.

The bill in the last-named case was filed January 2, 1906, and was brought by the said Stella R. McKenzie "in her official capacity as trustee by and under the last will" of the aforesaid Moses W. Webber against the aforesaid Charlotte Muchmore, Phoebe Goodwin and Johanna Murray, "and against any and all unknown pretended supplicants or pretended claimants in any way relating to the last will and estate of said Webber, being all the parties interested, or claiming to be interested, in the subject-matter of this bill." The aforesaid Charlotte Muchmore, Phoebe Goodwin, Johanna Murray, the Webber Hospital Association, and the Trull Hospital appeared in defense and filed answers to the bill.

Both cases were heard together on bills, demurrer, answers, and evidence before the justice of the first instance. At the conclusion of the hearing and by agreement of the parties, the cases were reported to the law court for determination.

All the material facts appear in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and KING, JJ.

Foster & Foster, Edwin Stone, George F. & Leroy Haley, and Cleaves, Waterhouse & Emery, for plaintiffs Webber Hospital Ass'n and others. James O. Bradbury, for defendant McKenzie. James O. Bradbury, for plaintiff McKenzie. Foster & Foster, Edwin Stone, George F. & Leroy Haley, and Cleaves, Waterhouse & Emery, for defendants Muchmore and others.

CORNISH, J. Construction of the will of Moses W. Webber formerly of Biddeford,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

who died June 9, 1899, is asked in two bills in equity brought under Rev. St. c. 79, § 6, par. 8. The first bill was filed September 5, 1905, in the name of the Webber Hospital Association and of the heirs at law against the executrix and trustee. On March 15, 1906, the Trull Hospital was admitted as party plaintiff, and at the September term, 1906, the heirs withdrew by consent of the defendant. To this bill the defendant filed a demurrer and answer, interposing the objection that neither the Webber Hospital Association nor the Trull Hospital has sufficient interest to enable it to maintain the bill. On January 2, 1908, a bill was filed in the name of Stella R. McKenzie, trustee, against the heirs at law and all parties claiming an interest under the will, asking for a construction thereof and instructions upon the execution of the trust. The heirs at law, the Webber Hospital Association, and the Trull Hospital appeared in defense and filed answers. Both cases are now before this court on report; the evidence taken being applicable to both. Under these circumstances it is unnecessary to determine the technical question raised by the demurrer as to whether the first bill should be entertained. All parties in interest are before the court, and are asking for the construction of the same will and the mode of executing the trust if one was created. The result in no way depends upon whether the first or the second bill is entertained or both. This is a privileged suit "to which the ear of the court should be open" to relieve parties from tedious and expensive litigation. *Richardson v. Richardson*, 80 Me. 585, 16 Atl. 250. Therefore, without discussing this technicality, we pass to the merits of the case.

The portion of the will which is said to be of doubtful construction is as follows:

"The balance of my estate and property real and personal and all that shall accrue to said estate, not otherwise mentioned, to constitute a fund which, when it shall have amounted to seventy-five thousand dollars, the income from which to be used for the maintenance of a free hospital in Biddeford Maine, where the unfortunate may receive good care and skillful treatment.

"If a hospital shall not have been built when the above hospital fund shall have amounted to seventy-five thousand dollars, twenty-five thousand dollars of the principal may be used for building one provided a sufficient sum is guaranteed for its maintenance.

"The above to be a memorial to my beloved wife, Eliza P. Webber."

The questions involved are:

First. Whether a valid trust was created by this residuary clause, or whether, the residuary clause being void, the heirs at law of the testator are entitled to the residuum as intestate estate.

Second. If a valid trust was created, how shall it be administered?

1. The intention of the testator is clear.

The will was made July 9, 1898, about one year before his death, and, as he was childless, he desired to dispose of the bulk of his estate for charitable purposes and at the same time as a memorial to his deceased wife. He makes a bequest of \$5,000 to his niece Stella F. Ripley, who is also named as executrix, together with all his household goods, books, pictures, etc., and the use of his house in Old Orchard for life, with \$100 a year from the income of his property for the maintenance of the same. Seven hundred and fifty dollars are given for a monument to be erected on the burial lot of his father. All other bequests create trust funds the income only to be used. Three of these are in small amounts for the care of family burial lots, a fourth is of \$15,000 "as a fund, the income from which to be given said Stella F. Ripley during her lifetime," and the fifth is of "one thousand dollars as a fund, the income from which to be donated to the aid of unfortunate women, to enable them to enter the Wardwell Home, so called, at Saco, Maine, the fund to be known as the Eliza P. Webber fund." Then follows the clause already quoted, bequeathing the balance of his estate "to constitute a fund which when it shall have amounted to seventy-five thousand dollars, the income from which to be used for the maintenance of a free hospital," etc., also as a memorial to his beloved wife.

A purpose so benevolent and an intention so clear ought to be upheld by this court unless prevented by positive and firmly established rules of law.

2. Counsel for the heirs contend that this residuary clause is void; that the legacy lapsed because the intention is incapable of being carried into effect, and the court in equity is not authorized to frame a new intention for the testator; that his purpose was to establish a hospital absolutely and entirely free, not a hospital some branch of which might be free, or which might provide a certain number of free beds to charity patients; that neither the Webber Hospital Association nor the Trull Hospital is or claims to be a free hospital in this sense; that, if \$25,000 of the principal is taken to build such a free hospital, the income of the remaining \$50,000 will be entirely inadequate to maintain it; that a guaranty of at least \$200,000 from outside parties would be needed, and, as it is impossible for the court to say that such a sum will be guaranteed, the entire provision is impossible of fulfillment, and therefore void. This contention invokes the commonly accepted rule that if it appears that the gift was for a particular purpose only, and that there was no general charitable intention, the court cannot by construction apply it cy pres the original purpose (*Doyle v. Whalen*, 87 Me. 414, 32 Atl. 1022, 31 L. R. A. 118); and, if the gift cannot vest in the first instance in the donees for the reason that donees cannot be found,

as in *Brooks v. Belfast*, 90 Me. 318, 38 Atl. 222, or if the gift is conditional upon a future and uncertain event, and the condition is never fulfilled so that the estate never arises, as in *Re White's Trusts*, 33 Ch. Div. 449, cited by the learned counsel for the heirs, the court cannot appoint other donees *cy pres* and the legacy lapses.

But in the case at bar the facts do not warrant the application of these rules. No condition whatever is attached to the bequest. The expenditure of \$25,000 in erecting such a hospital is not mandatory, but discretionary. "Twenty-five thousand dollars of the principal may be used for building one, provided a sufficient sum is guaranteed for its maintenance" are the words of the will. The trustee is to decide whether a sufficient sum has at any time been guaranteed, and even then he may expend \$25,000 of the principal or not, as his good judgment may determine.

Nor is the word "free" used in the sense of without compensation from any one receiving its benefits. Such a hospital is practically unknown. Income may be received from such as are able to pay, and yet the hospital be free. The word is used in its equally well-known meaning as defined by Webster "thrown open or made accessible to all." This is also a well-recognized definition of the word in law: "Open to all—public." 14 Am. & Eng. Ency of Law, p. 527; *Anderson, Law Dictionary*: "Open for the public use." 20 Cyc. 841; *Black's Law Dictionary*; *Dugan v. Baltimore*, 5 Gill & J. (Md.) 357-375. It was therefore a public hospital "where the unfortunate may receive good care and skillful treatment" that the testator had in mind. No charge should be made to those unable to pay, but this would not prohibit receiving compensation from those who are able. It was to be open to all. The rich should not be turned away because of their wealth nor the poor because of their poverty. It should be free in the broadest sense.

The will, while providing that the income of this fund shall be used for the maintenance of a hospital, does not prohibit aid from other sources, but, on the contrary, suggests such assistance. Patients may contribute from their means. The state may make generous appropriations, benevolent friends may unite in guaranteeing an endowment. All these things may be done, and they will promote rather than thwart the testator's intent. Without their aid the work of the hospital may be limited; with it it may be largely extended.

This bequest, therefore, fairly interpreted, is by no means impossible of fulfillment, and the contention of the heirs on this point fails.

3. We think a valid trust was created. The bequest under consideration clearly comes within the scope of a public charity. "Public," or as they are frequently termed,

'charitable' trusts, are those created for the benefit of an unascertained, uncertain, and sometimes fluctuating body of individuals in which the cestus que trustent may be a portion or class of a public community." 2 Pom. Eq. § 987; *Bangor v. Masonic Lodge*, 73 Me. 428, 40 Am. Rep. 369; *Doyle v. Whalen*, 87 Me. 414, 32 Atl. 1022, 31 L. R. A. 118; *Brooks v. Belfast*, 90 Me. 318, 38 Atl. 222; *Jackson v. Phillips*, 14 Allen (Mass.) 539. The following are examples: "To the suffering poor of the town of Auburn," *Howard v. Am. Peace Soc.*, 49 Me. 288. "To the town of Skowhegan for the worthy and unfortunate poor," *Dascomb v. Marston*, 80 Me. 223, 13 Atl. 888. "For the benefit of the inhabitants of E. and vicinity for educational purposes," *Sears v. Chapman*, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502. It is unnecessary to multiply authorities sustaining the point that the founding and maintenance of public hospitals form a favored branch of charitable trusts. *Ould v. Washington Hospital*, 95 U. S. 303, 24 L. Ed. 450; *Home for Incurables v. Noble*, 172 U. S. 386, 19 Sup. Ct. 226, 43 L. Ed. 486.

No trustee is named in the will, but a valid trust once created is never allowed to fail for want of a trustee. The executor may be held to act as trustee or the court may appoint one. *Washburn v. Sewall*, 9 Metc. (Mass.) 280; *Brown v. Kelsey*, 2 Cush. (Mass.) 243; *Sears v. Chapman*, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502; *Tappan v. Deblols*, 45 Me. 122; *Howard v. Am. Peace Soc.*, 49 Me. 288; *Wentworth v. Fernald*, 92 Me. 282, 42 Atl. 550.

In the case at bar that step has already been taken. In the probate court, and upon her own petition, *Stella F. Ripley* on March 4, 1902, was appointed trustee, and after her marriage and the surrender of her former letters of trusteeship was appointed trustee anew on June 2, 1903, under the name of *Stella R. McKenzie*, gave bond in the sum of \$75,000, and has settled two probate accounts in that capacity.

We therefore hold that a valid trust was created by the residuary clause of the will.

4. The next question is the mode of executing said trust: To whom shall the principal or the income be paid? There are two claimants, the Trull Hospital and the Webber Hospital Association, both now of Biddeford, but neither in existence at the time of the execution of the will or at the death of the testator.

The Trull Hospital is a corporation organized December 11, 1902, under Rev. St. c. 47, governing business corporations, with a capital stock of \$25,000 all of which has been since the incorporation, and still is, owned by Dr. Trull and three other members of his family. It owns and maintains a private hospital. It is distinctly a private enterprise, originated by Dr. Trull in 1900, and then incorporated two years later, as he says, for two principal reasons,—one because he had

organized a training school for nurses, and it gave them a better recommendation to graduate from an incorporated institution; and, second, because, if incorporated, he would be relieved from paying duty on certain drugs and on alcohol. No mention of charity work is made in the purposes of incorporation or in the by-laws. Some patients have failed to pay their bills, but regular charges are made against all. The management is in the hands of the directors who may receive or reject applicants as they see fit.

It is neither a public nor a charitable institution. No patient has a right to claim its benefits unless he pays for them. It is true that this claimant now declares its readiness to devote the income of the Webber fund, if received, to charity work, but that does not change the character of the institution itself. Such an enterprise is not a public charity even if indirectly it serves charitable ends. *Stratton v. Physio-Medical College*, 149 Mass. 505, 21 N. E. 874, 5 L. R. A. 33, 14 Am. St. Rep. 442.

Our conclusion is that the Trull Hospital is not such an institution as meets the requirements of the will, and that it is not entitled to any portion of the income.

The Webber Hospital Association was incorporated on November 23, 1899, under Rev. St. c. 57, governing charitable and benevolent organizations, for the admitted purpose of carrying out the provisions of this will and with the knowledge and approval of the executrix who was at first made a member of the board of directors. Its purposes are thus stated in its papers of organization: "For the purpose of taking and holding by purchase, gift, devise or bequest, personal and real estate, for the support and maintenance of a hospital in Biddeford where the unfortunate may receive medical and surgical treatment and nursing." It has a membership of about 350, and its officers are among the substantial and public spirited citizens of Biddeford. It received an appropriation of \$10,000 from the state in 1907. Pledges have been made by certain individuals and corporations for its assistance. It occupies a leased house, and is doing the work of a public hospital where the poor and unfortunate are treated gratuitously, limited only by the amount of its resources. It comes within the letter and the spirit of a charitable corporation whose distinctive feature is that it has no capital stock and no provision for making dividends or profits, deriving its funds mainly from public and private charity and holding them in trust for the object of the institution. 6 Cyc. 974; *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Farrington v. Putnam*, 90 Me. 405, 37 Atl. 652, 38 L. R. A. 339.

We therefore are of the opinion that the Webber Hospital Association meets the requirements of the will, and should be the recipient of its bounty.

When the principal of this trust estate amounts with its accumulations to \$75,000, the trustee thereof is authorized and directed to pay over semiannually to the treasurer of that association for its use the income of the trust fund. When that time arrives, the association may have already built a hospital. If not, the trustee may use \$25,000 of the principal for that purpose, if a sufficient sum is guaranteed by other parties, so that with the income from the remaining \$50,000 its maintenance is assured. That decision will call for the sound judgment of the trustees. If in the future this association is in such condition that the principal can properly be paid to it to be held in trust, appropriate proceedings can be had therefor.

5. The bill filed by the Webber Hospital Association contains many allegations of misconduct on the part of Stella R. McKenzie both as executrix and as trustee, and claims that had the estate been legally administered the balance available for this trust would now amount to at least \$75,000. The record contains a large amount of evidence bearing on these points. But these allegations and this evidence cannot be considered by this court sitting in equity upon the construction of a will. They are within the exclusive jurisdiction of the probate court in the first instance and of this court sitting as the Supreme Court of Probate on appeal in the last instance. The acts of the executrix and trustee have been passed upon by the probate court, and whether correctly or incorrectly cannot be made a matter of inquiry in this proceeding. *Harlow v. Harlow*, 65 Me. 448; *Piper v. Moulton*, 72 Me. 155; *Lebroke v. Damon*, 89 Me. 113, 35 Atl. 1028; *Graffam v. Ray*, 91 Me. 234, 39 Atl. 509; *Hawes v. Williams*, 92 Me. 483, 43 Atl. 101. Sitting as the Supreme Court of Probate, this court will not exercise equity power in construing a will (*Hanscom v. Marston*, 82 Me. 288, 19 Atl. 460), and the converse is equally true. Whatever rights and remedies an interested party has must be sought and enforced in the probate court.

We deem it, however, our duty in this case to observe that the administration of this estate seems to have been left too much in the hands of one person, and she a party with conflicting interests. Stella F. Ripley, now Stella R. McKenzie, was named as one of the executors in the will without bond "leaving the other executor to the discretion of the judge of probate," showing a purpose on the testator's part to have a coexecutor appointed who should give bond. It seems, however, that no action was taken by her looking to the appointment of a coexecutor, and she settled the estate as sole executrix without bonds, notwithstanding she was a legatee to the amount of \$5,000, and apparently made her own selection of securities with which to satisfy that sum. She was then, upon her own petition, appointed trustee of the \$15,000

fund of which she was the beneficiary, and to meet which she made another selection from the securities. In her petition she states that such was the wish of the testator. If so, he could have easily expressed it by naming her as trustee in the will. By the same letters of trusteeship she was made trustee of the residue of the estate, the income of which was to be for the benefit of a hospital. She claims that the balance has not yet reached the required sum. Her attitude toward the Webber Hospital Association, as disclosed by the record, is far from friendly and her interests in these various capacities are clearly antagonistic.

The court would suggest the propriety of the trustee resigning from the trust, and, having a disinterested person or corporation appointed, that would administer the \$15,000 trust, paying the income thereof to Mrs. McKenzie during life, and also a disinterested person or corporation to administer the hospital trust in accordance with the construction herein given. The law does not look with favor upon such a concentration of conflicting interests, and the rights of all parties will be better protected if these suggestions are carried into effect.

The Webber Hospital Association, the Trull Hospital, and the trustee are each entitled to recover one bill of costs to be paid out of the estate, and also the three heirs at law who are to be treated as one party.

Decree accordingly.

(104 Me. 372)

DUNTON v. WESTCHESTER FIRE INS. CO.

(Supreme Judicial Court of Maine. Sept. 15, 1908.)

1. INSURANCE (§ 567*)—FIRE POLICY—STIPULATION FOR REFERENCE—POWER OF REFEREES.

The stipulation in the Maine Standard fire insurance policy, providing that, in case the parties fail to agree, the amount of loss shall be determined by three referees as a condition precedent to any right of action on the policy, is not to be construed to authorize the referees to take jurisdiction of and determine the question of the plaintiff's title to the property insured; but such stipulation contemplates only an appraisal by the referees of the value of the property described in the policy and an estimate of the damage done by fire to that property, leaving the question of the plaintiff's title and the general question of the defendant's liability to be judicially determined in the courts of law.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 567.*]

2. INSURANCE (§ 124*)—STANDARD FIRE POLICY—EFFECT.

A policy of fire insurance in the standard form prescribed by Rev. St. c. 49, § 4, par. 7, is not to be treated as a legislative enactment after it has been accepted by the parties, but as a voluntary contract, which, like any other contract, derives its force and efficacy from the consent of the parties.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 124.*]

3. INSURANCE (§ 146*)—STANDARD FIRE POLICY—EFFECT.

The fact that the Legislature put forward the Maine Standard policy as a form for a contract to be executed by the parties affords no reason for giving the arbitration clause therein contained any different construction from that heretofore given by the courts to all similar contracts made without legislative sanction.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 146.*]

4. STANDARD FIRE POLICY — ARBITRATION CLAUSE—EFFECT.

In the judicial treatment of stipulations for arbitration in policies of insurance not prescribed by the Legislature, every allusion to a submission to ascertain the "amount of loss or damage" has uniformly been understood to signify a proceeding to appraise and estimate the damage to the property described, but not to embrace the question of ownership or any other matter which goes to the root of the cause of action; and, when a policy in the standard form prescribed by the statute has been issued, there is no reason to suppose that it was in the contemplation of the parties or of the Legislature that any other or different effect should be given to such words.

5. CONTRACTS (§ 127*)—OUSTING JURISDICTION OF COURTS.

A general stipulation, in a contract of insurance or similar contract, to refer to arbitration all matters of difference that may arise respecting both the right to recover and the amount of damages, will not be sanctioned or enforced so as to divest the courts of their established jurisdiction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 608-615; Dec. Dig. § 127.*]

6. CONTRACTS (§ 127*)—OUSTING JURISDICTION OF COURTS.

While parties may impose, as a condition precedent to application to the court, that they shall have first settled the amount to be recovered by an agreed mode, yet they cannot entirely close access to the courts of law.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 608-615; Dec. Dig. § 127.*]

7. INSURANCE (§ 567*)—ADJUSTMENT OF LOSS—VALIDITY OF PROVISION IN POLICY.

If parties stipulate in contracts of insurance and other similar contracts to submit to arbitration the question of the amount of damage, or any similar matters that do not go to the root of the action, it is entirely competent for them to make such an agreement a condition precedent to the right of action; and if it appears from the express terms of the contract, or from necessary implication, that such was the intention, it will be upheld by the courts, and no action can be maintained upon the contract without proof on the part of the plaintiff that he has fulfilled the stipulation in the contract, or made all reasonable effort to fulfill it. The effect of such an agreement is not to refer a cause of action, but to provide that a cause of action shall arise as soon as the amount to be paid has been determined, and not before. It does not deprive the courts of their jurisdiction, but simply provides a reasonable method of estimating and ascertaining the amount of the loss and leaves the general question of liability to be determined by the judicial courts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1420; Dec. Dig. § 567.*]

(Official.)

Exceptions from Supreme Judicial Court, Somerset County.

Action by Elmer H. Dunton against the Westchester Fire Insurance Company. Ver-

dict for plaintiff, and defendant excepts. Exceptions overruled.

Action on two fire insurance policies issued by the defendant in the standard form prescribed by Rev. St. c. 49, § 4, par. 7. The record does not disclose the defendant's plea. Tried at the March term, 1908, Supreme Judicial Court, Somerset County. At the conclusion of the testimony the presiding justice ordered a verdict for the plaintiff for \$1,246.71. To this order the defendant excepted and also excepted to certain other rulings made during the trial.

The case is stated in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, PEABODY, and BIRD, JJ.

Merrill & Merrill, for plaintiff. Butler & Butler and Frederick W. Brown, for defendant.

WHITEHOUSE, J. This is an action on two fire insurance policies issued by the defendant corporation in the standard form prescribed by Rev. St. Me. c. 49, § 4, par. 7.

Among the provisions contained in this form of policy are the following stipulations respecting the loss or damage and the method of ascertaining and estimating such damage by arbitration, viz.:

"The amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens but not to include loss or damage caused by explosions," etc.

"In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be within a reasonable time rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail," etc.

"In case of any loss or damage, the company within sixty days after the assured shall have submitted a statement as provided in the preceding clause, shall either pay the amount for which it shall be liable, which amount, if not agreed upon, shall be ascertained by award of referees as hereinafter provided, or replace the property with other of the same kind or goodness," etc.

"If there shall be any other insurance on the property, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon.

"In case of loss under this policy, and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of the three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final up-

on the parties as to the amount of loss and damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

It is admitted by the defendant that three referees were seasonably chosen in all respects in accordance with these stipulations in the policy and the statutes of the state providing for "a reference of the question of amount to three disinterested men * * * in case of a failure of the parties to agree as to the amount of loss." Thereupon the defendant contended before the board of referees, thus legally constituted, that at the time of the fire the plaintiff had no title to the property insured, and offered evidence to prove that prior to that time the plaintiff had no title to the property insured, and had sold the property to a third party. The referees excluded this evidence and ruled that they had no jurisdiction of the question of the plaintiff's title or insurable interest, and that the only question submitted to them was the amount of damage done by the fire.

The referees accordingly proceeded to take evidence upon the question of the amount of damage done by fire to the property described in the policies, and made their award determining the amount of damage on the merchandise insured to be \$6,280, and on the tools and machinery \$350. The defendant declined to recognize this award as a compliance with the requirements of the policy and denied its validity on the ground that the referees had refused to hear evidence upon and determine the question of the plaintiff's title to the property insured. The plaintiff thereupon commenced this action upon the policies, and at the trial the court received evidence, subject to the defendant's objection, to prove title in the plaintiff to the property insured, and also admitted the award of the referees as to the amount of damage done to the property by the fire.

The defendant requested the court to rule that upon this evidence the plaintiff was not entitled to recover. The court refused to rule as requested and ordered a verdict for the plaintiff for \$1,246.71. The case comes to the law court on exceptions to these rulings of the presiding justice.

The only question thus raised by the exceptions and argued by counsel is whether the stipulation in the Maine Standard policy in regard to arbitration authorizes and requires the referees to take jurisdiction of one of the principal questions involved in the plaintiff's right to recover, and determine his title to the property insured, as well as the amount of the damage done to the property, or whether it contemplates only an appraisal by the referees of the value of the property described in the policy and an estimate of the damage done by the fire to that property, leaving the question of the plaintiff's title and the general question of the

defendant's liability to be judicially determined in the courts of law.

When this question is examined in the light of the uniform current of judicial opinion respecting such stipulations for arbitration in contracts of insurance made prior to the adoption of the Maine Standard policy, and considered with reference to the provisions of the standard policy itself specially involved in the inquiry and the practical operation of the rule contended for by the defendant, the conclusion is irresistible that the ruling of the presiding justice was correct, and that the exceptions must be overruled.

It has been long established by authority both in this country and in England that if parties stipulate in contracts of insurance and other similar contracts to submit to arbitration the question of the amount of damage or any similar matters that do not go to the root of the action, it is entirely competent for them to make such an agreement a condition precedent to the right of action; and if it appears from the express terms of the contract, or from necessary implication, that such was the intention, it will be upheld by the courts, and no action can be maintained upon the contract without proof on the part of the plaintiff that he has fulfilled the stipulation in the contract or made all reasonable effort to fulfill it. The effect of such an agreement is not to refer a cause of action, but to provide that a cause of action shall arise as soon as the amount to be paid has been determined, and not before. It does not deprive the courts of their jurisdiction, but simply provides a reasonable method of estimating and ascertaining the amount of the loss, and leaves the general question of liability to be determined by the judicial courts. *Scott v. Avery*, 8 Exch. 497. (5 H. L. Cas. 811); *Elliott v. Assurance Co.*, 2 L. R. Exch. 237; *Hamilton v. Liverpool Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419; *Wolff v. Insurance Co.*, 50 N. J. Law, 453, 14 Atl. 561.

It is equally well settled that if an agreement to arbitrate is confined to an appraisal of value or an assessment of the amount of damages, and is at the same time only an independent stipulation and not made by the policy a condition precedent to the right of action, the plaintiff may still have his action and establish his claim by other evidence without procuring an award from the arbitrators. *Reed v. Insurance Co.*, 138 Mass. 572. In such a case the agreement to refer is not an essential term of the covenant, but a power which may be revoked at any time before it is fully executed. It is simply a collateral agreement to refer to arbitration, and not an agreement that only the adjusted loss shall be paid.

But there is a third proposition of paramount importance, which has undoubtedly been regarded as settled by judicial authority ever since the days of Lord Coke, and that is that a general stipulation in such a con-

tract to refer to arbitration all matters of difference that may arise respecting both the right to recover and the amount of damage will not be sanctioned or enforced so as to divest the courts of their established jurisdiction. *Stephenson v. Insurance Co.*, 54 Me. 55, and authorities cited. In this case the distinction between a valid and invalid agreement for arbitration in such a contract is thus stated by the court:

"While the parties may impose, as a condition precedent to application to the courts, that they shall have first settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law." See, also, *Wood v. Humphrey*, 114 Mass. 185; *White v. Railroad Co.*, 135 Mass. 216; *Fisher v. Insurance Co.*, 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428.

It does not appear from any of the decisions cited in support of the familiar propositions above stated, or from any other case to which the attention of the court has been called, that such a stipulation for the settlement of the question of damages by arbitration has ever been construed to require or authorize the referees to determine the question of the plaintiff's title to the property insured, as a condition precedent to the plaintiff's right of action on the policy. It has not been perceived that any judicial decision exists in which it has been held competent for the parties to stipulate that the determination of the question of the ownership of the property by arbitration should be a condition precedent to the plaintiff's right of action. No such doctrine has ever been suggested respecting stipulations for arbitration in policies of insurance not prescribed by legislative action, for the obvious reason that the question of the ownership of the property is not involved in the appraisal of the value of the property destroyed, or the estimate of the damages done to the property insured, but goes directly and solely to the plaintiff's cause of action and the defendant's liability.

But the Maine Standard policy, though its form is prescribed by statute, is not to be treated as a legislative enactment after it has been accepted by the parties, but as a voluntary contract, which, like any other contract, derives its force and efficacy from the consent of the parties. As stated by the court in *Reed v. Washington Ins. Co.*, 138 Mass. 572, with reference to the standard policy then prescribed by their statute: "It is their contract. As such, it does not deprive the plaintiff of his action and his trial by jury. It is not to be presumed that the Legislature intended, by prescribing the form of contract, and prohibiting any other, to give it effect in depriving a party of rights, which, as a contract, it would not have."

The fact therefore that the Legislature put forward the Maine Standard policy as a form for a contract to be executed by the parties affords no reason for giving to the arbitration clause any different construction from

that heretofore given by the courts to all similar contracts made without legislative sanction. It has been seen that, unlike the form considered in *Reed v. Washington Ins. Co.*, supra, the arbitration clause in the Maine policy contains an express provision that the award of the referees "shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action * * * to recover for such loss."

It will be noticed that, in the judicial treatment of this subject in all the cases cited and to be found relating to it, every allusion to a submission to ascertain the "amount of loss or damage" has uniformly been understood to signify a proceeding to appraise and estimate the damage to the property described, but not to embrace the question of ownership or any other matter which goes to the root of the cause of action. *Stephenson v. Insurance Co.*, 54 Me. 55; *Bangor Savings Bank v. Insurance Co.*, 85 Me. 68, 26 Atl. 991, 20 L. R. A. 650, 35 Am. St. Rep. 341. There is no reason to suppose that it was in the contemplation of the parties or of the Legislature that any other or different effect was to be given to those words in the Maine policy. All of the other terms of the policy and of the statutes relating to the subject are entirely consistent with this construction of the language of the arbitration clause in each of the policies in suit. There is nothing in any of the provisions of the policy prescribed or of any of the statutes relating to it, which indicates in the slightest degree any purpose or desire to change the established doctrine of the courts in regard to the distinction above stated between valid and invalid agreements for arbitration in this class of contracts.

The case of *Cassidy v. Royal Exchange Assurance Co.*, 99 Me. 399, 59 Atl. 549, differs toto cœlo from the case at bar, and is not an authority for the defendant's contention. The matter which was there deemed to be within the jurisdiction of the referees did not go to the cause of action, but to the amount of damages, and the only question of fact for the determination of the referees was whether certain piles of lumber were within 100 feet of each other.

Furthermore the rule claimed by the defendant would not be a wise or beneficent one in its practical operation. The settlement of questions of title to real and personal property often involves the duty of examining a complex state of facts and important and difficult questions of law, a duty which those not educated to the law would be wholly incompetent to perform; and yet it is a matter of common knowledge that, in a great majority of references under the arbitration clause of insurance policies, the referees are not selected from the legal profession, for the reason that they are required to perform the

functions of simple appraisers and not of general arbitrators. Under the terms of the Maine policy neither of the three persons named for referees by each of the parties is required to be learned in the law.

Exceptions overruled.

O'GRADY et al. v. UNITED STATES INDEPENDENT TELEPHONE CO.

(Court of Errors and Appeals of New Jersey.
March 1, 1909.)

1. CORPORATIONS (§ 614*)—INSOLVENCY—PERSONS ENTITLED TO MAINTAIN ACTION—STOCKHOLDERS.

The holder of a "voting trust" certificate is the beneficial owner of the stock represented by it in the hands of the "voting trustees." Being the beneficial owner, he is a stockholder within the meaning of section 65 of the corporation act (Laws 1893, p. 298, c. 185), and is entitled to institute the proceedings provided by that section for the winding up of an insolvent corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 614.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6667-6669; vol. 8, p. 7804.]

2. CORPORATIONS (§ 615*)—INSOLVENCY—PERSONS ENTITLED TO MAINTAIN ACTION—CREDITORS.

The trustee, under a mortgage given by a corporation to secure the payment of bonds issued by it, who forecloses the mortgage and recovers a decree for deficiency against the corporation, holds such decree for the benefit of the bondholders. The bondholders, being the beneficial owners of the decree, are creditors of the corporation within the meaning of the section above mentioned, and are any of them entitled to file a bill under that section for the purpose of having the corporation decreed to be insolvent, and for the appointment of a receiver.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 615.*]

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by James M. E. O'Grady and others against the United States Independent Telephone Company. Decree for complainants, and defendant appeals. Affirmed.

Lindabury, Depue & Faulks, for appellant.
Pitney, Hardin & Skinner, for respondents.

GUMMERE, C. J. The appeal in this case is taken from a decree of the Court of Chancery adjudging the United States Independent Telephone Company to be insolvent, and appointing a receiver to wind it up. The bill of complaint was filed by O'Grady on behalf of himself and of all other stockholders and creditors of the defendant company who should come in and contribute to the expense of the suit. He alleged in his bill as the basis of his right to maintain the suit that he was the owner of 112 shares of the capital stock of the company, and of 28 of its mortgage bonds of the par value of \$1,000 each. The other complainants, Julia

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Diefendorf and Lewis W. Miller, were permitted to intervene upon showing that they were the holders of certain other of the mortgage bonds of the defendant company.

The proofs taken at the hearing disclosed that all of the stock of the company, as soon as it was issued, was turned over to certain "voting trustees," who, by the terms of their trust, were to hold it until October, 1912, and that these trustees issued to each of the beneficial owners of such stock what is called a voting trust certificate, the material part of which is as follows: "This is to certify that on the 1st day of October, 1912, ——— will be entitled to receive a certificate, or certificates, for ——— fully paid shares of \$100 each of the common stock of the United States Independent Telephone Co., a corporation organized under the laws of the State of New Jersey, and in the meantime to receive payments equal to the dividends, if any, collected by the undersigned voting trustees, upon a like manner of such shares of common stock standing in their names; and until the 1st day of October, 1912, the voting trustees shall possess and be entitled to exercise all rights of every name and nature, including the right to vote in respect of any and all such stock; it being expressly stipulated that no voting right passes to the holder thereof by or under this certificate, or by or under any agreement express or implied." It further appeared that O'Grady held no certificate of stock, but was the owner of voting trust certificates entitling him to receive from the voting trustees a certificate for 112 shares of the common stock of the company on the 1st day of October, 1912. In addition it was in evidence that the mortgage which was issued to secure the payment of the bonds held by the complainants had been foreclosed by the trustee named therein for default in the payments provided thereby, that the foreclosure sale failed to produce sufficient moneys to satisfy the mortgage debt, and that a decree for deficiency had been entered against the defendant company for a sum amounting to more than \$10,000,000.

The insolvency of the company is not denied by the appellant. The single ground upon which the appeal is rested is that the decree is erroneous "for that none of the complainants in said case are either stockholders or creditors of the appellant, or otherwise entitled to the relief attempted to be granted by said decree." The summary proceeding provided by the sixty-fifth section of the corporation act (Laws 1896, p. 298, c. 186) for the winding up of an insolvent corporation can be instituted only by the stockholders or the creditors of the company. Consequently, if the appellant is right in its assertion, this suit must fail. The only one of the respondents who claims a status as a stockholder is O'Grady, who,

as has been stated, is the holder, not of a certificate of stock, but of a "voting trust" certificate. The question, therefore, to be determined is whether the owner of a voting trust certificate is a stockholder within the meaning of the statutory provision just referred to. In the case of *Hoopes v. Basic Co.*, 60 N. J. Eq. 679, 61 Atl. 979, s. c. on appeal, 65 Atl. 1118, it was held that a person to whom a certificate of stock had been issued, and who appeared as the owner thereof on the company's books, was not a stockholder within the meaning of this provision, when the whole beneficial interest in the stock was vested in another person; and in the case of *Reinhardt v. Interstate Telephone Co.*, 1 Buch. 70, it was held that a person in whom the whole beneficial interest in the stock was vested was entitled to maintain a bill to have the company declared insolvent, notwithstanding that the stock certificate had been issued to and was held by another party. Although the *Reinhardt Case* did not come to this court, the decision is the corollary of the *Hoopes Case*. The right of O'Grady, therefore, to maintain this suit, depends upon whether he is, in equity, the owner of the stock represented by the "voting trust" certificate which he holds. That he is such owner seems to us to be plain. The legal title to it is lodged in so-called voting trustees. Their very designation shows that they hold it, not in their own right, but for those for whose benefit the trust was created, viz., their cestuis que trust, and these persons are conclusively designated by the trust certificates issued by the voting trustees. All the rights and powers conferred by the voting trust agreement, all the duties required to be performed under it, are conferred and imposed solely for the benefit of those who created the trust and their assigns; in other words, the original stockholders and those who now stand in their shoes. The voting trustees have no interest in the stock beyond what is necessary to enable them to execute their trust. The beneficial owners of the stock are the persons who hold the certificates issued by the voting trustees, and those persons are the stockholders who are entitled to maintain the suit provided by the sixty-ninth section of the corporation act.

It is contended before us by counsel for the appellant that the effect of the provision contained in the trust certificate held by O'Grady (and which is also embodied in the trust agreement), that during the term of that agreement "the voting trustees shall possess and be entitled to exercise all rights of every name and nature, including the right to vote in respect of any and all of such stock," is to transfer from the stockholders to the voting trustees the exclusive right to institute proceedings for the winding up of the corporation in case it should become insolvent. But whether the provision

recited should be construed to have so broad a scope, in view of the fact that the trust agreement contemplates that the corporation will be a going concern at the end of the period covered by that agreement, and whether, if the stockholders intended to transfer such right to the voting trustees, the power to do so existed in them, are questions which we do not find it necessary to determine, for the reason that they are not raised by the appeal. The sole ground assigned in the petition of appeal for reversing the decree is that the respondents are neither stockholders nor creditors. Having determined that O'Grady is a stockholder, that ground of appeal fails.

For the same reasons which have led us to the conclusion that O'Grady is a stockholder of the appellant corporation, we conclude that he and his fellow respondents are among its creditors. The trustee of the mortgage bondholders has recovered a deficiency judgment against the company for a large amount. He holds it, not for his own benefit, but for the benefit of those whose trustee he is. They (the mortgage bondholders) are in equity the owners of this judgment. They are the real creditors, and as such are entitled to file a bill in this case for the purpose of having the appellant decreed to be insolvent.

The question brought forward at the argument on behalf of the appellant, whether the bondholders of the company are prohibited by the terms of the mortgage which was given to secure the payment of their bonds, from bringing suit to procure the appointment of a receiver in case of insolvency, is not raised by the petition of appeal, and is therefore not before us for consideration.

The decree under review must be affirmed.

(23 Vt. 85)

BUSH v. HARRISON GRANITE CO.

(Supreme Court of Vermont. Washington.
Feb. 16, 1909.)

CORPORATIONS (§ 567*) — INSOLVENCY — SET-OFF.

An insolvent granite company, in which defendant was a stockholder, had manufactured granite monuments for defendant under a contract requiring the latter to pay on completion and delivery. The insolvent being unable to complete work fast enough to seasonably pay its granite cutters, defendant had advanced money to the insolvent on estimates of the cost of the work done during the previous month. A receiver having been applied for, defendant sent the insolvent manager \$2,800 as an advancement on condition that the money should not be paid over to the insolvent except on an order from the court. The manager turned over this money to a referee in a pending suit, without condition and without authority, and he paid it to a receiver thereafter appointed. *Held*, that defendant was entitled to set off such amount against its liability for work completed for defendant by the receiver.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 567.*]

Exceptions from Chancery Court, Washington County; Alfred A. Hall, Chancellor.

Action by H. K. Bush, as receiver of the Producers' Granite Company, against the Harrison Granite Company. The action was in general assumpsit. Defendant pleaded general issue, payment, accord and satisfaction, and offset. A receiver was appointed, on whose report plaintiff was awarded judgment in the sum of \$3,070.64, with interest and costs, from which defendant brings exceptions. Reversed. Judgment for defendant.

Argued before ROWELL, O. J., and MUNSON, WATSON, and HASELTON, JJ.

Richard A. Hoar, for plaintiff. H. O. Smith and John W. Gordon, for defendant.

HASELTON, J. The Producers' Granite Company was a Vermont corporation. In a chancery proceeding brought to the September term, 1895, in Washington county, the plaintiff was on the 4th day of November, 1895, duly appointed its receiver. November 8, 1895, the receiver qualified and took possession of its property. By the order of appointment the receiver was authorized to employ labor and furnish material for the completion of unfinished work, and for the fulfillment of subsisting contracts. This suit was brought against the Harrison Granite Company to recover for liabilities accruing to the plaintiff from the defendant from the time when the receiver took possession and was specially authorized by the court of chancery. The action is general assumpsit. The defendant pleaded the general issue, payment, and offset. The case was heard upon a referee's substituted report and a supplemental report and the plaintiff's exceptions to such reports. Judgment was rendered for the plaintiff for \$1,797.23, with interest thereon from August 6, 1896, and costs of suit. The defendant excepted.

Prior to November 5, 1895, the firm of J. E. Harrison & Sons of Michigan was a dealer in Barre granite, and had done business with the Producers' Granite Company, of which it was one of the principal stockholders. The other principal stockholder was the Empire Granite Company, a Vermont corporation. On said 5th day of November, 1895, the Harrison Granite Company was incorporated under the laws of the state of Michigan, and two days thereafter was organized, became the owner of all the property of said firm of Harrison & Sons, and succeeded to its business. The referee finds: "That both the plaintiff and the defendant understood that the defendant was the owner of the property, accounts, contracts, and assets of J. E. Harrison & Sons, and that the plaintiff accepted and treated the defendant as such owner and transacted all business with and in the name of the defendant whether such busi-

ness pertained to the accounts and contracts prior or subsequent to the receivership or not." The Producers' Granite Company had done business with J. E. Harrison & Sons under a contract, which was, in substance, that the former should manufacture such monuments as the latter should order on the terms that the latter should furnish the stock and pay the former the amount of the stone cutters' wages, and 35 per cent. thereof in addition, and a price named for polishing. The 35 per cent. was treated as profit, although expenses of management and some incidental costs were to come out of it. All work was to be paid for upon completion and delivery. Damages for defective work were to fall upon the Producers' Granite Company. Loss from defective stone was to be borne by Harrison & Sons. The Producers' Granite Company had the same contract with the Empire Granite Company before mentioned.

But the capital of the Producers' Company was in its plant. It was obliged to pay the wages of its workmen monthly, and it did not complete work fast enough to secure enough money from its customers, under the terms of its contracts, to enable it seasonably to pay the granite cutters; and so it came about that, without any change of contract, each of the purchasing concerns from month to month advanced to the Producers' Company such sum of money as the manager of the latter company estimated to be the cost of the work for the previous month done on jobs in process of completion under the contract with such purchasing company. In the summer of 1895 the Producers' Company "voted to go into liquidation," but did nothing in pursuance of such vote. However, the Empire Granite Company brought a petition to the court of chancery at the September term, 1895, praying for the appointment of a receiver for the Producers' Company, and it was in this proceeding that the plaintiff was appointed as hereinbefore stated. In October, 1895, no work was done by the Producers' Company for the Empire Company, the petitioner in the chancery case. Near the end of that month the manager of the Producers' Company, Fred B. Mudgett, estimated the cost of work, for the month, on jobs for Harrison & Sons, at \$2,800, and sent his estimate to that company. Harrison & Sons thereupon sent to Fred B. Mudgett, manager, a draft for \$2,800, payable to his order, and therewith sent a letter dated October 28, 1895, which reads as follows: "Dear Sir: Answering yours of the 26th we inclose draft to the order of Producers' Granite Company, \$2,800. Before using this money for pay roll or any other purpose, please see a letter of to-day from H. O. Smith or Watts, Bean & Smith, to John W. Gordon, at Barre. You will notice that it is our wish that this money be paid over to the Producers' Granite Company only on an order from the court, in order to protect ourselves under the present tangled condition of affairs."

Under their contract nothing was due from Harrison & Sons to the Producers' Company at the time this draft was sent, and later, when the receiver was appointed, and, as the referee finds, a charge was made against Harrison & Sons, or the defendant, of \$5,100.19 for unfinished and undelivered pieces of work, a sum not due, the balance then and thus shown against Harrison & Sons, or the defendant, was only \$866.48. At the time the draft for \$2,800 was sent, the chancery proceeding brought by the Empire Company was pending, and Harrison & Sons anticipated the appointment of a receiver for the Producers' Company. The facts make it clear what was meant by the notice, in the letter, that the money was to be paid over only on an order of court for the protection of the senders thereof. They did not wish to advance money and receive therefor simply a credit from a corporation about to go into the hands of a receiver. Mr. Mudgett, the referee finds, had no authority other than the letter to turn over the draft. He, in fact, kept the draft until November 8, 1895, the day on which the receiver qualified. On that day he sent the draft to the plaintiff, together with the following letter: "Dear Sir: I have been advised and know for a fact that you have been appointed and have qualified as receiver of the Producers' Granite Company of Barre, Vt. Recognizing you as receiver, I hereby relinquish my position as manager of the said company, also all books, papers, moneys, etc., meaning to turn over to you all the business of the company heretofore held and conducted by me as manager and to answer no further responsibilities. I inclose you herewith New York draft drawn by J. E. Harrison & Sons payable to Producers' Granite Company for \$2,800, to meet October, 1895, pay roll, which was due to be paid November 5th." Mr. Mudgett had no authority to limit the use of the money as he attempted to do, but could pay it over only to effectuate the purpose expressed by Harrison & Sons in their letter to him. The referee finds that at the time Mr. Mudgett turned the draft over to the plaintiff the defendant, the Harrison Granite Company, had become its owner, and the referee further finds "that the \$2,800 was paid to the receiver by the defendant and should be charged to him for work that he took over from the Producers' Granite Company and completed and shipped to the defendant."

If these findings involve conclusions of law, the conclusions stand, for they are conclusions of law which the court itself draws from all the facts found by the referee. The defendant in several letters to the receiver insisted that the latter get an order from the court of chancery authorizing him to issue a certificate showing the nature of the defendant's claim for the \$2,800. In March, 1896, the receiver issued a certificate or receipt which faced both ways and was misleading. The plaintiff in his brief characterizes this

paper as fraudulent on its face, and the defendant's brief speaks of its false pretenses and misstatements. Since the plaintiff who gave this receipt and the defendant who received it are so well agreed as to its dubious and devious character, we do not recite it. It is mentioned here because of a reference to it in the findings of the trial court.

The contracts of the Producers' Company with Harrison & Sons, incomplete in respect to finishing or delivery when the receiver was appointed, were completed by the receiver, and new jobs were done by the receiver for the Harrison Granite Company under the same contract terms as had subsisted between the Producers' Company and Harrison & Sons. The old contracts were treated by the receiver as made with the Harrison Granite Company. The result of the dealings of the receiver with the Harrison Granite Company was that the receiver had charges against the Harrison Company which were allowed by the referee, to the amount of \$16,818.56, and that the credits to the Harrison Company admitted by the receiver on hearing and the additional credit of \$2,800, which should have been allowed, more than equalled the debit side of the receiver's account with the defendant. The defendant does not claim that his plea in offset is so drawn as to amount to a declaration in offset under which the defendant can recover any balance due him. Therefore we do not consider certain other claims of the defendant against the receiver. Some items of claimed offset against the Producers' Company were presented to the court of chancery in the receivership proceedings in pursuance of an order of court that the creditors of the Producers' Company should file their claims against it by a day named. In the proceedings last referred to no final action has been taken. However, the claim for the item of \$2,800, which has been considered, was not presented to the court of chancery in such proceedings, but appears always to have been regarded by the defendant as a charge against the receiver on account of its dealings with him, which have been herein reviewed.

Judgment reversed, and judgment for the defendant to recover its costs.

(82 Vt. 121)

STATE v. BOSTON & M. R. R.

(Supreme Court of Vermont. Orleans. Feb. 27, 1906.)

1. RAILROADS (§ 223*)—OPERATION—FURNISHING ACCOMMODATIONS AND FACILITIES.

Laws 1906, p. 133, No. 124, § 1, provides that every railroad company in the state shall grant every person or concern operating a public telephone line having 500 subscribers equal and reasonable terms for connection with the depots and offices of such railroad company. *Held*, that a mere refusal of a railroad company on request of the telephone company to place an instrument in its station, and grant to it the

"same terms and conditions" or "the same and equal arrangements or facilities" as it had granted another telephone company, does not show a violation of the act.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 223.*]

2. CONSTITUTIONAL LAW (§ 46*)—REVIEW—QUESTIONS TO BE DETERMINED—CONSTITUTIONALITY OF ACT.

Constitutional questions presented on review will not be passed on unless it is necessary to a final determination of the case.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

Exceptions from Orleans County Court; George M. Powers, Judge.

The Boston & Maine Railroad was convicted of refusing a telephone company a right to place an instrument in one of its stations with the same privileges it had granted another company in violation of law, and brings exceptions. Reversed.

Argued before ROWELL, C. J., and MUNSON, WATSON, and HASELTON, JJ.

Clarke C. Fitts, Atty. Gen., and E. A. Cook, State's Atty., for the State. Wm. B. C. Stickney and Young & Young, for defendant.

WATSON, J. The respondent is informed against for an alleged violation of Act No. 124, p. 133, Laws 1906, section 1 of which reads: "Every railroad corporation doing business in this state shall grant to every person, firm, joint stock company or corporation operating a public telephone line in the state and having at least five hundred telephone connections, equal and reasonable terms, arrangements and facilities for the installation of telephone instruments on the lines, or connected with the telephone system of such person, firm, joint stock company or corporation, in all depots, station houses or offices of such railroad corporation in the state." By section 2 a railroad corporation which violates the provisions of the preceding section shall be fined as therein specified. A trial was had and the facts found by the court.

It is found that on March 28, 1907, and for a long time previous thereto, the respondent had granted and did grant to the New England Telephone & Telegraph Company arrangements and facilities for the installation of a telephone instrument of that company at and in the depot and station house of the respondent at Barton Landing, this state. It is not alleged nor is it found, however, that the Vermont People's Telephone Company requested the respondent to grant, nor that the respondent ever refused to grant, to that company equal and reasonable terms, arrangements, and facilities for the installation of a telephone instrument at and in the same depot and station house. The relative situation of the Vermont People's Telephone Company to the respondent at Barton Landing may be substantially dis-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

similar to that of the New England Telephone & Telegraph Company in the number of subscribers and the size of the territory covered by them; in advantages and disadvantages, conveniences, and inconveniences, consequent on the installation of one of its telephone instruments in the depot and station house at that place. Reasonable and equal terms for one are not necessarily reasonable and equal terms for the other, for they can be so only when the conditions are substantially the same. Therefore the refusal by the respondent on request of the Vermont People's Telephone Company to grant to it the "same terms and conditions," or "the same and equal arrangements and facilities," as it (respondent) had granted to the other telephone company named, was no violation of the statute. Nor was the refusal to make or submit any terms upon which it (respondent) would permit such installation and connection to be made by the Vermont People's Telephone Company an offense. This refusal was in response to a demanded right to install and connect such telephone instrument "all under the same terms and conditions as the" other named telephone company theretofore had and did then have an instrument there installed and connected. To that demand such a refusal is not within the statute.

Constitutional questions were presented, but since the case is otherwise finally disposed of the general rule applies that such questions will not be passed upon unless it is necessary to the final determination of the case. *Blanchard v. City of Barre*, 77 Vt. 420, 80 Atl. 970.

Judgment reversed, and respondent discharged.

(82 Vt. 79)

RANN v. TWITCHELL.

(Supreme Court of Vermont. Orleans. Feb. 18, 1909.)

1. PHYSICIANS AND SURGEONS (§ 14*)—CARE REQUIRED—SPECIALISTS.

Where defendant for 12 years preceding the trial had been a specialist, and a regularly appointed ophthalmologist of an important hospital which advertised him as a specialist, the degree of care which he was required to exercise in making a diagnosis of and treating plaintiff's injured eye, when plaintiff was taken to him for such treatment because he was a specialist, was such as is ordinarily possessed by those who devote special study and attention to a particular organ, its diagnosis and treatment.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 21, 23; Dec. Dig. § 14.*]

2. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—SPECIALISTS—QUESTION FOR JURY.

Plaintiff was injured by a flying fragment of a railroad torpedo, striking him under the inner corner of the eye. The lower lid was cut off so that it hung down over the cheek, disclosing a wound under the eyeball into the socket. Plaintiff was taken to a physician, who treated the injury for a week, when he became

convinced that there was a foreign substance in the eye or socket, and sent plaintiff to defendant, an eye specialist. Defendant made no effort to learn anything further of the history of the case, beyond an external examination, though whether there was a foreign body in the eye could be safely discovered by the use of a probe. Defendant gave the eye attention for a few days and then sent plaintiff home, assuring him there was nothing in the eye, which, however, grew steadily worse, until plaintiff's original physician operated on it and removed a piece of tin nearly an inch long and a half inch wide, which was buried in the tissues. *Held*, that defendant could not be said as matter of law to have exercised the care required of him as a specialist in diagnosing and treating the injury.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 44; Dec. Dig. § 18.*]

Exceptions from Orleans County Court; John H. Watson, Judge.

Action on the case by Harold Rann, by his next friend, against M. C. Twitchell, for malpractice. A verdict was ordered for defendant, and plaintiff brings exceptions. Reversed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, HASELTON, POWERS, and MILES, JJ.

Cook & Williams, for plaintiff. Young & Young and A. G. Whittemore, for defendant.

POWERS, J. The plaintiff, a robust boy of 13 years, found a railroad torpedo near his house in Derby. He laid it on a plank and threw a stone upon it and exploded it, whereupon a flying fragment struck him under the inner corner of the right eye, causing the injury concerned in this action. This was April 19, 1905. The cut made in the lower lid of the eye was approximately an inch long, and at the upper end next to the inner corner of the eye the lid was cut off so that it hung down over the cheek, disclosing a wound under the eyeball into the socket of the eye. The boy was at once taken to Dr. Gaines of Newport, who took medical charge of the case and treated the injury for about a week. In the meantime Dr. Gaines became convinced that there was a foreign substance lodged in the eye or socket, and being uncertain whether or not or how far the eye itself might be involved, and not feeling competent to operate on the eye in these circumstances, he advised the employment of an eye specialist. The boy was taken to Sherbrooke for the purpose of consulting an expert, but the latter was away, so he could not be seen. After his return to Derby, and on April 25th, Dr. Gaines and Dr. Lund, who had been called in to assist, and who agreed with Dr. Gaines that there was a foreign substance in the eye, made preparations to operate for its removal. When it came to the point of beginning the operation, Dr. Gaines telephoned the defendant that the plaintiff had been injured by an explosion, and that some foreign substance had entered the orbit of the eye, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that he did not feel competent to remove it, and he arranged with the defendant to send the plaintiff to him for treatment. The plaintiff was thereupon taken to the Mary Fletcher Hospital at Burlington, where the defendant undertook the treatment of the case. He made no effort to learn anything further of the history of the case or its prior treatment. He did not attempt to determine by probe or otherwise whether or not there was in fact a foreign body lodged in the eye or its orbit—beyond an external examination more or less cursory in character, according to the evidence—though it is plain that the use of a probe would have easily and safely discovered the presence of the piece of tin which was afterwards removed. He gave the eye attention for a few days, and then sent the plaintiff home, assuring him that there was nothing in the eye, and with instructions to Dr. Gaines as to its subsequent treatment. The eye grew steadily worse until July 18th, when Dr. Gaines operated upon it and removed from the orbit a piece of tin nearly an inch long and about one-half inch wide, which was buried in the tissue to such a depth that its nearest point was about a quarter of an inch from the surface. The action is case for malpractice. It was originally brought against the defendant and the Mary Fletcher Hospital jointly, but during the progress of the trial, at the plaintiff's request, the court ordered a verdict for the hospital, and the trial proceeded against the defendant alone. At the close of the plaintiff's evidence the court ordered a verdict for the defendant. The propriety of this action of the court is the only question presented.

At the outset of the discussion the parties disagree as to the rule which is to be applied to this defendant to test the sufficiency of his diagnosis and treatment of this injury. The plaintiff claims that the evidence is such that the defendant must be judged as a specialist, while the defendant insists that there is no evidence to warrant the application of anything but the rule governing general practitioners. We quite agree with the court below that this defendant must be judged in this case by the more exacting rule which applies to specialists. Most of the evidence on this subject comes from the defendant himself. From him we learn that he is a physician and surgeon, and for the 12 years preceding the trial he has been a specialist in the medical and surgical treatment of the eye, practicing at Burlington. As early as 1902 he was regularly appointed ophthalmatist of the Mary Fletcher Hospital, and then presumed that he would be and later knew that he was so named in a certain pamphlet issued by the Hospital that year. At the time here involved, he had charge of the eye, ear, and throat department of that institution. He says that the term "ophthalmatist" means an eye specialist; one who does everything that is required for the eye, medical or surgical. True, he says the term does not imply any special

skill in such matters, but in this statement Dr. Twitchell is too modest. His 12 years of specialized practice, his selection by an institution of the high standing of the Mary Fletcher Hospital to take charge of the very important department named, imply special skill in the lines specified. Moreover, the very circumstances in which he was employed in this case unmistakably show that it was the special skill that he was understood to have in the surgical treatment of the eye which alone induced the plaintiff to seek his aid, and it is perfectly plain that the defendant so understood it when Dr. Gaines made the arrangement with him to treat this injury. So we must test his professional conduct in this matter, not by the standard applicable to general practitioners—the oft-cited and recently approved rule of *Hathorn v. Richmond*, 48 Vt. 557—but by the stricter rule applicable to specialists. Whether or not this is determinative of the case we do not say.

One who holds himself out as a specialist in the treatment of a certain organ, injury, or disease, is bound to bring to the aid of one so employing him that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury, or disease, its diagnosis and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time. 5 *Thomp. Neg.* § 6714; *Feeney v. Spalding*, 89 *Me.* 111, 35 *Atl.* 1027; *Baker v. Hancock*, 29 *Ind. App.* 456, 63 *N. E.* 323, 64 *N. E.* 38; note to *Gillette v. Tucker* (Ohio) 93 *Am. St. Rep.* at page 664. The duty of exercising this degree of skill attached to this defendant at the time of his employment and is the measure of his responsibility in the diagnosis of the case to determine the nature and condition of the injury, as well as the proper treatment to be applied. *Thomp. Neg.* § 6717; *Ely v. Wilbur*, 49 *N. J. Law*, 685, 10 *Atl.* 358, 441, 60 *Am. Rep.* 668. He is not to be judged by the result, nor is he to be held liable for an error of judgment. His negligence is to be determined by reference to the pertinent facts existing at the time of his examination and treatment, of which he knew, or in the exercise of due care should have known. It may consist in a failure to apply the proper remedy upon a correct determination of existing physical conditions, or it may precede that and result from a failure properly to inform himself of these conditions. If the latter, then it must appear that he had a reasonable opportunity for examination, and that the true physical conditions were so apparent that they could have been ascertained by the exercise of the required degree of care and skill, for, if a determination of these physical facts resolves itself into a question of judgment merely, he cannot be held liable for his error. *Manser v. Collins*, 69 *Kan.* 290, 76 *Pac.* 851; *Langford v. Jones*, 18 *Or.* 307, 22 *Pac.* 1064; *Staloch v. Holm*, 100 *Minn.* 276, 111 *N. W.* 264, 9 *L. R. A. (N. S.)* 712.

Tested by this rule, the evidence tended to show that the defendant's conduct did not measure up to its requirements. He had a fair chance to examine the eye, and, with the indications of the presence of the piece of tin so strong as the testimony of Dr. Gaines tends to show, it cannot be said as a matter of law that the defendant in his preliminary examination to ascertain the essential data upon which to predicate a professional opinion met the requirements of the rule above stated. The testimony tended to show that he did not, and the question should have been submitted to the jury, for the evidence shows that the tin ought to have been removed at the earliest possible moment.

Judgment reversed, and cause remanded.

(82 Vt. 92)

In re HAYES' ESTATE.

(Supreme Court of Vermont. Orange. Feb. 20, 1909.)

EXECUTORS AND ADMINISTRATORS (§ 238*)—CLAIMS—COMMISSIONERS' REPORT—PETITION TO VACATE.

A petition to vacate the report of commissioners of an estate alleged that the administrator had agreed to keep the petitioner informed as to the progress made in the settlement of the estate, and that he was led to believe that no debts existed against it other than those of the last sickness and burial, but that a claim had been allowed in favor of the administrator which the petitioner believed was fraudulent and of which he did not learn until long after the commissioners' report had been accepted by the probate court, and the time to appeal had expired. The petition, however, did not allege the date of decedent's death nor of the appointment of the administrator, nor whether the estate had been fully administered. *Held*, that the petition was fatally defective.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 848; Dec. Dig. § 238.*]

Exceptions from Orange County Court; Eleazer L. Waterman, Judge.

Judicial settlement of the estate of Elizabeth A. Hayes, deceased, in which William C. Greenlaw, husband of the decedent's heir at law, petitioned to have the report of the commissioners vacated. A petition was granted by the probate court from which an appeal was taken to the county court, and there held on a motion to dismiss the petition. Motion was overruled pro forma, and defendant brings exceptions. Judgment reversed, and petition dismissed without prejudice.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

N. L. Boyden and E. W. Smith, for petitioner. March M. Wilson, for defendant.

WATSON, J. The motion to dismiss is based upon several grounds, but we consider only the one that nothing alleged in the petition shows cause for the relief sought. The motion should have been granted. Neither

the date of Elizabeth A. Hayes' death nor the time of the appointment of the administrator on her estate, nor whether the estate had been fully administered upon or otherwise, is alleged. It is alleged, however, that the administrator agreed to keep the petitioner informed as to the progress made in the settlement of the estate; that, upon information given by the administrator, the petitioner was led to believe that no debts existed against the estate other than those of the last sickness and burial, and it would seem from further statements in the petition that some claim believed by the petitioner to be fraudulent was allowed by the commissioners against the estate in favor of the administrator, of which claim and allowance the petitioner did not learn until long after the report of the commissioners was filed and accepted by the probate court, and long after the time for taking an appeal therefrom had expired, but the allegations in this respect are not sufficiently definite nor full enough to warrant any expression upon the merits of the case.

Judgment reversed, petition dismissed, with costs, but without prejudice, to be certified to the probate court.

(83 Vt. 91)

FRENCH v. MILLER.

(Supreme Court of Vermont. Brattleboro. Feb. 20, 1909.)

APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

The error, if any, in instructions as to the damages recoverable on a finding of conversion of property by defendant, is harmless where the jury found that there was no conversion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. § 1068.*]

Exceptions from Windham County Court; George M. Powers, Judge.

Action by Watson S. French against Viola Miller. Defendant had judgment, and plaintiff brings exceptions. Affirmed.

Chase & Daley, for plaintiff. Herbert G. and Frank E. Barber, for defendant.

ROWELL, C. J. This is trover for a pair of stags, which the plaintiff owned subject to a mortgage and an agister's lien. The defendant denied a conversion and controverted the value of the stags. The court charged that, if there was no conversion, the plaintiff could not recover; but if there was that he was entitled to nominal damages, and to as much more as the value of the stags exceeded the amount of the liens. The jury returned a verdict for the defendant, which necessarily means that it did not find a conversion. The plaintiff claims that he was the general owner of the stags and therefore was entitled to recover, if at all, their full value, regardless of the liens, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that it was error to charge otherwise and prejudicial to him. But, if error, it could not have been prejudicial to him, for it did not touch the question of conversion, which was found against him.

Judgment affirmed.

(223 Pa. 490)

PETTIT v. JAMESTOWN & F. R. CO.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. ADJOINING LANDOWNERS (§ 3*)—LATERAL SUPPORT.

The right of an owner to lateral support is an incident to the land attached to and passes with the soil.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. § 7; Dec. Dig. § 3.*]

2. ADJOINING LANDOWNERS (§ 3*)—LATERAL SUPPORT—DAMAGES.

A landowner conveyed a strip of land passing through his tract to an individual described as trustee. The land was particularly described by reference to the survey of a railroad, and the deed reserved a railroad crossing over the strip with the right to lay pipes under it. Thereafter the strip was conveyed to a railroad company. *Held*, that in the absence of any provision in the deed to the trustee obligating him to build a railroad, and in the absence of any release of damages, if the company in constructing its road causes adjoining land to fail, it is liable in damages to the owners.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. §§ 7-16; Dec. Dig. § 3.*]

Appeal from Court of Common Pleas, Venango County.

Action by Joseph Pettit against the Jamestown & Franklin Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Robert F. Glenn and Peter M. Speer, for appellant. A. R. Osmer, J. H. Osmer, and N. F. Osmer, for appellee.

MESTREZAT, J. This is an action of trespass brought by the plaintiff to recover damages from the defendant for injuries which he alleges he sustained by reason of the removal of the lateral support from his land. The court directed a verdict for the defendant, and judgment having been entered thereon, the plaintiff has taken this appeal.

In the year 1905 the estate of S. P. McCalmont, deceased, was the owner of several tracts of land in Venango county, one of which lay along the Allegheny river and contained about 135 acres. By deed dated January 23, 1905, McCalmont's executors conveyed in fee simple to F. J. Jerome, trustee, a part of this tract, being a strip adjoining and extending along the Allegheny river about 190 rods, and containing 15.6 acres.

The land conveyed was particularly described by reference to the location survey of the defendant's railroad. In the description a reference is made to a map attached to the deed for a further description of the premises conveyed. Reservations were made of the oil and gas, a railroad crossing over the premises conveyed, and the right to lay pipes and oil lines under the railroad. By deed, dated November 28, 1905, Jerome conveyed the same land to the Jamestown & Franklin Railroad Company, the defendant in this action, which prior thereto had located a railroad over it. After the sale to Jerome, McCalmont's executors sold the residue of the tract of which the Jerome land was a part to Joseph Pettit, the plaintiff, and conveyed it to him in fee by deed dated February 10, 1906. Subsequent to this purchase by Pettit, the defendant company constructed the railroad upon the strip of land which it had acquired from Jerome. The plaintiff alleges, as his cause of action, that in the construction of the road the defendant "removed or caused to be removed the lateral support of plaintiff's land lying and being on the side of the hill adjacent to defendant's proposed line of railroad to such an extent, and in such a manner that the surface of the earth on said hillside cracked or opened, and slid down the hill, carrying with it derricks, machinery, and other appliances placed thereon by plaintiff, and used by him in the production of oil therefrom, and destroying the oil wells thereon and the fixtures and fittings therein." It seems that the strip of land purchased by Jerome and now held by the defendant company lay along a steep hillside extending from the Allegheny river above and beyond the defendant's premises, and that outside of the defendant's land the plaintiff was operating extensively for oil and had put down several wells. In the construction of the railroad, it was necessary to make several deep cuts and excavations in the premises, and the plaintiff claims that in doing so the defendant caused the hillside, a part of his land, to slip and slide down the hill towards the river and carry with it his oil wells and other property.

There is no allegation of fraud, accident, or mistake in the execution or delivery of the deed by McCalmont's executors to Jerome, nor is it claimed that it does not express the agreement of the parties relative to the land conveyed. No attempt has been made by either party to reform it so as to make it express a different intention or a different purpose. It must, therefore, be taken to be the contract of the parties, and as such it must speak for itself and determine their rights. Hence the single question in the case is whether the title acquired by the Jerome deed justifies the defendant company in digging and excavating on its

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

own premises in constructing its road so near to the plaintiff's land as to remove the lateral support, and thereby cause the plaintiff's land to subside and fall into the excavation. The trial judge held that it was apparent from the evidence in the case that the strip of land was purchased by Jerome as trustee for the defendant company for the purpose of constructing a railroad thereon, and that the deed conveyed the premises to Jerome and released the defendant company from all damages, including the withdrawal of lateral support occasioned by the construction of the railroad. On this ground the learned judge directed a verdict for the defendant company. The court below in its opinion refusing a new trial says: "If the damages had been assessed under the statute, clearly the probability of the injury now complained of would have been considered and the assessment would have covered it." The theory of the learned judge seemed to be that the premises were acquired by Jerome for a right of way of a railroad, that the grantors knew this fact, and that the deed took the place of condemnation proceedings. In other words, the learned judge regarded the deed by which the premises were conveyed to Jerome as vesting in the grantee the same title and relieving him from damages to the same extent as condemnation proceedings instituted under the statute by a railroad company for the assessment of damages. In this we think the court was in error.

The defendant company does not claim to occupy the strip of land by virtue of the authority conferred by eminent domain. It unquestionably had the right to enter upon and condemn the strip of land for the purposes of its railroad. In doing so, it had the right to appropriate a strip of land 66 feet in width and a greater width at cuts and embankments for the use of its railroad. The statute confers this power upon railroad companies. It recognizes the necessity in various parts of the state of deep cuttings and embankments in order to make a proper location. While, therefore, the statute confines the company to a width of 66 feet at grade for its road, it confers authority to take a greater width where cuts or fills are necessary to make the statutory width at grade. While this authority is conferred on railroad companies, the statute manifestly regards the appropriation of the extra width as a "taking" under the Constitution, and requires due compensation to be made for it in the assessment of damages. The general railroad act of 1849 (P. L. 79) is broad in its provisions, and confers on the railroad company the authority to take the necessary land, not only for its roadbed, but also for its depots, warehouses, offices, etc., and "for any purpose necessary or useful in the construction, maintenance or repairs in said railroad." It also confers authority upon the company "to

take, excavate, and embank, make, grade, and lay down and construct the road." But the owner of the land is fully protected by the statute, which requires the railroad company to make "compensation proper for the damage done or likely to be done to, or sustained by any such owner," and this includes compensation not only for the strip of land 66 feet in width at grade but for the additional width taken at cuts and fills. Any present or future injury which the owner may sustain by the construction of the road must be compensated for by the company. It is not only the damage which presently results from the construction of the road, but also that which is "likely to be done" thereby that is the measure of the owner's compensation for the injury done him. It will therefore be observed that a railroad company, under eminent domain proceedings, may appropriate for its use a strip of land of the statutory width, and also, when necessary, may take a greater width at cuts and fills, but compensation must include damages for the additional ground taken.

Is the deed by which Jerome acquired title to the strip of land from McCalmont's executors the equivalent of condemnation proceedings in conferring upon Jerome or his grantee the right to enter upon the strip of land and construct a railroad thereon, and does the compensation named therein cover the damages which would be assessed in condemnation proceedings? A reference to the deed will answer this question in the negative. It is an ordinary deed conveying a fee-simple title to the strip of land described in it. The consideration therein named is the price of the land conveyed and not compensation for damages resulting from the construction of a railroad thereon. The purchaser takes a fee-simple title the same as any individual or other purchaser under a similar deed. The deed does not convey "a right of way for railroad purposes," nor does it convey the strip of land for railroad purposes. There is nothing in it disclosing an intention to convey the land for any particular purpose, or requiring the grantee to use it for any specific purpose. He acquires a fee-simple title, and, so far as the grantors are concerned, he may convey it to whomsoever he pleases, or he may make any use of it which he may desire, so long as he does not offend the law. In other words, Jerome acquired the title to this strip of land by a conveyance in fee-simple, and the McCalmont title in the premises passed to him absolutely. As he purchased as a trustee, he was responsible only to his cestui que trust who might be an individual or a corporation. The owner has the right to put any lawful structure on it or use it for any lawful purpose he sees fit. He may operate for oil or gas, and use it exclusively for that purpose. He may devote it to manufacturing purposes. If he abandon it, the title will not revert in McCalmont's executors, the grantors.

It is true that the property is described by reference to the location survey line of a railroad. It is likewise true that there is a reservation in the deed that gives the grantor a crossing over any railroad that may be constructed on the premises, and also authorizes him to lay pipe lines under the railroad. But the description and reservations do not deprive the grant of its fee-simple character or compel the grantee to use it for railroad purposes. The strong probability is that the land was acquired for the purpose of constructing a railroad thereon, but there is not a single line in the deed that compels the grantee to construct the road or deprives him of any right to which a fee-simple owner of land is entitled. If, the day after the delivery of the deed by Jerome to the defendant company, the latter had concluded to construct its road on the opposite side of the Allegheny river, and not over this land, it could have sold and conveyed the land in fee simple and the grantee would have taken the title, subject to the reservations in the Jerome deed. It is apparent, therefore, that there is nothing in the deed to Jerome which shows that the premises conveyed were to be used for railroad purposes or that compels the grantee to apply them to such purposes. Neither is there anything in the deed that shows that the grantors intended or agreed that the premises should be used for railroad purposes, or that they received any compensation for damages which would result to the residue of the farm from the construction of a railroad on the strip of land acquired by the grant. Their conveyance being a fee-simple title, the property passed from them, and the purpose for which it was acquired or the use to which it might thereafter be put was solely for the determination of the grantee. The defendant company, therefore, holds the premises in fee, subject only to the reservations named in the McCalmont deed. So far as the grantors are concerned, it occupies the same position as an individual who had acquired the fee-simple title. It has the same rights and is subject to the same duties and obligations in the use of the premises as an individual were he occupying its place. In the Jerome deed there is no release of damages arising from the construction of a railroad over the premises conveyed, nor is there a release authorizing the defendant with impunity to do any other act on the premises which would unlawfully injure the residue of the tract now owned by the plaintiff. If, therefore, an individual would be liable for damages for the injury complained of in this action, the defendant company is equally liable and must respond in damages for the injuries done. It is settled law that the owner of land is entitled to have it supported and protected in its natural condition by the soil of the adjoining proprietors. In the case of land, which is fixed in its place, each owner has the absolute right to have his land re-

main in its natural condition, unaffected by any act of his neighbor, and, if the neighbor digs upon and improves his own land so as to injure this right, he may maintain an action against him without proof of negligence. *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312. Neither of the owners of adjacent land has the right to excavate his soil so as to cause that of his neighbor to be loosened and fall into such excavation. *Washburn on Easements*, 514. The right of the owner to lateral support of his land is a natural right. It is not simply an easement, but an incident to the land, a right of property necessarily and naturally attached to and passing with the soil. *Wier's Appeal*, 81* Pa. 203; *McGettigan v. Potts*, 149 Pa. 155, 24 Atl. 198; *McGuire v. Graft*, 25 N. J. Law, 356, 67 Am. Dec. 49; *Farrand v. Marshall*, 19 Barb. (N. Y.) 380. There can be no question that, if an individual owned the strip of land sold to the defendant and on which its road was constructed, he would be liable for the withdrawal of the lateral support to the plaintiff's land. This is the common law and it obtains in this as well as in other jurisdictions.

We have examined our own cases on the subject, and none of them supports the contention of the defendant. In the cases cited by defendant's counsel, with possibly one exception to which we will refer hereafter, there was a release of damages or something equivalent thereto. Of course, the owner of land cannot claim damages for injury done by the construction of a railroad on a strip of land which he had sold, and, by the instrument conveying it, had also released the purchaser from liability for damages to the residue of the tract by reason of the construction of the railroad. When the deed conveying the premises sufficiently discloses an intention not only to pass the title to the land, but also to release the grantee from damages by reason of the construction of a railroad on the premises granted, the two purposes disclosed by the deed must be carried out, and the deed will not only convey the title, but will also release the damages.

The recent case of *Hendler v. Lehigh Valley Railroad Company*, 209 Pa. 256, 58 Atl. 496, 103 Am. St. Rep. 1005, was trespass against the company for taking sand outside of its right of way which it had acquired by an agreement with the owner of the land. In sustaining a judgment for the plaintiff, this court, by the present chief justice, said (page 262 of 209 Pa., page 488 of 58 Atl. [103 Am. St. Rep. 1005]): "When, therefore, a railroad company obtains a right of way, either by condemnation or as in this case by an equivalent agreement, it has the right to use without further compensation all the suitable materials, except timber, within the lines of its survey, for construction of its road through the property of the landowner. * * * If it is necessary to go outside the lines of their right of way for sufficient width to support

an embankment, they may do so, but must pay for the additional land occupied, and so, if it is necessary to go outside the lines to give the walls of a cut the slope required to prevent sliding or washing down, they may do so on paying for the additional materials taken outside." North & West Branch Railway Company v. Swank, 105 Pa. 555, is relied on by the defendant to sustain its contention that the company is relieved from damages for the injuries complained of in this case. That case, however, does not sustain the defendant's position. The contract was not a deed conveying the premises in fee simple. It was an agreement that the railroad company "shall have the right of way through my land" for "the amount of damages" fixed by an agreement between the railroad company and the owner of another tract of land through which the road was constructed. That was simply an agreement that the company should have "a right of way" for the damages agreed upon by the parties. The railroad company therefore got by the agreement precisely what it would have secured under condemnation proceedings, simply a right of way, and it paid therefor the amount of damages fixed by the parties. Under the agreement, if the railroad company had subsequently vacated the premises, the land would have reverted to the owner. The damages agreed upon, of course, included compensation for all the injuries done the owner by reason of the taking of the land for railroad purposes and the construction of the road thereon. The company could not have devoted the land to any other purpose without forfeiting it to the former owner. The agreement simply took the place of condemnation proceedings, and, when it was interposed as a defense to the proceedings instituted by the owner to have damages assessed for the construction of the road, it necessarily deprived him of the right to recover. The agreement did not, as does the deed in the case in hand, convey a fee-simple title to the land, but is simply a release of damages, and was so regarded by this court in *Rudolph v. Pennsylvania Schuylkill Valley Railroad Company*, 186 Pa. 541, 554, 40 Atl. 1083, 1087, 47 L. R. A. 782, in which we say: "In several cases commencing with *Railway Company v. Swank*, 105 Pa. 555, we have held that a mere release by the owner of a right of way was a bar to a subsequent action for damages for the construction and lawful operation of the railroad."

We are of opinion that the defendant company occupies the same position here as an individual owning property adjacent to the plaintiff's land, that the deed to Jerome from the plaintiff's predecessor in title does not release the damages to the residue of the land arising from the construction of a railroad on the land conveyed to the company, and that the company is liable for any injury

which the adjacent property has sustained by reason of the removal of lateral support.

The judgment is reversed, and a venire facias de novo awarded.

(222 Pa. 487)

OHIO PAIL CO. v. A. W. COOK & CO.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. SPECIFIC PERFORMANCE (§ 22*)—PERSONS AS AGAINST WHOM PERFORMANCE MAY BE ENFORCED.

A lumber company sold under a written agreement all timber of a certain kind and size, and by a second agreement all timber of a certain kind without regard to size. It thereafter verbally agreed to cut and haul the timber to the purchaser. Afterwards the company sold the land to another person with knowledge of the original agreement and the oral agreement. *Held*, that such purchaser could not be compelled to specifically perform the act of cutting and hauling the timber.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 51, 52; Dec. Dig. § 22.*]

2. VENDOR AND PURCHASER (§ 239*)—RIGHTS OF BONA FIDE PURCHASER.

Where a lumber company sold by written contract timber of a certain kind and size, and by a second agreement all timber of a certain species without regard to size, and thereafter sold the land to one having knowledge of the first but not of the second agreement, such vendee cannot be enjoined from converting to his own use the timber on land which the lumber company had acquired after the date of the original agreement.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 239.*]

Appeal from Court of Common Pleas, Somerset County.

Bill by the Ohio Pail Company against A. W. Cook & Co. From a decree for plaintiff, defendant appeals. Modified.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. H. Ruppel, C. Z. Gordon, and Chas. F. Uhl, Jr., for appellant. J. A. Berkey, Clarence L. Shaver, and Wm. G. King, for appellee.

FELL, J. It is averred in the bill filed that in September, 1901, the Droney Lumber Company was the owner of a large tract of timber land, and that it entered into a written agreement with the plaintiff for the sale of the poplar, cucumber, bass, and linn timber of certain sizes, and agreed to furnish cars at convenient points on the line of its road and haul the timber to the plaintiff's mill without charge. The plaintiff was to erect a mill on the land of the lumber company, to follow its log cutters, cutting over only such land as they had cut over each year, and to load and unload the timber. In December, 1901, a second written agreement was entered into which provided for the sale and delivery at the plaintiff's mill of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

all the basswood without regard to size. In pursuance of these agreements, the plaintiff entered into possession and built a mill at a cost of \$10,000, and the contracts were carried out by both parties until February, 1906, when the lumber company sold all its interest in the land and lumber to A. W. Cook & Co., the defendant, who bought with knowledge of the agreements and carried them out until July, 1906, since which time it has refused to deliver the basswood or permit the plaintiff to cut and take away any timber, and has cut and converted the same to its own use. The prayers of the bill are for a decree restraining the defendant from converting the timber to its own use, requiring the carrying out of the contracts, and for an account for timber taken.

It was found by the court that soon after operations had been commenced under the written agreements of September and December, 1901, a supplemental verbal agreement, revocable at any time by either party, was entered into whereby for an increased price the plaintiff was relieved from all work in the woods and all timber was to be cut and delivered by the lumber company; that the parties operated under this agreement for four years and up to the time of the sale by the lumber company, and that the agreement was carried out by the defendant for some months after its purchase; that at the time of the purchase by the defendant it had actual knowledge of the first written agreement and of the verbal agreement, and of the possession and operations of the plaintiff; but that it had no knowledge of the second written agreement, and that in the conveyance of the land and the sale of the personal property there was no reservation of any right in favor of the plaintiff, and that the defendant had not agreed with any one to carry out the contracts which the plaintiff and the lumber company had entered into. The decree enjoins the defendant from converting to its own use any of the timber mentioned in the written agreements, from interfering with the plaintiff in the exercise of rights conferred by these agreements, and requires the defendant "to perform the covenants, stipulations and conditions which the Droney Lumber Company had agreed and

undertaken to perform by virtue of said contracts," and to pay such damages as may be established on further hearing.

The decree is not limited in its operation to lands owned by the lumber company at the time the agreements of September and December, 1901, were made, but extends to all lands afterwards acquired by the company and conveyed by it to the defendant. The finding of fact on which the enlargement of the decree is based is that it appeared that some tracts were acquired by the lumber company after it had entered into the contracts mentioned, and it did not appear from the evidence what had been cut over at the time of the sale to the defendant, and that the lumber company had made no distinction between before and after acquired lands in delivering timber to the plaintiff.

The burden of showing what lands were included in the contracts was on the plaintiff, and, if as to any tracts its proofs were indefinite or unsatisfactory, it failed as to them. Moreover, the agreements relate only to lands then owned by the lumber company and could not be extended as against it, and much less as against its grantee without knowledge or notice to lands afterwards acquired. The decree also goes too far in enforcing the rights of the plaintiff secured against the lumber company by the second agreement and in requiring the defendant to furnish cars and haul lumber, as provided by the first. Of the second written agreement the defendant had no knowledge. The operations on the land by the plaintiff were all consistent with its rights under the first agreement, and they were not notice of the existence of other rights and gave rise to no duty of inquiry. The agreement to haul lumber was a purely personal one by the lumber company, and cannot be specifically enforced against the defendant. The limit of the plaintiff's remedy in the proceeding is to have secured to it the right to cut and remove the timber mentioned in the first agreement, in accordance with the terms thereof, and to an account for timber bought under that agreement that has been appropriated by the defendant.

With this modification of the decree it is affirmed.

(223 Pa. 514)

In re JOHNSTON'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 510*)
—ASSIGNMENTS OF ERROR—EXCEPTIONS TO ACCOUNT.

Exceptions to an executor's account must be set forth in the assignments of error in their exact words.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 510.*]

2. EXECUTORS AND ADMINISTRATORS (§ 510*)
—ASSIGNMENTS OF ERROR.

Assignments of error on exceptions to an executor's account must run against the decree, and not the opinion of the court.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 510.*]

Appeal from Orphans' Court, Indiana County.

In the matter of the estate of S. A. Johnston. From a decree dismissing exceptions to account of John B. Taylor, Katharine J. Sutton appeals. Dismissed.

Argued before MITCHELL, C. J., and ELKIN, FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

John P. Blair, for appellant. D. B. Taylor, for appellee.

BROWN, J. This appeal is from the action of the court below in disposing of 10 exceptions to the account of John B. Taylor, administrator of the estate of S. A. Johnston, deceased. By these exceptions the appellant sought to surcharge the accountant on certain items with which he had charged himself at their appraisement in the inventory; to have credits disallowed for depreciation in the appraised value of other items; to have him charged with more interest than he charged himself with; and to reduce his commissions and the fee charged by his attorney. Five of these exceptions, among them being those relating to the commissions of the accountant and the attorney fee, were dismissed, and the remaining sustained, resulting in a decree surcharging the accountant with \$10,907.05. Our examination of the record has satisfied us that all of the exceptions were properly disposed of and that the decree made was proper, but our reasons for reaching this conclusion would be out of place, as the decree has not been assigned as error. If it is correct, as it must be assumed to be in the absence of an assignment that it is error, the reasons given by the learned judge in arriving at it are unimportant and ours for sustaining it are equally so. Fullerton's Estate, 143 Pa. 61, 23 Atl. 321. The dismissal of no one of the exceptions to the account is assigned as error. If any one of them was erroneously dismissed, it ought to appear in its exact words in the assignment of error to its dismissal. Wright's Estate, 155 Pa. 64, 25 Atl. 877. No such assignment is before us.

Appeal dismissed at appellant's costs.

(223 Pa. 470)

SCHLEMMER v. BUFFALO, R. & P. RY. CO.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. MASTER AND SERVANT (§ 240*)—CONTRIBUTORY NEGLIGENCE—DANGEROUS METHODS OF WORK.

Where a brakeman attempted to make a coupling in a dangerous way when his attention was directly called to a safer way and twice raised his head, though especially cautioned at the time of the danger of so doing, no recovery can be had for the injuries received.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 755; Dec. Dig. § 240.*]

2. NEGLIGENCE (§ 80*)—CONTRIBUTORY NEGLIGENCE.

Any contributory negligence bars recovery without regard to the negligence of the other party.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 84; Dec. Dig. § 80.*]

Appeal from Court of Common Pleas, Jefferson County.

Action by Catherine Schlemmer, now Catherine Craig, against the Buffalo, Rochester & Pittsburgh Railway Company. From a judgment for defendant notwithstanding the verdict, plaintiff appeals. Affirmed.

The following is the opinion of Reed, P. J., of the court below:

"At the trial it appeared that the action was brought to recover damages for death of plaintiff's husband employed as a brakeman by the defendant. The accident happened between 8 and 9 o'clock on the evening of April 5, 1900, while the deceased was attempting to couple a caboose to a steam shovel attached to the rear of a train of 17 cars. It was shown that the coupler on the steam shovel was somewhat unusual in form, but it also appeared that the deceased was an experienced brakeman. The evidence tended to show that the deceased had knowledge of the character of the coupler, and knew that, if he got his head or any part of his body between the ends of the cars in attempting to make the coupling, it would be crushed. A yard conductor advised the deceased to push the caboose up by hand to the steam shovel, and when the deceased rejected this advice he was told twice to get down and keep down, so as not to get caught in the crush between the cars. In spite of this warning the deceased did not keep his head down, and it was caught between the ends of the cars and crushed. The jury returned a verdict in favor of the plaintiff for \$10,000."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

A. J. Truitt and Charles Corbet, for appellant. C. Z. Gordon, C. H. McCauley, and John G. Whitmore, for appellee.

PER CURIAM. It is the settled law of Pennsylvania that any negligence of a party injured, which contributed to his injury, bars

*For other cases see same topic and Section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

his recovery of damages without regard to the negligence either greater or less than his own of the other party. The present is a clear case of contributory negligence within this rule. The evidence is indisputable that the unfortunate decedent not only attempted to make the coupling in a dangerous way when his attention was directly called to a safer way, but also did it with reckless disregard of his personal safety by raising his head, though twice expressly cautioned at the time as to the danger of so doing.

Judgment affirmed.

(222 Pa. 406)

BURNS v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. APPEAL AND ERROR (§ 248*)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS.

Assignments of error not supported by exceptions of record will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1432; Dec. Dig. § 248.*]

2. ARBITRATION AND AWARD (§ 68*)—ARBITRATORS AND PROCEEDINGS—OBJECTIONS—WAIVER.

Exceptions to the award of arbitrators, based upon alleged misconduct of the arbitrators, were properly dismissed, where counsel for the party excepting was present, knew what the arbitrators did, entered no objection whatever to their conduct, but continued the arbitration until the cause had been fully heard and disposed of.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 343; Dec. Dig. § 68.*]

3. ARBITRATION AND AWARD (§ 68*)—ARBITRATORS AND PROCEEDINGS—OBJECTIONS.

Where, at the time exceptions were filed to an award of arbitrators, the party excepting also appealed from the award, the appeal remanded the case to the common pleas, and thereafter it was immaterial what disposition was made of the exceptions, so far as it affected the subsequent trial.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 343; Dec. Dig. § 68.*]

4. CONTINUANCE (§ 17*)—GROUNDS—WANT OF PREPARATION.

Where a cause had been pending for over five years, and had been tried several times in the common pleas, and had been three times in the Supreme Court, a motion to strike it from the June trial list, on which it was placed April 18th for undue haste, and postpone it to the next term, several months thereafter, was properly overruled.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 14; Dec. Dig. § 17.*]

5. VENUE (§ 72*)—CHANGE OF VENUE—BURDEN OF PROOF.

The burden is upon applicant for a change of venue to show that it could not have a fair and impartial trial in that jurisdiction.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 127; Dec. Dig. § 72.*]

6. VENUE (§ 50*)—CHANGE OF VENUE—LOCAL PREJUDICE.

A change of venue on the ground that the unfair, improper, and untruthful statements of the press, relative to the case, would prevent a

fair and impartial trial, was not erroneously denied, where, before the press had discussed the case at all, the jury, on the first trial, returned a verdict for the exact amount of the verdict upon the fourth and last trial, and where two other juries had returned verdicts of about the same amount, and where counsel for the party applying for the change had invited such discussion by replying in a lengthy article in defense of such party to the first comment made by the press.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 73; Dec. Dig. § 50.*]

Appeal from Court of Common Pleas, Cambria County.

Trespass by Catherine Burns against the Pennsylvania Railroad Company to recover damages for the death of her husband. Judgment for plaintiff for \$12,000, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. W. Storey, for appellant. E. T. McNeelis, for appellee.

MESTREZAT, J. This case was here on three former appeals. 210 Pa. 90, 59 Atl. 687; 213 Pa. 280, 62 Atl. 845; 219 Pa. 225, 68 Atl. 704. When it was here a year ago, we then expressed regret that we were compelled to remand it for another trial. We are now pleased to say that our judgment on this appeal will terminate the litigation which has been pending for nearly six years. Such delay frequently results in a denial of justice and contravenes the maxim: "Inter est reipublice ut sit finis litium."

We have examined with care the twelve assignments of error, and we fail to find any merit in a single one of them. The sixth, seventh, eighth, and ninth assignments are not only without merit, but have no exceptions of record to support them. They need not be considered. The court was clearly right in dismissing the exceptions to the award of arbitrators. They were frivolous and without substance, and the only apparent excuse for filing them was to delay the final adjudication of the cause. The rule to arbitrate was taken by the defendant company, the arbitrators were regularly and legally chosen, and after a hearing in which both parties participated, an award in due form was filed. The exceptions to the award by the defendant was to the alleged misconduct of the arbitrators. As shown by the opinion of the court in refusing to sustain the exceptions, the allegation of misconduct was wholly unfounded. What was done by the arbitrators was done in the presence of counsel of both parties, and no objection was taken thereto until after the award had been filed. The defendant's counsel was present, knew what the arbitrators did, entered no objection whatever to their conduct, but continued the arbitration until the cause was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fully heard and disposed of. At the time the exceptions were filed, the defendant also appealed from the award of the arbitrators. The appeal remanded the case to the common pleas, and thereafter it was immaterial what disposition was made of the exceptions, so far as it affected the subsequent trial of the cause. The case was then ripe for trial in court without further delay by reason of the arbitration.

The learned judge was unquestionably right in refusing to strike the cause from the June trial list. The case was placed on the list on April 18, 1908, and was tried the 1st day of the following June. In view of the fact that the cause had been pending for over five years, had been tried several times in the common pleas, and had been three times in this court, the defendant company was not in a position to allege undue haste in the trial, or that it did not have an opportunity to prepare for trial. The court in its opinion says: "The cause is regularly placed upon the list, and the action of the prothonotary in placing it upon the list in compliance with præcipe of plaintiff was entirely legal, and indeed any other action on the part of the prothonotary would not have been warranted." This is a construction by the learned court of its own rules with which we will not, under the circumstances of this case, interfere. To strike the case from the June trial list and postpone it to the next term, several months thereafter, as asked for by the defendant company, would have been an infringement of the plaintiff's right to a speedy trial of the cause. The motion to strike the case from the trial list was properly overruled.

There was no sufficient ground shown by the defendant company to sustain its application for a change of venue which was presented to the court on the day the case was called for trial. The burden was upon the company to show to the satisfaction of the court that it would not have a fair and impartial trial in that jurisdiction. As the learned judge below correctly says: "There was no proof of any sort presented to sustain the application, and no evidence offered to show that any juror summoned to attend court has been in any wise influenced

by the publications complained of." The answer of the plaintiff denied the averments of the petition for the change of venue, and, in the absence of any evidence to support its allegations, the court was warranted in declining to order the change. The cause assigned in the petition was the alleged "unfair, improper, and, in many instances, untruthful statements" of the press of Cambria county relative to the case, producing conditions which prevented a fair and impartial trial of the cause in the county. That the comments of the press had no such effect and did not increase the amount of the verdict is shown by the fact that, before the press had discussed the case at all, the jury on the first trial in December, 1903, returned a verdict for \$12,000, which is the exact amount of the last verdict. In view of the further fact that two other juries returned verdicts for \$12,537 and \$14,480, respectively, it is apparent, we think, that the learned trial judge committed no error in holding that the discussion of the case by the press of Cambria county did not deprive the defendant company of a fair and impartial trial. It may also be observed that, if the press of Cambria county did comment upon the case and discuss its merits, the defendant company, through its counsel, is not entirely without fault in inviting such discussion. From the excerpts from the press, printed as defendant's exhibits in its paper book, it appears that, the second day after the first comment on the case was made by the press, the counsel for the defendant replied in a lengthy article in defense of his company. If therefore the case was tried in the newspapers of the county, the defendant company, by its counsel, and not the plaintiff, was responsible in part for its submission to that tribunal for adjudication. He who invites war must accept its consequences.

The other assignments of error are without merit and need not be noticed. The case was unquestionably for the jury, and the court would have committed reversible error in directing a verdict for the defendant company or in entering judgment for it non obstante veredicto.

The judgment is affirmed.

(222 Pa. 512)

PHILADELPHIA CO. et al. v. RENNER et al.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

MINES AND MINERALS (§ 79*)—LEASE—RENT—PAYMENT.

Where an oil lease provides for payment of rent by check or draft, it is no ground for forfeiture that a check sent had printed across its face "payable only through" a named clearing house; the check being perfectly good.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 79.*]

Appeal from Court of Common Pleas, Greene County.

Bill by the Philadelphia Company and the Fisher Oil Company against Baronett F. Renner and Martha J. Renner. Decree for plaintiffs, and defendants appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James J. Purman and Frank W. Downey, for appellants. A. H. Sayers, for appellees.

ELKIN, J. As this case has developed, the only question to be determined here is whether at the time this proceeding was instituted there had been a forfeiture of the lease by failure to pay the rental according to the terms of the contract. The appellants claim the right to declare a forfeiture which the appellees deny. The clause under which a forfeiture is asserted provides that the lease shall become null and void unless a well shall be completed on the premises within sixty days from the date thereof, or unless the lessee shall pay at the rate of \$30 quarterly, in advance, for each additional three months such completion is delayed. The well was not completed within 60 days, but the quarterly payments were made from time to time during a period of nine years up to and including the rental due August 17, 1907, as to which payment the controversy in the present proceeding arises. The lease provides that the quarterly payments may be made direct to the lessors, or to Baronett F. Renner, one of the complainants, at Garrison post office by check or draft. Payment was tendered in due time by a check or draft, drawn upon the Farmers' Deposit National Bank of Pitts-

burg, for the sum of \$30, which check or draft was deposited in the mails for transmission and was received by Renner, November 18, 1907, one day before the payment was due. He refused to accept the draft and returned the same by first mail to the lessee upon the ground that across its face were printed the words "payable only through the Pittsburgh Clearing House"; the contention then and now being that a draft made payable through the clearing house was not a compliance with the contract. The objection is too technical to be substantial. The contract only provided that the payment could be made by check or draft, and nothing is said about the method of collection. What Renner had the right to demand was a check or draft, drawn by the lessee on a bank which when paid was a compliance with the very letter of the covenant. He received in due time a draft drawn upon a responsible banking institution, calling for the payment of the proper sum to meet the advance rental, and all that he had to do was to deposit it for credit with the bank in which he did business and collection would follow in due course of banking. The fact of payment was what the lessor was interested in and not the method of making it, so long as the terms of the contract were not violated. It was immaterial to the lessor whether the draft was paid over the counter of the banking institution drawn upon or through the clearing house, if in point of fact it was paid or would have been paid and he had received or would have received the benefit of it. That the draft was good is not denied, and that it would have been paid through the clearing house, if presented, is not questioned. Certainly, under these circumstances, complainant was not justified in returning the draft and declaring a forfeiture of the lease. For a long period of years the lessee had paid the quarterly rentals by draft just as was done in this instance, except the former drafts were not made payable through the clearing house, but, as heretofore suggested, this at most only affected the method of collection in due course of banking, and did not deny to the lessor any substantial right under the contract.

We find no reversible error, and the decree is affirmed at the cost of appellants.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(20 R. I. 429)

HART et al. v. SUPERIOR COURT.

(Supreme Court of Rhode Island. March 12, 1909.)

FORCIBLE ENTRY AND DETAINER (§ 44*)—TRIAL—VERDICT.

Pub. Laws, p. 37, c. 1533, § 5, relating to forcible entry and detainer, provides that, if the jury shall find the complaint supported by the evidence, "they shall sign and return to the court their verdict." Section 6 provides that upon the return of the verdict for the complainant the court shall enter up judgment for restitution of the premises. The form of the statutory writ of restitution provides that "the jurors impaneled and sworn by our said justice did return their verdict in writing, signed by each of them." *Held*, that a verdict signed only by the foreman is irregular, and the proceedings should be quashed, on review of the case by certiorari, under Pub. Laws, p. 39, c. 1533, § 9, authorizing the Supreme Court to quash them for irregularity, especially where it nowhere appears that the corporation making the complaint ever authorized it to be made.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Dec. Dig. § 44.*]

Richard Hart and others, by a writ of certiorari to the superior court, bring proceedings in that court before the Supreme Court for review. Proceedings quashed for irregularities.

See, also, 71 Atl. 513.

William A. Heathman, for complainants.
Julius L. Mitchell, for defendant.

PER CURIAM. This is a petition for a writ of certiorari, under the provisions of Pub. Laws, 1908, p. 34, c. 1533, entitled "An act concerning forcible entry and detainer," passed April 21, 1908, section 9 of which reads as follows: "Sec. 9. Such proceeding may be removed by certiorari into the Supreme Court, and be there quashed for irregularity, if any such there be."

Upon inspection of such proceedings so removed it appears that the verdict was signed by the foreman of the jury impaneled and sworn therein, and by none of the other jurors. Portions of sections 5 and 6 of said act, material to this inquiry, read as follows:

"Sec. 5. If, upon a full hearing of the cause, the jury shall find the complaint laid before them supported by the evidence, they shall sign and return to the court their verdict. * * *

"Sec. 6. Upon the return of verdict for the complainant as aforesaid, the court shall enter up judgment that the complainant have restitution of the premises, with all costs, to be taxed by the court, and shall award a writ of restitution and for costs against the party complained of. * * *

The form of the writ of restitution prescribed by the statute provides that "the jurors impaneled and sworn by our said justice did return their verdict in writing, signed by each of them. * * *" This interpretation of the words, "they shall sign and

return * * * their verdict," used in said section 5, seems to us conclusive. The verdict so signed by the foreman alone is clearly irregular. See *Cone v. Cotton*, 2 Blackf. (Ind.) 82; *Ward v. Crane*, 3 Blackf. (Ind.) 393.

Furthermore, it nowhere appears that the Olney Street Baptist Church, the corporation which appears to make the complaint in the original proceeding, ever authorized the complaint to be made, and the persons who did sign the complaint are not shown to have had any authority to institute that proceeding.

The proceedings are therefore quashed for such irregularities.

SACCOCIO et ux. v. SPRAGUE et al.

(Supreme Court of Rhode Island. March 12, 1909.)

COVENANTS (§ 132*)—TITLE—BREACH—DAMAGES.

A purchaser of land, suing for breach of a covenant as to title, can recover the costs and expenses of suits through which he determined the nature and extent of the incumbrance, a right of way, especially where the vendors refused, after notice, to settle the matter, so as to save expense to the purchaser.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 260; Dec. Dig. § 132.*]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Action by Michele Saccoccio and wife against William Sprague and others. From a verdict for plaintiffs, defendants bring exceptions. Exceptions overruled, and cause remitted, with direction to enter judgment on the verdict.

Plaintiff sues for breach of covenant in a warranty deed, arising from the existence of a right of way not mentioned in the deed.

James J. McGovern, for plaintiffs. Louis L. Angell, for defendants.

PER CURIAM. A careful consideration of the transcript of evidence convinces us that the verdict is supported by the evidence and that the court committed no error in rulings or charge. We cannot agree with the counsel for the defendants in his contention that the court erred in allowing the plaintiffs to recover for the costs and expenses of one of the lawsuits and of the equity suit through which the plaintiffs finally ascertained and determined what was the exact nature and extent of the incumbrance (right of way) upon the property sold to the plaintiffs by the defendants. We know of no better way in which the exact legal status of the real estate could have been ascertained, particularly in view of the refusal of the defendants, after notice, to take any steps to make a settlement of the matters in dispute, so as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to save expense to the plaintiffs. Nor do we think the other damages allowed to the plaintiffs for actual occupation of the land and for detriment to the rest of the land are so clearly excessive as to warrant an interference with the verdict.

The defendants' exceptions are therefore overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

(29 R. I. 423)

CAMPBELL v. CAMPBELL et al.

(Supreme Court of Rhode Island. March 12, 1909.)

1. TRIAL (§ 31*)—EXCEPTIONS TO RULINGS—TIME FOR TAKING.

The conduct of the court, in compelling counsel to choose either to continue the case without witnesses after the regular hour of adjournment or to limit the number of witnesses to be called on the following day to those he could forthwith name, is a ruling made during the hearing of a cause, subject to exceptions to be taken immediately, under Court and Practice Act 1905, § 483.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 55, 84; Dec. Dig. § 31.*]

2. NEW TRIAL (§ 20*)—GROUNDS—CONDUCT OF COURT.

The conduct of the court in requiring counsel to choose either to continue the case without witnesses after the regular hour of adjournment or to limit the number of witnesses to be called on the following day to those he could forthwith name, without having previous notification that the court would sit beyond the usual time or that he would be compelled to make such choice, is not such a denial of an impartial trial as, under Court and Practice Act 1905, § 472, entitles a party to a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 23; Dec. Dig. § 20.*]

Action by Ellisha J. Campbell against George E. Campbell and others. There was a verdict for defendants, and plaintiff petitions for a new trial. Petition denied and dismissed.

See, also, 71 Atl. 369, 881.

Green, Hinckley & Allen, for petitioner. James Harris and Irving Champlin, for respondents.

PER CURIAM. This is the appellant's petition for a new trial, under Court and Practice Act 1905, § 472, upon the ground that he did not have a full, fair, and impartial trial in the superior court, for the reason that the justice who presided at the trial in said superior court compelled his counsel to choose either to continue the case without witnesses after the regular hour of adjournment or to limit the number of witnesses to be called on the following day to those he could forthwith name, without having previously notified him that the court would sit beyond the usual time that night, or that he would be compelled to make such choice.

The conduct of the court complained of was subject to exception to be taken immediately,

under Court and Practice Act 1905, § 483; which reads as follows: "Sec. 483. Exceptions to rulings, directions, and decisions made during a hearing in a cause heard by the court without a jury or during a trial by a jury shall be taken immediately. * * * As was clearly explained by Matteson, C. J., in *Bristow v. Nichols*, 19 R. I. 719, 37 Atl. 1033: "To render a trial not a full, fair, or impartial trial, within the meaning of Gen. Laws 1896, c. 251, § 2, there must, we think, be something more than mere error on the part of the court which would form the subject of an exception. Unless there be something more than this, to grant a new trial under section 2 would be to do away practically with the procedure provided in section 6."

That case is determinative of this, and therefore the appellant's petition for a new trial must be denied and dismissed.

(109 Md. 602)

LANASA v. STATE.

(Court of Appeals of Maryland. Jan. 15, 1909.)

1. CONSPIRACY (§ 23*)—DEFINITION OF TERM.

A "conspiracy" in general terms is a combination of two or more persons by concerted action to accomplish some criminal or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. The act intended need not be punishable by indictment. The essence of the offense is the unlawful agreement and combination of the parties, and therefore it is complete whenever such combination is formed, though no act be done toward carrying the main design into effect.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 32; Dec. Dig. § 23.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

2. CONSPIRACY (§ 23*)—AGREEMENT FOR DESTRUCTION OF PROPERTY—"COMPLETED CRIMINAL CONSPIRACY."

A combination and agreement between two or more persons willfully and maliciously to injure and destroy the property of a third person is a "completed criminal conspiracy," and is the subject of indictment; it not being necessary to the completion of the crime that the conspirators should determine in advance what particular property should be injured or destroyed.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 23.*]

3. CONSPIRACY (§ 43*)—AGREEMENT TO DESTROY PROPERTY—INDICTMENT—DESCRIPTION OF PROPERTY.

As it is not essential to the completion of the offense of conspiracy to destroy property that any particular property should be destroyed, it is not required that the object of the unexecuted conspiracy should be set out with great particularity and certainty in the indictment; only such facts being required as shall fairly and reasonably inform the accused of the offense with which he is charged.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 86; Dec. Dig. § 43.*]

4. CONSPIRACY (§ 43*)—AGREEMENT TO DESTROY PROPERTY—INDICTMENT—DESCRIPTION OF PROPERTY.

An indictment charging a conspiracy to willfully and maliciously "injure and destroy the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

property" of the prosecutor is sufficient without further description of the property.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 43.*]

5. CRIMINAL LAW (§ 878*)—VERDICT ON SEVERAL COUNTS—REPUGNANCY.

There is no repugnancy between the verdict of guilty on a count charging conspiracy to maliciously "injure and destroy the property" of the prosecutor and the verdict of acquittal on a count charging conspiracy to "injure and destroy the property and dwelling house" of the prosecutor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2101; Dec. Dig. § 878.*]

6. CRIMINAL LAW (§ 1134*)—REVIEW—SUFFICIENCY OF EVIDENCE.

The sufficiency of the evidence will not be reviewed on appeal from a judgment overruling a motion in arrest after conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2997; Dec. Dig. § 1134.*]

7. CONSTITUTIONAL LAW (§ 257*)—DUE PROCESS OF LAW—CRIMINAL PROSECUTION.

Where a person accused of crime within the state is subjected, like all other persons, to the law in its regular course of administration in a court of justice, he cannot be heard to say that the proceedings and judgment were without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 746; Dec. Dig. § 257.*]

8. CRIMINAL LAW (§ 1213*)—CRUEL AND UNUSUAL PUNISHMENT.

A sentence to jail for 10 years on conviction of a member of the Black Hand of conspiracy to destroy by a dynamite bomb the property of a man who had refused to pay money after threats against his life and property is not cruel or unusual within the prohibition of Const. U. S. Amend. 8, and Declaration of Rights Md. art. 16.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3308; Dec. Dig. § 1213.*]

9. CRIMINAL LAW (§ 1149*)—REVIEW—DISCRETION OF COURT—ELECTION BETWEEN COUNTS.

In the absence of any abuse thereof, the discretion of the trial court in its ruling on a motion to require the prosecution to elect between counts will not be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3058; Dec. Dig. § 1149.*]

10. CRIMINAL LAW (§ 1149*)—REVIEW—DISCRETION OF COURT—BILL OF PARTICULARS.

In the absence of an abuse thereof, the discretion of the trial court in overruling a demand for a bill of particulars will not be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3041; Dec. Dig. § 1149.*]

11. CRIMINAL LAW (§ 510*)—EVIDENCE—TESTIMONY OF ACCOMPLICES—CORROBORATION.

A conviction of conspiracy to destroy property cannot be had on the uncorroborated testimony only of accomplices connecting defendant with the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124, 1125; Dec. Dig. § 510.*]

12. WITNESSES (§ 379*)—CREDIBILITY—IMPEACHMENT.

Testimony of statements by a witness out of court contradictory to the material facts testified to by him in court is admissible as affecting his credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1209; Dec. Dig. § 379.*]

13. WITNESSES (§ 198*)—"PRIVILEGED COMMUNICATIONS"—ATTORNEY AND CLIENT.

To render communications between attorney and client privileged, they must be made during the existence of the actual relation or during interviews and negotiations looking to the establishment of such relationship, and must relate to professional advice and to the subject-matter about which such advice is sought.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 198.*]

For other definitions, see Words and Phrases, vol. 6, p. 5591; vol. 8, p. 7764.]

14. WITNESSES (§ 222*)—PRIVILEGES COMMUNICATIONS—ATTORNEY AND CLIENT.

Evidence held to show that the relation of attorney and client did not exist between counsel for defendant and an accomplice so as to disqualify him to testify to communications between them in contradiction to testimony of the accomplice against defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 786; Dec. Dig. § 222.*]

15. CRIMINAL LAW (§ 510½*)—TESTIMONY OF ACCOMPLICE—CORROBORATION.

A statement in writing made by an accomplice 29 days after the crime and while in custody under a joint indictment for the same offense is not admissible as corroborative evidence after the testimony of the accomplice on the trial has been contradicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1135; Dec. Dig. § 510½.*]

Appeal from Criminal Court of Baltimore City; D. G. Wright and Henry Stockbridge, Judges.

Antonio Lanasa was convicted of conspiracy, and appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

William L. Marbury and Thomas G. Hayes, for appellant. Eugene O'Dunne and Isaac Lobe Straus, Atty. Gen., for the State.

BURKE, J. 1. Antonio Lanasa, together with certain named persons, was indicted in the criminal court of Baltimore for the crime of conspiracy. That court upon his motion granted a severance as to him, and after a lengthy trial he was convicted upon the third count of the indictment, and was sentenced to be confined in the Baltimore city jail for the term of 10 years. From that judgment he has brought this appeal. The indictment contains 10 counts. The appellant filed a general demurrer to the indictment and also demurred to each count. The second, fourth, and ninth counts were quashed by the court upon motion of the state's attorney. The demurrer to the indictment and to each count thereof was overruled. The traverser then moved the court to require the state to elect as to the third, seventh, and eighth counts, which motion the court overruled. He was found guilty upon the third count, but was acquitted upon the six remaining counts. Motions for a new trial and in arrest of judgment were filed. He abandoned the motion for a new trial,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the motion in arrest of judgment was overruled by the Supreme Bench of Baltimore city. The object of the conspiracy charged in the counts of the indictment upon which he was tried was as follows:

(1) Feloniously, willfully, and of their malice aforethought to kill and murder Joseph Di Giorgio.

(3) To willfully and maliciously injure and destroy the property of Joseph Di Giorgio.

(5) Feloniously, willfully, and of their malice aforethought to kill and murder certain members of the family and household of the said Joseph Di Giorgio.

(6) Unlawfully to wound, hurt, and injure certain members of the family and household of the said Joseph Di Giorgio.

(7) Unlawfully to willfully and maliciously injure and destroy the property and dwelling house of the said Joseph Di Giorgio.

(8) Unlawfully to willfully and maliciously injure and destroy the property and dwelling house then and there being of the said Joseph Di Giorgio.

(10) Unlawfully to extort and obtain unto themselves from the said Joseph Di Giorgio certain money and property of the said Joseph Di Giorgio.

The fifth, and sixth counts set out the names of the persons who were intended to be injured, and the eighth and tenth counts set out certain overt acts done in pursuance of the conspiracy. It is important to note that Joseph Tamburo and Salvatore Lupo are named as co-conspirators with Lanasa in each count of the indictment, and that upon the evidence of these two men the state relied to connect the appellant with the crime of which he was convicted. These two facts become of great importance when we come to consider the exceptions taken to the rulings of the court upon the evidence. Philippi Rei, who is frequently referred to in the record, was an Italian, who, it is alleged, was induced by Lanasa to become one of the co-conspirators. Rei was killed in Pittsburgh by a fellow countryman named Cincerla a day or two before the explosion at Di Giorgio's home. On March 30, 1908, Lupo pleaded guilty to the eighth count, and after the conviction of Lanasa was sentenced to jail for 15 months; and 2 days after Lanasa's conviction the state entered a plea of not guilty as to Tamburo. It was contended with great earnestness and ability by the distinguished counsel for the appellant that the demurrer to the third count should have been sustained, first, because it charges no crime; secondly, because it does not sufficiently describe the object of the conspiracy. In support of the motion in arrest of judgment, in addition to the reasons assigned for grounds of the demurrer, it was urged, first, that there is an absolute and necessary repugnancy between the verdicts rendered by the jury in that it is shown by the record that by the verdict of not guilty

upon the seventh count of the indictment the traverser was acquitted of the identical crime for which he was convicted upon the third count; secondly, because the judgment deprives the appellant of his liberty without due process of law, in violation of the fourteenth amendment of the Constitution of the United States, and constitutes a cruel and unusual punishment, in violation of the Constitution of the United States and of the Maryland Declaration of Rights. In the elaborate briefs filed by the counsel for the appellant and the state these questions have been fully discussed, and many cases, both in this country and in England, upon the law of conspiracy, have been called to our attention. It is apparent that upon this subject, as upon most others, there is much real or apparent conflict to be found in the adjudged cases. Upon the settled law of this state and upon the authority of well-reasoned cases in other jurisdictions, we cannot agree that the count assailed is in any respect defective, or that the judgment should be arrested. A conspiracy may be described in general terms, as a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. It is not essential that the act intended to be done should be punishable by indictment. The essence of the offense consists in the unlawful agreement and combination of the parties, and therefore it is completed whenever such combination is formed, although no act be done towards carrying the main design into effect. 3 Greenleaf on Evidence (2d Ed.) §§ 89-91. It may be said that this statement of the law by Mr. Greenleaf announces the almost universally accepted doctrine upon the subject of criminal conspiracy. This is made perfectly apparent by the numerous citations from text-books and reports contained in the briefs filed in this case. It is the rule which has obtained in this state since the great case of the State v. Buchanan, 5 Har. & J. 317, 9 Am. Dec. 534, in which will be found a collection of many cases in which an unexecuted conspiracy to commit acts not in themselves indictable offenses, was held to be a criminal conspiracy. In the course of his opinion in that case Judge Buchanan said: "In 1 Hawk. P. C. 190, c. 72, it is said: 'There can be no doubt that all combinations whatsoever wrongfully to prejudice a third person are highly criminal at common law.' This is literally adopted and transcribed into 1 Burn's Justice, 378, and 3 Wilson's Works, 118. 3 Chitty, Criminal Law, 1139, says: 'In a word, all confederacies wrongfully to prejudice another are misdemeanors at common law, whether the intention is to injure his property, his person, or his character.' And in 4 Blk. Com 137 (Christian's note 4): 'Every confederacy to injure individuals, or to do acts which are

unlawful, or prejudicial to the community, is a conspiracy.' We cannot for a moment doubt that a combination and agreement between two or more persons willfully and maliciously to injure and destroy the property of a third person is a completed criminal conspiracy, and is the subject of an indictment. Nor is it necessary to the completion of the crime that the conspirators should determine in advance what particular property should be injured or destroyed. To hold that the law cannot interpose and arrest by criminal procedure the malicious purposes of the conspirators, unless they had agreed upon the destruction of some particular property, would strip it of its most beneficent preventive powers, and leave the confederates at liberty to consummate their wicked purposes. The law is not so impotent and ineffective. As it is not essential to the completion of the offense that any particular property should be destroyed, it is therefore not required that the object of the unexecuted conspiracy should be set out with great particularity and certainty in the indictment, because only such facts need be stated as shall fairly and reasonably inform the accused of the offense with which he is charged. To require more in such a case would be to put an unnecessary burden upon the state, and make it impossible in many cases to secure the conviction of the guilty. The position taken by the state that, in a prosecution for such an offense as that charged in the third count, the indictment need not particularly describe the property, the injury, or destruction of which was the object of the conspiracy, is well supported by the authorities. 2 Bishop, New Criminal Procedure, §§ 204, 207, 208; 2 Wharton's Criminal Law, c. 21; U. S. v. McKinley (C. C.) 126 Fed. 242; Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 39 L. Ed. 545; United States v. Stevens (D. C.) 44 Fed. 132, 141; State v. Straw, 42 N. H. 393; Reinhold v. State, 130 Ind. 467, 30 N. E. 306; People v. Clark, 10 Mich. 314; 8 Cyc. 664, 666.

We are of opinion that the third count charged the defendant with a common-law conspiracy, and sufficiently informed him of the crime charged. The objection against it is purely technical, as it is not pretended that he was in the slightest degree injured or prejudiced by the general and indefinite description of the property, the destruction of which is charged to have been the object of the conspiracy. On the contrary, the record shows that he was well informed as to the accusation against him. Nor can we discover any necessary repugnance between the verdict of guilty on the third count and the verdicts of acquittal on the seventh and eighth counts. In those counts the object of the conspiracy was alleged to be "to injure and destroy the property and dwelling house of Joseph Di Giorgio." The jury might have very reasonably concluded that, while the

evidence in their judgment did not fully support the allegations of these counts, it did satisfy them that it was the purpose of the accused to injure and destroy some of Mr. Di Giorgio's property. We must conclude that they were so convinced by the verdict of guilty upon the third count and the acquittal upon the others. The sufficiency of the evidence was a question for the jury, and this court upon a motion in arrest of judgment has no power to review their finding. We said in *Hiss v. Welk*, 78 Md. 446, 28 Atl. 401, that: "As an appellate court we cannot review the findings of the jury upon matters of fact, nor can we pass upon the comparative weight of the conflicting evidence submitted to them. If no error of law had been committed by the inferior court in any of its rulings, the verdict of the jury, whether right or wrong, just or unjust, and even though it be directly against and in the very teeth and face of the preponderance of evidence, cannot be interfered with here; and there is no power lodged elsewhere to set the verdict aside, except with the Judge before whom the case was tried." Much that was said in argument in support of the motion in arrest of judgment cannot be considered by this court; but could have been appropriately addressed to the trial court upon an application for a new trial.

It is insisted by the appellant that the indictment, trial, verdict, judgment, and sentence, violate the sixth, eighth, and fourteenth amendments of the federal Constitution, and the sixteenth and twenty-first articles of the Maryland Declaration of Rights. The sixth amendment provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation, and the fourteenth declares that no state shall deprive any person of life, liberty, or property without due process of law. Practically the same declarations are found in the twenty-first and twenty-third articles of the Declaration of Rights of this state. The object of these provisions was to declare and secure the pre-existing rights of the people as those rights had been established by usage and the settled course of law. We take it to be settled that when a person accused of crime within a state is subjected, like all other persons, to the law in its regular course of administration in the courts of justice, he cannot be heard to say that the proceedings and judgment were without due process of law because law in its regular and orderly administration through the courts is due process of law within the meaning of the constitutional provisions, and, when the rights of the citizen are thus secured by the law of the state, the requirements of the federal Constitution are gratified. Having hereinbefore held that by the law of this state the third count of the indictment is sufficient, it necessarily follows that the appellant has been deprived of no right secured to him either by the twenty-

first article of the Maryland Declaration of Rights or the sixth or fourteenth amendment of the federal Constitution.

It is urged that the judgment should be reversed, because it constitutes a cruel and unusual punishment in violation of the provisions of the Maryland Declaration of Rights and of the Constitution of the United States. In support of this contention the appellant relies upon the eighth amendment of the federal Constitution, which forbids the infliction of cruel and unusual punishment, and upon article 16 of the Maryland Declaration of Rights, which declares that no law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time hereafter. To dispose of this question we must understand the real crime of which the accused was charged. Di Giorgio was a prominent business man living in Baltimore city and engaged in the importation of fruit to the Baltimore market. He lived with his wife and family at Walbrook. In order to extort money from him, threatening letters demanding money were sent him by an organization or society of men known as the "Black Hand." He declined to comply with these demands, and on the night of December 10, 1907, a dynamite bomb was placed in the rear room of his dwelling house and exploded, terrorizing the occupants of the house, and causing much damage. Whatever may have been the motive which prompted this act, whether it was an attempt to murder Di Giorgio and his family in revenge for his refusal to pay over money in response to demands made upon him, or had for its ultimate purpose the coercion of Di Giorgio by personal violence into a compliance with these demands, there can be no two opinions as to the heinousness of the crime. It was an act characterized by the most malicious and diabolical wickedness, and should be punished with the greatest severity. We do not think that a sentence of 10 years for such a crime would be open to any constitutional or other objections. In the case of *Mitchell v. State*, 82 Md. 527, 34 Atl. 246, where the accused had been sentenced to jail for a term of 15 years upon a conviction for an assault with intent to commit a rape, this court passed upon the very question now before us, and held that the sentence was not a cruel and unusual punishment within the constitutional prohibition. It is said in that case that "our law inflicts pain not in a spirit of vengeance, but to promote the essential purposes of public justice. Severity is not cruelty. The punishment ought to bear a due proportion to the offense. Crimes of great atrocity ought to be visited with such penalties as would check, if not prevent, their commission. It is impossible in the abstract to mark the boundaries which separate cruelty from just severity. If the circumstances which accompany the crime are of unusual aggravation, the punishment ought to be unusually severe. But the

courts must adopt the methods of punishment prescribed by law. No one ought to imagine that in a free country a court would have the power to devise new and singular modes of punishment. Its duty is 'dicere non facere legem.' Even where the law confides to the judge the imposition of the sentence without definite limit, it still may be possible to violate the Declaration of Rights. If the punishment is grossly and inordinately disproportionate to the offense so that the sentence is evidently dictated not by a sense of public duty, but by passion, prejudice, ill will, or any other unworthy motive, the judgment ought to be reversed and the cause remanded for a more just sentence." While the sentence in this case is severe, it is not open to the objection of being in the sense of the law cruel or unusual. We cannot review the action of the lower court in refusing to require the state to elect between certain counts and in overruling the appellant's demand for a bill of particulars. Those motions were addressed to the sound discretion of the court, and its action upon them is not the subject of an appeal in the absence of some gross abuse of discretion in the lower court resulting in injury to the accused, and we find nothing of that kind in this case. *Warren v. Twilley*, 10 Md. 39; *Gibson v. State*, 54 Md. 453. In *Gibson's Case* it is said: "No question has been raised in this court to the refusal of the court below to compel the state to elect on which the prisoner should be tried. The practice is well settled in this state that such a motion is addressed to the discretion of the court, and is not a subject of appeal or writ of error. *State v. Bell*, 27 Md. 677, 92 Am. Dec. 658. It is unnecessary to multiply authorities on this question, as they are practically unanimous in support of the doctrine stated by this court.

2. This brings us to the consideration of the 36 bills of exception reserved by the accused to the rulings of the trial court upon questions of evidence. We have given these careful consideration; but we do not think it necessary to discuss them all separately. We find no reversible error in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-sixth, twenty-seventh, twenty-eighth, and twenty-ninth exceptions. There was, however, serious error committed by the court in the sixteenth, twenty-fifth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, and thirty-sixth exceptions. The state relied largely upon the testimony of Tamburo and Lupo to connect Lanasa with this crime. Both were under indictment, and upon the uncorroborated evidence of accomplices connecting Lanasa with the crime the law does not permit a conviction to stand. *Wharton's Crim. Evidence* (8th Ed.) §§ 441, 442. Lupo

pleaded guilty, and turned state's evidence in the hope and expectation of a light sentence, and in this he was not disappointed. According to his own testimony, he was induced to become a witness for the state by a statement made to him by the state's attorney. He testified: "As a result of my having plead guilty and turning state's evidence, I get from the state a request or beg the court to give my liberty in order to take care of my family and provide for my family. I was forced to declare myself guilty because I knew all about it. I do not know how much the state's officers will endeavor to reduce my sentence for having plead guilty to the eighth count. I do not know anything. The court knows when the prosecuting attorney will ask the court. Whatever they will give me I do not know anything about it. All the state's attorney told me is this: 'That if you will tell us what you know—we don't want any lies from you—but, if you tell us what you know, we will ask the court to sentence you to 18 months.' I pleaded guilty before the state's attorney spoke to me about these things. Before he ever told me anything about it I pleaded guilty. The state's attorney promised me if I plead guilty that he would ask the court to give me 18 months. He didn't tell me he would give me 18 months, but he would ask the court to give me 18 months." He testified to facts which, if believed by the jury, not only connected Lanasa with the crime, but which showed that he was the head and front of the whole conspiracy—the originator and master spirit of the whole nefarious business. After Lanasa's conviction, the state confessed a plea of not guilty against Tamburo, who also had testified to certain things, which will be presently alluded to, which tended to show Lanasa's participation in the crime. The appellant testified in his own behalf, asserting his innocence, and denying all the acts imputed to him by the state. It is therefore perfectly obvious that the result of the trial resolved itself into the question of the credibility of Lupo and Tamburo. The question of the appellant's liberty seems to have depended upon his ability to break down the evidence of these two men by convincing the jury that they were attempting, for selfish purposes, by false and perjured testimony, to secure his conviction of a crime of which he was entirely innocent. In this situation it was vitally important to the appellant that all testimony legally admissible to weaken the force and affect the credibility of these witnesses should have been submitted to the jury. He had a right to show that they had made to others contradictory statements as to the material facts testified to by them at the trial. This was the object of the proffered evidence embraced in the sixteenth and twenty-fifth exceptions. "When a witness has testified to any matter of fact material to the issue about which he has made a different statement to others, such statement, if denied by him,

may be given in evidence to discredit or impeach him. *Munshower v. State*, 55 Md. 21, 39 Am. Rep. 414."

The sixteenth exception was taken during the cross-examination of Lupo, who had pleaded guilty to the eighth count of the indictment which charged an executed conspiracy; the overt act charged in that count being the explosion of dynamite which had been placed under and near the property and dwelling house of Di Giorgio, his plea of guilty to that count having been entered under the circumstances stated above. He testified fully to Lanasa's participation in the crime, had told of certain meetings of himself, Lanasa, and Rei in Pittsburg, and of the circumstances under which he had come to Baltimore and the object of his visit, but claimed that he was not present when the dynamite was exploded. He testified that Lanasa said in Pittsburg to Rei "that a bomb ought to be thrown into the house of Mr. Di Giorgio, of Mr. Joseph Di Giorgio"; that Lanasa said to witness "come to Baltimore, as I want to put a bomb in the house of Di Giorgio"; that Lanasa gave him \$10 to come to Baltimore "to put the bomb into the house of Mr. Di Giorgio"; that he told Lanasa that he was not good for that kind of business, and that Lanasa said he had two other men; that "he would give me two other men to do the business." He further testified that he reached Baltimore on the 11th of December at 4 o'clock in the morning, and went to a hotel and remained there until about 9 o'clock a. m. of that day; that he afterwards saw Lanasa, and told him that Rei was dead, and that the traverser said "my best friend was killed in Pittsburg, and I have sent two men to rob the house of Joseph Di Giorgio." "I did not say, 'rob the house.' The interpreter misunderstood me. He told me: 'My best friend, Phillip Rei, was killed in Pittsburg, and I have sent two men to blow up the house of Di Giorgio.'" He further testified that he went that day to the house of Lanasa, who took him upstairs, and that Lanasa there, in the presence of two people, repeated again, "my best friend was killed in Pittsburg, Phillip Rei, and I have taken two young fellows and sent them to blow up the house of Joseph Di Giorgio"; that he came here for the purpose of blowing up the house, and learned after he reached here from Lanasa that the house had been blown up. Lupo on the 10th of January, 1908, in Cleveland, Ohio, had made a written statement of his participation in the crime in the presence of Capt. A. J. Pumphrey and two other officers. In this statement, which is called in the record a confession, he stated: That he heard Lanasa say to Rei: "I wish you would come to Baltimore to-morrow. I want to blow up Di Giorgio's house, and kill him." That in the upstairs room of Lanasa's house in Baltimore, Russo said, "They have killed Rei. Now we will blow up Di Giorgio's house with dynamite, and kill Di Giorgio."

Tony Lanasa also said this same remark as Russo did." That Lanasa said he had sent two men to blow up the house. In order to lay the foundation to discredit and impeach this witness by showing that he had made certain statements tending to exculpate Lanasa from all connection with the crime of which he was accused, counsel for Lanasa asked the witness the following question: "Did you not at the city jail on Thursday, March 28, 1908, about 8 o'clock a. m., say to Mr. George Penniman and Mr. Harry Wolf that you were not guilty of the charge against you?" This question was objected to by the state, and the court ruled that, before the question should be permitted to be propounded to the witness, the nature of the relationship existing or attempted to be created by Messrs. Penniman and Wolf on the occasion of that visit should be more clearly established. Mr. Penniman was then called and testified as to the object of his visit to Lupo in the city jail, and give the circumstances under which certain statements were made to him by Lupo. At the conclusion of Mr. Penniman's evidence, the counsel for Lanasa propounded to the witness the following questions: "Did you at the city jail on Thursday, March 28, 1908, at about 8:30 a. m., say to Mr. George Dobbins Penniman and Mr. Harry Wolf that you were not guilty of the charge against you; that your attorneys wanted you to plead guilty, but that they could not fool you, and that you were not going to do anything like that; that they were trying to take your life; that the confessions were not true; that, after you had talked with Dimarco for an hour and a half, he went out with his tail between his legs; that all in the papers about pleading guilty was not true, as no one could talk for you; that, after they took you to court, you would cry out in court 'that Mr. Dimarco was not my lawyer, but I want Mr. Wolf'—that subsequently, at the end of the conversation, you asked Mr. Penniman and Mr. Wolf to meet you at the jail at 8:30 a. m., Saturday March 28th, when you would employ them as your counsel, and give them your defense, and that you wanted to stand trial?" Upon objection by the state the court refused to permit the witness to answer. The record states "to which offer as so made the state objected, and the court sustained the objection, and refused to permit the defendant to prove said offer." The trial court treated the statements made by Lupo to Mr. Penniman as confidential communications between attorney and client. We cannot so consider them. We have been referred to no case, and we have been unable to discover one, in which statements made under the circumstances disclosed by the record have been held to be privileged, and it would be an undue extension of the doctrine to hold it applicable to this case.

The subject of confidential communications between attorney and client has been fully

treated by this court. The result of the authorities is that, to make the communications privileged, they must be made during the existence of the actual relation of attorney and client, or during interviews and negotiations looking to the establishment of such a relationship between the parties, and must relate to professional advice and to the subject-matter about which such advice is sought. When such conditions exist, the law will not permit the counsel to divulge the communications without the consent of the client. In *Chase's Case*, 1 Bland, 222, 17 Am. Dec. 277, the chancellor said: "The policy of the law does not permit a solicitor to divulge the secrets of his client. Such confidential communications are not to be revealed at any period of time either before or after the suit has been brought to an end or in any other case; for, as to all such matters, his mouth is shut forever." The same principle is announced in *Chew v. Farmers' Bank*, 2 Md. Ch. 240; *Fulton v. MacCracken*, 18 Md. 543, 81 Am. Dec. 620. In *Chew's Case*, supra, the chancellor said: "But, although the rule is thus inflexible in the cases to which it applies, there are what are sometimes called exceptions to it, although these exceptions are rather apparent than real, and will, I think, be found upon examination to be entirely without the principle upon which the rule rests. That is, they will be found not to be communications from the client to the legal adviser at all, but information which the latter had acquired independently of any such communication. And, when that is the case, the interests of justice, so far from requiring that it shall be locked up in the breast of the attorney, demand its publicity when necessary to guard or to assert the rights of the third persons." The record shows that Mr. Penniman, who was counsel for Lanasa, had heard that Lupo was being subjected in the jail to some improper treatment. The evidence does not show the exact information conveyed to him; but it caused him to think that some improper influence was being used upon the prisoner—"that something was being done which should not be done"—and he wanted to get at the bottom of it and see what the trouble was, that he did not go there as counsel for Lupo, and had no thought of such employment, and it was not pretended by Lupo that he regarded Mr. Penniman as his counsel or legal adviser at any time, and as a matter of fact he was never so employed. During the interview which took place under these circumstances, Lupo, it is said, made the statement referred to in the questions embraced in this exception, and Mr. Penniman testified that at the time they were made the relation of lawyer and client did not exist, nor was such a relationship mentioned in any way, nor had it occurred to him. This is undisputed. But "after everything was said," to use the language of Mr. Penniman, the question of his employment

was broached, and an arrangement was made that he should return on the following Saturday, when Lupo "would give us his defense." He did go to the jail on Saturday, but Lupo declined to see him, and never did give him his defense so far as the record shows. We think it clear that the facts do not bring these statements within the rule as to confidential communications. The witness should have been required to answer, and, if he had denied the statement attributed to him, Mr. Penniman should have been permitted to contradict him, if he could do so, as such evidence would have had a direct tendency to discredit the witness upon a most material point in the case, viz., the connection of Lanasa with the conspiracy. For precisely the same reason, there was reversible error in the ruling on the question embraced in the twenty-fifth exception. Joseph Tamburo, one of the defendants, had testified to certain facts tending to show the guilt of the appellant. Among other things he swore that he was present in the upper room of Lanasa's house on the occasion testified to by Lupo, and heard the appellant say that he had sent two men to blow up the house of Di Giorgio. The defense proposed to contradict him upon this point by two witnesses by showing that Tamburo had stated that he was not present at Lanasa's home on the occasion testified to by him and Lupo, and that he knew nothing about the trouble. Such testimony was clearly admissible, and its exclusion was well calculated to do the appellant injury.

The thirtieth to the thirty-sixth exceptions, inclusive, present substantially the same questions. The testimony of Joseph Tamburo had been contradicted, and for the purpose of supporting his credibility he was recalled by the state in rebuttal. Thirty-nine days after the commission of the crime, and while he was in the custody of the police department of Baltimore city, he made to F. P. Di Maio, the superintendent of Pinkerton's National Detective Agency, in the presence of three members of the Baltimore city detective department, a statement which was reduced to writing and sworn to by him before a notary public. This statement, over the objection of the traverser, was admitted in evidence in corroboration of Tamburo's testimony in chief. If it be conceded that the statement is not excluded by section 3, art. 35, Code Pub. Gen. Laws 1904, we are of opinion that such a statement by one jointly indicted with the appellant for the identical crime for which he was being tried, made so long after the commission of the offense and under the circumstances disclosed by the record, does not fall within the exception to the general rule "which excludes mere hearsay evidence because ex parte and without the sanction of an oath." The rule which admits such testimony in corroboration of the evidence of an impeached witness is one which is "not very generally recog-

nized in the courts of England, or of other states in this country, and it should not be extended, but applied strictly." *Maitland v. Bank*, 40 Md. 559, 17 Am. Rep. 620. In all the cases in this court in which such evidence has been admitted, it appears that the corroborating statement was made immediately, or soon after the transaction. *Ooke v. Curtis*, 6 Har. & J. 93; *Washington Fire Insurance Company v. Davison*, 30 Md. 105; *McAleer v. Horsey*, 35 Md. 464; *Maitland v. Citizens' Bank*, 40 Md. 559, 17 Am. Rep. 620; *Bloomer v. State*, 48 Md. 537; *Mallonee v. Duff*, 72 Md. 286, 19 Atl. 708. In the case of the City Passenger Railway Company v. Knee, 83 Md. 78, 34 Atl. 252, we said: "Ever since the case of *King v. Parker*, 3 Doug. 242, it is well settled, according to the weight of authority, that 'what a witness says not upon oath, will not be admitted to confirm what he said upon oath.' *Robb v. Hackley*, 23 Wend. (N. Y.) 55; *Conrad v. Griffey*, 11 How. 490, 13 L. Ed. 779. But, though this is the general rule, the text-writers agree that most courts have held that there 'may be many cases where, under special circumstances, it possibly might be admissible, as for instance in contradiction of evidence tending to show that the account was a fabrication of a late date, and where consequently it becomes material to show that the same account had been given before its ultimate effect and operation arising from a change of circumstances could have been foreseen.' 2 Starkie on Ev. Mar. p. 187; 1 Wharton on Ev. § 570; *Rapalje's Law of Witnesses*, § 224; *Taylor's Ev.* § 1330. This exception to the general rule seems to rest upon the theory that the witness having been impeached by evidence showing that he has testified under corrupt motives, or has fabricated his testimony to meet the exigencies of the case, the fact that he uttered the same statement shortly after the transaction, and before the motive to fabricate existed tends to support not only his integrity, but also the accuracy of his recollection. To bring the case within the exception, it must appear that the conversation occurred soon after the transaction, is consistent with the statements made on oath, and contains such fact or facts pertinent to the issues involved, as reasonably to furnish to the jury some test of the witness' integrity and accuracy of recollection. And this is the rule that obtains in Maryland." The appellant was accused of a crime of great atrocity; but he was entitled to all the presumptions and to all the safeguards which the law has provided for the protection of the personal liberty of the citizen. He was presumed to be innocent, and this presumption was an absolute protection against conviction and punishment until it was overcome by proof which placed his guilt beyond any reasonable doubt. This presumption attended him throughout all the proceedings against him from the beginning until his conviction after

a fair and impartial trial. He had a right to be judged by the law of the land; and where it appears, as it does by this record, that he has been denied the benefit of substantial rights during the progress of the trial, it is the duty of this court to reverse the judgment and award a new trial.

Judgment reversed, and new trial awarded.

(109 Md. 361)

**BALTIMORE REFRIGERATING & HEATING CO. OF BALTIMORE CITY
v. KREINER.**

(Court of Appeals of Maryland. Jan. 12, 1909.)

1. EVIDENCE (§ 129*)—RELEVANCY—SIMILAR FACTS.

While the facts of the particular transaction involved are ordinarily the only legitimate evidence, facts occurring before or after the transaction in suit are admissible where they afford a fair and reasonable presumption of the fact to be tried.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 388-398; Dec. Dig. § 129.*]

2. WAREHOUSEMEN (§ 34*)—INJURY TO GOODS—EVIDENCE.

In an action against a cold-storage warehouseman for damages to dressed poultry stored with him by water from a broken city water main which flooded the cellar because of the failure to maintain drain pipes to carry off surplus water, and because of the failure to make the freezer water-tight, evidence that plaintiff had previously packed and placed poultry in storage there with good results was inadmissible either to show that the particular poultry was properly prepared and packed, or that the injury was due to the negligence of the warehouseman.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 78; Dec. Dig. § 34.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

In an action against a cold-storage warehouseman for damages to dressed poultry placed in storage by water from a broken city main which flooded the cellar and submerged the poultry, because of the failure to maintain drain pipes to carry off the surplus water, and because of the failure to make the freezers water-tight, the error in admitting evidence that plaintiff had previously packed and placed poultry in storage there with good results was not prejudicial to the warehouseman.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153, 4154; Dec. Dig. § 1050.*]

4. EVIDENCE (§ 498½*)—COMPETENCY OF EXPERT WITNESS—DISCRETION OF COURT.

The admissibility of expert evidence is largely within the discretion of the trial court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2291; Dec. Dig. § 498½.*]

5. EVIDENCE (§ 536*)—EXPERT WITNESSES—COMPETENCY.

A witness to testify as an expert must possess such intelligence and familiarity with the subject as in the sound discretion of the court will enable him to express a well-informed opinion, and the competency of the expert depends on the subject of the inquiry.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2343; Dec. Dig. § 536.*]

6. EVIDENCE (§ 536*)—EXPERT WITNESSES—COMPETENCY.

One who had been in charge of the cold-storage department of a packing business for 8 years, and who had for over 20 years worked in the cold-storage business, and who had visited and examined various cold-storage plants, was competent to testify that cold-storage plants usually had sewers in the cellars, and that the ice boxes were usually constructed air and water-tight.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2343; Dec. Dig. § 536.*]

7. WAREHOUSEMEN (§ 34*)—ACTIONS FOR INJURIES—BURDEN OF PROOF.

One suing a cold-storage warehouseman for injuries to goods placed in storage for hire has the burden of proving negligence of the warehouseman, and must introduce evidence from which the jury may infer such negligence, but he need not prove the specific acts of negligence causing the injuries.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 76, 77; Dec. Dig. § 34.*]

8. WAREHOUSEMEN (§ 34*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

An instruction in an action against a cold-storage warehouseman for injuries to goods placed in storage for hire that, if the jury find certain facts therein recited, the law presumes that the damage was caused by the negligence of the warehouseman, is erroneous, because it withdraws from the jury the right to determine whether negligence may be inferred, taking into consideration the facts of the case.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 84, 85; Dec. Dig. § 34.*]

9. NEGLIGENCE (§ 136*)—PROVINCE OF COURT AND JURY.

The court must determine whether any facts have been established from which negligence may be reasonably inferred, but the jury must determine whether from those facts negligence ought to be inferred.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 293; Dec. Dig. § 136.*]

10. TRIAL (§ 139*)—QUESTION FOR JURY—BURDEN OF PROOF.

Whether there is sufficient evidence to shift the burden of proof from one party to the other is ordinarily for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.*]

11. WAREHOUSEMEN (§ 34*)—INJURIES TO GOODS—NEGLIGENCE—EVIDENCE.

In an action against a cold-storage warehouseman for injuries to goods placed in storage for hire, evidence held to justify a finding of negligence because of failure to properly construct the cold-storage cellar and the ice box therein, which negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 79; Dec. Dig. § 34.*]

12. NEGLIGENCE (§ 136*)—QUESTIONS FOR JURY.

The court will not grant a prayer that there is no evidence legally sufficient to show want of reasonable care on the part of a party, unless there is no evidence from which such want of reasonable care may reasonably be inferred by the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 293; Dec. Dig. § 136.*]

13. WAREHOUSEMEN (§ 34*)—INJURIES TO GOODS—BURDEN OF PROOF.

Where plaintiff suing a cold-storage warehouseman for injuries to goods placed in storage makes a prima facie case of negligence of the

warehouseman, who seeks to establish a fact which avoids the effect of plaintiff's evidence, the burden of the evidence shifts and rests on the warehouseman to show the latter fact, and, where the evidence proving such fact is adduced, the onus is cast again on plaintiff to show that, notwithstanding such fact, the warehouseman is responsible.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 76, 77; Dec. Dig. § 84.*]

14. WAREHOUSEMEN (§ 84*) — INJURIES TO GOODS—NEGLIGENCE—QUESTION FOR JURY.

Where, in an action against a cold-storage warehouseman for injuries to goods placed in storage, defendant sought to avoid responsibility by proving the bursting of a city water main and the flooding of the cellar in consequence, and that such occurrence had not happened before for at least 16 years, the question whether defendant could by the exercise of ordinary foresight have averted the injury was for the jury.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 84; Dec. Dig. § 34.*]

15. NEGLIGENCE (§ 121*)—BURDEN OF PROOF—EVIDENCE OF ADVERSE PARTY.

In an action based on negligence, plaintiff is not confined to his own testimony to prove his case, but is entitled to the benefit of all facts brought out by the evidence offered by either party.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 224; Dec. Dig. § 121.*]

Appeal from Baltimore City Court; Alfred S. Niles, Judge.

Action by Thomas Kreiner against the Baltimore Refrigerating & Heating Company of Baltimore City. From a judgment for plaintiff, defendant appeals. Reversed, and new trial awarded.

The following prayers were asked by plaintiff and given by the court:

"(1) The plaintiff prays the court to instruct the jury that if they find that the squabs, ducks, and chickens mentioned in the evidence were in good and marketable condition and properly prepared and packed for cold storage when they were deposited by the plaintiff and accepted by the defendant for cold storage during the months of July and August, 1904 (if the jury find such deposit and acceptance), and that the same squabs, ducks, and chickens were in a damaged condition when they were delivered by the defendant to the plaintiff during the months of January and February, 1905 (if the jury find they were so delivered), and if they further find that the damaged condition of said poultry was due to the negligence of the defendant—that is, to the failure of the defendant, or its agents or employees, to exercise that degree of care and skill or to employ those means and facilities which ordinarily prudent business men in the same business and under the same circumstances would have exercised and employed in the storage and preservation of like goods so deposited—then their verdict will be for the plaintiff.

"(2) The plaintiff prays the court to instruct the jury that if the jury believe that the poultry mentioned in the evidence was

in good and marketable condition and properly prepared and packed for cold storage when it was delivered by the plaintiff to the defendant during the months of July and August, 1904 (if the jury find such delivery), and that the same poultry was in a decayed and damaged condition when it was withdrawn by the plaintiff from the defendant's warehouse during the months of January and February, 1905 (if the jury find it was so withdrawn), and that there is nothing in the nature of poultry such as the plaintiff's to cause it to become decayed and damaged from being left in cold storage for the time the plaintiff's poultry was, and if the jury further find that during the interval between the delivery of said poultry to the defendant's warehouse and its withdrawal therefrom said poultry was in the exclusive possession of the defendant, then the law presumes that the damage to said poultry was caused by the negligence of the defendant, and the verdict of the jury will be for the plaintiff, unless the defendant shows to the satisfaction of the jury that its negligence (if the jury find that it was negligent) did not cause the damage to said poultry.

"(3) The plaintiff prays the court to instruct the jury that, even though they find that the cellar of the cold-storage warehouse of the Baltimore Refrigerating & Heating Company was without any carelessness or negligence on the part of said company flooded on December 28, 1904, by the bursting of a city water main one square and a half away from said cellar, and that the damage to the plaintiff's poultry (if the jury find that it was damaged) was caused by such flooding of the cellar, the plaintiff is still entitled to recover in this case, provided the jury further find that the said cellar was not a reasonably proper and safe place for the cold storage of the plaintiff's poultry; that is to say, that an ordinarily prudent business man in the same business and under the same circumstances would not have stored similar poultry in said cellar.

"(4) The plaintiff prays the court to instruct the jury that although they may find that the cellar of the defendant company's cold-storage warehouse was without any negligence or carelessness on the part of said company flooded on December 28, 1904, by the bursting of a city water main one square and a half away from said cellar, and although they find that the damage to the plaintiff's poultry (if the jury find that it was damaged) was caused by such flooding, still if the jury further find that ordinarily prudent business men in the same business and under the same circumstances, in case they had stored similar goods in said cellar, would have provided and kept in working order some outlet or drainage from said cellar, and that the defendant did not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

provide or keep in working order such outlet or drainage from said cellar, then the plaintiff is entitled to recover in this case, provided the jury further find that said flood of water would not have gotten into the ice box or freezer where the plaintiff's poultry was (if the jury so find) if the defendant company had provided such outlet or drainage, and kept it in working order.

"(5) The plaintiff prays the court to instruct the jury that even though they find that the cellar of the cold-storage warehouse of the Baltimore Refrigerating & Heating Company was flooded on December 28, 1904, by the bursting of a city water main one square and a half away from said cellar, and that the damage to the plaintiff's poultry (if the jury find it was damaged) was caused by such flooding, the plaintiff is still entitled to recover in this case, provided the jury further find that the water from the city's main would not have gotten into the ice box or freezer built in said cellar where the plaintiff's poultry was (if the jury so find) if the defendant company had exercised reasonable care, as defined in the plaintiff's third prayer, in the construction of said ice box or freezer, or in keeping the doors to said ice box or freezer closed.

"(6) The plaintiff prays the court to instruct the jury that, if they find for the plaintiff, then the measure of damages is the difference between the market value of the squabs and chickens in their damaged condition and the market price of good and marketable squabs, ducks, and chickens of the same kind at the various times when said poultry was delivered by the defendant to the plaintiff, with interest at 6 per cent. from March 1, 1905, in the discretion of the jury."

The following prayers were asked by defendant:

"(1) The jury is instructed that no sufficient evidence has been introduced to show that the damage to the plaintiff's poultry was caused by any negligence on the part of the defendant, the Baltimore Refrigerating & Heating Company, and their verdict must be in favor of said company.

"(2) If the jury believe from the evidence that the plaintiff stored with the Baltimore Refrigerating & Heating Company the poultry mentioned in the evidence, and that the said poultry was damaged while in the warehouses of the refrigerating company by reason of the bursting of the city water main, which caused the water to run into the said warehouse, and if the jury further find that the refrigerating company took such care of said poultry as a prudent man would take under similar circumstances of his own property, then the verdict must be for the defendant, the Baltimore Refrigerating & Heating Company.

"(3) If the jury find from the evidence that the plaintiff stored with the Baltimore Refrigerating & Heating Company the poultry

mentioned in the evidence, and that the said poultry was delivered to the plaintiff in a damaged condition, and such condition was caused by the bursting of the city water main, the burden is on the plaintiff to show that there was any negligence on the part of the refrigerating company which caused the damaged condition of the poultry."

The court gave defendant's second prayer, but refused the others.

Argued before BOYD, C. J., and PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

Robert H. Smith, for appellant. Bagby & Bagby, for appellee.

WORTHINGTON, J. This suit was instituted by the appellee against the appellant to recover the amount of loss which the former sustained by reason of the deterioration in quality of a large quantity of dressed ducks, chickens, and squabs which he (the plaintiff) had in cold storage for hire, at the defendant's cold-storage warehouse at 410 South Eutaw street, in Baltimore city. The plaintiff alleges negligence on the part of the defendant in failing to exercise due and proper care in managing and maintaining its cold-storage warehouse, wherefore the poultry became decayed, mouldy and practically unmarketable. The remote cause of the injury seems to have been the bursting on December 28, 1904, of one of the city's water mains on Eutaw street about 500 or 600 feet north of the defendant's warehouse. The water from this broken main ran underground along one or more of the several pipe lines in the street, and some of it reached and made its way into defendant's cold-storage cellar, flooding the cellar to the height of four or five feet, and submerging a number of boxes containing the poultry in question. The cellar remained in this flooded condition for 24 hours or more before the leak could be repaired and the water from the cellar removed. The ice box or refrigerator where the poultry was stored was the rear part of the cellar, being separated from the front part by a so-called insulated partition. In this partition was a door opening from the front part of the cellar or vestibule into the ice box. Under this door was a crevice one-sixteenth, of an inch wide and four and one-half feet long. There was also a small gutter on each side of the cellar floor running under the partition intended to carry off water used in washing the freezer or ice box. This water was collected by means of these little gutters in a hole in the vestibule part of the cellar, and carried out from thence in buckets or barrels. There was, however, no drainage or sewer pipe in the cellar. These facts are undisputed. The plaintiff's witnesses also testified that a cold-storage cellar was not a good place to store delicate poultry like this, because there would be more or less dampness about a cellar which would cause the poultry to mould and

deteriorate; that poultry properly prepared and packed ought to keep from six to twelve months; that there was nothing in the nature of poultry such as this to render it unmarketable or damaged from being left in cold storage for six months or more; that this poultry was put in cold storage when freshly killed, and after being carefully prepared and packed for that purpose; that it was put in during August, 1904, on to January, 1905, and about the middle of January a box of squabs was taken out and the squabs found to be discolored and dark, and all the poultry was found to be in such a damaged condition that it had to be sold for half price. The defendant's witnesses testified that this cellar was dry as a bone and the proper place for the storage of poultry; that the temperature in the freezer was maintained at 4 to 13 degrees. Two of defendant's witnesses on cross-examination also testified that a freezer is made air-tight, or is supposed to be air-tight, but not necessarily water-tight; that they did not provide against water. In rebuttal two of the plaintiff's witnesses testified, against the objection of the defendant, that a well-constructed cold-storage cellar should contain a drain pipe or sewer to carry off any superfluous water that might get in there, and also that a freezer or ice box should be made air-tight and water-tight. During the progress of the trial the defendant reserved four exceptions, three to the rulings of the court on the admissibility of certain evidence, and one relating to the prayers. The verdict and judgment being for the plaintiff, the defendant has appealed.

1. The first exception is to the ruling of the court in permitting the following question, propounded to the plaintiff, to be answered: "Q. How about the poultry that you prepared and packed in July and August in other years, in the same way, and which you left until January and February following came out? Ans. It came out all right." It is, of course, well settled that the facts of the particular transaction are ordinarily the only legitimate evidence of the injury and the manner and cause of its occurrence, and not other and different occurrences. But it is equally well settled that facts occurring before or after the suit are admissible if they afford a fair and reasonable presumption of the fact to be tried; it being left to the jury to determine their precise force and effect. *Brooke v. Winters*, 39 Md. 505; *Davis v. Calvert*, 5 Gill. & J. 269, 25 Am. Dec. 282. In the present case this evidence was offered, as stated in appellee's brief, "as tending to show that the injury to the plaintiff's poultry was due to some act on the part of the defendant, and not to either the nature of the poultry itself or to the way it was packed by the plaintiff." While we do not think the question a proper one to have been asked or answered, under the circumstances of this case, for the reason that the facts sought

to be elicited thereby related to other occurrences too remotely connected with the issue in this case to enable the jury to fairly infer therefrom either that this particular poultry was properly prepared and packed or that the injury complained of was due to negligence or want of care on the part of the defendant, yet we are unable to see in what manner the defendant was prejudiced by the answer given. In the case of *Baltimore, etc., v. Leonhardt*, 66 Md. 70, 5 Atl. 346, cited in support of defendant's contention as to this exception, the evidence was offered by the defendant to show that no accident had ever before happened to a passenger on the upper deck of one of its cars. This court held that the evidence was properly excluded; the reason being, of course, that the defendant could not adduce evidence of proper care on its part on former occasions as tending to show proper care on its part on the particular occasion then under investigation. In the case of *Wise v. Ackerman*, 76 Md. 375, 25 Atl. 424, also relied upon by the defendant on this point, the offer was by the plaintiff to show that an accident similar to that sued for in that case had happened on a former occasion. This court held the evidence inadmissible because it could not form "the basis of a well-founded presumption as to the existence of negligence on the part of the defendant as the direct cause of the injury to the plaintiff" in the case then before the court. In the case at bar the evidence is offered by the plaintiff, and shows that on former occasions the poultry stored by plaintiff with the defendant came out all right. While such evidence tended to show that the plaintiff had on former occasions properly prepared and packed the poultry stored by him with the defendant, yet, as we have said, the jury could not fairly infer therefrom how this particular poultry was packed or prepared. At the same time it tended to show that there was nothing in the nature of dressed poultry such as this to prevent its keeping in good condition in a cold-storage cellar for several months, and also that the defendant did ordinarily manage and maintain its cold-storage warehouse in a careful and proper manner. The answer, therefore, taken altogether, was much stronger in favor of the defendant than of the plaintiff by whose counsel the question was propounded. For this reason, we think this exception furnishes no reversible error.

2. The second and third exceptions relate to the action of the trial court in permitting the plaintiff's witness Gettier in rebuttal to answer the two following questions: "Q. How ought a refrigerator situated as this used by the Baltimore Refrigerating & Heating Company to have been constructed? A. All the refrigerators I have ever seen, and I have been in abattoirs here, and in Washington and in New York, and been through all the abattoirs and they all have sewers in the cellars. When the sewer main broke, it

broke beside Swift & Co.'s warehouse, at the corner of Eutaw and Camden streets, and we have as large, if not a larger, cellar than the Baltimore Refrigerating & Heating Company, and we did not have a cent of damage because we had a sewer there. Q. I asked you how the ice box ought to have been constructed, or how they are usually constructed? A. They are usually constructed airtight and water-tight." The objection to these questions is in both instances based on the ground that the witness had not shown proper qualifications to make him an expert on the subject of the construction of storage warehouses. The admissibility of expert or opinion evidence is largely within the discretion of the trial court, whose judgment is nevertheless always subject to review by this court. *Dashlell v. Griffith*, 84 Md. 363, 35 Atl. 1094. It must be shown that the witness possesses such intelligence and such familiarity with the subject as in the sound discretion of the court will enable him to express a well-informed opinion in regard thereto. Some subjects, of course, require a much higher degree of intelligence and of special knowledge than others. It is therefore said that expert capacity is a matter wholly relative to the subject of the particular inquiry. In the present case, besides the evidence of his qualifications contained in his answer to the first of the above questions, the witness had before the questions were put to him testified that he was in the employ of Swift & Co. engaged in the packing business, and had charge of and looked after the cold-storage department, and had done so for 8 years; that for the last 22 or 23 years he had been working in the cold-storage business; that he had been employed at three or four places where there were cold-storage plants, including the abattoir in Baltimore; that he had been through some of Swift & Co.'s cold-storage plants in New York, Washington, and Norfolk; that he looked after the produce end of Swift & Co.'s business, such as poultry, butter, and eggs; that he had knowledge of defendant's plant from packing goods there for Swift & Co. We think these opportunities for observation, together with the experience which he was shown to have had in the cold-storage business, qualified the witness to answer the questions propounded to him.

3. The fourth exception relates to the granting of the plaintiff's six prayers and to the rejection of two of the defendant's prayers. All the prayers are set out in full in the report of this case preceding this opinion. The principal objection urged by the defendant's counsel is to the granting of the plaintiff's second prayer. By that instruction the jury are told that if they find certain facts therein recited, "then the law presumes that the damage to said poultry was caused by the negligence of the defendant." The objection urged to this prayer is that it

puts the burden of proof of negligence upon the defendant. More correctly speaking, it may be said to declare a *prima facie* case to have been made out, and to shift the burden of proof from the plaintiff to the defendant by the presumption of negligence from certain facts recited as a matter of law. Several authorities outside of this state are cited by the attorneys for the respective parties in support of and against the correctness of this prayer.

But we think the substantial question has been passed upon and settled in at least two cases heretofore decided by this court; one of these being the case of *Hambleton v. McGee*, 19 Md. 43. In this case an action was brought by a liveryman to recover damages for injuries to a horse which had been hired to the defendant. This court, speaking by Bartol, J., said: "We agree with the appellant's counsel that the onus of proving want of diligence and reasonable and proper care was on the plaintiff. But surely it cannot be said that there was no evidence from which the jury might find a want of reasonable care in this case. The horse when hired was sound and in good condition. On the following evening when returned he was badly foundered, hardly able to walk, and died in a few days. One of the witnesses stated that in his opinion the horse was foundered by hard driving. On this point several witnesses testify that a horse may be foundered when properly and carefully used. But that was a question for the jury, properly left to them by the court's instruction." The other case in mind is that of the *American District Telegraph Co. v. Walker*, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479. In that case the American District Telegraph Company hired a boy to drive a two-horse team for the plaintiff. The horses ran away while in the boy's care, breaking the vehicle, and so seriously injuring one of the horses that it had to be shot, while the other horse was rendered unsafe to drive. In an action for damages against the telegraph company this court, speaking by Chief Judge Alvey, said: "That, if negligence or want of skill in the bailee or his servant be the ground of action, the onus of proof is on the plaintiff." The former of these two cases comes under the third head of Lord Holt's division of the subject of bailments, as explained in his opinion delivered in the case of *Coggs v. Bernard*, 2 Lord Raymond's Report 919; and the latter under the fifth head of such division. The fifth head includes all cases where goods are intrusted to the bailee for safekeeping or to be carried, or to have some work done upon them, for hire to be paid to the bailee. But under both heads, when negligence is the ground of the action, the burden of proving negligence is upon the bailor. The case at bar comes under the fifth head, and according to the rule declared in the two opinions of this court, just cited, the onus of proving negli-

gence is on the plaintiff. This does not mean, however, that the plaintiff must prove the specific acts of negligence which caused the injury, evidence from which the jury may infer such negligence is sufficient. As in the case of *Hambleton v. McGee*, supra, while the court held that the burden of proving negligence was on the plaintiff, yet that there was evidence in the case from which the jury might infer negligence without proof of the specific acts of negligence. The vice of the plaintiff's second prayer is that it declares that negligence may under the circumstances set forth in the prayer be presumed as a matter of law, whereas it is for the jury to determine whether negligence may be inferred or presumed or not, taking into consideration all the facts and circumstances of the case. The court is to say whether any facts have been established by the evidence from which negligence may be reasonably inferred. The jurors have to say whether from those facts when submitted to them negligence ought to be inferred. See *Schermer v. Neurath*, 54 Md. 491, 39 Am. Rep. 397. In the case of *Russell v. New Haven Steamboat Company*, 50 N. Y. 121, Rapallo, J., speaking for the Court of Appeals of that state, says, at page 127: "The nature of an accident may itself afford prima facie proof of negligence, and we think, as the case stood, the judge erred in not submitting the question of negligence to the jury." In a later case from the same court it is said, citing *Russell v. Steamboat Co.*, supra: "While it is true as a general proposition that a bailor charging negligence on the part of the bailee rests under the burden of proof, yet often times slight evidence will shift the burden to the bailee." *Wintringham v. Hayes*, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. Rep. 725. But that there is sufficient evidence thus to shift the burden of proof is not ordinarily for the court to determine, but for the jury. In *Price's Case*, 29 Md. 420, this court, speaking through Alvey, J., says: "It is very true negligence may in some cases become a mere question of law, to be determined by the court, upon a given state of facts, either admitted or to be found by the jury. It is not, however, the duty of the court to draw inferences or make deductions from evidence. To do that falls within the well-defined province of the jury that courts should be ever careful not to invade." The circumstances of that case, it is true, were different from those in the case at bar, but the principle enunciated therein as quoted above is equally applicable here. We think, therefore, that there was harmful error in granting the plaintiff's second prayer.

We understand that there is no objection to the remaining five prayers of the plaintiff, and we think these would fairly have instructed the jury had the erroneous second prayer been omitted altogether.

As to the defendant's first prayer, by which it was sought to withdraw the case from the

consideration of the jury, we think it was properly rejected. There was evidence proper to be submitted to the jury, from which they could have found want of proper construction of defendant's cold-storage cellar, and ice box or freezer located therein, and that such want of proper construction was the proximate cause of the injury to plaintiff's poultry. The court will not grant a prayer that there is no evidence legally sufficient to show want of reasonable care on the part of the defendant, unless there is no evidence in the case from which such want of reasonable care may reasonably be inferred by the jury.

As to the defendant's third prayer, which was also rejected, while in the abstract it seems intended to express a correct proposition of law, yet not only is its phraseology somewhat obscure, by reason of the use of the word "caused" twice in different senses in close connection with each other, but it also ignores the fact that the defendant's witnesses in testifying to the breaking of the water main and the flood of water that in consequence ran into the cellar of defendant also testified to the fact that the freezer was not air-tight or water-tight, but that there was a crevice under the freezer door, and also an opening under the partition where the gutter was located, which crevice and openings allowed the water to run into the freezer, thereby causing the injury complained of, and also that there was no drain pipe or sewer leading from the cellar, from which facts the jury might have inferred want of due care without any further proof on the subject. In order to make clear the objection to this prayer, it may be useful to say here a word upon the subject of the burden of proof. As we have already stated, in this case the burden is upon the plaintiff to show negligence on the part of the defendant; that is to say, the plaintiff must show that some negligent act or omission of the defendant was the proximate cause of the injury in order to entitle him to recover. If the plaintiff, by his testimony in chief, make out a prima facie case, and the defendant, instead of producing evidence to negative the facts which the plaintiff's evidence tends to establish, proposes to show a distinct proposition which avoids the effect of the plaintiff's evidence, then the burden of evidence shifts, and rests upon the party proposing to show the latter fact. If evidence tending to prove this fact be adduced, then the onus is cast again upon the plaintiff to show that notwithstanding such distinct fact the adverse party is still responsible because such fact does not excuse him. Such a defense amounts really to a plea of confession and avoidance. As is said by Thayer in his *Prelim. Treatise on Evidence*: "The parties are doing the work at the trial that it is the preliminary function of the pleadings to do. Practically they are pleading *ore tenus*." In this case the defendant confesses the injury, but undertakes to avoid responsibility by

showing the bursting of a city water main and the flooding of its cellar in consequence. Such an occurrence, the testimony shows, had not happened before for at least 16 years, and it is contended that it is one that the defendant could not be expected to provide against. But that was a question for the jury to determine; for if, notwithstanding such unusual occurrence, the defendant could, by the exercise of ordinary care and foresight, have averted the injury, he still must answer in damages to the person injured. Van Zyle on Ballments, §§ 202-204. In undertaking to show by way of confession and avoidance that this unusual occurrence was the cause of the damage to the poultry, the defendant's witnesses, as we have already stated, also testified to facts which in the minds of the jury might have given rise to the inference of the want of ordinary care and foresight on the part of the defendant without further proof on either side. And, besides this, the plaintiff in rebuttal did adduce evidence still further tending to show a faulty construction of the defendant's cold-storage cellar, and, had the defendant's third prayer been granted, the jury might have inferred that, even if they deemed all the evidence taken together sufficient to warrant them in finding such want of ordinary care and prudence, yet that in the opinion of the court some further evidence on the part of the plaintiff was necessary to justify them in so finding. Negligence is a question for the jury to determine from all the facts and circumstances of the case, and not from the evidence of either party alone. For these reasons, we think the defendant's third prayer, if granted, would have been misleading to the jury, and that under the circumstances of this case it was properly rejected.

But for the error in granting plaintiff's second prayer, the judgment must be reversed, and a new trial awarded.

Judgment reversed, with costs to the appellant and a new trial awarded.

(222 Pa. 516)

DILTS v. PLUMVILLE R. CO.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. RAILROADS (§ 56*)—LOCATION OF ROUTE—PRIORITY OF RIGHT.

Where the location of the route has been made by the engineers of a railroad company and become complete by adoption by the company, the title to the route, as against other companies, passes to such company.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 56.*]

2. EMINENT DOMAIN (§ 320*)—RIGHT OF WAY—TIME WHEN TITLE PASSES.

Where the location of the route of a railroad company by its engineers and adoption of the location by the company has been followed by the payment of the damages due the landowner, or when a bond to secure the damages has been given and accepted by the owner or

approved by the common pleas, the title to the right of way passes to the company.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 851, 852; Dec. Dig. § 320.*]

3. EMINENT DOMAIN (§ 320*)—RIGHT OF WAY—TIME WHEN TITLE PASSES—BOND.

Where a sufficient bond approved by the court has been given, the railroad company acquires as perfect a right to the easement as if it had paid cash therefor, and the landowner's only remedy is upon the bond in connection with the statutory provision for assessment and collection of damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 852; Dec. Dig. § 320.*]

4. EMINENT DOMAIN (§ 317*)—RIGHT OF WAY—TITLE ACQUIRED.

The interest which a railroad acquires by right of eminent domain is not a fee, or an easement in the proper sense of the word; but it is, in substance, an interest in the land special and exclusive in its nature.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 834½, 836; Dec. Dig. § 317.*]

5. EMINENT DOMAIN (§ 323*)—RIGHT OF WAY—ABANDONMENT.

Where a railroad company under the right of eminent domain appropriates land for its right of way, fixes the width of its appropriation, which is approved and adopted by its board of directors, gives a bond to secure the damages resulting, and actually occupies and constructs its road on the land, it cannot thereafter refuse to take any part of the right of way, so as to defeat the owner's right to damages for the width originally fixed by the company.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 864; Dec. Dig. § 323.*]

6. EMINENT DOMAIN (§ 84*)—TITLE ACQUIRED—SPRINGS.

A railroad company does not by condemnation secure title to the waters of a spring within the right of way, and in assessing damages the landowner is not entitled to the value of the spring, but is entitled to compensation for interference with its use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 227; Dec. Dig. § 84.*]

7. EMINENT DOMAIN (§ 318*)—TITLE ACQUIRED—SUBJACENT SUPPORT.

A railroad company, in the exercise of its right of eminent domain, secures not only the surface, but also so much of the underlying minerals as may be necessary to support the surface.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 841, 842; Dec. Dig. § 318.*]

8. EMINENT DOMAIN (§ 153*)—PERSONS ENTITLED TO DAMAGES—OWNER OF UNDERLYING MINERALS.

Where the owner of the surface had, prior to the appropriation of the land for a railroad right of way, conveyed the coal underlying the surface, with sufficient mining rights to enable the grantee to remove all the coal, regardless of its effect upon the surface, the grantee of the coal must be compensated by the railroad company for any part of it necessary for the support of the surface.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 407; Dec. Dig. § 153.*]

9. EMINENT DOMAIN (§ 203*)—ASSESSMENT OF DAMAGES—EVIDENCE—ADMISSIBILITY.

The answer of a witness that he would not wish to own the farm after the appropriation of a railroad right of way across it was immateri-

al, as affecting the damages, and should have been stricken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542; Dec. Dig. § 203.*]

Appeal from Court of Common Pleas, Indiana County.

Condemnation proceedings by Mary J. Dilts against the Plumville Railroad Company. Judgment for plaintiff for \$1,860 and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

S. F. Channell, M. C. Watson, W. F. Elkin, F. E. Watrous, H. F. Marsh, and J. N. Langham, for appellant. John P. Blair and David Blair, for appellee.

MESTREZAT, J. This is a condemnation proceeding, instituted July 26, 1907, by the plaintiff for the purpose of having determined the damages which she has sustained by reason of the location and construction of the defendant company's road through her lands in Indiana county. She owns a farm containing 62 acres, on which are two dwelling houses, one large barn, and other outbuildings. The right of way of the defendant's road through her premises is a strip of land 66 feet in width and 96 rods in length, and contains 2.4 acres. In the summer of 1905 the defendant company located its road over the plaintiff's premises, and, the parties failing to agree on the damages due her, the company tendered, and the plaintiff accepted, a bond. The defendant took possession and commenced the construction of its road on the land on July 18, 1905. Prior to the appropriation of the right of way, as we infer, the plaintiff and her husband, by deed dated July 3, 1905, conveyed to the Plumville Coal Company all the coal in and under her farm, "except two acres underlying the buildings and spring appurtenant thereto," together with full mining rights authorizing the vendee to mine and remove all the coal without liability for any injury done thereby to the overlying surface or any structures thereon, together also with certain surface privileges reasonably necessary to drain or ventilate the mine, and with the right to make and maintain trolley lines and drains upon or under the surface and to erect on the surface the necessary structures to mine the coal. Viewers were appointed by the court, and, having made their report, the defendant company appealed to the common pleas. The case was tried in that court last April and resulted in a verdict and judgment for the plaintiff. The defendant has appealed.

The route adopted by a railroad company is in the discretion of the president and board of directors, with the exceptions noted in the statute. The location of the route on the ground is made by the engineers of the company, and becomes complete when it has been

adopted by the company. The title to the route, as against rival corporations, then passes to the company which has made the location. When this action of the company has been followed by the payment of the damages due the landowner, or when a bond to secure the damages has been given and accepted by the owner or has been approved by the common pleas, the title to the right of way passes to the corporation. *Fries v. Southern Pennsylvania Railroad, etc., Company*, 85 Pa. 73; *Hoffman's Appeal*, 118 Pa. 512, 12 Atl. 57; *Johnston v. Callery*, 173 Pa. 129, 33 Atl. 1036. In the *Fries* Case it is said (page 74 of 85 Pa.): "But here the railroad company gave the required bond and entered lawfully. The easement of the company was therefore lawfully acquired, and passed to the purchaser under the mortgage unincumbered by any lien, except the judgment upon the report of viewers, which, however, was obtained after the mortgage had been recorded. As the consequence of these proceedings, the purchaser took a clear title, and the landowner was thrown back upon his bond." In the *Johnston* Case it is said (page 137 of 173 Pa., page 1037 of 33 Atl.): "It (the selection and adoption of a line for the proposed road) fastens a servitude upon the property affected thereby, and so takes from the owner and appropriates to the use of the corporation. It gives to the latter a standing to settle with and make compensation to the owner for the property thus taken and appropriated to its own use, and, in case they cannot agree, to give adequate security for the payment of damages when legally ascertained. Until such compensation is made, or, in lieu thereof, approved security is given, the title to the owner is not divested. As against him, the corporation, by its act of location, can acquire only a conditional title which ripens into an absolute one upon making compensation." After the bond has been given, the grasp of the owner is released from the property, and he is remitted to the bond for the damages which he may sustain by reason of the location and construction of the road through his premises. The right of way passes to a subsequent purchaser or mortgagee unincumbered by any claim for damages. In *Hoffman's Appeal*, 118 Pa. 512, 12 Atl. 57, pending an appeal by the landowner from the report of viewers assessing damages, the company's property and franchises were sold under proceedings instituted on a mortgage of the company's road by the trustee for the bondholders, and on distribution of the fund realized on the sale the owner of the land was denied the right to recover his damages. It was held that he was confined to his remedy upon the bond. In that case *Sterrett, J.*, delivering the opinion, says (page 518 of 118 Pa., page 59 of 12 Atl.): "When a sufficient bond with sureties approved by the court, had been given, the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

company acquires as clear and perfect right to the easement as if it had paid therefor in cash. The landowner's only remedy is upon the bond in connection with the statutory provision for assessment and collection of damages." This case is followed in *Fischer v. Catawissa Railroad Company*, 175 Pa. 554, 34 Atl. 860.

The interest which a railroad company acquires in real estate by the right of eminent domain is well settled in this state. It is not a fee, nor is it an "easement" in the proper sense of that word. Our cases have frequently defined it, and among them is *Pennsylvania Schuylkill Valley R. R. Co. v. Reading Paper Mills*, 149 Pa. 18, 24 Atl. 205, which has been frequently approved and followed. In that case the present chief justice, delivering the opinion, says (page 20 of 149 Pa., page 205 of 24 Atl.): "Such title is sometimes called an easement, but it is a right to exclusive possession, to fence in, to build over the whole surface, to raise and maintain any appropriate superstructure including necessary foundations and to deal with it within the limits of railroad uses as absolutely and as uncontrolled as an owner in fee. There was no such easement at common law, and it may well be doubted if it is not a misnomer to extend to this newly invented interest in land the name of easement, perhaps appropriate enough to the railroad's ordinary right of way for its tracks. It would seem to be rather a fee in the surface and so much beneath as may be necessary for support, though a base or conditional fee, terminable on the cesser of the use for railroad purposes. But whatever it may be called, it is in substance an interest in the land special and exclusive in its nature and which may be the subject of special injury."

The title to the right of way having vested in the company for railroad purposes by payment of the damages to the landowner, or by the damages being secured by acceptance of a bond or its approval by the common pleas, the company cannot thereafter discontinue the proceedings and deprive the owner of his right to the damages he has sustained. The title to the property is in the company, and the owner's right to damages is fixed. The corporation may abandon the right of way and permit it to go back to the owner, but this act will not prevent the owner from enforcing his claim for the damages sustained by him. In *Fischer v. Catawissa Railroad Company*, 175 Pa. 554, 34 Atl. 860, which was an appeal from the award of viewers assessing damages, the court, on the trial of the cause, permitted the railroad company to withdraw its bond and to discontinue all proceedings for the assessment of damages. This court held that such action was erroneous, and in reversing the order *Sterrett, C. J.*, said (page 558 of 175 Pa., page 861 of 34 Atl.): "It was unwarranted by any act of assembly or by any of our rulings in the class of cases to which this belongs. As

shown by the cases above cited, the effect of the proceedings deliberately instituted by one of the defendants, including the approval and filing of the bond, appointment of viewers, etc., was to divest plaintiff's right to the possession of the land taken, and remit him to his claim for compensation, under the Constitution, secured by the bond, etc. Not only had a divestiture of plaintiff's right of possession been effected, but, after the approval and filing of the bond, defendants were in the actual and rightful possession of the land in question. Under all our decisions it was then too late to discontinue the proceeding."

1. Before the viewers, and subsequently on the trial of the cause in the common pleas, the appellant company's counsel offered to "renounce any and all rights and privileges which they may have or may be supposed to have in" a part of the right of way, being 13 feet in width and 199 feet in length. The viewers very properly disregarded the offer, and the court likewise rejected it. The offer was first made more than two years after the right of way had been located, the bond to secure the damages had been accepted by the owner of the premises, and the defendant had taken possession of the land and constructed its railroad thereon. At this time, and for the two years immediately preceding, the title to the right of way, including this small portion of it, had been in the appellant company. The owner's right to possession had been divested, and her right to compensation had vested and been secured by the bond. At any time after the acceptance of the bond by the owner, if the appellant's property and franchise had been mortgaged or sold, the title to the right of way would have passed, unincumbered by the owner's claim for damages. The purchaser would have taken the title to the part of the right of way proposed to be renounced, and the owner would have been compelled to look to the bond for her damages. It was therefore not within the power of the appellant company, against the objection of the appellee, to renounce any part of the right of way or reconvey it to her, so as to prevent her from recovering the damages which she had sustained. Such logically follows from the appropriation of the land by the appellant for its right of way and the giving of the bond to secure the damages therefor. It may also be suggested that the renunciation presented to the viewers and to the court was utterly valueless for the purpose, as it discloses no authority on the part of the counsel of the railroad company to dispose of its property by gift or otherwise.

A railroad company may, as contended by appellant's counsel, limit the width of its appropriation through the owner's land to less than permitted to be taken by the statute. The width of its right of way cannot exceed 66 feet, but it is entirely discretionary with the company whether it shall take that or a lesser width. As plainly pointed out in *Jones v. Erie & Wyoming Valley R. R. Co.*, 144 Pa.

629, 23 Atl. 251, it is the duty of the company to define the width of its location when it enters and appropriates the land. In the absence of such action on the part of the company, fixing the width of its right of way, it will be presumed that it has appropriated the full width allowed by its charter. This presumption, however, is only applicable where the entry is adverse and upon properties subject to seizure or appropriation under general laws, and does not apply to the entry upon a public street. *Jones v. Erie & Wyoming Valley R. R. Co.*, 169 Pa. 333, 32 Atl. 535, 47 Am. St. Rep. 918. But where a railroad company under the right of eminent domain enters for the purpose of appropriating land for its right of way, fixes the width of its appropriation, which is approved and adopted by its board of directors, gives a bond to secure the damages resulting from such appropriation, and actually occupies and constructs its road on the land, the railroad company cannot thereafter refuse to take any part of the right of way so as to defeat the owner's right to damages for the width originally fixed by the company. The appellant contends that the two cases of *Jones v. Railroad Company*, just cited, are authority for a different doctrine, and sustains its contention that the company may renounce its right of way to the small strip of land, 13 by 199 feet, and thereby defeat the owner's right to damages pro tanto. The cases were between the same parties and arose out of the same facts. A railroad company had located and constructed its road on a street in the city of Scranton. It refused to define the width of its location. If it was 60 feet it took a part of the plaintiff's premises. He instituted proceedings to have his damages assessed. The company still declined to fix the width of its appropriation and resisted a recovery on the ground that it did not take any of the plaintiff's property. The trial court held with the defendant, and a verdict was had against the plaintiff. On appeal this court reversed the judgment, holding that, as the company had not defined the limits of its appropriation, there was a presumption that it took the full width fixed by its charter of incorporation, which would include a portion of the plaintiff's premises. The court held that, in view of the presumption as to the width of the appropriation and of the evidence tending to show that the company had taken the full width allowed by its charter, the case was for the jury. The case was tried again, and another appeal was taken. It was then held that the presumption that the company took the full width allowed by its charter would not prevail in the case because the road was located and constructed on a public street. It was said in the opinion, and upon this the appellant relies to sustain its position in this case: That, while the proper time to define the width of the company's appropriation is when the

appropriation is made, yet the right to define the location may be exercised afterwards, within a reasonable time; that where the right of way has been located, but there has been no actual taking of the land, and the railroad has been constructed and is in operation outside of the plaintiff's boundaries, the company may then define the limits of its right of way and thereby prevent a recovery for land not actually taken. But in these cases, as will be observed, the company had not defined the width of its appropriation, nor had compensation been made or secured to the owner for the damages likely to result from the appropriation of the land, and hence the owner's title had not been divested. A bond had been tendered to the plaintiff, but it had not been accepted, nor had a bond been presented to or approved by the court to secure the plaintiff's damages. The bond which was presented to the owner of the land recited that the defendant "had located its railroad track near the property of the said John Jones, in the city of Scranton, and it is alleged by him that said property is and will be damaged thereby." It is apparent therefore that the cases are not authority for the doctrine contended for by appellant that a railroad company may renounce any part of its right of way after it has appropriated the land and the owner's title has been divested by his acceptance of a bond.

2. Within the right of way as located by the company there is a spring of water. The appellant attempted to diminish the damages resulting from the appropriation of the appellee's land by renouncing the part of the right of way on which the spring was located. As we have seen, the company was properly defeated in its attempt to evade responsibility for damages for this part of its right of way. For injury to the spring, the appellee is entitled to damages. By condemning the land, however, the company does not secure title to the waters of the spring, and hence it cannot sell or dispose of the water, nor can it make use of the water for any purpose whatever. It has the right to conduct it, by proper drainage, onto the lands of the appellee, to whom it belongs, and who may dispose of it as she pleases. The appellant's appropriation of the land interferes with and changes the manner of the appellee's use of the spring, and to that extent she is injured. *Plank Road Company v. Braden*, 172 Pa. 460, 33 Atl. 562, was a bill filed by a road company, having the right of eminent domain, to prevent the owner of premises through which the company had condemned a right of way from interfering with a spring within the limits of the right of way. It was there held that the title to the water of the spring was in the owner of the fee, and that he had the right to use the whole of the water, to conduct it by pipes wherever he desired, to consume it, to sell it, or to waste it. In delivering the opinion Mr. Justice Williams says (page 466 of

172 Pa., page 562 of 33 Atl.): "The plaintiff's easement qualified the manner in which the defendant might use his spring, but it did not qualify his title. The title was as absolute and unqualified to the water as to the rocks out of which it issued, and the defendant had the right to take it where he pleased and use it as he pleased. Mills on Eminent Domain, p. 70. He had no right to use it in such a manner as to inflict injury on the plaintiff's roadbed, but he had the right to use the whole of it, to conduct it by pipes wherever he desired, to consume it, to sell it, or to waste it. The plaintiff has no easement in the spring. It has a right of way for public travel over the land upon which the waters of this spring descended, and for the purpose of preserving its roadbed in a condition suitable for travel it may drain the water off. The right is one of drainage of the roadbed only. It is not a right to appropriate, or to take exclusively possession of, the spring itself, or to exclude the owner therefrom. Mills on Eminent Domain, p. 71.

* * * (Page 467 of 172 Pa., page 562 of 33 Atl.) The corporation has a roadway at the side of which the defendant has a spring. Each must so use its own as to inflict no unnecessary injury on the other, but neither can forcibly exclude the other from what is his own. * * * The corporation may drain its road, but it cannot in the exercise of the right of drainage take forcible possession of this spring, exclude the owner from access to it, and transport it for its own use or the use of any other person off the owner's land." It follows therefore that, in assessing the damages sustained by the appellee, she is not entitled to the value of the spring. The title to it remains in her, and its water may be used by her. While this is true, yet her use of the water of the spring may be interfered with by the use of the land by the appellant company, and for that she is entitled to be compensated. As we have seen, the company has the right to the exclusive possession of the land for railroad purposes, and it may interfere with the spring and the use of it by the owner of the land to any extent found necessary in the use of its right of way for such purposes. It has the right to occupy the whole width of its right of way, including the ground from which the water issues in this spring, and place thereon its tracks or any structures necessary in the operation of its road. It may therefore prevent the appellee from taking the water directly from the place it issues from the ground by depositing dirt or erecting structures thereon. The manner of using the spring, her property, is therefore interfered with by the appellant's appropriation of the land, and to the extent of her injury she is entitled to compensation. The amount of the damages will depend upon the extent of the injury, which, of course, must be made to appear by evidence. If the use to which the appellant puts this part of its right of way should destroy

the spring, the appellee must be awarded compensation for the value of it. In *Wheatley v. Baugh*, 25 Pa. 528, 533, 64 Am. Dec. 721, Chief Justice Lewis, delivering the opinion, said: "The owner of land on which a spring issues from the earth has a perfect right to it against all the world, except those through whose land it comes. He has even a right to it, as against them, until it comes in conflict with the enjoyment of their own property. * * * Even a railroad corporation, armed by law with the right of eminent domain, and having power to take private property for the construction of its road, is answerable to the owner of a spring for destroying it, although its destruction be caused by excavations on the land of an adjacent proprietor."

3. In condemnation proceedings a railroad company, in the exercise of its right of eminent domain, secures not only the surface of the land, but also so much of the underlying minerals as may be necessary to support the surface. The company's entry upon the land is an appropriation of the subjacent strata of coal or other minerals so far as necessary to support the surface for any purpose to which it may be put for railroad uses. *Penn Gas Coal Company v. Gas Company*, 131 Pa. 522, 19 Atl. 933; *Davis v. Gas Company*, 147 Pa. 130, 23 Atl. 218. In the former case a bill was filed by the plaintiff, a coal company, to restrain the defendant gas company from laying its pipes through the surface of the land, owned by another party, until the filing and approval of an adequate bond to the plaintiff company securing payment of any damages which might accrue to it. The owner of the land had granted the coal to the plaintiff company and released his right to the support of the surface, thereby enabling the company to remove all the coal without regard to the effect upon the surface. The trial court refused the injunction, but this court reversed and directed the court to require the gas company to file the bond. Mr. Justice Williams, delivering the opinion, said (page 533 of 131 Pa., page 933 of 19 Atl.): "The right of eminent domain cannot be abridged or defeated by the contracts between the private owners, or by the release of the owner of the surface. An entry by the state upon the surface is an entry upon the subjacent strata so far as they are necessary to support the surface for the purposes of the canal, railroad, pipe line, or other structure to be built thereon. If the corporation making the entry has no knowledge that the right of support has been released, or if it fails for any reason to tender a bond to the owner of the coal, the remedy of the owner is by bill to restrain, or by a proceeding to obtain an assessment of the damages sustained." In that case it is distinctly ruled that both the surface and coal owner are entitled to compensation for the injury sustained by the appropriation of the right of way.

In the case in hand the owner of the sur-

face had, prior to the appropriation of the land, conveyed the coal underlying the surface, with sufficient mining rights to enable the grantee to remove all the coal, regardless of its effect upon the surface. If any part of the coal was necessary for the support of the surface, occupied by the appellant company, the owner of the coal is entitled to compensation. When therefore the company entered and appropriated the land for its right of way, it was required to compensate both the owner of the surface and the owner of the coal for the damages resulting from the appropriation. The owner of each is entitled to damages to the extent of his holdings, and it is apparent that the amount of damages to which the owner of the surface is entitled will depend upon the interest she has in the land. The extensive mining rights which she granted to the purchaser of the coal might affect the interest or estate which she has in the land. Those rights belong to the owner of the coal and must be considered as a part of his property in estimating the damages done him by the company in appropriating the right of way. It therefore follows that a witness in testifying to the amount of damages due the owner of the coal or the owner of the surface must be acquainted with the title of the party seeking to recover damages. In testifying in the action brought by the owner of the surface, he should be informed that the ownership of the coal and mining rights is in another, and that fact should be taken into consideration by the witness if the appellant's appropriation imposed any servitude on the coal. The statement of the fact will not, as appellee seems to think, confuse the witness. Counsel need not read from the deed the mining rights. The mere statement that the coal and the right to remove it all regardless of the effect upon the surface is sufficient information for the witness. He will then have the requisite knowledge of the titles to enable him to testify intelligently.

4. The fourth assignment of error is not sustained. The objection was made to the competency of the testimony offered, and not to the competency of the witness. It was certainly competent to show the damages sustained by the appellee, and that is all there is in the question.

The answer of the witness complained of in the fifth assignment of error should have been stricken out. The fact that the witness would not wish to own the farm, after the appellant's appropriation of the right of way, was immaterial as affecting the damages.

The testimony complained of in the sixth assignment of error was stricken out, and hence the assignment need not be considered.

So far as the matters complained of in the assignments are in conflict with this opinion, they are sustained, and the judgment is reversed with a venire facias de novo.

(222 Pa. 472)

COLLINS et al. v. CLOUGH et al.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. BOUNDARIES (§ 1*)—ADJACENT TRACTS—PRIOR LOCATION.

Where the division line between adjoining tracts, alike claimed under original warrants, is disputed, and that line once ascertained is a determining factor, the first thing to do is to ascertain, if possible, which of the tracts was first located.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. BOUNDARIES (§ 40*)—QUESTIONS FOR JURY.

Where plaintiffs in ejectment claimed under one warrant and defendants under three, and the return shows that all were surveyed on the same day, and the return of defendants' surveys calls for plaintiffs' warrant as its boundary and adjoiner on the northeast while the return of plaintiffs' survey calls for vacant land on the southwest, the court should have held as a matter of law that priority of location was with plaintiffs, and the question should not have been submitted to the jury.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 196; Dec. Dig. § 40.*]

3. BOUNDARIES (§ 3*)—CALLS FOR ADJOINERS—CONTROLLING OTHER ELEMENTS.

As the calls in surveys for trees and other objects indicating corners are conclusive with respect to such corners, so calls for adjoiners, as like declarations of the surveyor, that such adjoining tracts had previously been located, are equally conclusive of the facts declared.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 80-83; Dec. Dig. § 3.*]

4. BOUNDARIES (§ 3*)—MARKED LINES—CONTROLLING OTHER ELEMENTS.

The survey of an independent separate member of an established block of surveys is to be located by the work of the surveyor found upon the ground, if it can be traced; that is, by its own marks and monuments, aided, if need be, by the legal presumption.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 25-29; Dec. Dig. § 3.*]

5. BOUNDARIES (§ 8*)—CONTROL OF MONUMENTS.

Where admitted marks and monuments are found answering the calls of a survey, they establish conclusively the location.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 14-19; Dec. Dig. § 3.*]

6. BOUNDARIES (§ 5*)—MONUMENTS—EFFECT OF LOSS.

Where some only of the original marks and monuments answering the calls of a survey can be found, it is entirely competent to show that others answering the calls did at one time exist and where, and, if the testimony fails to supply them all, the legal presumption will supply those unaccounted for.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 46; Dec. Dig. § 5.*]

7. BOUNDARIES (§ 3*)—CALLS FOR ADJOINERS—CONTROLLING OTHER ELEMENTS.

It is only in the absence of marks and monuments upon the ground and the total failure of the evidence to supply them that recourse can be had to the lines and calls of a block of surveys, or the lines and calls of any junior member of the block, or any other.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 30-33; Dec. Dig. § 3.*]

8. BOUNDARIES (§ 41*)—QUESTIONS FOR JURY.

Where, in ejectment, it conclusively appeared that plaintiffs' tract had been first located as

a separate member of a block of surveys, and plaintiffs offered evidence to show that there were upon the ground monuments answering the calls of the survey, and that other monuments had at one time existed answering other calls, it was error to submit to the jury both the question of priority of location and the existence of monuments sufficient to locate the survey, for the true and only issue was whether there had been shown marks upon the ground made by the surveyor from which plaintiffs' location could be determined.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 205; Dec. Dig. § 41.*]

9. EVIDENCE (§ 121*)—RES GESTÆ—DECLARATIONS OF DECEASED SURVEYOR.

Declarations of deceased surveyors are admissible, not to establish reputation, but solely on the ground of their being part of the *res gestæ*, and, to be competent, must have been made upon the land.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 307; Dec. Dig. § 121.*]

10. EVIDENCE (§ 121*)—DECLARATIONS—BOUNDARIES—FIELD NOTES.

The field notes of a deceased surveyor are admissible as declarations contemporaneous with the work done on the ground, provided they are authenticated in some way other than by the mere subsequent declaration of the surveyor himself.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 309; Dec. Dig. § 121.*]

Appeal from Court of Common Pleas, Forest County.

Ejectment by T. D. Collins and others against L. S. Clough and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas H. Murray, A. L. Cole, Ritchie & Carringer, and C. Z. Gordon, for appellants. S. P. Wolverson, D. I. Ball, A. C. Brown, W. D. Hinckley, W. E. Rice, and J. H. Alexander, for appellees.

STEWART, J. When the true division line between two or more adjoining tracts, alike claimed under original warrants, is the subject of dispute, and that line once ascertained is a determining factor, the first thing to do is to ascertain, if possible, which of the two tracts was first located. In an issue such as this the party holding under the earlier location has certain advantage resulting therefrom, since the prior location limits the call of the junior, however much such limitation may disappoint. To state this case: The plaintiffs claim that the land in controversy is included within the limits of warrant No. 5266, one of a series of warrants issued to George Mead, February 28, 1794, and returned as surveyed and located April 28, 1794. A series of warrants had been issued to Jonathan Mifflin 22 days before the Mead warrants were issued. Defendants hold under warrants Nos. 5104 and 5101 of the former series, and No. 5882 of the Mead. These Mif-

flin warrants, though issued earlier than the Mead, were returned the same day to the land office, and the return shows that all, both Mifflin and Mead, were surveyed the same day, April 28, 1794. Defendants claim that the land in controversy is properly included within the limits of their three warrants which as located adjoin each other. The plaintiffs' location is immediately above; that is, to the northeast of defendants' tracts. Their relative positions are about as here indicated:

5	2	6	6
5104	5101	5182	

The actual work required in making these surveys, together with the others returned as of the same date, seems to suggest inaccuracy in the statement that all the surveys were made on the same day; yet, accepting the statement as correct, some one tract must have had priority of location over all the others, and each excepting the last, priority over some other; for there could be no such thing as simultaneous surveys, and it matters not whether the difference between them be measured by hours or days. If No. 5266 had the earlier location, its boundary lines on the southeast thus established would determine the controversy. If defendants' tracts were located before No. 5266, then their northeast boundary wherever established would determine it. Which was the earlier was a preliminary question, provided the evidence warranted a legal conclusion with respect to it. If not, it became a question which the jury could alone decide.

The facts were these: The return of the survey of defendants' opposing warrant for No. 5101, the whole of which lies southwest of No. 5266, calls for George Mead tract No. 5266 as its boundary and adjoiner on the northeast. The opposing warrant No. 5282 calls in part for the same boundary on the northeast, and that of No. 5104 calls for land of George Mead generally as its boundary, whilst No. 5266 calls for vacant land on its southwest. What other conclusion is possible from this than that No. 5266 must have been located before the others were surveyed? How could its southern line become the northern boundary of the other tracts, except it has been first located. Then, too, the fact that while the return of No. 5266 shows that on three sides it was bounded by specific individual surveys of Mead warrants according to their number, the call is for vacant land on the side where defendants' land adjoins, clearly indicates that the warrants for defendants' lands had not then been laid. *Gratz v. Hoover*, 16 Pa. 232. In *Salmon Creek Lumber Co. v. Dusenberry*, 110 Pa. 446, 1 Atl. 635, Mr. Justice Gordon says, speaking of just such calls as we have here: "They are part and parcel of the survey, and as infallibly indicate adjoiner, and the adoption

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the lines of such adjoiner, as do the calls for trees and other objects indicate corners and courses of lines on the ground." As the calls in surveys for trees and other objects indicating corners are conclusive with respect to such corners, so calls for adjoiners, as like declarations of the surveyor, that such adjoining tracts had previously been located, are equally conclusive of the facts declared. This being the situation, the court should have held as a matter of law that priority of location was with the plaintiffs. With nothing to support a claim for priority in any of the tracts under which defendants hold, except the bare presumption that the surveyor located his warrants in the order in which they were issued, because of his direction so to do, a finding by the jury in their favor on this bare presumption in the face of the positive and unchallenged declarations which appear on the face of his returns that he had disregarded these directions could not be sustained.

Plaintiffs' third request for instructions was as follows: "The question in this case for the jury to determine is the true location of the southwest line of No. 5286." And this correctly indicated the one governing fact. It should have been unequivocally affirmed; but, instead, the affirmance was conditioned on the jury finding that the line had been located prior to the location of the tracts adjoining which are alleged to interfere. This was error, and the eleventh assignment which complains of it is sustained. So to the assignments which complain of those portions of the charge in which the question of priority of location as between these warrants was submitted to the jury.

With the question of priority of location settled, it would yet remain with the plaintiffs to show that the original location of the warrants under which they claim embraces the disputed territory. The law indicates in no uncertain way the kind of evidence required for the purpose, and makes clear distinction between what is best and what but secondary. Involved in the very idea of priority is that of separate individual location. We are then dealing here with a survey actually made of an independent, separate member of an established block. Such a survey is to be located by the work of the surveyor found upon the ground, if it can be traced; in other words, by its own marks and monuments, aided, if need be, by the legal presumption. *Ferguson v. Bloom*, 144 Pa. 549, 23 Atl. 49. Where admitted marks and monuments are found answering to the calls of the survey, they established conclusively the location. As has been said, these are the official footsteps of the deputy surveyor, and are therefore the highest and best evidence of the true location. If some only of these original marks and monuments can be found, it is entirely competent to show that others answering to the calls did at one time exist, and where. If the testimony fails to supply them all, the

legal presumption will supply those unaccounted for. It is only in the absence of such marks upon the ground, and the total failure of the evidence to supply them, that recourse can be had to the lines and calls of the block, or the lines and calls of any junior member of that block or any other. Both these methods cannot be resorted to at the same time. *Ferguson v. Bloom*, 144 Pa. 549, 23 Atl. 49; *Grier v. Penna. Coal Company*, 128 Pa. 79, 18 Atl. 490. The plaintiffs do not contend that the evidence adduced by them establishes all the monuments called for in their survey as existing at the present time; but they insist that between such as they have shown to exist and those which their evidence shows once existed their true southeast line was established in the only legal way that it could be determined. In view of the ruling already made, it is unnecessary to state any more specifically the claim made by the plaintiffs. To do so would require a review of the evidence, and there is nothing in the case that calls for that. It is enough to say that the evidence offered by the plaintiffs was sufficient to carry the case to the jury. If credited by the jury, it established a *prima facie* case entitled to prevail, except as overcome by defendants' testimony. Now, the defendants were under the same limitations with respect to their evidence as the plaintiffs. The way was open to them to refute the plaintiffs' claim that there were upon the ground monuments answering to the calls of the survey, and to assail the evidence upon which the plaintiffs relied to show that other monuments at one time existed, though now obliterated, answering to the other calls; and this was the only proper line of defense. With priority of location established for tract No. 5286 as a separate member of its block, until it appeared that it was not possible to fix its true location by work of the surveyor on the ground, neither the line of the block of which it was a member nor the lines of any members of that block or any other could be appealed to. The defense proceeded on the assumption that it was for the jury to decide which party had established the earlier location; and defendants' principal effort, instead of being directed to a refutation of the evidence for plaintiffs with respect to the work upon the ground, and its sufficiency for purposes of location, was expended fruitlessly on something which belonged to the court, and not the jury, to decide. It was to this end, the establishment of an earlier survey, that much if not all the evidence adduced by defendants was offered. Could the effort have succeeded, an end to the controversy would at once have been reached, since the northern line of defendants' survey as laid by the surveyor is not in dispute. If the senior survey, it would halt imperatively No. 5286 as the junior survey. But this could not be. The accuracy of the return to the survey of No. 5286 was not impeached, and the return conclusively established priority in it. The re-

sult of it all was that the case was submitted to the jury on a false issue, in a charge which, had the issue been what the court supposed, would have been unexceptionable. Because the issue was misconceived, the charge must be regarded as inadequate, and the twenty-first assignment of error be sustained. The true and only issue was: Did the evidence show marks upon the ground made by the surveyor from which the location of No. 5266 could be determined? If it did, then, if such location would include the disputed territory, plaintiffs would be entitled to the verdict. If it did not, then, since it was upon such evidence that plaintiffs' case wholly rested, the plaintiffs would necessarily fail. A like result would follow, of course, if location were established and the disputed territory fell without the plaintiffs' lines.

Since the case must be again tried, the question raised in the first and second assignments of error calls for an expression of view. F. F. Whittekin, a witness called by plaintiffs, having testified that in 1882 he ran certain lines upon the ground in dispute, it was proposed to prove by him that Mr. Irwin, a surveyor of large experience, who had surveyed on the land and lines to which the testimony of the witness referred, had furnished him certain field notes, and that with the use of these the witness went upon the ground and located the lines, or some of them, to which he has testified, and found the field notes to correspond with the location he had given. Another offer was to prove by the son of the said Richard Irwin, himself a surveyor, that he had custody of his father's field notes after the latter's decease; but that they have since been lost; that his father identified certain monuments he found on the ground as the original course of No. 5266; that the line dating to 1836 is the line with the peculiar marks of Richard Irwin; and that he located No. 5266 by his survey as it is now claimed to be located by the plaintiff. These offers were rejected because the declarations proposed to be proved were not made on the ground. That declarations of a deceased owner with respect to boundary are competent evidence only when made on the ground is admitted; but it is contended that such limitation ought not to, and does not, apply to the declarations of deceased surveyors. If the rule be as asserted by the learned judge in rejecting the offer, its reasonableness may be safely assumed. We need only concern ourselves to inquire whether the law in Pennsylvania makes the distinction here set up. Boundary is one of the excepted issues wherein reputation and hearsay of deceased persons are received in evidence. The offer here, however, was not to show reputation, but specific statements of one since deceased as to what he actually found when making his survey. The distinction is not unimportant. The rules governing hearsay evidence with respect to reputation are not the rules which govern where

the offer is to prove independent facts by hearsay evidence. Declarations of deceased owners and surveyors are admissible only as they speak to such independent facts, not as establishing reputation, but as tending to establish certain relevant facts which because of the lapse of time are not susceptible of more direct proof. It is true historically that, when this exception to the general rule was first allowed, no other limitations were imposed except that it must be first made to appear that the declarant had peculiar means of knowing the facts to which he spoke, and had no interest to misrepresent. But it is equally true that, when the exceptions came to be applied in Pennsylvania, it was with quite another limitation, which naturally narrowed its field of operation, viz., that the declarant must have been on the land at the time the declaration was made, and engaged at the time in pointing out the boundaries of the land. Mr. Wigmore in his valuable treatise on Evidence, § 1567, speaking of this additional limitation, says it is purely a Massachusetts variant, "which has since unfortunately been adopted thence by Maine, New Jersey, Pennsylvania, and perhaps in other jurisdictions also." Our reference here to this text is more especially to show the reason on which the additional limitation or restriction which the author deprecates is based. In the section preceding the one from which we have quoted, the author states that in some jurisdictions individual statements taken solely on the credit of the individual declarant were justified under what he calls the reputation exception; while in Massachusetts the *res gestæ* doctrine, whether in the general and loose sense of something done, or in some special relation to an adverse possessor's declaration, was regarded as covering these statements. Here we have the variance and the reasons for it clearly indicated. In some jurisdictions the declarations are admitted on one principle, and in others on a wholly different one. In the jurisdiction in which the declarations are admitted under the reputation exception all that is required is that the declarant be shown to have had peculiar means of knowledge of the fact, and without any interest to misrepresent. In the jurisdictions where the declarations are admitted on the principle of *res gestæ*, they must be shown to have been made while in the act of pointing out the boundary or determining the line, which must necessarily have occurred on the ground. If this be the true history of the variance, and it admits of no question, then the additional limitation called the variant would not only seem to be a necessary and logical deduction, but it so well accords with the established principles of evidence that it would be far more correct to say of any opposing rule that it was the variant.

The general rule is thus stated in Best on Evidence, § 501: "Allied to these are declarations in the regular course of business, of-

fice, or employment by deceased persons who had personal knowledge of the facts, and no interest in stating an untruth. But the rule as to the admission of such evidence is confined strictly to the particular thing if it was the duty of the person to do, and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that being. And it is also a rule with regard to this class of declarations that they must have been made contemporaneously with the acts of which they relate." If the admission of declarations of persons deceased can be justified only on the ground of *res gestæ*, something done must be shown, and it must appear that the declarations were made in connection with the doing. In the case of declarations of deceased owners, the thing done would be the pointing out the boundary; in those of deceased surveyors, the professional work in connection with the survey of the land. Both involve being on the ground, and thus we have explained the meaning of the limitation as ordinarily expressed. Now there can be no question but that in Pennsylvania while evidence of reputation is admitted where nothing better is obtainable declarations of deceased owners and surveyors are admissible, not to establish reputation, but solely on the ground of their being part of the *res gestæ*. In *Kennedy v. Lubold*, 88 Pa. 246, *Agnew, C. J.*, says, with reference to the facts of that case: "Herrington in 1837, and Fenton in 1838, were engaged in professional acts; the latter locating the warrant officially under his oath of office. The declarations as to the corners when found, blocked, and counted were a part of the *res gestæ*, and so far from being doubtful evidence were competent and always admitted when the transaction is old and the surveyor dead." This being the ground of their admissibility, no reason can be suggested why the limitation should not be the same in case of surveyors as in the case of owners. So much for the principle.

Now as to the adjudications. Counsel say that no case can be found in our reports where the declarations of a deceased surveyor have been excluded because not laid on the ground. This may be true; but it is more certainly true that no case can be found in which the declarations of a deceased surveyor not made on the ground were admitted. The diligence of counsel has failed to discover any such case. They rely with some confidence on *Borough v. Anderson*, 40 Pa. 514; but this case gives no support whatever to their contention. The declarations there received were offered in connection with the general plan of lots in which the public generally were interested. The case distinguishes very clearly between declarations in aid of private rights, and those affecting the public at large, and the decision is made

to rest on such distinction. "But," says Reed, J., in the course of his opinion, "the declarations of a deceased surveyor in relation to lines run or plans made from actual survey are clearly evidence in an instance like the present, which concerns a matter of general if not public interest." A careful examination of our cases where declarations of deceased parties have been made the ground of decision or comment—and they are numerous—will show conclusively that in this jurisdiction at least it has always been understood that declarations of deceased surveyors, and declarations of deceased owners are alike subject to the same limitation; that is to say, in either case to be admissible, they must be shown to be part of the *res gestæ*. When the declarations of the surveyor or owner are so far separated from the occurrence to which they relate as not to form a part of a continuous whole, they are properly excluded. This ruling would admit the field notes of the deceased surveyor as declarations contemporaneous with the work done on the ground, provided they were authenticated in some other way than by the mere subsequent declaration of the surveyor himself; and in this case we think they were. It would exclude so much of the offer as proposed to prove the later verbal statements of Mr. Irwin to his son as to what he found on the ground when engaged in making his survey.

Judgment reversed, and venire de novo awarded.

(232 Pa. 534)

WHITE v. WESTERN ALLEGHENY R. CO.
(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. EVIDENCE (§ 498½*)—OPINION EVIDENCE—QUALIFICATION OF WITNESS.

The qualification of a witness to express an opinion is a preliminary question to be passed upon by the court before the witness is permitted to express an opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2290; Dec. Dig. § 498½.*]

2. EVIDENCE (§ 474*)—OPINION EVIDENCE—QUALIFICATION TO GIVE OPINION—LAND VALUES.

A farmer who had known the farm through which a railroad was constructed for 40 years, and had observed the improvements and quality of the land, who knew the boundaries, and had some familiarity with land values and the general selling price in the neighborhood, as a county commissioner and man of affairs who had observed the cut made in the location of the railroad, and was familiar with the conditions before and after the entry, was qualified to express an opinion as to the market value of the farm.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2217; Dec. Dig. § 474.*]

3. EMINENT DOMAIN (§ 262*)—APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Though an answer of a witness in condemnation proceedings to the question of what inconvenience, disadvantage, and danger there would be in the use of the farm due to crossing

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the railroad at grade was speculative, and upon request should have been stricken, where it was meaningless as bearing upon the amount of damages, its admission was harmless error.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 686; Dec. Dig. § 262.*]

Appeal from Court of Common Pleas, Lawrence County.

Condemnation proceedings by John S. White against the Western Allegheny Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. A. McMillin, called to testify as to the market value of the land, was asked: "Q. What inconvenience, disadvantage, and danger would there be in crossing this railroad at grade in the use of it for farming it as a stock farm, or for any use in which a farmer usually uses a farm and for which farms are used in that section of the community? (Defendant's counsel object and call for the purpose. Offered for the purpose of showing the damage to the plaintiff in the construction and the operation of the railroad through this farm. Objected to by defendant's counsel as incompetent and immaterial, and not being an inquiry as to the subject-matter of the issue in this case.) The Court: He may answer the question, and an exception is sealed for the defendant. A. You wouldn't be in any danger unless a train came along, and if one came along it would be apt to crush the wagon or the cattle if the railroad would have the right of the track." Defendant's counsel object to the question and answer, and ask the court to withdraw it from the consideration of the jury and strike the evidence from the record, for the reason that the answer as well as the question are entirely speculative and do not go to the subject-matter of the issue.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. Norman Martin, for appellant. Robert K. Alken, for appellee.

ELKIN, J. This case grows out of a proceeding to condemn a strip of the plaintiff's land for railroad purposes under the right of eminent domain. The assignments of error relate to the qualification of certain witnesses to testify to market value before and after the taking. It is argued that the witnesses McMillin and Jones did not have such actual personal knowledge of the farm, its area, improvements, productive qualities, the uses for which adapted, and the general selling price of lands in the neighborhood, as to make them competent to express an opinion on market value. The rule is that the possession and sufficiency of such knowledge is a preliminary question to be passed upon by the court before the witness should be permitted to express an opinion. *Michael v. Crescent Pipe Line Co.*, 159 Pa. 99, 28

Atl. 204. The importance of testing the qualification of a witness to express an opinion as a preliminary question is pointed out by Brother Mestrezat in *Davis v. Pennsylvania Railroad Co.*, 215 Pa. 581, 64 Atl. 774, wherein it is said: "After such testimony has gone to the jury, it is impossible to eradicate it entirely from their minds by any instructions or directions by the court." We agree with the learned counsel for appellant that it is the duty of the trial judge to carefully consider the qualification of each witness in such cases as a preliminary question before an opinion is expressed upon market value. However, the test applied must not set the standard of qualification so high as to exclude the only available kind of testimony ordinarily obtainable in such cases. Market value of land is not capable of exact proof, and at best is a matter of opinion, not generally of experts with special knowledge, but of persons familiar with values in the neighborhood. As we view the facts of the present case, the witnesses objected to were qualified to express an opinion as to market value. McMillin was a farmer, had known the farm through which the railroad was constructed for a period of 40 years, frequently passed through it on the public highway, observed the improvements and quality of the land, knew the boundaries, had some familiarity with land values and general selling price in the neighborhood as a county commissioner and man of affairs in that section, had observed the cut made in the location of the railroad, and was familiar with the conditions before and after the entry. It is true the witness could not recall any particular sales in the neighborhood about the time of the entry, but there is no evidence of such sales being made, and there may have been none. Because sales are few, and at long intervals or not at all, it would be unreasonable and unjust to the landowner to hold that he is precluded from offering any testimony on the subject of land values before and after the taking, on the ground of there having been no particular sales in that neighborhood. The witness must have such knowledge of the subject-matter as can reasonably be expected in view of the circumstances, the frequency or infrequency of sales, the location, improvement, and quality of the land, and such other things as enter into a proper estimate of market value. In other words, the rule requires the best evidence available under the circumstances of the case. We think McMillin and Jones, as well as the other witnesses, met this requirement and were qualified to express an opinion as to the market value of the land in question. *Smith v. Railroad Co.*, 205 Pa. 645, 55 Atl. 768; *Hope v. Railroad Co.*, 211 Pa. 401, 60 Atl. 996; *Lally v. Railroad Co.*, 215 Pa. 436, 64 Atl. 633. The answer of the witness to the question complained of in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the third assignment was speculative, and upon request should have been stricken from the record, but it could not possibly have done appellant any harm, because it was meaningless as bearing upon the amount of damages involved, and certainly does not constitute reversible error.

Assignments of error overruled, and judgment affirmed.

(232 Pa. 571)

PARKS v. PENNSYLVANIA CLAY CO.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

ESTOPPEL (§ 93*)—TITLE TO LAND—ACQUISITION IN IMPROVEMENTS.

Plaintiff owned an acre of land adjoining nine acres owned by defendants, who had acquired the land at a receiver's sale. Plaintiff had been in the brick business with his sons, who owned the nine acres and built two kilns on his land, which were used in the business. After he withdrew from the business, he permitted his sons and a corporation that succeeded them to use the kilns without charge, and they were repaired by the corporation, the president of which knew that they were on plaintiff's land, and the corporation commenced a third kiln thereon. Before it was completed the corporation passed into the hands of a receiver, who, without knowledge of plaintiff, finished the kiln, but on notice of plaintiff's title he abandoned it, and defendant acquired title to the adjoining land. *Held*, that plaintiff in ejectment was not estopped to claim such land because of such use of it by the corporation.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264, 265; Dec. Dig. § 93.*]

Appeal from Court of Common Pleas, Beaver County.

Action by James I. Parks against the Pennsylvania Clay Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. F. Reed, for appellant. William A. McConnel, for appellee.

FELL, J. This was an action of ejectment for an acre of land that adjoined a tract of nine acres owned by the defendant and had been used in connection with it in the manufacture of fire bricks. There was no dispute as to the plaintiff's record title. He had purchased the land many years before by deed duly recorded, and his title had never been divested by conveyance or by legal process. The defendant had no record title. Its defense to the action was that the plaintiff was estopped by his silent acquiescence with knowledge when improvements were made on his land by the defendant's predecessor in title under the erroneous belief that it owned the land. This defense was not sustained by the evidence.

At a time when the plaintiff was associated in business with his sons, who then owned the adjoining tract, he built at his own expense two brick kilns on his land,

which were used in connection with the business carried on by the partnership. After he had withdrawn from the partnership, his sons and a corporation that succeeded them in business used the kilns and a part of the land without charge. This use was permissive only and not under any claim of right. These kilns were repaired or rebuilt when it became necessary, and a third kiln was located partly on the plaintiff's land. Before work had been commenced on this kiln, the president of the corporation was informed that the location was partly over the line of its property. Before the kiln was completed, the corporation passed into the hands of a receiver, who finished the kiln in ignorance of his rights but without the knowledge of the plaintiff. Subsequently, on notice of the plaintiff's title, he abandoned the use of the kiln and took up the tracks leading to it. This was the situation at the time of the receiver's sale, under which the defendant acquired title to the adjoining land.

There was nothing in the facts proved upon which an estoppel could be based, and a verdict was properly directed for the plaintiff.

The judgment is affirmed.

(222 Pa. 586)

GARRETT et al. v. BEAVER VALLEY TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. STREET RAILROADS (§ 117*)—COLLISION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where plaintiff, alighting from a street car, caught the handhold of a passing engine, and as he placed his foot on the floor, he was struck by the car from which he had alighted, and there was ample evidence of the negligence of the motorman in allowing his car to collide with the engine, inasmuch as plaintiff did not step on defendant's track, but was carried there while on the engine, and after he had passed the peril of getting on the moving engine, the question of contributory negligence was for the jury.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 117.*]

2. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Where, in an action for personal injuries, the court charged that the jury could allow only the worth of plaintiff's earning power from the time he reached 21 years, and during the remainder of his probable natural life, a judgment for plaintiff will not be reversed because the court referred, in view of an argument of plaintiff's counsel, in a cautionary way to the duty of the jury to consider the probability of the young man living to the allotted time of three score years and ten.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 295.*]

Appeal from Court of Common Pleas, Beaver County.

Action by Robert Garrett, in his own right, and Perry Garrett, by his guardian, against the Beaver Valley Traction Company. Judg-

ment for plaintiffs, and defendant appeals. Affirmed.

The court below charged in part as follows:

"There is another legal principle which you will consider in determining the question of contributory negligence. He had a right to presume, unless he saw the car coming under circumstances that would indicate to him that there was danger of a collision, that the street car would make the proper stop before attempting to make the grade crossing, and if the circumstances were not such as to indicate to him that the street car was not going to make the usual stop before reaching such a crossing, he would not be guilty of contributory negligence in boarding the train in the manner and at the place he did. Now this is a fact for you to determine. You will look at the young man's testimony. He said that he did not look for the car as he ran down to board this engine; that he did not know where it was, except that he left it and came down along the track to board the locomotive.

"As we said to you before, when you come to consider the compensation for loss of earning power, there are many contingencies that naturally enter into the determination of this question. You will take into consideration the probabilities of this young man improving, looking at the testimony of the physicians, and from your observation of the young man himself, and taking into consideration the history of the case from its inception down to the present time, and you will also take into consideration the probabilities of his being able to do other kinds of work than that which he was doing at the date of the accident, when you come to make up your verdict as to the amount of compensation to which he is entitled; and, having taken into consideration the probability of the young man living to the allotted time of three score years and ten, and all the circumstances and contingencies that will probably enter into the life of a man, and, bringing to bear that good judgment and common sense which men of business and affairs exercise, determine the amount of compensation due to this young man."

Verdict and judgment for Robert Garrett for \$1,500, and for Perry Garrett for \$6,000. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James L. Hogan and John M. Buchanan, for appellant. William A. McConnell, for appellees.

FELL, J. The plaintiff was employed as an inspector of air brakes at the yard of the Pennsylvania Company at Conway, on the line of the defendant's street railway. He lived with his parents near the line of the Ohio River Junction Railroad, whose

track crossed that of the defendant at grade at Crow's run. This railroad is seven miles in length, and is used mainly to transfer freight cars to and from factories to the tracks of another road. It has no passenger cars, stations, or regular stopping places, but its trains are stopped or slowed to enable passengers to get on or off at any point on the road. Passengers ride in the cab of the engine or on the tender, and get on and off at a step at the back of the engine. The plaintiff in going to and returning from his work used both roads, changing from one to the other at Crow's run. On the evening when he was injured, he came from Conway to Crow's run on the defendant's car, and got off at the rear platform after the car had stopped at a waiting room 200 feet from the crossing. He saw an engine backing a train of freight cars slowly over the crossing from east to west. He ran on the east side of the public road, and reached the railroad track as the engine was passing. He placed his right foot on the step, caught the handhold, and as he placed his left foot on the floor of the cab, or was in the act of raising it to the floor, he was struck by the defendant's car from which he had alighted. He at no time stepped on the track of the defendant company.

There was ample evidence of the negligence of the motorman in allowing his car to collide with the engine. The question to be considered is whether the case should have been withdrawn from the jury on the ground of the plaintiff's contributory negligence. On the facts the turning point of the case in the plaintiff's favor is that he did not step on the defendant's track. He was carried there while on the engine. He had safely passed the peril of getting on a moving engine, and his negligence in that regard was not the cause of his injury, although a circumstance that made it possible. But against such a possibility he was under no duty to guard, because he had no reason to apprehend danger from the defendant's car when on the engine. There was no causal connection between his negligence and his injury. The case is governed by the principles stated in *Boulfrois v. Traction Co.*, 210 Pa. 263, 59 Atl. 1007, 105 Am. St. Rep. 809, and *Besecker v. Railroad Co.*, 220 Pa. 507, 69 Atl. 1039, 123 Am. St. Rep. 714.

A part of the charge relating to the compensation for the loss of earning power is assigned for error. The learned judge, in calling the attention of the jury to matters to be taken into consideration in arriving at a conclusion on the amount of compensation, spoke of the probability of the plaintiff's improving, of his being able to perform other kinds of work, and of his "living out the allotted time of three score years and ten." The general instruction on the subject was accurate and thorough, and the jury were distinctly told that they could allow only the present worth of earning power "from the

time he reached 21 years for and during the remainder of his probable natural life." The language quoted was no doubt suggested by the argument of plaintiff's counsel that 70 years was the proper period to fix. There was not, as in *Dooner v. Canal Co.*, 164 Pa. 17, 30 Atl. 269, the statement of a rule not founded on evidence to be followed by the jury, but rather a caution, in view of the argument advanced, to consider the probabilities.

The judgment is affirmed.

(222 Pa. 538)

In re SLIPPERY ROCK TP. SCHOOL DIST.

Appeal of CUNNINGHAM et al.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

SCHOOLS AND SCHOOL DISTRICTS (§ 53*)—REMOVAL OF SCHOOL DIRECTORS—REVIEW BY COURTS.

On appeal from an order of the court of common pleas in a proceeding under Act June 6, 1893 (P. L. 330), removing school directors for failure to provide suitable and adequate school accommodations for the children of the district, the Supreme Court can only consider the matter as before it on certiorari, and look into the record only so far as may be necessary to ascertain whether the court below exceeded its jurisdiction or its proper legal discretion.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 133; Dec. Dig. § 53.*]

Appeal from Court of Common Pleas, Lawrence County.

Proceedings for the removal of R. Slemmons Cunningham and others, school directors of Slippery Rock township, Lawrence county, under Act of June 6, 1893 (P. L. 330). From an order of the common pleas removing them from office, the school directors appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James A. Gardner, for appellants. J. Norman Martin, for appellees.

POTTER, J. This was a proceeding for the removal of school directors of Slippery Rock township, Lawrence county, under the provisions of the act of June 6, 1893 (P. L. 330), for failing, without valid cause, to provide suitable and adequate school accommodations for the children of the district. Upon petition filed the court of common pleas appointed an inspector to visit the district, inquire into the facts, and make report to the court. The inspector reported that the directors had failed without valid cause to provide suitable accommodations. Thereupon the court granted a rule upon the school directors, six in number, to show cause why they should not be removed from office. After answer filed and after argument, the court made the rule absolute, as to all the

directors save one. The directors who were thus removed have appealed.

The act of assembly in question, that of June 6, 1893, first came before this court for construction in *Ross's Appeal*, 179 Pa. 24, 36 Atl. 148, where Justice Dean said (page 30 of 179 Pa., page 150 of 36 Atl.): "We are of the opinion that the intent of the act of 1893 is to confer on the courts of common pleas of this state a power by this new proceeding to ascertain the facts and determine whether the directors have exercised a sound discretion in providing suitable building accommodations for all the school children of the district." And in *Kittanning Township School Directors*, 179 Pa. 60, 36 Atl. 151, this court said: "It will be a rare case, where the court below has such superior opportunities for wise action as in these cases, that a purely appellate court would undertake to review its decree on the facts or the inferences therefrom, even conceding our power to do so." And in *Barr's Petition*, 188 Pa. 122, 41 Atl. 303, a case which arose under the same act of assembly, Justice Dean said (page 127 of 188 Pa., page 304 of 41 Atl.): "The court below on ample testimony has found the facts warranting its decree. We would not touch it, unless there was a manifest error in its finding or a flagrant abuse of its discretion."

The question of the right to review in this court does not seem to have been raised in the former cases, but we may suggest that the proceeding is entirely statutory, and no appeal from the judgment of the court of common pleas is given by the statute. We are at liberty, therefore, to consider the matter only as being before us on certiorari, and we may look into the record only so far as may be necessary to ascertain whether the court below exceeded its jurisdiction or its proper legal discretion. It matters not that we might have reached a different conclusion upon the facts, or drawn other inferences therefrom. It is sufficient to say that in no way does it appear from the record that the court below went beyond the power conferred upon it by the statute, or that it in any way abused the discretion vested in it, in the inference which it drew from the facts or the conclusions which it reached.

The assignments of error are overruled, and the order and judgment of the court below is affirmed.

(222 Pa. 567)

COMMERCIAL NAT. BANK v. KIRK et al.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. COURTS (§ 8*)—JURISDICTION—ENFORCING LAWS OF ANOTHER STATE.

The courts in Pennsylvania will not enforce the penal laws of another state.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 19; Dec. Dig. § 8.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. COURTS (§ 8*)—JURISDICTION—ENFORCING LAWS OF ANOTHER STATE.

Where the Supreme Court of another state has decided that the liability of the directors of a corporation in such state for failure to make a statutory return is a penal liability, it will not be enforced in Pennsylvania, in an action brought in its courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 19; Dec. Dig. § 8.*]

3. PENALTIES (§ 32*)—AFFIDAVIT OF DEFENSE.

In a penal action, no affidavit of defense is required.

[Ed. Note.—For other cases, see Penalties, Cent. Dig. § 28; Dec. Dig. § 32.*]

Appeal from Court of Common Pleas, Lawrence County.

Action by the Commercial National Bank of Bozeman against C. J. Kirk and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Argued before MITHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Oscar L. Jackson (Hartman & Hartman and Chas. R. Davis, on the brief), for appellant. J. Norman Martin, for appellees.

ELKIN, J. The appellees were stockholders in, and directors of, a mining corporation of Montana. Under a statute of that state it is made the duty of the corporation to make an annual report showing the amount of capital stock authorized, the proportion of the capitalization paid in, and the existing indebtedness, which report is required to be filed in the office of the clerk of the county where the principal place of business is located. In the present case the annual report was not made nor filed as required by the statute. Failure to make and file the report imposes upon the directors a statutory liability to jointly or severally pay the indebtedness of the corporation then existing, or any that shall thereafter be contracted, until such report shall be made and filed. This suit was instituted in Pennsylvania to enforce against certain of the directors here the collection of an indebtedness of the corporation due the appellant bank in Montana. The right to recover as a personal obligation against directors in this state depends upon the nature of the liability under the Montana statute, which if penal, must be enforced in that jurisdiction. The earlier cases in most jurisdictions regarded such statutes as penal, and suits upon them as actions for penalties, but the later cases, especially those of the federal courts, which perhaps declare the sounder view of the law, hold that the liability in such cases is contractual in its nature, and such statutes remedial. The leading case declaratory of this doctrine is *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. We have carefully considered this case and the numerous other cases cited by the learned counsel for appellant, and we

agree that the weight of authority sustains the general principle announced, but we are not convinced that it can have controlling force in the decision of the present case under the circumstances. It must not be overlooked that the liability sought to be enforced here arises under a Montana statute, and in the first instance we must look to the law of that state to determine its nature, limitation, and extent. If the courts of that state had not passed upon the question involved here, it would then be our duty to consider and decide it according to the general principles of law applicable to such cases. But, the Supreme Court of Montana has passed upon the question in several cases by holding the statute under which the alleged liability in this case arises to be penal, and that its provisions must be strictly construed. *Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18; *Elkhorn Trading Co. v. Tacoma Min. Co.*, 16 Mont. 322, 40 Pac. 606; *Wetthey v. Kemper*, 17 Mont. 491, 43 Pac. 716; *State Savings Bank v. Johnson*, 18 Mont. 440, 45 Pac. 662, 33 L. R. A. 552, 56 Am. St. Rep. 591. We do not feel at liberty to disregard these decisions of the Montana courts, and must conform our administration of the law to them, and this is true independently of what our views on the question involved might be. *Ball v. Anderson*, 196 Pa. 86, 46 Atl. 368, 79 Am. St. Rep. 693. This view of the case makes it unnecessary to discuss the question raised as to the necessity of filing an affidavit of defense. If penal no affidavit is required. The argument of the learned counsel for appellant is able and exhaustive, and if presented to us in the first instance, perhaps convincing, but we are bound by the Montana decisions as to the penal character of the statute; and, if penal, the disposition of the case by the learned court below was clearly right.

Judgment affirmed.

(222 Pa. 556)

WALLACE v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 4, 1909.)

1. DAMAGES (§ 26*)—PERSONAL INJURIES—FUTURE PAIN AND SUFFERING.

In an action for personal injuries, the jury should award compensation for the future pain and suffering when the probability thereof is established by the evidence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 69; Dec. Dig. § 26.*]

2. DAMAGES (§ 34*)—PERSONAL INJURIES—AGGRAVATION OF INJURY.

A surgeon employed by a railroad company set the broken leg of a passenger in such a manner as to make a second operation necessary. This operation was performed by a surgeon in whose skill a prudent person would have a right to rely. *Held*, that the consequences following such second operation are the result of the original accident, and it is immaterial that the second operation did not relieve the patient's pain.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 43; Dec. Dig. § 34.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. EVIDENCE (§ 359*)—ADMISSIBILITY—RADIO-GRAPHS.

Where the surgeon of a railroad set the broken leg of a passenger in such a way as to cause the fibula to override, and a second operation was necessary, the surgeon performing the second operation could show by radiograph pictures the basis for his conclusion that the operation was necessary, and that on operating he found the conditions to be such as the picture showed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1509, 1510; Dec. Dig. § 359.*]

Appeal from Court of Common Pleas, Lawrence County.

Action by Fred F. Wallace against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 219 Pa. 327, 68 Atl. 952.

At the trial when Dr. L. W. Swope was on the stand certain radiograph pictures were shown to him, and he was asked this question:

"Q. I will ask you, Doctor, to take Exhibit B to the jury. First, when this incision was made state whether or not the conditions that you found there corresponded with the radiograph? A. It did. Mr. Jackson: I ask that answer to be withdrawn until I make my objection. Mr. Aiken: We will consider it withdrawn. Mr. Jackson: What is the question for? Mr. Aiken: What do you say? I am not saying. It is your duty to give the purpose of the question. (Question read at suggestion of counsel. Defendant's counsel object, as it contains two separate and distinct questions and different subject-matters.) We object to the witness going to the jury and showing the jury the radiograph plate, because it has not been properly identified or shown by an expert to have been made so as to make it evidence for any purpose. It is objected to for the second reason because a radiograph plate, sometimes called X-ray, of the wounded or injured parts of this man's leg, for which suit is brought, is incompetent and irrelevant evidence and should not be received for any purpose whatever as to anything in issue in this case, and we desire the court to understand we make two distinct and specific objections to the offering of these radiographs to the jury, in that it has not been shown to have been taken in such a way or by such a person of such a profession, such an expert, as would entitle it to be received as evidence. Further objected to for the reason that the radiograph and X-ray pictures of injured and deformed parts are not receivable in evidence on the trial of a case like this; that there is nothing at issue in this case except a question of damages for injuries sustained, for costs and expenses that may have been incurred, for such damages as might properly be allowed for pain and suffering and for loss of earning power since the accident up to the present and if it should be believed in the future. No one of

these questions is relevant in the offer of the picture, X-ray or radiograph, as it is termed, nor is it competent, and that its being offered is for an improper purpose, and only for the purpose, of inflaming the minds of the jury improperly. The Court: The surgeon is called upon to go before the jury and to use the radiograph in explaining the condition of the injured leg as found by him, and I believe it would be proper to allow him to do so, and we will permit the witness to do that. There is really no question before the court to rule on. You may proceed, Doctor. Mr. Jackson: The court being of opinion that there is no question before the court to raise the question objected to, I now object to the witness showing this plate to the jury because the plate has not been sufficiently identified and has not in fact been offered in evidence, and it is therefore incompetent for the witness to use it in illustrating, as there is no proof that it even pretends to be a picture of the plaintiff's injured limb. The Court: We will overrule the objection and seal an exception for the defendant. (Last question read witness.) A. Yes, sir, it did."

The court charged in part as follows:

"In addition to compensation for expenses incurred and loss of earning power, you may consider compensation for pain and suffering, and in doing so you are not confined simply to what he has endured since the accident to the present time, but what he will probably suffer in the future as a sequence of the injury."

Plaintiff presented these points:

"(7) In considering the damages you may award the plaintiff for pain and suffering you will consider the pain and suffering he has already endured, bodily and mentally, and which he is likely to endure, and it is for you to determine what compensation under all the circumstances should be allowed the plaintiff, in addition to the other items of damage to which he is entitled, in consideration of the pain and suffering as a result of the accident and what amount of money is sufficient compensation for pain and suffering is to be decided by the jury. Answer: Affirmed."

"(4) That if the jury find that the operation of Dr. Swope caused dead bone, and that this dead bone was not the sequence or result of the original injury, they should not take this dead bone into account in making up their verdict. Answer: Refused. While it is true the plaintiff cannot recover for injuries which are not the sequence of the original injury received in the accident, yet if he exercised care, caution, and good judgment in the selection of a skillful and competent surgeon, he has discharged his duty in this respect and is not responsible for an error in judgment or unskillful treatment on the part of the surgeon who has been selected with

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

care. Where a person has used reasonable care in selecting a physician or surgeon, but owing to unskillful treatment the injury has been increased, the party causing the injury will be held liable for the latter."

"Defendant presented this point:

"That the defendant is not liable for damages arising from the fault, mistake, or neglect of plaintiff's own surgeon, which produced injury and loss to plaintiff that could under no circumstances have resulted from the injuries plaintiff received at the collision. Answer: Affirmed. In affirming this point, while we say the defendant is not liable for an injury caused by the fault, mistake, or neglect of the surgeon which could under no circumstances have resulted from the injury caused by the accident, yet if the plaintiff used reasonable care in selecting a physician or surgeon, but owing to unskillful treatment by the surgeon thus selected the injury has been increased, the defendant will be held liable for the increased injury if it is liable for the original injury."

Verdict and judgment for plaintiff for \$15,250. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Oscar L. Jackson, C. B. Fernald, and Charles R. Davis, for appellant. Robert K. Aiken, for appellee.

STEWART, J. The evidence fully warrants the conclusion reached by the jury in this case that the injuries sustained by the plaintiff were severe to an unusual degree. Whether they all were legally chargeable to defendant's negligence is a matter to be considered later on. Under the instructions of the court the jury were allowed, in determining the plaintiff's damages, to take into consideration the pain and suffering he would probably in the future endure, as a sequence of his injuries, as well as that he had already suffered. This instruction is complained of as introducing an element of damage too remote and speculative to form a basis of legal recovery, and it is the subject of the first assignment of error. Nothing is better settled than that in cases of personal injury pain and suffering are to be reckoned as distinct elements for which compensation is to be allowed. It is equally well settled that this rule admits of compensation for future as well as past pain and suffering. With what degree of certainty must it be made to appear that the future pain and suffering will ensue before compensation for them can be allowed? That is the question raised by the assignment, and it might well call for consideration if no rule existed with respect to it, or the rule were of questionable authority; but neither is the case. In the multitude of cases of like character which have come before this court for review, one unvarying rule has been observed regarding the quantum of proof required, and it is this: The jury may

and should award compensation for future pain and suffering whenever the evidence furnishes just ground for the belief that such pain and suffering will likely or probably ensue. This standard has met with the approval and sanction of this court in every case, and that without qualification. It is sufficient to refer to the cases of *Schneider v. Penna. Co.*, 2 Cent. Repr. 74; *McLaughlin v. City of Corry*, 77 Pa. 109, 18 Am. Rep. 432; *Scott Township v. Montgomery*, 95 Pa. 444; *Lake Shore, etc., Railway Co. v. Frantz*, 127 Pa. 297, 18 Atl. 22, 4 L. R. A. 389; *Smedley v. Railway Co.*, 184 Pa. 620, 39 Atl. 544. Many others as distinctly recognizing and enforcing the rule could be cited were it necessary. In the case of *Scott Township v. Montgomery*, 95 Pa. 444, an instruction to the effect that the "jury shall allow for pain and suffering the plaintiff had already endured, bodily and mentally, and which he is likely to experience," was assigned for error. This court held in a per curiam that the measure of damages was correctly stated. In *Lake Shore, etc., Ry. Co. v. Frantz*, 127 Pa. 297, 18 Atl. 22, 4 L. R. A. 389, the trial judge in his charge had allowed the jury to consider the pain and suffering "the plaintiff has undergone and may undergo in the future." This was specifically assigned as error. This court, while disapproving of the expression "may undergo," affirmed the judgment on the ground that in the connection in which it was used it could not have been misleading to the jury, in view of the subsequent instruction that recovery was to be limited to "that already experienced and likely yet to be experienced." With such explicit and repeated recognition by our own courts of a rule which admits compensation for pain and suffering likely to ensue, it comes to nothing to show that in some jurisdictions recovery for these is allowed only when it is made to appear that they are reasonably certain to result. We are not called upon to vindicate the justice or reasonableness of the rule which obtains with us. It is only necessary to assert it and express our continued adherence to it. All that is required with us is that there be sufficient evidence from which the jury may fairly derive the conclusion that the chances that the plaintiff will endure future pain and suffering preponderate over those that he will not. Such preponderance denotes probability or likelihood, and that is sufficient.

The plaintiff, while a passenger, was injured in a collision between two of defendant's trains, sustaining a fracture of both bones of his left limb between the knee and ankle. This occurred September 7, 1905. He was at once removed to a city hospital, where he was placed in charge of a physician and surgeon in the employ of the defendant company, who proceeded without delay to place the injured limb in alignment and apply splints. The plaintiff remained in the hospital under treatment for nearly a month,

when, being able to go about on crutches, he was taken to his home. About the middle of November following, the same surgeon removed the plaster cast and directed moderate use of the limb. Plaintiff testified that after the removal of the cast he suffered pain in his limb so severe that he was scarcely able to endure it. It is not alleged that this pain resulted from any undue or immoderate use of the limb. Because of its continued severity plaintiff procured radiographs to be taken of the injured part, and, in view of what these were supposed to disclose, he employed Dr. Swope, a surgeon of repute residing and practicing in the city of Pittsburg. From an examination of the radiographs and the patient, Dr. Swope concluded that what caused the pain was an overriding of the fibula to the extent of three-fourths of an inch, and that an operation was necessary to make the small bones unite squarely, and thus relieve the pressure upon the vessels and nerves of the foot resulting from the overriding. The operation involved not only an incision, but a severance of the bones which had partially united, the removal of the oblique ends, and the bringing them into a more perfect apposition and securing them in proper place by artificial tendons. This operation was performed by Dr. Swope with the assistance of another surgeon, and in the presence of several, at the same hospital where the patient was first treated. Dr. Swope testified that he found the conditions to be just as the radiographs represented them, and in addition he found the tissues about the place of fracture devitalized; the blood supply having been interfered with by the pressure of the bone. Several months later another operation was required for the removal of a piece of dead bone which resulted from the devitalized tissues. At that time it was observed that the tissues were doing no good, not healing, not throwing off the broken-down processes. Dr. Swope gave it as his conclusion from a very recent examination of the patient that there had been but little improvement in his condition, that necrosis was still going on, and that another operation would be required for the removal of dead bone. The effort on part of the defendant was to show that the operation performed by Dr. Swope was wholly unnecessary, that plaintiff's limb was in good condition at the time the operation was performed, that the healing processes were steadily going forward, that if there was any overriding of the bone it was so slight as to be of no consequence, nothing beyond what is ordinarily looked for in such cases, and the necrosis which subsequently set in, and is the admitted cause of plaintiff's present disability and suffering, is due wholly to the operation performed by Dr. Swope. This view of the case was expressed by Dr. Wilson, the surgeon who first treated the plaintiff, and he was fully supported in it by several others called by the defendant.

Into this controversy we need not enter.

Every point submitted by the defendant which bore relation to it was affirmed by the court with a single exception. Defendant's fourth point was as follows: "If the jury find that the operation of Dr. Swope caused the dead bone, and that this dead bone was not a sequence or result of the original injury, they should not take this dead bone into account in making up their verdict." In refusing this point the learned trial judge said: "While it is true the plaintiff cannot recover for injuries which were not the sequence of the original injury received in the accident, yet if he exercised care, caution, and good judgment in the selection of a skillful and competent surgeon, he has discharged his duty in this respect, and is not responsible for an error in judgment or unskillful treatment on the part of the surgeon who has been selected with care. Where a person has used reasonable care in selecting a physician or surgeon, but owing to the unskillful treatment the injury has been increased, the party causing the injury will be held liable for the latter." Putting it somewhat differently, the point was refused because it did not comprehend sufficient matters of fact to justify the conclusion sought to be drawn, and this was clearly right. If the operation was performed in good faith, before the recovery of the plaintiff from the original injury, with a view to promote and insure complete recovery or mitigate plaintiff's pain, either by correcting what had been done or by supplementing it, by the surgeon in whose skill and judgment the ordinarily prudent person would have a right to rely, the consequences following the operation and resulting directly therefrom are in a legal sense the sequence and result of the original accident. The affirmance of the point would have involved an assumption that there was no evidence from which the jury could find such conditions as those we have indicated, and which, once established, would legally refer the consequence to the accident as the proximate cause. Instead of this being the state of the evidence, there was not only abundant testimony in support of every contention we have above referred to, but there was no attempt whatever on the part of the defendant to controvert it. This testimony, if accredited, established not only a connection between the pain and suffering caused by the presence of the dead bone and the original accident, sufficient in law to make the accident the proximate cause, but it linked the two together in such a way as to make a natural whole. Any consideration of this matter must start with the fact that before the fractured parts had healed, while the process was going on, and after plaintiff had been virtually released from the surgeon's care and supervision, he was subjected to intense pain and suffering in the region of the fracture. If such were not the fact, or if it resulted from something else than the original injury, defendant should have made some effort to controvert the testimony with re-

spect to it. It is enough in this connection to know that the testimony was undisputed. The natural connection between the pain, if it existed, and the original accident, is too obvious to call for remark. It was just as natural that the plaintiff, in his desire to be released from the pain to which he was subjected, should have recourse to surgical skill and submit to whatever treatment such skill should determine upon. The suffering which followed the treatment, whether that treatment was wise or unwise, is as directly and naturally traceable to the original accident as that which attended the setting of the fractured limb in the first place; both were parts of the connected whole, and of course it is of no consequence that one is further from the beginning of the chain of events than the other.

What we have here said applies as well to the fourth assignment, which is the answer of the court to the defendant's fifth point, which asked the court to say "that defendant is not liable for damages arising from the fault, mistake, or negligence of plaintiff's surgeon which produced injury and loss to plaintiff that could under no circumstances have resulted from the injury plaintiff received in the collision." The court affirmed the point, and followed the affirmance with a qualification or explanation which set out the same considerations which led to a refusal of the fourth point. It is the qualification that is assigned for error. Like the point itself it assumes a case where the injury under no circumstances could have resulted from the original accident, and acquits from liability the party causing the accident. It goes on to say, however, that, though injury was caused by unskillful treatment, yet, if the plaintiff exercised ordinary care in the selection of the surgeon, the defendant, if liable legally for the original injury, would be liable for the increased injury as well. The point submitted should have been refused for reasons which we have stated in considering the former point. The explanation left the affirmance without advantage to the defendant, but so far as it went it was a correct statement of the law under the facts of the case.

It was entirely proper to allow the witness Dr. Swope to state the grounds on which he based his conclusion as to what caused the pain from which the plaintiff suffered, and prevailed with him in determining that an operation was necessary. His conclusions were based largely upon what the radiographs revealed. This circumstance made the radiographs admissible. While, as we have stated, it was not a material inquiry in the case whether the operation was a prejudicial one or not, if made in good faith by one on whose skill the plaintiff had a right to rely, yet it was around this question that the controversy was waged; the defendant insisting that no

excuse whatever existed for the operation. Under such circumstances it would have been most unjust to the witness to refuse him permission to show by the radiograph what directed his judgment. He testified that when operating he found the conditions to be just as the pictures represented. In view of this testimony the objection that they were not taken by a professional comes to nothing.

The sixth assignment of error, for the reasons given, cannot be sustained. The remaining assignment complains of the inadequacy of the charge in that it does not sufficiently call the attention of the jury to the evidence on the part of the defendant as to plaintiff's ability to make use of the injured limb—this in connection with the question of compensation. This assignment is without merit. The charge is not only a full and adequate presentation of the evidence, but strictly impartial.

The judgment is affirmed.

(104 Me. 352)

SPRAGUE v. INHABITANTS OF ANDROSCOGGIN COUNTY.

(Supreme Judicial Court of Maine. Sept. 12, 1908.)

1. JURY (§ 35*)—RIGHT TO JURY TRIAL—EFFECT OF RIGHT TO APPEAL.

Chapter 42, p. 86, Laws 1907, providing that a husband who, without lawful excuse, deserts his wife, or neglects to support her when in need, may be fined and imprisoned, and that the proceeds of his labor while in jail estimated as the statute provides shall be paid to his wife, is not unconstitutional on the ground that the respondent is deprived of a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 236-241; Dec. Dig. § 35.*]

2. JURY (§ 35*)—RIGHT TO JURY TRIAL—CONSTITUTIONAL LAW.

The proceeding being a criminal one, the accused convicted by a municipal court has necessarily the same right of appeal under the general statute (Rev. St. c. 133, § 17) that he would have if convicted of any other offense; and, having the right to appeal, he is not deprived of a trial by jury in the appellate court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 236-241; Dec. Dig. § 35.*]

3. REVIEW ON APPEAL.

Inasmuch as this case comes up on report, and the only question argued is that of the constitutionality of the statute, the court does not consider the question whether the form of remedy adopted is appropriate, or could be sustained, if objected to.

(Official.)

4. WORDS AND PHRASES—"MAGISTRATE."

The word "magistrate," as used in Rev. St. c. 133, § 17, providing for appeals from the decisions or sentences of magistrates, includes judges of municipal courts as well as trial justices.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4271-4273.]

Report from Supreme Judicial Court, Androscoggin County.

Action by Lizzie M. Sprague against the

Inhabitants of the County of Androscoggin. Case reported. Judgment for plaintiff.

Action to recover money alleged to be due the plaintiff by virtue of the provisions of chapter 42, p. 36, Pub. Laws 1907. Plea, the general issue.

When this action came on for trial, an agreed statement of facts was filed, and the case was then reported to the law court for determination, with the stipulation "that, if judgment is for the plaintiff, the defendant is to be defaulted in the sum of \$12 with full costs."

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, PEABODY, and BIRD, JJ.

Harry Manser, for plaintiff. McGillicuddy & Morey, for defendant.

SAVAGE, J. Action to recover money alleged to be due the plaintiff by virtue of the provisions of chapter 42, p. 36, Pub. Laws 1907. The case comes up upon an agreed statement of facts, and the defendant makes no objection to the present form of proceeding. Hence we do not consider whether it is the proper form or not. The only question raised in argument is the constitutionality of the statute above referred to, and that question we will decide.

The statute provides, in substance, that if a husband, without lawful excuse, deserts his wife in destitute or necessitous circumstances, or if, being able by means of his property or labor to provide for her necessary support, he willfully neglects or refuses so to do when she is in destitute or necessitous circumstances, he shall be deemed guilty of a misdemeanor, and may be fined or imprisoned or both; that the court may direct that a fine imposed shall be paid wholly or in part to the wife; that, in lieu of punishment, or in addition thereto, the court may order the payment of weekly sums to the wife for one year, and release the husband from custody on his entering into a recognizance conditioned for his personal appearance whenever ordered to do so within the year, and for his compliance with the order of payment; that when the husband is sentenced to hard labor, and is actually employed in such labor in the county jail, the jailer shall each week certify to the county commissioners the number of days the prisoner has been thus employed, and that the county commissioners shall thereupon draw their order for a sum equal to fifty cents for each day's labor, and the county treasurer shall pay the same to the wife. It is further provided that the fines and penalties named in the act may be recovered and enforced by complaint or indictment. Municipal courts are given jurisdiction of such complaints.

In this case the complaint originated in the Auburn municipal court. The husband was

convicted and sentenced to hard labor in the jail in Androscoggin county and labored 24 days. All the necessary statutory steps to establish the plaintiff's right to the money sued for have been taken or waived.

The principal, if not the only, ground upon which the constitutionality of the act is questioned by counsel, is that the husband complained against is deprived of the right of a trial by jury because he has no right of appeal. *Cotton v. Cotton*, 103 Me. 210, 68 Atl. 824, is cited as authority for this position. That case arose under chapter 123, p. 130, § 6, Pub. Laws 1905, under the provisions of which a husband of sufficient ability who willfully and without reasonable cause neglects or refuses to support his wife may, by a civil proceeding, be compelled to contribute to her support. In such cases the Supreme Judicial Court, the superior courts, the probate courts, and municipal courts have concurrent jurisdiction. In *Cotton v. Cotton*, it was held, for reasons not necessary to be repeated, that such a proceeding commenced in a municipal court is not appealable.

That, however, is not this case. The statute under which these proceedings arose is a criminal statute. It creates an offense. It provides for a criminal proceeding. It is not a substitute for the statute under which *Cotton v. Cotton* arose, but is additional to it. It provides another and sharper method of enforcing the duties of husbands to necessitous wives.

The proceeding being a criminal one, the accused convicted by a municipal court has necessarily the same right of appeal under the general statute (Rev. St. c. 133, § 17) that he would have if convicted of any other offense. Within the meaning of this section relating to appeals the term "magistrate" includes judges of municipal courts as well as trial justices. See same chapter, sections 2, 3, 4, 5, and 6. See, also, the act creating the Auburn municipal court, respecting the right of appeal. *Priv. & Sp. Laws* 1891, p. 254, c. 152, § 12. The right of appeal appertains to all criminal proceedings within the jurisdiction of municipal courts.

It is too well settled to require discussion that one put on trial in a municipal court for an offense within its jurisdiction is not unconstitutionally deprived of his right to a trial by jury when he is freely allowed an appeal to a court where a jury trial can be had. *Johnson's Case*, 1 Me. 230; *State v. Gurney*, 37 Me. 156, 58 Am. Dec. 782; *State v. Craig*, 80 Me. 85, 13 Atl. 129.

The counsel for the defendant also discusses the policy of the statute, but with that we have nothing to do.

To enact that a husband who, without lawful excuse, deserts his wife or neglects to support her when in need, may be fined and imprisoned, and that the proceeds of his labor while in jail, estimated as provided in

this statute shall be paid to his wife, does not transcend in any respect our conception of constitutional legislative power.

Judgment for the plaintiff for \$12.

(104 Me. 394)

STATE v. LAMBERT.

(Supreme Judicial Court of Maine. Nov. 4, 1908.)

1. CRIMINAL LAW (§ 351*)—EVIDENCE—ADMISSIBILITY—CONSCIOUSNESS OF GUILT.

The fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself. But it is for the jury to determine what weight and value should be given to such evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785; Dec. Dig. § 351.*]

2. CRIMINAL LAW (§ 351*)—EVIDENCE—ADMISSIBILITY—CONSCIOUSNESS OF GUILT.

The defendant was indicted for larceny, and at the trial the arresting officer testified that the defendant had a loaded revolver in his overcoat pocket when arrested. *Held*, that the evidence was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 780, 786; Dec. Dig. § 351.*]

3. WITNESSES (§§ 344, 355, 361*)—CRIMINAL LAW (§ 1169*)—REPUTATION OF ACCUSED—SPECIFIC INSTANCES.

The defendant, when on trial for larceny, called as a witness a resident of Portland, who testified that he had known the defendant for five years, and that he had seen him quite frequently and had numerous business dealings with him. There was no evidence that the defendant had ever resided in Portland, nor that the witness had ever resided in a community where the defendant had resided. The defendant's counsel asked the witness if he knew the defendant's "reputation for honesty in that community." The question was excluded. The witness further testified, however, that in his dealings with the defendant he had found him "honest and reliable," but that he had never heard his reputation discussed or referred to.

Held: (1) That it was not indispensable that the witness to the defendant's reputation should have resided in the same community with the defendant.

(2) That the defendant's reputation for honesty was not regularly provable by personal knowledge of the witness derived from specific instances in his dealings with the defendant.

(3) That the ruling allowing the witness to state that he "found him honest and reliable" was more favorable to the defendant than he was entitled to.

(4) That the defendant was not aggrieved by the ruling excluding the question relating to the defendant's "reputation for honesty in that community."

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1125, 1154, 1171; Dec. Dig. §§ 344, 355, 361;* Criminal Law, Dec. Dig. § 1169.*]

4. CRIMINAL LAW (§ 762*)—TRIAL—EXPRESSION OF OPINION BY COURT ON FACTS.

The defendant excepted to an alleged expression of opinion by the presiding justice upon issues of fact in contravention of Rev. St. c. 84, § 97. *Held*, that a careful examination of all the defendant's exceptions relating to the comments of the presiding justice upon the testimony, and the conduct and appearance of wit-

nesses, and the language in which the instructions were given in the charge to the jury, fails to disclose any exceptionable infringement of the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

(Official.)

Exceptions from Superior Court, Cumberland County.

Thomas L. Lambert was convicted of larceny, and he excepts. Exceptions overruled.

The defendant was indicted for the larceny of "one horse of the value of \$200, one wagon of the value of \$100, and one harness of the value of \$10."

Tried at the January term, 1908, superior court, Cumberland county. The jury found the defendant guilty. The defendant excepted to several rulings made by the presiding justice during the trial, and also excepted to an alleged expression of opinion by the presiding justice. It appears from the bill of exceptions that "the notes of the official stenographer taken at the trial of this indictment were lost in the fire which destroyed City Hall (Portland) on January 24, 1908, so that it is impossible to make exact quotations either from the evidence or the charge."

The case is stated in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, PEABODY, SPEAR, and BIRD, JJ.

Joseph E. F. Connolly, Co. Atty., for the State. John B. Kehoe, for defendant.

WHITEHOUSE, J. At the January term, 1908, of the superior court of Cumberland county, the defendant was found guilty by the jury of the larceny of a horse, wagon, and harness, the property of George A. Lufkin, on the evening of Sunday, September 15, 1907. The case comes to the law court on exceptions to the rulings of the presiding judge admitting and excluding certain evidence during the progress of the trial, and to the alleged expression of opinion by the presiding judge upon issues of fact, in contravention of section 97 of chapter 84 of the Revised Statutes.

Eugene Groves, who was indicted at the same term as an accomplice and pleaded guilty to the charge, appeared as a witness for the state, and testified that the defendant came to his house with a team Saturday evening September 14th, and remained there overnight; that the next evening, at the defendant's request, he rode with him to Walnut Hill Church, and saw the defendant Lambert drive away from the horse sheds back of the church with the Lufkin team; that thereupon they drove along the road some distance, Lambert driving the Lufkin team and Groves driving the other; that Lambert then stopped and gave him \$2 and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a pint of whisky, and told him to go home, and that Lambert then drove off with the Lufkin team.

Other witnesses testified for the state that they met these two men riding together in the same team that day towards Falmouth corner. One witness testified that he met them riding in separate teams on the road from Walnut Hill Church; that he identified the Lufkin horse on the road that day, and recognized Lambert as the driver of it.

The defendant testified, *inter alia*, that his residence at that time was in Tyngsboro, Mass., and that his business was buying and selling goods, including horses. He admitted that he was with Groves on the day of the larceny, and that in the afternoon they drove in a "roundabout way" to the electric cars at Falmouth Foreside, where they separated, and that he, the defendant, then went on to Portland by the electric cars, and left for Boston on the steam cars, arriving there between 9 and 10 o'clock. No part of the Lufkin team was afterwards found.

1. At the trial, Deputy Sheriff Foley testified that he arrested the defendant on an electric car coming from Yarmouth to Portland October 3, 1907. The county attorney inquired if the defendant was armed at the time of the arrest. The defendant's counsel objected to the question, but before the court could rule upon it, the witness promptly answered that the defendant was armed with a revolver. The court denied the request of the defendant's attorney to have the testimony stricken out, and the witness testified further as to the details of the arrest, and stated the defendant had the revolver in his right-hand overcoat pocket, and that it was loaded.

The defendant admitted in cross-examination that he was coming from Groves' house at the time of the arrest, and had then learned from Groves' wife, for the first time, that Groves was under arrest, but she did not know upon what charge.

Upon this state of facts, it is the opinion of the court that there was no error on the part of the presiding judge in declining to strike out the testimony. The defendant had just been informed that his accomplice was under arrest. There was no apparent occasion for any legitimate use of the revolver by the defendant that day, and, if it was not loaded and carried for the purpose of aiding him to escape by intimidating any officer who might recognize him and attempt to arrest him, the defendant had full opportunity to explain for what purpose he did have it. "It is to-day universally conceded," says Mr. Wigmore, "that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." 1 Wigmore on Ev. § 276; State v. Frederic, 69 Me. 400. The pos-

session of tools suitable for effecting an escape is also deemed an incriminating fact which may go to the jury. State v. Duncan, 116 Mo. 288, 22 S. W. 699; Clark v. Com. (Ky.) 32 S. W. 131; State v. Palmer, 65 N. H. 216, 20 Atl. 6. And evidence that the defendant had a revolver under his pillow when arrested, and that he resisted arrest, was held admissible in People v. Burns, 67 Mich. 537, 35 N. W. 154. So, in a prosecution for picking a pocket, it is competent to show that the accused when arrested had a billy on his person. People v. Machen, 101 Mich. 400, 59 N. W. 664.

In the case at bar it was for the jury to estimate what weight and value should be given to the evidence excepted to as an indication of the conscious guilt of the defendant.

2. The defendant called a witness by the name of Jordan, a resident of Portland, who testified that he had known the defendant for five years, and that he had seen him quite frequently and had numerous business dealings with him. There was no testimony that the defendant had ever lived in Portland, nor that Jordan had ever lived in a community where the defendant had resided. The witness was asked by defendant's counsel if he knew the defendant's "reputation for honesty in that community," and the question was excluded by the court. The witness further testified, however, that in his dealings with the defendant he had found him "honest and reliable," but that he had never heard his reputation in any community discussed or referred to. The defendant called another witness who offered to testify to substantially the same facts under the same conditions, and his testimony as to the defendant's "reputation for honesty in that community" was also excluded, and exceptions were taken in each instance.

It was not indispensable that the witnesses to his reputation should have resided in the same community with the defendant. His general reputation as to honesty may have been better established and more definitely understood in the community where the witnesses lived and where they had had "numerous business dealings with him." "In the conditions of life to-day, especially in large cities, a man may have one reputation in the suburb of his residence and another in the commercial or industrial circles of his place of work. * * * There may be distinct circles of persons, each circle having no relation to the other, and yet each having a reputation based on constant and personal observation of the man. There is no reason why the law should not recognize this. The traditional phrase about 'neighborhood' reputation was appropriate to the conditions of the time; but it should not be taken as imposing arbitrary limitations not appropriate in other times. *Alla tempora, alii mores.*" 2 Wigmore on Evidence, § 1616, and cases cited. "The rules of evidence," said Lord

Ellenborough, "must expand according to the exigencies of society." *Pritt v. Fairclough*, 3 Camp. 305.

In the case at bar the witness Jordan was allowed to testify that "in his dealings with the respondent he had found him honest and reliable, but that he had never heard his reputation in any community discussed or referred to." So far as this last statement implies that the witness had not had sufficient opportunity to learn what the defendant's reputation was, he would not be qualified to testify as to reputation. But if, from long acquaintance and "numerous business dealings" with him, he had had opportunities for learning about his reputation, the fact that he had never heard it "discussed or referred to" would be cogent evidence that it was good. It is accordingly a rule of evidence that a witness to good reputation may testify that he has never heard anything said against the person. 2 Wigmore on Ev. § 1614. But since the defendant's reputation for honesty was not regularly provable by personal knowledge of the witness derived from specific instances in his dealings with the defendant, the ruling which allowed the witness to state that he "found him honest and reliable" was more favorable to the defendant than he was entitled to. If, therefore, it be assumed that the witness was qualified to state what the general reputation of the defendant was in that community, the defendant was not aggrieved by the refusal of the presiding judge to permit him to answer the question, and there was no exceptionable error.

3. A careful examination of all of the defendant's exceptions relating to the comments of the presiding judge upon the testimony and the conduct and appearance of witnesses, and the language in which the instructions were given in his charge to the jury, fails to disclose any exceptionable infringement of the statute in that respect. In *McLellan v. Wheeler*, 70 Me. 285, the court said: "The statute does not go so far as to prohibit the presiding judge from stating to the jury the questions which they are called upon to determine. * * * If the judge is of such a happy temperament as to be indifferent whether the cases tried before him are decided rightly or wrongly, or not at all, the statute will justify him in omitting such statement. But it does not prohibit it. * * * Neither is the utterance of a mere truism, or of a matter of common experience which nobody would think of disputing, however it might bear upon the issue, an infringement of the statute prohibition. * * * It does not follow that the judge has expressed an opinion upon the issue because his opinion may be inferred from some allusion which he may make to some obvious and indisputable fact." See, also, *State v. Day*, 79 Me. 120, 8 Atl. 544; *York v. R. R. Co.*, 84 Me. 117, 24

Atl. 790, 18 L. R. A. 60; *Hamlin v. Treat*, 87 Me. 310, 32 Atl. 909; *Jameson v. Weld*, 93 Me. 345, 45 Atl. 299.

Furthermore, in the case at bar, in order that nothing in the conduct of the trial or the charge to the jury should be construed as an expression of opinion upon the question of the defendant's guilt, the presiding judge made the following observations at the close of the charge: "The presiding justice has no right, and in this case no intention, to express any opinion as to the guilt or innocence of the respondent, or the effect or weight to be given to any evidence in the case; and that the jury, if they thought they detected any such expression of opinion, were to entirely disregard it, and, so far as their verdict was concerned, rely entirely upon their own independent judgment as to the weight and effect to be given to the testimony as a whole."

Exceptions overruled.

(104 Me. 414)

STATE v. HOLLAND.

(Supreme Judicial Court of Maine. Nov. 5, 1908.)

1. CRIMINAL LAW (§ 1149*) — MOTION TO QUASH INDICTMENT—EXCEPTIONS.

A motion to quash an indictment or complaint is addressed to the discretion of the court, and, if overruled, no exceptions can be allowed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3042; Dec. Dig. § 1149.*]

2. CRIMINAL LAW (§ 286*)—PLEA IN BAR.

The court has no occasion or duty to rule upon a plea in bar in a criminal case until it is traversed or demurred to.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 286.*]

(Official.)

Exceptions from Superior Court, Cumberland County.

William A. Holland was indicted for maintaining a liquor nuisance. Motion to quash the indictment overruled, and defendant excepts. Dismissed.

The defendant was indicted at the January term, 1908, superior court, Cumberland county, for maintaining a liquor nuisance. He then filed the following motion to quash the indictment: "And now the said William A. Holland, respondent in said case, comes and moves that the said indictment be quashed for the following reasons, to wit: Because an indictment for a liquor nuisance was found against him on the first Tuesday of May, A. D. 1904, that it was a valid indictment, the court has jurisdiction of the offense, the jury was impaneled, and the defendant placed on trial, and was then and there in jeopardy. After a hearing on the said indictment the jury disagreed, and at the September term of the superior court, A. D. 1904, said indictment was nol. pros'd. by the state. A copy of said indictment is hereto annexed and made a part of this mo-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion. (Omitted in this report.) Reference is hereby made to the records of this court in case No. 229 on this docket for the year A. D. 1904. The defendant further says that the present indictment covers a period from the first day of October, A. D. 1903, covering several months of the period covered by the prior indictment of 1904. He says the offense in the prior indictment was the same as the offense alleged in the present indictment, but that the period covered by the last indictment extends from October 1, 1903, to the first Tuesday of January, A. D. 1908. Defendant says that under the provisions of our Constitution he cannot again be placed in jeopardy for the same cause. Wherefore the defendant asks that said indictment be quashed." The motion was overruled, and the defendant excepted.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, PEABODY, SPEAR, and BIRD, JJ.

Joseph E. F. Connolly, Co. Atty., for the State. Dennis A. Meaher, for defendant.

EMERY, C. J. The defendant was indicted for maintaining a liquor nuisance. He filed a motion to quash the indictment because of a former jeopardy. The facts relied upon to show the former jeopardy were set out in the written motion, which concluded with the prayer "that said indictment be quashed." The court overruled the motion, and the defendant excepted.

A motion to quash an indictment for any reason is addressed to the discretion of the court, and exceptions do not lie to the overruling such a motion, since the defense stated therein may be made by plea, demurrer, or motion in arrest of judgment. *State v. Stuart*, 23 Me. 111; *State v. Hurley*, 54 Me. 562.

If the motion filed in this case was intended for, or could be regarded, as a plea in bar, there was no question presented for the court to rule upon, since there was no demurrer to nor traverse of the plea. If a plea, the court had no occasion to rule upon its sufficiency until demurred to, nor to question its truth until traversed. The exceptions must be dismissed, and the defendant left to interpose his defense by plea or demurrer.

Exceptions dismissed.

(104 Me. 331)

STATE v. HOLLAND.

(Supreme Judicial Court of Maine. Nov. 3, 1908.)

1. INTOXICATING LIQUORS (§ 248*)—KEEPING FOR ILLEGAL SALE—COMPLAINT—DUPLICITY.

A complaint for keeping and depositing intoxicating liquors intended for unlawful sale, in which it is alleged that they had been first seized by the complainant without a warrant, and in which there is the further averment re-

specting the complainant, "being then and there an officer, to wit, a deputy sheriff, within and for said county, duly qualified and authorized by law to seize intoxicating liquors kept and deposited for unlawful sale and the vessels containing them, by virtue of a warrant therefor issued in conformity with the provisions of law," is not bad for duplicity or uncertainty. This language is not descriptive of the offense. It is merely the necessary averment of the officer's authority to seize without a warrant.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 368-374; Dec. Dig. § 248.*]

2. CRIMINAL LAW (§ 974*)—MOTION IN ARREST OF JUDGMENT—IMPOSSIBLE DATE IN COMPLAINT.

A motion for arrest of judgment on the ground that the alleged date, namely, the year, of the commission of the offense, is an impossible date, will not be sustained, when upon an examination of the certified copies furnished to the law court it appears that the date should be read either as "1908" or "1980," but it is not made to appear which is correct, as when some of the copies may properly be read "1908" and others "1980." It is incumbent upon the defendant to make it appear to the court that the date was "1980," and not "1908," which he has failed to do.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 974.*]
(Official.)

Exceptions from Superior Court, Cumberland County.

William A. Holland was convicted of an unlawful sale of intoxicating liquors. Motion in arrest of judgment overruled, and defendant excepts. Exceptions overruled.

Complaint against the defendant for keeping and depositing intoxicating liquors intended for unlawful sale, and on which a warrant was issued by the Portland municipal court. The defendant was adjudged guilty by the said municipal court, and thereupon he appealed to the superior court. On trial in the superior court he was found guilty by the jury.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, PEABODY, SPEAR, and BIRD, JJ.

J. E. F. Connolly, Co. Atty., for the State. Dennis A. Meaher, for defendant.

SAVAGE, J. Motion in arrest of judgment. The defendant was convicted upon a complaint for keeping and depositing intoxicating liquors intended for unlawful sale in this state. He then filed this motion, which was overruled, and he excepted. The motion sets out two grounds for arrest:

1. It is contended that the complaint is double, ambiguous, and indefinite, in that it is based upon two inconsistent situations and upon two differing statutes. The defendant claims that the complaint contains the necessary allegations for obtaining a warrant for a search and seizure of intoxicating liquors, under Rev. St. c. 29, § 49, and likewise the allegations necessary for obtaining a warrant for the seizure of liquors already

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

taken without a warrant, under section 48 of the same chapter. As to this ground, it is only necessary to say that the defendant has misinterpreted the language in the complaint. Rev. St. c. 29, § 48, provides that "in all cases where an officer may seize intoxicating liquors, or the vessels containing them, upon a warrant, he may seize the same without a warrant, and keep them in some safe place for a reasonable time until he can procure such warrant." This is sometimes called, perhaps not with strict accuracy, a "seizure" warrant, in distinction from a "search and seizure" warrant. Such was the warrant in this case. In order to obtain such a warrant, it was necessary for the officer, after seizing the liquors without a warrant, to make complaint setting out that he had already seized and was holding the liquors, and also in apt terms that he was, when he seized the liquors, an officer authorized by law to seize, upon a warrant, liquors intended for unlawful sale. Such an officer only can obtain a "seizure" warrant, and his authority must be alleged. The language which the defendant now complains of as one of two inconsistent descriptions of the offense is in these words, namely, "being then and there an officer, to wit, a deputy sheriff, within and for said county, duly qualified and authorized by law to seize intoxicating liquors kept and deposited for unlawful sale and the vessels containing them, by virtue of a warrant therefor issued in conformity with the provisions of law." This is not descriptive of the offense. It is merely the averment of the officer's authority. Having alleged his authority, the complainant then proceeded to allege that he had found and seized the liquors, and he prayed for a warrant. So far the complaint appears to be in proper form.

2. The other alleged ground for arresting judgment is that the allegation of the time of the seizure is an impossible date, or, to use the language of the motion, "that the officer says he seized the liquors by virtue of a warrant therefor on the fourth day of January, A. D. 198." This is not an accurate statement. There is no allegation that the liquors were seized "by virtue of a warrant." But passing that, it is not correct to say that the complaint alleges the seizure to have been "on the fourth day of January, A. D. 198." What the actual date written was, the court, of course, must determine, if it can, by inspection. We have inspected the certified copies which were evidently intended to be fac simile copies of the original, but we find that they are not alike. The complaint made January 6, 1908, sets out that the defendant unlawfully kept and deposited the liquors "on the fourth day of January in said year." And the time of the seizure is alleged as "on the fourth day of January, A. D." Then the year appears in

four figures, first "19," and then an "8" written upon and partly above an "0," or an "0" written upon and partly beneath an "8." But the "0" and the "8" are not in the same perpendicular line. In some of the copies the "8" appears to be a little to the left of the center line of the "0," and in others a little to the right.

Though the complaint in this respect was bunglingly made, we think it would be putting too fine a point upon it to say that we cannot tell by inspection that this was written and should be read not as "198," but either as "1908" or as "1980," according to the relative positions of the "8" and "0." But which? If "1908," the complaint was good. If "1980," it was bad. It is doubtless true that the writer intended to write "1908." But that does not help the case. We cannot rewrite it. We must take it as written. And that is uncertain. The defendant has not clearly shown to us how it was written, or, at any rate, that it was written "1980." For the purposes of this case, we do not place any stress upon the fact that defendant in his motion described the date as "198" instead of "1980." But we think that it was incumbent upon him, in support of his exceptions, to show that the date was "1980" instead of "1908," and that he has failed to do. It therefore has not been shown that the date was impossible as alleged.

Exceptions overruled.

Judgment for the state.

(21 Conn. 707)

ROBINSON v. NATIONAL FRATERNAL LEAGUE OF NEW HAVEN.

(Supreme Court of Errors of Connecticut.

March 3, 1909.)

1. INSURANCE (§ 807*) — MUTUAL BENEFIT CERTIFICATE — STIPULATION FOR ARBITRATION—CONSTRUCTION.

A stipulation, in a benefit certificate providing for weekly benefits, that on disagreement "as to the amount payable on account of any valid claim" the amount should be determined by arbitration, requires the submission to arbitration of the question of the amount of a valid claim in case of a disagreement, but not where the validity of the claim is disputed, and in such case a holder of a certificate may sue thereon without submitting the issues to arbitration.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 807.*]

2. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR—STRIKING OUT PLEADINGS.

Where, in an action on a benefit certificate stipulating for weekly benefits, the complaint alleged performance of all the conditions required of the holder to entitle him to the benefits, the striking out of a defense describing one of the conditions of the certificate, which it was claimed that the holder violated, without prejudicing the right of the association to prove the alleged facts, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110, 4111; Dec. Dig. § 1042.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, Fairfield County; Silas A. Robinson, Judge.

Action by Thornton H. Robinson against the National Fraternal League of New Haven. There was a judgment for plaintiff for \$1,235.33 rendered after the overruling of a demurrer to the complaint and striking out a defense of the answer, and defendant appeals. Affirmed.

Richard H. Tyner, for appellant. Carl Foster, for appellee.

HALL, J. The complaint, dated the 31st of August, 1904, alleges that by the terms of his certificate of membership in the defendant's association, made a part of the complaint, the plaintiff, by reason of bodily injuries sustained in a railroad accident on the 31st of March, 1903, which wholly disabled him from transacting any business, and of which the defendant had due notice, became, on the 1st of April, 1904, entitled to receive \$25 a week for the 52 weeks between March 31, 1903, and April 1, 1904, less the sum of \$300 alleged to have been paid by the defendant to the plaintiff, and that the defendant has refused to pay the sum of \$1,000 still remaining due, and has denied any liability to the plaintiff under said certificate. The defendant demurred to the complaint upon the grounds, in substance, that it was not alleged that before the commencement of this suit the plaintiff had requested the defendant to arbitrate said claim, and that the defendant had declined to submit it to arbitration. The court having overruled this demurrer, the defendant afterwards pleaded the failure of the plaintiff to offer to submit his said claim to arbitration, as one of his special defenses.

The principal questions of law raised by the appeal are based upon the action of the court in overruling said demurrer, and in deciding that the failure of the plaintiff to submit his claim to arbitration do not constitute sufficient defenses to this action. The provisions of the section of the certificate of insurance, material to these questions, are the following:

"7. In the event of a disagreement as to the amount payable on account of any valid claim made under this certificate, it is expressly understood and agreed that said amount shall be determined by arbitration. * * * No legal proceedings for recovery under this certificate shall be brought until ninety days after the receipt of affirmative and positive proof of loss by the league at its home office, nor be brought at all unless the league shall have declined to arbitrate having been requested to do so in writing; and the league shall not be liable in any legal proceedings whatever unless the same are actually begun within one year from the date of said proof."

The trial court did not err in overruling the demurrer, and in holding that under the terms of the certificate the plaintiff was not

required to offer to submit his claim to arbitration before commencing this action. Not only the amount justly payable upon a confessedly valid claim, but the legality of the entire claim presented, are clearly questions upon which there might be a disagreement between the defendant league and a certificate holder. Twenty-five dollars a week, for 52 weeks, is a maximum payment for a maximum period, when the certificate holder is wholly disabled. There might be a dispute between the insured and the league, as to whether his valid claim was not for a less sum and for a shorter period than such maximum sum and period. There might also be a question whether a certificate holder, however seriously injured, had so complied with the conditions and requirements of his application and certificate of insurance as to entitle him to any indemnity.

In this case, by numerous separate defenses and a counterclaim, the defendant contends that it is under no liability whatever to the plaintiff. It denies that the plaintiff was a member of the league in good standing, that he was injured in the railroad accident, that he gave the required notice to the defendant, and that he has paid his dues. It alleges that the plaintiff failed to comply with several named conditions of the certificate of insurance; that the plaintiff falsely and fraudulently pretended that he was suffering from the alleged injuries; and by its counterclaim asks for \$500 damages on account of the plaintiff's fraudulent acts. The issues thus framed do not present questions which by the terms of the certificate of insurance were required to be submitted to arbitration. Only the question of the amount of a valid claim, and not the existence of a claim, the validity of which was disputed, was to be submitted to arbitration by section 7 of the certificate. The former is generally a question of fact, which generally may more properly be submitted to arbitration than the latter, which is usually one of law. The trial court rightly construed the language of the section in question as not requiring the plaintiff, upon the facts found, to offer to submit his claim to arbitration before commencing this action. *Fricke v. United States Indemnity Society*, 78 Conn. 188, 191, 61 Atl. 481.

There was no harmful error in striking out the second defense, which described one of the conditions of the certificate of insurance which the defendant claimed had been violated. The facts were not correctly pleaded as a special defense; but could properly have been alleged as specifying a claimed breach of a condition of the certificate, all the conditions of which the plaintiff had alleged he had performed. *Hennessey v. Metropolitan Life Ins. Co.*, 74 Conn. 690, 702, 52 Atl. 490. The ground upon which the allegations were stricken out in no way prejudiced the defendant's right to prove the alleged facts. The 150 pages of evidence unnecessarily printed in the record in support of a motion

to correct the finding only serve to show that there was a conflict of evidence upon the material facts of the case, the decision of the trial court upon which was final.

There is no error. The other Judges concur.

POPKE v. NEW YORK, N. H. & H. R. CO.
(Supreme Court of Errors of Connecticut.
March 4, 1909.)

1. RAILROADS (§ 346*)—ACCIDENT AT CROSSING—EVIDENCE.

In an action for the negligent death of a traveler struck by a train at a crossing, plaintiff must show prima facie that decedent exercised due care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1121, 1122; Dec. Dig. § 346.*]

2. RAILROADS (§ 329*)—INJURIES TO TRAVELERS AT CROSSING—CONTRIBUTORY NEGLIGENCE.

A traveler was killed by a train at a crossing. Witnesses testified that they saw decedent approach the crossing; that they called to him to look out; that he drove straight along; that the train was in plain sight; that decedent did not see the train until it was almost on him. The crossing was an exceptionally dangerous one, and no warnings had been furnished for it. Decedent was familiar with the surroundings. He was very deaf. *Held*, that decedent was, as a matter of law, guilty of negligence, precluding a recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1026; Dec. Dig. § 329.*]

Appeal from Superior Court, Fairfield County; William S. Case, Judge.

Action by William D. Popke, administrator of G. William Walter, deceased, against the New York, New Haven & Hartford Railroad Company. From a judgment refusing to set aside a nonsuit, plaintiff appeals. Affirmed.

J. Moss Ives and John R. Booth, for appellant. Joseph F. Berry, for appellee.

HALL, J. The plaintiff's intestate, G. William Walter, was, on the 29th of December, 1907, between 5 and 6 o'clock in the afternoon, struck and fatally injured by the defendant's train, on its Highland Division, at the Maple avenue grade crossing in the city of Danbury.

The complaint alleges that without fault or negligence upon the part of the deceased the injury was caused by the neglect of the defendant to maintain gates or other safeguards at said crossing, which, it is alleged, was extremely dangerous for public travel. The defendant demurred to the complaint upon the ground, in substance, that it did not appear that the Railroad Commissioners had ordered the defendant to provide any such gates or safeguards at said crossing, as were alleged to have been necessary. The court overruled this demurrer. The first defense of the answer denied the alleged negligence of the defendant, and due care of the

deceased. The averments of the second defense, that the Railroad Commissioners had made no order requiring such safeguards to be provided at said crossing as were in the complaint alleged to be necessary, and that the defendant had violated no order or requirement of the Railroad Commissioners regarding safeguards at said crossing, were admitted by plaintiff's reply.

The evidence presented by the plaintiff showed these facts: Maple avenue, running north and south in the city of Danbury, is crossed at grade by the tracks of the defendant's railroad, running easterly and westerly. At the time of the accident there were no gates, flagman, or automatic bell at this crossing, and none had been ordered by the Railroad Commissioners. The Danbury railroad station is a few hundred feet east of said crossing. At between 5 and 6 o'clock of the evening of December 29, 1906, the plaintiff's intestate, G. William Walter, while going southerly on Maple avenue, was struck and killed, at said grade crossing, by a westerly bound train of the defendant. Walter was 69 years old. He was very deaf. He had lived in Danbury 30 years, and was familiar with the Maple avenue crossing. Just before the accident he was seated in his wagon, driving slowly, in a southerly direction, a gentle horse, which he had used for many years. The evening was dark. The only two eyewitnesses of the accident called by the plaintiff testified, in substance, that they had themselves just hurried across the tracks going north in front of the train, which they saw approaching from the east; that after they had crossed they saw Walter quite near the tracks, seated in his wagon, driving pretty slowly toward the crossing; that they called to him to look out, saying that there was a train coming; that he did not appear to heed the warning, but drove straight along; that the train was in plain sight, and one could see the headlight of the engine; that Walters "didn't see the train until it was almost onto him"; that the horse saw the train before Walters did, and was frightened and reared up, and Walters jumped out with the reins in his hands, and the train struck him.

The testimony of these two witnesses, with evidence showing that the Maple avenue crossing was an exceptionally dangerous one, and the admitted facts that no safeguards or warning signals had, at the time of the accident, been either furnished or ordered for this crossing, constitute practically the entire proof presented by the plaintiff of the alleged negligence of the defendant, and the reasonable care exercised by the plaintiff's intestate.

When the plaintiff rested his case, the court granted the defendant's motion for a nonsuit. The plaintiff contends that the only question raised by the appeal from the judg-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment of nonsuit is whether there was sufficient evidence of due care upon the part of the deceased to be submitted to the jury.

The record does not show that that was the question upon which the motion for a nonsuit was decided. Notwithstanding the ruling of the trial court upon the demurrer to the complaint, and the fact that the plaintiff produced considerable evidence of the exceptionally dangerous character of this crossing, it does not appear from the record that the trial court held that the plaintiff had presented prima facie proof of the defendant's alleged negligence. But we do not find it necessary to discuss the question of whether there was sufficient evidence upon the question of the defendant's negligence to go to the jury. It is sufficient to say that the record shows that the plaintiff clearly failed to present evidence from which the jury could have been justified in deciding that the plaintiff had sustained the burden of proving that Walters was in the exercise of due care as alleged. Walters placed himself in a position of danger, and by so doing he was injured. Does the evidence recited fairly indicate, as it should to sustain a prima facie case in favor of the plaintiff, that Walters used the care of a person of ordinary prudence in placing himself in that position? It not only fails to do so, but clearly shows the contrary. The only fair conclusion from the evidence is that Walters, had he made reasonable use of his eyes, would have seen the headlight of the approaching engine in ample time to have escaped injury. For his failure to look, the facts furnish no excuse. He was negligent in failing to make any reasonable use of his senses to avoid injury, and for that reason the trial court properly granted the motion for a nonsuit. *Fay v. Hartford & Springfield Street Ry. Co.*, 81 Conn. 330, 336, 71 Atl. 364.

There is no error. The other Judges concurred.

(81 Conn. 711)

STALKER v. HAYES.

(Supreme Court of Errors of Connecticut.
March 4, 1909.)

1. PAYMENT (§ 59*)—DEFENSE—PLEADING.

Under the express terms of Practice Book 1908, p. 250, § 160, payment must be pleaded to be available as a defense.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 143½; Dec. Dig. § 59.*]

2. CHATTEL MORTGAGES (§ 106*)—CONSTRUCTION—INTENTION OF PARTIES.

In construing an instrument claimed to be a chattel mortgage, it was proper to consider the intent of the parties as disclosed by the writing in the light of the surrounding circumstances in which it was executed.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 102, 109; Dec. Dig. § 106.*]

3. EVIDENCE (§ 462*)—PAROL EVIDENCE—ADMISSIBLE—PURPOSE IN EXECUTING INSTRUMENT.

One's purpose in executing an instrument may be shown by parol evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2134; Dec. Dig. § 462.*]

4. CHATTEL MORTGAGES (§ 255*)—REMEDIES OF MORTGAGEE.

A chattel mortgage debt may be collected by an action at law as well as by foreclosing the mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 517; Dec. Dig. § 255.*]

5. SALES (§ 479*)—CONDITIONAL SALES—REMEDY OF SELLER.

On breach by the buyer under a conditional sale the seller can sue on the debt or reclaim the property.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1418, 1420, 1436; Dec. Dig. § 479.*]

6. CHATTEL MORTGAGES (§ 255*)—TAKING POSSESSION OF GOODS—EFFECT ON RIGHT TO SUE ON MORTGAGE DEBT.

Defendant, being in debt to plaintiff for rent and costs of an action of summary process, executed a chattel mortgage reciting that on default in paying the debt certain goods might be taken by plaintiff. *Held*, that by receiving the goods after suing on the debt plaintiff was not estopped from making further claim on account of the debt.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 517; Dec. Dig. § 255.*]

Appeal from Court of Common Pleas, Hartford County; John Coats, Judge.

Action by Edwina E. Stalker against Eunice Hayes. From a judgment for plaintiff, defendant appeals. Affirmed.

Joseph P. Tuttle, for appellant. J. Gilbert Calhoun and James B. Henry, for appellee.

RORABACK, J. This action is brought to recover rent and costs of an action of summary process. The substance of the material facts appearing in the finding is as follows: On June 3, 1907, the defendant owed the plaintiff for rent and costs of an action of summary process amounting to the sum of \$53.96. The defendant owned and had in her possession the articles named in the following writing: "Hartford, Conn., June 8, 1907. This is to certify that I have received of Edwina E. Stalker at Hartford, Conn., the following goods and chattels, to wit: Five iron double beds complete with mattresses and springs, one Richmond range, one parlor stove, which goods and chattels are to be and remain the property of said Edwina E. Stalker until I shall have fully performed my part of the agreement as hereinafter set forth. I hereby agree to keep said property at my own risk and charge and pay said Edwina E. Stalker for the use thereof the sum of \$58.18 on or before the 1st day of July, 1907, as evidenced by her indorsements on the back of this agreement, when said goods and chattels shall become my property, when all claim to the same by her shall cease and be determined. It is further

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

hereby agreed that said goods and chattels are to be kept by me at my residence, No. 115 Ann street, Hartford, or in some place of storage in said Hartford, the name of which I am to inform said Mrs. Stalker, or before I remove said articles from 115 Ann street, and that I will not remove the same from said places without the consent of said Edwina E. Stalker indorsed on this agreement, nor dispose of the same in any manner; and it is further agreed by me that if I shall make default of any of said payments, or shall fail in any manner to perform this agreement, the said Edwina E. Stalker shall be entitled to the immediate possession of said property, which I hereby promise to deliver to her on demand. In case I shall violate any part of the foregoing agreement, the said lessor, her agent, or assigns may enter upon my premises and take possession of said property, and they and every of them are hereby exonerated from any claim on my part, or on the part of any person in my name or stead for any damages which I might have against them for so doing had this agreement not been made and entered into by me. Eunice M. Hayes. [L. S.] This is to certify that the above-described property has been delivered to the lessee named in the foregoing agreement by the undersigned on the terms and conditions therein specified. Dated at Hartford this 3d day of June, A. D. 1907. Edwina E. Stalker, By Terry J. Chapin, Her Attorney." In response to a demand for security for her indebtedness the defendant signed and delivered to the plaintiff this writing. This written instrument by a mistake stated the amount which the defendant was to pay the plaintiff at \$58.16, instead of \$53.96. On July 1, 1907, upon demand the defendant refused payment. This action was then commenced. A long time after commencing her action the plaintiff took possession of the articles in question.

The trial court, from the surrounding circumstances and the intention of the parties expressed in the writing, found that the contract in effect is a mortgage and intended as security for the debt named therein. The defendant contends that this action of the court was erroneous for reasons which may be briefly stated as follows: The court erred and mistook the law in holding that the writing did not constitute payment of the charges and claims for which the plaintiff brought this action; that the plaintiff was not estopped, by the writing and the receipt of the articles therein mentioned, from making further claim against the defendant on account of said rent or costs in said summary process; that this writing constituted in effect a mortgage upon the articles mentioned therein. The defense of payment claimed to be shown is not indicated by the written instrument. The defendant seeks to

import into this document a condition or contingency of which it furnishes no intimation. There is nothing in the complaint from which payment can be found or inferred. If the defendant wished to avail herself of the defense of payment resulting from the transaction, she should have specially pleaded it. Practice Book 1908, p. 250, § 160.

The plaintiff alleged in her complaint, and the trial court has found, that this writing was given as security for the debt therein described. The court in construing this instrument properly took into consideration the intent of the parties as disclosed by the writing in the light of the surrounding circumstances under which it was executed. The purpose of the party in executing an instrument may be shown by parol evidence. *Lovell v. Hammond Co.*, 66 Conn. 500, 510, 34 Atl. 511; *Williams v. Chadwick*, 74 Conn. 252, 255, 50 Atl. 720; *Post v. Gilbert*, 44 Conn. 9, 18; *Susman v. Whyard*, 149 N. Y. 127, 130, 43 N. E. 413.

For the purposes of this case it is unnecessary to determine whether the writing in question is a mortgage or a conditional sale. If it is a mortgage the plaintiff had an option either to collect her debt by an action at law, or by a proceeding to foreclose the mortgage. 27 Cyc. 1515. Assuming that the contract is a conditional sale, the plaintiff could bring an action for the debt or reclaim the property. The finding shows that an action for the collection of the debt was commenced long before possession was taken of the goods. Receiving the goods after the commencement of this action did not estop the plaintiff from making further claim on account of the indebtedness in question. *Robinson's Appeal from Commissioners*, 63 Conn. 290, 297, 28 Atl. 40; *Crompton v. Beach*, 62 Conn. 25, 35, 25 Atl. 446, 18 L. R. A. 187, 36 Am. St. Rep. 323; *Bailey v. Hervey*, 135 Mass. 172, 174; *Herryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160.

There is no error. The other Judges concur.

(31 Conn. 702)

THOMAS et al. v. YOUNG.

(Supreme Court of Errors of Connecticut.
March 3, 1909.)

1. PLEADING (§ 248*)—AMENDMENT—CHANGE OF CAUSE OF ACTION.

Where, in an action to recover possession of land and damages, the original plaintiffs were the heirs at law, the widow, and the administrator of the deceased owner of the land, the court properly permitted the administrator to withdraw, and the remaining plaintiffs to file a substitute complaint alleging that the ownership of the premises and the right of possession was in them, and that they had been dispossessed by defendant; such amendment not introducing a new cause of action.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 248.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. LANDLORD AND TENANT (§ 62*)—ESTOPPEL TO DENY LANDLORD'S TITLE.

In an action by the widow and heirs at law of a decedent to recover possession of land, a lease executed by plaintiffs to defendant was admissible as an estoppel, though plaintiffs alleged that on a date subsequent to the termination of the lease they possessed the premises, and were on such date dispossessed by defendant, since the operation of the estoppel did not cease with the termination of the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 163; Dec. Dig. § 62.*]

3. LANDLORD AND TENANT (§ 63*) — LANDLORD'S TITLE—ESTOPPEL.

In ejectment, a notice served on plaintiffs by defendant, purporting to notify them that defendant surrendered to them all right, title, or possession that he ever received, if any, to the premises, and also that he disclaimed having entered into possession under certain leases executed by plaintiffs, and renounced any tenancy under them, was ineffective to relieve defendant from the operation of the estoppel created by the leases, and put him in a position to question plaintiffs' title; it being incumbent on defendant to surrender possession before he could question the title.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 161; Dec. Dig. § 63.*]

4. LANDLORD AND TENANT (§ 62*)—LANDLORD'S TITLE—ESTOPPEL.

The rule that in ejectment by a landlord against a tenant the latter must surrender possession before he can question plaintiff's title is as applicable when the lease is given to one already in possession as where the lessee is one who is admitted to possession.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 154; Dec. Dig. § 62.*]

5. LANDLORD AND TENANT (§ 66*)—ESTOPPEL TO DENY LANDLORD'S TITLE—EFFECT OF DISCLAIMER—ADVERSE POSSESSION.

A disclaimer by a lessee does not afford him the right of thereafter asserting a title adverse to the lessor until the statutory period for the perfection of title by adverse possession expires.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 204; Dec. Dig. § 66.*]

6. LANDLORD AND TENANT (§ 62*)—EJECTMENT—ESTOPPEL TO QUESTION LANDLORD'S TITLE.

In ejectment by a landlord, defendant cannot assert that the one from whom plaintiff received his title never had title to the premises, never occupied the same, and never claimed ownership, since such assertion is in derogation of the estoppel created by the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 156; Dec. Dig. § 62.*]

7. LANDLORD AND TENANT (§ 62*)—ESTOPPEL TO DENY LANDLORD'S TITLE—VALIDITY OF LEASE.

Where the acceptance of a lease is induced by the fraud or false representations of the lessor, the lessee is not estopped to question the lessor's title.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 153; Dec. Dig. § 62.*]

8. LANDLORD AND TENANT (§ 62*)—ESTOPPEL TO DENY LANDLORD'S TITLE—VALIDITY OF LEASE.

Where, in ejectment by a landlord against a tenant, defendant failed to show that a lease under which an estoppel to question plaintiff's title arose was not voluntarily executed, that a prior lease giving defendant an option for re-

newal was fraudulently obtained from him was immaterial.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 153; Dec. Dig. § 62.*]

9. EVIDENCE (§ 155*)—PART OF CONVERSATION—SHOWING ENTIRE CONVERSATION.

All that two parties say at a single interview on whatever subject is not rendered admissible for the simple reason that what is said on some one or more subjects is testified to.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 455; Dec. Dig. § 155.*]

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action by William P. Thomas, administrator, and others, against John H. Young, to recover possession of land and damages. Judgment for plaintiffs, and defendant appeals. No error.

This case was formerly before this court. 79 Conn. 493, 65 Atl. 955. The facts out of which it arises are sufficiently stated there. After it had, as the result of the decision then rendered, been returned to the trial court, leave was asked, and, against the objection of the defendant, granted for the plaintiff Thomas, administrator, to withdraw, and for the remaining plaintiffs to file a substitute complaint alleging that the ownership of the premises and the right of possession thereof was in them, and that they had been dispossessed by the defendant. Upon the trial the plaintiffs supported their allegation of title by the introduction of the lease of March 1, 1901, and presented no other testimony upon that point.

William B. Stoddard and George E. Hall, for appellant. Edward A. Harriman, for appellees.

PRENTICE, J. (after stating the facts as above). The defendant complains of the action of the court in permitting the substitute complaint to be filed. The contention is that the plaintiffs were thus allowed to substitute for the original cause of action another and different one, and one which could not have been joined with the original. The original plaintiffs were the heirs at law, widow, and administrator, of George T. Smith, deceased, his personal representatives, and all of them. They were seeking to obtain possession of certain real estate, which, as they claim, Smith owned at his death, and then passed to them as his personal representatives. They asserted no right which did not thus come to them. In their attempt to enforce that right they alleged ownership in the widow and heirs, and, the estate being still in settlement, as was averred, the right of possession in the administrator. The present plaintiffs are the same persons save that the administrator has disappeared. They are seeking to enforce, as to the same land, the same right of possession derived in the same way by virtue of the title cast upon them by the death of Smith. The substituted com-

plaint differs from the original only in that it proceeds upon the theory that the right of possession was, at the time of the claimed dispossession, and is, in the widow and heirs at law, the present plaintiffs, and not in the administrator, and so alleges. The opinion in *Dunnett v. Thornton*, 73 Conn. 1, 46 Atl. 158, contains an exhaustive review of the history of our law upon the subject of the amendment of declarations and complaints, both before and after statutory regulation was attempted, and calls attention to the generous policy which has always marked it. It also recites at length the course of statutory regulation, and calls attention to the liberal and untechnical spirit in which they have been construed and applied. The present statute (Gen. St. 1902, § 639) is considered, both of itself and in its relation to the spirit and provisions of the practice act, and the principles which should govern its application stated. It is unnecessary to repeat what was there said. It is sufficient to observe that the court, in exercising its discretion in permitting the present amendment, was well within its rights as there defined.

There was no error in admitting in evidence the lease of March 1, 1901. It was not offered or received as establishing title in the plaintiffs, but as creating an estoppel, which would be equally as effective as against the defendant. *Camp v. Camp*, 5 Conn. 291, 300, 13 Am. Dec. 60; *Magill v. Hinsdale*, 6 Conn. 464, 469, 16 Am. Dec. 70; *Thomas v. Young*, 79 Conn. 498, 497, 65 Atl. 955. The operation of this estoppel did not cease with the termination of the lease. *Camp v. Camp*, 5 Conn. 291, 301, 13 Am. Dec. 60; *Bigelow on Estoppel*, 348. One reason assigned by the defendant's counsel for the exclusion of the lease was that the complaint alleged that on April 1, 1904, a date subsequent to that of the termination of the lease, the plaintiffs possessed the premises, and were on that day dispossessed by the defendant. This claim attaches too much importance to the allegation of time, which is an immaterial one. *Bulkley v. Norwich & Westerly Ry. Co.*, 81 Conn. 284, 286, 70 Atl. 1021.

The defendant offered in evidence a written notice signed by him, and addressed to the plaintiffs, bearing date April 20, 1907, and claimed to have been served upon each of the plaintiffs by copy on April 26, 1907. This paper purported to notify the plaintiffs that the defendant surrendered to them "all right, title, or possession that he ever received, if any, to the premises" in question. It also notified the plaintiffs that the defendant disclaimed ever having entered into the possession of the premises under the lease of March, 1904, or a prior one; that he disclaimed and denied that he ever by virtue of said pretended leases, or either of them, occupied the premises; that he now disclaimed any and all right to the possession or occupancy of them by virtue of said instruments; and that he solemnly renounced and

disclaimed any tenancy under them. The purpose of this notice was to relieve the defendant from the operation of the estoppel created by the leases, and put him in a position to question the plaintiffs' title. It was ineffective to that end. Counsel have called it a surrender, but it surrendered nothing. It was incumbent upon the defendant to surrender possession before he could call in question the plaintiffs' title. *Camp v. Camp*, 5 Conn. 291, 301, 13 Am. Dec. 60; *Bigelow on Estoppel*, 371; *Tiedemann on Real Property*, § 157; *Taylor on Landlord & Tenant*, § 705, note. This principle is as applicable where the lease is given to one already in possession as where the lessee is one who is admitted to possession. *Washburne on Real Property*, 600, 601; *Camp v. Camp*, 13 Amer. Dec. 71, note. At the very time that the defendant was engaged in making the pretended surrender he was clinging fast to the possession, and has done so ever since. Nothing was further from his thoughts than letting the plaintiffs into possession. On the contrary, he was devising means to retain it himself, and the giving of the notice was one of those means. If the notice be regarded as a disclaimer, the defendant is placed in no better position. The cases which give the greatest efficacy to disclaimers hold that they do not afford the lessee the right of thereafter asserting a title adverse to the lessor until the statutory period for the perfection of title by adverse possession shall have expired. *Willison v. Watkins*, 8 Pet. 43, 7 L. Ed. 596; *Peyton v. Stith*, 5 Pet. 485, 491, 8 L. Ed. 200; *Bigelow on Estoppel*, § 373. See *Hanford v. Fitch*, 41 Conn. 486, 501. The notice was rightly excluded.

The defendant offered evidence to show that Smith, from whom the plaintiffs received their title, never had any, never occupied the premises, and never claimed to own them. This evidence was rightly excluded as being in derogation of the estoppel. Other evidence was presented for the purpose of showing that a prior three-year lease, terminating March 1, 1898, was procured from the defendant by these plaintiffs by means of false representations and deceit. It is an established principle that where the acceptance of a lease is induced by the fraud or false representations of the lessor, there is no estoppel. *Washburne on Real Property*, 599; *Bigelow on Estoppel*, 364. The defendant offered no evidence that the lease of March, 1901, was not freely and voluntarily taken. That is the lease under which the present estoppel arises, and the facts which may have surrounded a prior transaction of a similar character are immaterial. They are none the less so, and the giving and acceptance of the last lease no less an independent transaction, for the reason that the former lease gave the lessee an option for a renewal. *Platt v. Outler*, 75 Conn. 183, 186, 52 Atl. 819; *Nutmeg Park Driving Corporation v. Fiske*, 81 Conn. 463, 71 Atl. 499. Other rul-

ings upon the admission of testimony do not call for discussion beyond the observation that all that two parties say at a single interview, upon whatever subject, is not rendered admissible for the simple reason that what is said upon some one or more subjects is testified to. Wigmore on Evidence, §§ 2115, 2119.

There is no error. The other Judges concurred.

(82 Vt. 108)

WELLS v. BOSTON & M. R. R.

(Supreme Court of Vermont. Essex. Feb. 27, 1909.)

1. CARRIERS (§ 380*)—CARRIAGE OF PASSENGERS—EJECTION OF PASSENGERS—ACTIONS—PLEADING—EVIDENCE.

Under a declaration, in an action against a railroad alleging assault and battery and wrongful ejection of a passenger from a train, plaintiff could show that he purchased a ticket having three coupons, the first entitling him to ride to a fair, the second to attend the fair, and the third to return passage; that on his return the conductor took up his ticket; that thereafter there was a change of conductors; that the new conductor refused to accept plaintiff's statement that he had already surrendered his ticket, and demanded the fare, and on plaintiff's refusal to pay it, forcibly ejected him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1464; Dec. Dig. § 380.*]

2. ASSAULT AND BATTERY (§ 24*)—PLEADING—DECLARATION.

In an action for assault and battery, it is not essential that the declaration state the injury with any inducement of defendant's motive or of the circumstances under which the injury was committed.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 25, 26; Dec. Dig. § 24.*]

3. TRIAL (§ 59*)—ORDER OF PROOF—DISCRETION OF COURT.

Where under the pleadings certain evidence was admissible at some stage of the trial, the order of its admission was within the discretion of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 139; Dec. Dig. § 59.*]

4. JUDGMENT (§ 725*)—RES JUDICATA—MATTERS CONCLUDED.

The general rule is that a verdict and judgment is conclusive evidence, between the same parties in a subsequent suit, of all that the jury must have found to warrant the verdict, and no further, and it is not necessary to the conclusiveness that the issue should have been taken on the precise point which it is proposed to controvert in the subsequent suit; it being enough if that point was essential to the former judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1255; Dec. Dig. § 725.*]

5. JUSTICES OF THE PEACE (§ 130*)—JUDGMENT—RES JUDICATA—MATTERS CONCLUDED.

P. S. 1656, provides that no judgment of a justice, where an appeal is not allowed, shall be an estoppel on a question or matters not therein expressly adjudicated, and no right of recovery shall thereby be established on a collateral matter. In an action against a railroad for wrongful ejection of a passenger from a train, it appeared that on plaintiff's surrender of his ticket the conductor failed to give him anything as evidence of his right to a passage; that thereafter a new conductor demanded the

ticket, and on his failing to produce it, ejected him; that a friend thereupon paid the fare, and plaintiff continued his journey; that later plaintiff recovered judgment against defendant before a justice of the peace for the amount so paid. *Held*, that plaintiff's right to be on the train without producing a ticket or paying his fare not having been expressly adjudicated in the action before the justice, the admission of the former recovery as conclusive evidence that plaintiff was rightfully on the train at the time of his ejection, and of his right to recovery in the subsequent action, was error.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1153; Justices of the Peace, Dec. Dig. § 130.*]

6. JUDGMENT (§ 948*)—PLEADING—NECESSITY—ESTOPPEL.

A defendant, failing to plead a former judgment between the parties, cannot take advantage of it by way of estoppel, though such judgment is in the case as evidence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1787; Dec. Dig. § 948.*]

7. EVIDENCE (§ 123*)—RES GESTÆ.

In an action against a railroad for wrongful ejection of a passenger from a train for alleged nonpayment of fare, testimony that one not called as a witness was in the same car with plaintiff, and told the conductor that he saw the former conductor take up plaintiff's ticket, was but the narration of a past occurrence, and was inadmissible as part of the *res gestæ*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 362; Dec. Dig. § 123.*]

8. CARRIERS (§ 382*)—CARRIAGE OF PASSENGERS—EJECTION OF PASSENGER FROM TRAIN—DAMAGES—EXEMPLARY DAMAGES—EVIDENCE.

In an action against a railroad for wrongful ejection of a passenger from a train for alleged nonpayment of fare, testimony that one not called as a witness was in the same car with plaintiff, and told the conductor that he saw the former conductor take up plaintiff's ticket, was inadmissible on the question of exemplary damages, since the disregard of a third person's statement in such circumstances did not tend to show that the ejection of plaintiff was maliciously, wantonly, or recklessly committed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1489; Dec. Dig. § 382.*]

9. DAMAGES (§ 18*)—PERSONAL INJURIES—PROXIMATE CONSEQUENCES.

In an action for personal injuries, only such special damages may be shown as are the natural and proximate, not the necessary, consequences of the act complained of.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 37; Dec. Dig. § 18.*]

10. CARRIERS (§ 382*)—CARRIAGE OF PASSENGERS—EJECTION OF PASSENGERS—SPECIAL DAMAGES—EVIDENCE.

In an action against a railroad for wrongfully ejecting a passenger from a train and injuring him, evidence that plaintiff in consequence of the injuries was unable to assist his employes in cutting, manufacturing, etc., certain timber he had contracted to purchase, and was compelled to abandon the contract at a great loss, was inadmissible to show special damages, it appearing that the work he was rendered unable to do was but a small part of a business of considerable magnitude, and that the work might have been performed by a competent employé; the loss being more particularly the proximate result of plaintiff's voluntary abandonment of the contract than of the injuries.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1483; Dec. Dig. § 382.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

11. CARRIERS (§ 384*)—CARRIAGE OF PASSENGERS—EJECTION OF PASSENGERS—ACTIONS—INSTRUCTIONS—EXEMPLARY DAMAGES.

In an action against a railroad for wrongful ejection of a passenger from a train, an instruction that if the jury found for plaintiff, and that if his ejection was willful and malicious, they might give exemplary damages, was erroneous, as permitting an award of exemplary damages regardless whether defendant was guilty or not of the wrong committed by its servant by directing, participating in, or subsequently approving it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1500; Dec. Dig. § 384.*]

Exceptions from Essex County Court; Willard W. Miles, Judge.

Trespass for assault and battery by Charles A. Wells against the Boston & Maine Railroad. There was a plea of the general issue, and verdict and judgment for plaintiff, and defendant excepted. Reversed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Howe & Hovey, for plaintiff. Young & Young and Harry Blodgett, for defendant.

WATSON, J. The first count of the declaration alleges in detail an assault and battery at Barton, including "and also then and there, with great force and violence, shook and pulled about the plaintiff, and threw and cast the plaintiff out of and from a certain railroad passenger car, and cast and threw [him] down to and upon a certain wooden platform then and there situated," and special damages. Pleas, the general issue, and special in justification that at the time when, etc., the plaintiff, riding in a certain car of defendant's train through the towns of Newport and Barton to Lyndonville, on proper request by the conductor in charge of the train, refused to pay his fare or to produce a ticket as evidence of payment thereof, whereupon by reason thereof, the defendant by its said conductor, using no more force than was necessary, ejected the plaintiff from the car. The plaintiff replied, de injuria. Subject to objection and exception on the ground that the evidence was not admissible under the declaration, the plaintiff was permitted to show that on the morning of September 7, 1905, he purchased a ticket at Lyndonville, having three coupons, the first entitling him to ride over defendant's railroad from there to Sherbrooke, the second to attend the fair at Sherbrooke, and the third to a ride over defendant's railroad from Sherbrooke back to Lyndonville on the same day; that the plaintiff rode to Sherbrooke, surrendering the first coupon, attended the fair, surrendering the second coupon, and took the train at Sherbrooke late in the afternoon to ride back to Lyndonville; that between Sherbrooke and Newport the conductor of the train took up the third coupon, returning nothing to the plaintiff to show that he had paid his fare from Newport to

Lyndonville; that at Newport some changes were made in the train, and also a change of conductors; that when the conductor south of Newport called upon the plaintiff for his fare, the plaintiff told him he had a ticket from Sherbrooke to Lyndonville and that the conductor north of Newport took it up and retained it, whereupon the conductor told plaintiff he must pay his fare, which he refused to do, or be put off; that when the train stopped at Barton Station, the plaintiff again refusing to pay his fare, the conductor ordered him to leave the train, and as the plaintiff refused to do so, he was forcibly ejected. The admission of this evidence was not error. To make out his opening case it was necessary for the plaintiff to prove, not only the assault and battery, but also such facts as in law make the defendant responsible therefor. And it is not essential that the declaration state the injury with any inducement of the defendant's motive or intent, or of the circumstances under which the injury was committed. 1 Chitty, Pl. (14th Am. Ed.) 387. Whether the evidence went beyond what was necessary to the opening case we need not inquire, since under the special pleadings it was all admissible at some stage of the trial, and even though somewhat varied from the regular order, the variance was within the discretion of the court, and it is not manifest that the defendant was put to any disadvantage thereby. State v. Magoon, 50 Vt. 333.

That the plaintiff purchased and had such a ticket was not denied by the defendant. Its evidence, however, tended to show that the conductor north of Newport did not retain the ticket, but punched it, and returned it to the plaintiff; that when the train reached Barton, the plaintiff refusing to produce a ticket, pay his fare, or get off the train, the conductor and a brakeman ejected him from the train, using no more force than was necessary to accomplish that purpose, and that the plaintiff had the same ticket in his possession several days afterwards. It appeared immediately after the plaintiff had been ejected his fare from Newport to Lyndonville was paid to the conductor by a friend of the plaintiff, and that the plaintiff then returned to the same car and rode therein to Lyndonville, on the way paying the friend the amount of the fare so paid by him. It further appeared that subsequently thereto, and before the commencement of this suit, the plaintiff brought his action of assumpsit against the defendant before a justice of the peace, to recover back the money thus paid at Barton, and such proceedings were had therein that a judgment was rendered for the plaintiff to recover the amount so paid and costs of suit. No appeal therefrom was allowable by law. Subject to defendant's objection and exception, the plaintiff was allowed to introduce a certified copy of this judg-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1857 to date, & Reporter Indexes

ment as conclusive evidence that the plaintiff was rightfully on the train at the time he was ejected, and also as conclusive of the plaintiff's right of recovery in this case. The latter question was also raised by exception to the charge.

The judgment in question falls within the purview of the statute which reads: "No judgment of a justice where an appeal is not allowed shall be an estoppel upon a question or matters not therein expressly adjudicated, and no right of recovery shall thereby be established upon a collateral matter." P. S. 1656. The general rule is that a verdict and judgment is conclusive evidence, between the same parties in a subsequent suit, of whatever it was necessary for the jury to find in order to warrant the verdict in the former action, and no further. *Town v. Lamphere*, 34 Vt. 365. It is not necessary to the conclusiveness that the issue should have been taken in the former action upon the precise point which it is proposed to controvert in the subsequent suit. It is enough if that point was essential to the former judgment. 1 Greenl. Ev. § 534. In other words, every point that was expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment, is concluded. *Board of S. v. M. P. R. R. Co.*, 24 Wis. 93, 124. In the former suit the question directly and distinctly put in issue was the plaintiff's right to recover of the defendant the money paid to it at Barton for his passage from Newport to Lyndonville. The result depended upon whether the plaintiff had previously paid for the same passage, within the meaning of the law; that is, whether his ticket to Lyndonville was taken up by the conductor north of Newport without giving him anything as evidence in lieu of the ticket of his right to a passage through. If he had, then the money paid at Barton was a second payment for the same thing, and it was held by the defendant to the plaintiff's use. On the other hand, if the plaintiff had not made such previous payment, then the money paid at Barton was for a valuable consideration, and not recoverable back. See *Jerome v. Smith*, 48 Vt. 230, 21 Am. Rep. 125. The plaintiff's right to be upon the train when ejected, without producing a ticket or something equivalent thereto, or paying his fare, likewise depended on whether such previous payment had been made. Yet this right was not a question expressly adjudicated. It was a collateral matter which can only be inferred by arguing from the judgment. And aside from the statute a judgment is not evidence of any matter which came collaterally in question merely, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. *The Duchess of Kingston's Case*, 20 St. Tr. 361, 2 Smith's Lead. Cas. *573; *Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218; *Lawrence v. Hunt*, 10 Wend. (N. Y.) 81, 25 Am. Dec.

539; *Campbell v. Consalus*, 25 N. Y. 613; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024; *McCravey v. Remson*, 19 Ala. 430, 54 Am. Dec. 194. It follows that, both under the statute and at common law, the admission of the former recovery as conclusive evidence that the plaintiff was rightfully on the train at the time of his ejection, and of his right of recovery in this action, was error, as was also the charge giving it such conclusive effect.

The defendant contends that the former recovery is a bar to this action, and that since the plaintiff introduced it in evidence, the defendant is entitled to the full benefit thereof. It is a sufficient answer to this position that the defendant cannot take advantage of the judgment by way of estoppel, he not having pleaded it as such; and the fact that it is in the case as evidence does not change the rule in this respect. *Briggs v. Mason*, 31 Vt. 433; *Poole v. Massachusetts Mut. Acc. Ass'n*, 75 Vt. 85, 53 Atl. 331.

The plaintiff was permitted to introduce testimony that one Ben Taylor, a person not called as witness, was in the same car as was the plaintiff between Newport and Barton, and that Taylor told the conductor that he saw the conductor above Newport take up plaintiff's ticket. It is urged by the plaintiff that the evidence was properly received, first, as part of the *res gestæ*; and, secondly, as bearing on the question of exemplary damages. The evidence, however, was not admissible on either ground. Not on the first, since it was but the narration of a past occurrence (1 Greenl. Ev. § 110); nor on the second, for the disregard of a third person's statement in such circumstances does not tend to show the act of the conductor in ejecting the plaintiff to have been maliciously, wantonly, or recklessly committed. If the evidence had any tendency, it was that the conductor was performing his duty as required by rule 579, furnished by the defendant to all conductors of its passenger trains, and introduced in evidence by the plaintiff, which provides: "The conductor will not permit any person * * * to ride on his train without a ticket or pass, except those provided for by rule."

As bearing on the question of special damages, and subject to defendant's exception, the plaintiff was permitted to introduce evidence tending to show that at the time of the assault he had a parol contract with the Moose River Lumber Company, whereby he purchased of that company at \$8 per 1,000 feet stumpage the standing timber on a certain lot, and that the amount of timber was estimated by the company at 700,000 feet; that the first winter after the assault, and because of the injury resulting therefrom, he could not be around with his men cutting and hauling the logs more than probably half the time, and could do but little of all kinds of work connected therewith; that because of

this injury he was not well enough to go on with the cutting and manufacturing of this lumber, and had to abandon his contract of purchase and give it up to the Moose River Lumber Company; that at the time of such abandonment he had cut, manufactured, and sold lumber to the amount of 165,000 feet, and the completion of the work would have occupied another year; that he then had a contract with the Northern Lumber Company, whereby it was to have the manufactured lumber subject to the prices as they should range in the market; that in doing the work he employed choppers in the woods, some teams besides his own, with teamsters, in hauling the logs, and help at his mill in sawing, etc.; that the plaintiff never kept any exact account, but as near as he could tell he made \$5 profit per 1,000 feet on the lumber manufactured and sold, and estimated that he could have made the same profit on the rest of the lumber had he not been obliged to abandon his contract of purchase. Without considering the sufficiency of the declaration in this respect, when properly alleged, only such special damages may be shown as are the natural and proximate (not the necessary) consequences of the act complained of. *Roberts v. Graham*, 6 Wall. 578, 18 L. Ed. 791; *Brown v. Cummings*, 7 Allen (Mass.) 507. In the case at bar the wrongful act at most but partly disabled the plaintiff from personally performing work in cutting, hauling, manufacturing, etc., the lumber, which he otherwise would have done in connection with the carrying out of the timber contract of purchase, the manufacturing and sale of the lumber. Yet the work he was thus rendered unable to do would be but a small part of the whole in the prosecution of a business of such nature and magnitude, and there would seem to be no reason why that also might not have been performed by a competent employé. It cannot be said that his loss of profits, whatever they might have been in connection with this lumber contract was the natural and proximate result of the act complained of. Such loss was more particularly the natural and proximate consequence of the plaintiff's subsequent voluntary act of giving up or abandoning the contract. For this reason—not considering others suggested in argument—the loss of such profits does not constitute an element of recoverable damages, and the rulings otherwise in the admission of evidence, and in submitting the case to the jury, were error.

The jury were instructed that if they found the plaintiff was entitled to recover, and that the act of putting him off the cars "was a willful and malicious act," then they had the right to add to the damages sustained "such damages as you think ought to be imposed as a punishment; as an example, called here sometimes 'exemplary damages,' and sometimes 'punitive damages,'" to which ex-

ception was taken. Under this charge the jury were at liberty to add exemplary damages without regard to whether the defendant corporation was or was not guilty of the wrong committed by its servant, by directing, participating in, or subsequently approving it. This is contrary to the rule laid down upon careful consideration of the question in *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72, following the case of *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, and was error.

Judgment reversed, and cause remanded.

(82 Vt. 34)

UNITED STATES, to Use of ELIAS LYMAN COAL CO., v. UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court of Vermont. Chittenden. Feb. 27, 1909.)

1. UNITED STATES (§ 67*) — CONTRACTORS' BONDS—CONSTRUCTION—MATERIALS.

Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), requires a contractor for a public building to give bond to promptly pay for all labor and materials supplied to him for the work. A contract provided that the contractor should furnish "materials for the construction of" certain buildings for the United States government, "all in accordance with the plans and specifications" made a part of the agreement. The condition of the contractor's bond was for performance of the covenants and agreements in the contract and for the prompt payment for all labor or materials supplied to the contractor for the work. *Held*, that the bond contained two distinct covenants, one for the performance of the contract and the other for the protection of persons supplying labor and materials, and the latter should be interpreted in the light of the former, and the meaning of the "materials" in the bond should be ascertained from the contract, including the specifications, construed in view of the work to be performed and in the light of the circumstances surrounding the transaction.

[Ed. Note.—For other cases, see *United States*, Cent. Dig. § 50; Dec. Dig. § 67.*]

2. UNITED STATES (§ 67*) — CONTRACTORS' BONDS—CONSTRUCTION—"MATERIALS."

A contract with the United States government to furnish all labor and materials necessary for buildings at a fort provided that all materials should be subject to the acceptance or rejection of an officer in charge, and any material rejected should be at once removed and replaced by the contractor. The contractor gave bond for performance of the contract and for the prompt payment for all labor or materials supplied to him for the work, as expressly required by Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523). *Held*, that coal furnished for use in the heating plants and in certain of the buildings for heating purposes while work of plastering, laying floors, painting, and varnishing was being done was not "materials" within the bond or the statute.

[Ed. Note.—For other cases, see *United States*, Cent. Dig. § 50; Dec. Dig. § 67.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4409-4413; vol. 8, p. 7718.]

3. UNITED STATES (§ 67*) — CONTRACTORS' BONDS—LIABILITY—ACTION—EVIDENCE.

The question whether the coal constituted "material" within the purview of the bond and the statute under which it was given, depending

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

upon the provisions of the specifications expressly made a part of the contract, as well as upon the bond and contract proper, and it being impossible to determine the question without the specifications, the contract and bond without the specifications were inadmissible for determination of that question.

[Ed. Note.—For other cases, see *United States*, Cent. Dig. § 50; Dec. Dig. § 67.*]

4. UNITED STATES (§ 67*) — CONTRACTORS' BONDS—ACTIONS—BURDEN OF PROOF—EXTENSION OF TIME FOR COMPLETING WORK.

In an action on a building contractor's bond, conditioned for the prompt payment by the contractor for materials furnished him for the work contracted for, for coal furnished the contractor in connection with the construction of the buildings, after the expiration of the time fixed by the contract for the completion of the work, the burden is upon plaintiff to show that an extension of time was granted.

[Ed. Note.—For other cases, see *United States*, Cent. Dig. § 50; Dec. Dig. § 67.*]

5. UNITED STATES (§ 67*) — CONTRACTORS' BONDS—ACTIONS—QUESTION FOR JURY.

There being no written extension of time, and parol evidence bearing on the question of an extension other than in writing being conflicting, it was a question for the jury.

[Ed. Note.—For other cases, see *United States*, Cent. Dig. § 50; Dec. Dig. § 67.*]

Exceptions from Chittenden County Court; George M. Powers, Judge.

Action by the United States of America, for use of the Elias Lyman Coal Company, against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant excepts. Reversed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Horace H. Chittenden and Max L. Powell, for plaintiff. E. M. Horton and J. E. Cushman, for defendant.

WATSON, J. Chapter 280 of the United States Statutes at Large for 1894 provides: "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, * * * shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract," etc. Act Aug. 13, 1894, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523).

On March 16, 1903, E. H. Denniston Company entered into such a contract in writing with the government to "furnish all labor and materials necessary for the construction of the following buildings at Fort Ethan Allen," this state, namely, one bachelor officer's quarter, two barracks, and two stables, "all in accordance with the plan and specifications hereto attached and which are made a part of this agreement." Pursuant to the requirements of the statute, the bond on

which this action is based was executed to the government by the contractor as principal and the defendant as surety. The use plaintiff, the Elias Lyman Coal Company, furnished coal to the contractor at the times, in the amounts, and at the prices charged in the plaintiff's specifications, it having been delivered to the contractor at Fort Ethan Allen while the company was constructing the buildings named in the contract. Subject to defendant's objection and exception on the ground that the coal thus furnished was not "material" within the meaning of the bond in suit and of the federal statutes, evidence was introduced tending to show that the coal mentioned was furnished to the contractor at the place, on the dates, and in the amounts specified, for the agreed price charged; that the coal was used in the heating plants and three of the buildings named in the contracts then being constructed by the contractor; that at the time the coal was used work of plastering, laying floors, putting on interior finish, painting, and varnishing was being done in said buildings. No evidence was introduced by the plaintiff tending to show that any other use was made of the coal, and no evidence was introduced by the defendant. The same question in effect is raised by exception to the overruling of defendant's motion for a verdict at the close of the evidence. An exception on the same ground was also allowed the defendant to the court's ordering a verdict for the plaintiff.

As before seen, the terms of the contract are that the contractor shall furnish "materials for the construction of" the buildings named therein, "all in accordance with the plans and specifications" attached to and made a part of the agreement. The condition of the bond, stating that part of the contract to be for furnishing "materials necessary for the construction of," etc.—the same language used in the contract—is for the performance of "all and singular the covenants, conditions, and agreements in and by said contract agreed and covenanted by said E. H. Denniston Co. to be observed and performed according to the true intent and meaning of said contract, * * * and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract," etc. Here are two distinct and separate covenants, the former for the purpose of securing to the government the performance of the contract for the construction of the buildings, and the latter solely for the protection of persons supplying labor and materials in the prosecution of the work. "These covenants are to be read together, and the latter interpreted in the light of the former." *United States F. & G. Co. v. United States*, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242. The same court later said that in construing the latter obligation

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

we must not overlook the manifest purpose of the statute to require that labor and material actually contributed to the construction of public buildings shall be paid for, and to provide security to that end; also, that the language used in that obligation, read in the light of the statute, looks to the protection of those who supply the labor or materials provided for in the contract. *United States, for Use of Hill, v. American Security Co.*, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437.

Article 11 of the contract is indicative of the intention of the parties thereto in this respect. It reads: "That all materials and workmanship shall be subject during the entire progress of the construction to the inspection and acceptance or rejection of the officer in charge or his agent, and any material or work not accepted shall be replaced by the said E. H. Denniston Co., at their own expense; the rejected materials to be immediately removed from the premises." Does not this article strongly show that the word "materials" as used in the contract has reference to such materials only as are within the purview of that instrument? For what purpose would such a provision respecting other materials be there made?

In *City of Philadelphia v. Malone*, 214 Pa. 90, 63 Atl. 539, *Malone & Co.* entered into a contract with the plaintiff city to excavate and construct certain reservoirs. The agreement required the contractors to furnish all the materials and perform all the labor necessary in constructing the reservoirs in strict and exact accordance with the proposal and specifications attached to and made a part thereof. A bond was given by the contractors as required by a city ordinance. The use plaintiff furnished coal to a subcontractor excavating one of the reservoirs, which coal was used for generating steam to run the steam shovel and the locomotive used in excavating and removing dirt in constructing the reservoir. The bond on which the suit was brought, taken for the protection of the city and for the security of parties from whom the contractor or his subcontractor might obtain labor and materials, was conditioned that the contractors "shall and will promptly pay * * * all sums of money which may be due for labor and materials furnished and supplied, or performed in and about said work." The question was whether coal was "material" within the meaning of the bond in suit and the ordinance. It was held that both the labor and materials which the contractors obligated themselves to furnish were specifically set out and named in the proposal and specifications attached to and made a part of their contract; that in determining the question the test was, the materials or labor must be such as the contract covers; and that an inspection of the proposal and specification disclosed nothing which could be construed

to include coal furnished for running the steam shovel or locomotive. The judgment was for the defendants. In effect the same construction was given in *United States v. Kimpland* (C. C.) 93 Fed. 403; *United States v. Morgan* (C. C.) 111 Fed. 474; *Thomas Laughlin Co. v. American Surety Co. of New York*, 114 Fed. 627, 51 C. C. A. 247.

The case of *American Surety Co. v. Lawrenceville Cement Co.* (C. C.) 110 Fed. 717, relied upon by the plaintiff as sustaining its contention here, seems to have given a similar bond a broader construction. There the governing distinction was made between labor and materials consumed in the work or in connection therewith, and labor and materials made use of in furnishing the so-called contractor's plant, and available not only for the work there done, but for other work also. The court, a single judge, seems to have construed the covenant in the bond, which was for the benefit of materialmen, without regard to what materials the contractor was under obligation with the government to furnish, and without taking into consideration the covenant securing to the government the performance of the principal contract. The case of *Zipp v. Fidelity & Deposit Co.*, 73 App. Div. 20, 76 N. Y. Supp. 386, is much relied upon by the plaintiff. There the contractor entered into an agreement with the city of Buffalo wherein he agreed to construct a retaining wall across Evans Slip in that city. The security bond was conditioned for the performance of the labor and the furnishing of "all the material necessary to fully complete the work or improvement" in the contract contemplated, and for the payment "for all material used and services rendered in the execution of such contract." During the progress of the work two boilers and engines were used in excavating the rocks, stones, and earth, and for pumping the water from the slip. The plaintiff furnished to the contractor the coal used as fuel in the boilers to create power. It was contended that the claim for this coal was not within the strict terms of the contract. The court said the defendant's bond contemplated the performance of the contract by the contractor, and whatever fairly came within the compass of that work was also within the scope of the bond; that the generation of power was essential in the performance of the contract, and that, "when the defendant became responsible for the payment of 'all material used and services rendered in the execution of such contract,' it might have expected that fuel was to be consumed in the undertaking"; that the materials used need not be a permanent constituent of the structure itself, but must be necessarily incident to the execution of the agreement, to come within the purview of the bond, and the coal consumed in carrying on the work was of that character.

In *United States, for the Use of Standard*

Furniture Co., v. Henningsen, 40 Wash. 87, 82 Pac. 171, the principal contract was for the construction, equipment, and furnishing of a certain lighthouse and two keepers' residences. The specifications attached to the contract and made a part thereof expressly required the contractors to furnish certain furniture for the residences. The bond executed was conditioned that the contractors should fully perform the contract, "and promptly make payments to all persons supplying them with labor and materials in the prosecution of the work therein provided for." The contractors, in the performance of the contract, purchased of the use plaintiff certain furniture called for in the specifications, a part of the purchase price of which remained unpaid. It was contended that the furniture so purchased was not "material" within the meaning of the statute. It was held that the law should be liberally construed, and that all persons furnishing any materials in the prosecution of the work provided for were protected by the bond, even though the materials did not enter into or become a part of any permanent structure; and that a recovery could be had for the furniture sold to the contractors in pursuance of the terms and stipulations of the principal contract.

The statute under which the bond in question was given was amended by an act approved February 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709). Though enacted subsequently to the execution of the bond in question, the later act sheds light on the proper construction of the earlier law; for in respect to the persons entitled to the benefit of such a bond the later act effected no material change. United States, for Use of Hill, v. American Surety Co., cited above. The amendatory act describes the persons who shall have the right by intervention to the benefit of the bond as "any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made." The great similarity of the language used in the provision of the contract obligating the contractors to furnish materials is noticeable—"shall furnish * * * materials necessary for the construction of the following buildings," etc. And, in view of the fact that the same words are used in the statement of the contract in the condition of the bond, we apprehend that the language later used therein, "materials in the prosecution of the work provided for in said contract," can have no broader signification. In either expression the "materials" are to be ascertained from the contract, including the specifications, construed like any other contract, in view of the work to be performed and in the light of the circumstances surrounding the transaction. Whatever "ma-

terials" are fairly within the express or implied terms of the contract are within the scope of the bond, and any one supplying them in the prosecution of the work provided for in the contract, and not receiving pay therefor, is entitled to the benefit of the bond. It cannot be said that any more liberal rule of construction was contemplated by the parties, and none should be given.

During the trial of the case at bar the plaintiff offered in evidence certified copies of the bond, of the contract, and of the specifications referred to in the contract. The court without objection admitted the copies of the bond and of the contract, but excluded the copies of the specifications. It does not appear from the record that any exception was taken to this exclusion, yet the specifications were a part of the contract so material to the case that without them the record contains nothing whereby it can be determined whether the coal furnished by the use plaintiff and used as before stated was or was not "material" within the purview of the bond and of the statute under which the bond was given. It follows that without showing more the evidence objected to was improperly admitted; that the defendant's motion for a verdict should have been granted; and that to direct a verdict for the plaintiff was error.

By the terms of the contract the work of the contractor was to be completed on or before the 1st day of December, 1903. The coal in question was largely furnished by the use plaintiff subsequent to that date, and from time to time up to and including January 28, 1904. No written extension of time in which the contractor might perform was shown, and the parol evidence bearing on the question of an extension other than in writing was conflicting. The court refused to submit that question to the jury, to which defendant excepted. This exception was well taken. The burden of showing that an extension of time was granted by the government was with the plaintiff, and, the parol evidence being conflicting, it was a question of fact for the jury.

Judgment reversed, and cause remanded.

(32 Vt. 103)

UNITED STATES v. UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court of Vermont. Chittenden. Feb. 27, 1909.)

1. UNITED STATES (§ 67*)—CONTRACTS—LIABILITY OF SURETY—"MATERIAL."

A person contracting with the United States government to furnish materials for the construction of buildings according to plans and specifications executed a bond, required by statute, binding himself to pay persons furnishing him labor and materials for the work provided for in the contract. The contract provided that all materials should be subject to inspection of the officer in charge. Held that, to be within

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the scope of the bond as "material" furnished, lumber must have been fairly within the express or implied terms of the principal contract, including the specifications, and must have been used in the prosecution of the work provided for in that contract, and no recovery could be had on the bond for defective lumber rejected by the inspector and not used in the prosecution of the work.

[Ed. Note.—For other cases, see *United States*, Dec. Dig. § 67.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4409-4413.]

2. UNITED STATES (§ 67*)—CONTRACTS — LIABILITY OF SURETY.

For lumber of an inferior quality at first condemned, but later used with the inspector's consent, either in its original condition or by being remilled, the liability of the surety under the bond would be the reasonable value thereof, not exceeding the contract price, with the right, under the express provisions of P. S. § 2689, to have the benefit of any defense which might be available to its principal in an action brought against it on the same obligation.

[Ed. Note.—For other cases, see *United States*, Dec. Dig. § 67.*]

Exceptions from Chittenden County Court; George M. Powers, Judge.

Action by the United States of America, for use of J. G. Strait & Son, against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant excepts. Reversed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Max L. Powell and Rufus E. Brown, for plaintiff. E. M. Horton and J. E. Cushman, for defendant.

WATSON, J. This case was before this court on the pleadings, and is reported in 80 Vt. 84, 66 Atl. 809. The action is brought upon the same bond as was that of *United States, for the Use and Benefit of Elias Lyman Coal Co. v. United States Fidelity & Guaranty Co.*, 71 Atl. 1106.

Upon the trial it was stipulated that the declaration should be treated as covering everything which could be properly declared upon and recovered in this action by virtue of the federal statute, under which the bond was given, and that in turn the defendant might avail itself of any further defense thereto, as if formal pleas had been filed. All other and further pleadings were waived by both parties.

J. G. Strait & Son, the use plaintiffs, seek to recover the balance due for flooring furnished by them to the E. H. Denniston Company, the contractor, the lumber having been delivered to that company at Ft. Ethan Allen, in this state, while the company was constructing the buildings named in the principal contract with the government, for the performance of which the bond was given. Certified copies of the bond, of the principal contract, and of such parts of the specifications referred to in the contract and made a part thereof as relate to upper flooring for

the construction of the bachelor officers' quarters and the two barracks were admitted in evidence without objection, and are before us as a part of the exceptions.

Subject to exception, the plaintiff introduced evidence tending to show that the flooring in question was shipped by the use plaintiffs to Ft. Ethan Allen, that it was accepted by the contractor, and that the latter agreed to pay therefor. The uncontradicted evidence of the defendant tended to show that it was not such flooring as was required by the contract between the government and the contractor; that a large part of it was defective on account of being warped, cracked at the ends, improperly milled and matched, and not being straight grain, rift sawed, and heart faced, and on account of having sap stains, sap streaks, resin and pitch pockets in its face; that very little, if any, of said flooring would meet the requirements of the specifications forming a part of that contract; that 39,226 feet thereof were remilled in Burlington in order to overcome improper milling and matching, and in so doing the width of each board was reduced from 2½ inches to 2¼ inches; that the mill charge for remilling was \$2.50 per thousand feet, and the transportation of the flooring from Ft. Ethan Allen to Burlington for that purpose and back again was \$2 per thousand feet; that some of the flooring furnished by the use plaintiffs was condemned by the United States inspector, but later the contractor was allowed by the inspector to select therefrom the best of it and lay the part thus selected in the floors, and some that was condemned was afterwards remilled and used in laying the floors. It was conceded that the contractor at an expense of \$241.61 bought elsewhere 5,369 feet of pine flooring to take the place of some of the flooring purchased of the use plaintiffs which had been rejected. And the evidence tended to show that the contractor sold to one Dumas between four and five thousand feet of the rejected flooring. The uncontradicted evidence further tended to show that in order to use the portion of flooring purchased of the use plaintiffs and laid in the officers' quarters and barracks, before the same was remilled, much labor was required to scrape the boards contiguous thereto, by reason of improper milling, so that the flooring would have an even surface; that the government inspector condemned the first flooring laid, covering an area of less than 100 square feet, and caused the same to be torn up and removed on account of the defective condition of at least 50 per cent. of the boards laid therein; that the condition of the flooring rendered the same defective according to the specifications mentioned in the principal contract, and only about two-fifteenths of the entire flooring furnished by the use plaintiffs would meet the requirements of the specifica-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tions. The defendant claimed that in order to entitle the plaintiff to recover it must show that the flooring furnished by the use plaintiffs complied with the requirements of the government's specifications. The court ruled that all the plaintiff needed to show was that the lumber in question was furnished to the contractor for the work at Ft. Ethan Allen; that whether or not it strictly complied with the requirements of the specifications is not at the use plaintiffs' risk; and that the question of whether or not the lumber furnished conformed to the requirements of the specifications under the government contract is immaterial. To which holdings defendant excepted.

This exception was well taken. The specifications provide: "Upper floors of first and second stories to be laid at completion of other inside work of $\frac{1}{8}$ inch T. and G. clear-heart face, straight grain, quarter saw; long leaf yellow pine, from the Gulf states, showing $2\frac{1}{2}$ inch space, thoroughly kiln dried, tightly strained, and blind nailed at joists, and planed off and scraped at finish. Butt joints of floor to be cut over joists only. A three inch mitered board to be placed around half projecting $\frac{3}{16}$ of an inch above the floor." Further: "The contractor shall give his personal superintendence to the work, or have a competent foreman, satisfactory to the officer in charge, on the job at all times, to act for him, and shall furnish all materials, labor, etc., necessary to complete the work according to the true intent and meaning of the drawings and these specifications, of which intent and meaning the officer in charge shall be the interpreter. No local terms or classifications will be considered in the interpretation of these specifications." And, by the principal contract, all materials and workmanship shall be subject during the entire progress of the construction of the buildings to the inspection and acceptance or rejection of the officer in charge, or his agent, and any material or work not so accepted shall be replaced by the contractor at its own expense.

The liability of the defendant does not depend wholly upon the fact that the lumber was furnished to the contractor for the work at Ft. Ethan Allen, that he accepted it, and agreed to pay for it. To be within the scope of the bond as "material" furnished, the lumber must have been fairly within the express or implied terms of the principal contract, including the specifications, and must have been used in the prosecution of the work provided for in that contract. *United States, for the Use and Benefit of Elias Lyman Coal Co. v. United States Fidelity & Guaranty Co.*, 71 Atl. 1106, mentioned above. Consequently no recovery can be had for the defective lumber rejected by the government inspector and not used in the prosecution of the work. This, however, does not

include that at first condemned but later selected and used by his consent either as it was or by being remilled. In either case the flooring used, being of an inferior quality and but a portion of that shipped by the use plaintiffs to the contractor, the liability of the defendant therefor under the provisions of the bond is measured, not by the contract price, but by the reasonable value thereof, not exceeding the contract price, with the further right by statute in the defendant as surety to have the benefit of any defense which might be available to its principal in an action brought against it on the same obligation. *P. S. 2639; Flagg v. Locke*, 74 Vt. 320, 52 Atl. 424.

Judgment reversed, and cause remanded.

(32 Vt. 132)

BATCHELDER v. WHITE'S ADM'R.

(Supreme Court of Vermont. Windham. March 5, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 235*) —ALLOWANCE OF CLAIMS—"CLAIMS"—"DEMANDS."

P. S. 2814, provides for the appointment of commissioners to receive and adjust claims and demands of persons against decedent. Section 2820 gives the court power to limit time for presenting claims. Section 2824 provides that one who fails to exhibit his claim shall be barred from recovering such demand. *Held*, that the words "claim" and "demand" as so used mean the same thing.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 837-840; Dec. Dig. § 235.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1202-1211; vol. 8, p. 7604; vol. 2, pp. 1973-1974; vol. 8, p. 7633.]

2. EXECUTORS AND ADMINISTRATORS (§ 228*) —ALLOWANCE OF CLAIMS—METHOD OF PRESENTATION—"PRESENT"—"EXHIBIT."

The words "present," as used in P. S. 2820, and "exhibit," as used in section 2824, as indicating how a creditor of the estate is to get his claim before the commissioners for allowance, are synonymous, the statute requiring no particular formalities to constitute a sufficient presentation of the claim.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 822; Dec. Dig. § 228.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2583-2584; vol. 6, pp. 5528-5529; vol. 8, p. 7761.]

3. EXECUTORS AND ADMINISTRATORS (§ 228*) —ALLOWANCE OF CLAIMS—SUFFICIENCY OF PRESENTATION.

A person holding a note of a decedent, acting through a relative living at the late residence of decedent, sent to the commissioners of the estate a statement of the note, which was received by them during the life of their commission, to the effect that the amount due on a note of decedent in favor of the creditor was as shown therein, followed by a statement of the amount of the note, amount of a payment thereon, and the interest due. *Held*, that the note was sufficiently presented.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 822; Dec. Dig. § 228.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. EXECUTORS AND ADMINISTRATORS (§ 235*)—ALLOWANCE OF CLAIMS—FAILURE TO REPORT ON CLAIM PRESENTED—RIGHT OF CREDITOR TO RELIEF.

Where commissioners of an estate failed to allow or disallow a claim duly presented, and omitted to mention it in their report, and the creditor, without legal fault, did not discover the failure until his statutory remedies had expired, he could have relief in equity.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 235.*]

5. EXECUTORS AND ADMINISTRATORS (§ 235*)—CONCLUSIVENESS—PROBATE JUDGMENT DISALLOWING CLAIM AS BAR TO EQUITABLE RELIEF.

The fact that the creditor first made an unsuccessful application to the probate court would not bar his suit in equity.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 235.*]

Appeal in Chancery, Windham County; Seneca Haselton, Chancellor.

Bill by Newton M. Batchelder against Alvin H. White's administrator. Decree of dismissal, and orator appeals. Reversed and remanded, with mandate that decree pass for orator.

Argued before ROWELL, C. J., and MUNSON, WATSON, and POWERS, JJ.

Herbert G. and Frank E. Barber, for orator. F. D. Stowe, for defendant.

POWERS, J. When Alvin H. White, late of Newfane, was alive, he owed the orator a promissory note and a small balance on open account. Commissioners on White's estate were duly appointed, and the orator, acting through a relative living at Newfane, seasonably sent to them a statement of the book account, and the following statement of the note:

"Newfane, Vt. December 14, 1905.

"Commissioners A. H. White Estate.

"The amount due on note of Alvin H. White in favor of N. M. Batchelder is as per statement rendered below:

Dated August 25, 1898, face.....	\$207 59
Payment, August 16, 1904.....	1 00

	\$206 59
Interest (simple).....	86 94
Interest (annual).....	15 75

\$309 28

"Yours, etc., F. A. De Witt."

These statements were received by the commissioners during the life of their commission, and it is apparent that they understood that they were expected to act upon them as regularly presented claims. For they allowed the book account, and made return thereof as required by law. They kept the statement of the note, but took no action upon it, and omitted all reference to it in their report. The orator supposed that the note had been allowed, and made no further move in the matter until his statutory remedies had expired, though he made an unsuc-

cessful application for relief to the probate court before he brought this bill.

Under our statute, commissioners have jurisdiction to adjust "claims" and "demands." P. S. 2814. It is apparent that these terms mean the same thing, for P. S. 2820, speaks only of "claims," and P. S. 2824, provides that one who fails to exhibit his "claim" shall be barred from recovering "such demand." The "claim" here involved was the thing demanded; the "thing demanded" was the debt represented and evidenced by the note. So the claim was properly represented before the commissioners by the statement above recited.

P. S. 2820, indicates that a creditor is to "present" his claim; P. S. 2824, that he is to "exhibit" it. So these are convertible terms used to indicate how a creditor is to get his claim before the commissioners for allowance. No particular formalities are required by the statute to constitute a sufficient presentation of the claim. And properly so, for it is of first importance that the procedure before the commissioners shall be simple, plain, and expeditious. Without attempting to lay down a general rule, we hold that this note was sufficiently presented as a claim, since the statement notified the commissioners that such a debt existed against the estate, gave them sufficient information as to the nature and amount thereof to enable them to act intelligently thereon, and was brought to them in such circumstances as to show that the creditor was seeking to charge the estate with its payment. Of course, there was no legal evidence before the commissioners to support the claim; but that was important, not on the question whether or not the commissioners should act at all, but only on the question of what their action should be. It was as much the duty of the commissioners to act upon the claim—to allow or disallow it—as it would have been had the note itself been presented. This being so, the case comes within the holding in *Dickey v. Corliss*, 41 Vt. 127; for the orator was without legal fault, and his mistaken application to the probate court should not bar him here.

Decree reversed and cause remanded, with mandate that a decree pass for the orator according to the prayer of the bill, with costs, both here and in the court below.

(32 Vt. 127)

CARVER v. SYKES.

(Supreme Court of Vermont. Windsor. March 5, 1909.)

APPEAL AND ERROR (§ 1170*)—REVERSAL—ERROR IN ADMISSION OF EVIDENCE.

In an action for conversion of certain sheep, evidence that defendant's brother stated to plaintiff's servants, who were sent for the sheep, that they were in defendant's pasture, to which no objection was taken when it was first introduced,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and of which no misuse was made, was not of sufficient importance to justify a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1170.*]

Exceptions from Windsor County Court; Wm. H. Taylor, Judge.

Action by David Carver against Albert Sykes. Judgment for plaintiff, and defendant brings exceptions. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Stickney, Sargent & Skeels, for plaintiff. Charles Batchelder and S. E. Evaris, for defendant.

POWERS, J. The plaintiff sent his son, Harry Carver, and his hired man, Phillip Waite, to the place of Deforest Sykes, a brother of the defendant, after some sheep he claimed to own, and which are the basis of this action of trover. Harry and Phillip were witnesses in the plaintiff's behalf, and were allowed to testify that Deforest told them that the sheep were in the defendant's pasture. The only exceptions here relied upon relate to the admission of this testimony. The defendant admitted that the sheep were then in the pasture on the farm where he lived; but he claimed, and his evidence tended to show, that the farm was owned and managed by his father-in-law, Crandall, and that the sheep were still in the possession and control of Deforest, who brought them there. The only evidence of a conversion by the defendant was that tending to show a demand upon him for the property and his refusal to deliver the same. The defendant insisted that this was no evidence of a conversion by him, as he was not in a position to comply with the demand, since he did not have the custody or control of the property. It was only on this last question that the evidence excepted to could in any view have been considered harmful.

The defendant argues that the jury would naturally treat the statement of Deforest as to the whereabouts of the sheep as evidence that they were in the possession and control of the defendant, since he spoke of the pasture as the defendant's. We cannot agree with this view. It seems clear to us that the evidence was quite too colorless to have been harmful. When it first came into the case, it was not objected to. The plaintiff based no claim upon it and made no attempt to misuse it. As the trial went it was altogether too unimportant to require a reversal.

Judgment affirmed.

MILLER v. WEST JERSEY & S. R. CO. (Supreme Court of New Jersey. Feb. 23, 1909.) CARRIERS (§ 314*)—INJURY TO PASSENGER—DECLARATION.

Plaintiff alleged that he was a passenger of defendant railroad company; that he was invit-

ed by defendant's agent to enter its terminal at W. to board one of defendant's cars, and that while standing on defendant's platform defendant knew, or had reasonable cause to know, that the agents of another railroad were using or about to use the platform by moving its freight trucks against and over plaintiff's foot; and that defendant negligently permitted them to do so. Held, that the declaration stated a cause of action.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1260, 1270, 1273-1280; Dec. Dig. § 314.*]

Action by Howard W. Miller against the West Jersey & Seashore Railroad Company. On demurrer to declaration. Overruled.

See, also, 70 Atl. 175.

Argued November term, 1908, before GUM-MERE, C. J., and SWAYZE and TRENCHARD, JJ.

John W. Wescott, for plaintiff. Gaskill & Gaskill, for demurrant.

PER CURIAM. The declaration avers that the plaintiff was a passenger of the defendant; that he was invited by the defendant's agent to enter its terminal at Woodbury for the purpose of boarding one of the defendant's passenger cars; that, while plaintiff was standing on the platform of the defendant for that purpose, the defendant knew or had reasonable cause to know that the agents of the Pennsylvania Railroad Company, or the agents of the Amboy Division of the Pennsylvania Railroad Company, were using, or were about to use, or were likely to use, the platform by moving one or more of its freight trucks or vehicles against, upon, and over the plaintiff's foot; and that the defendant negligently and carelessly permitted an agent of the Pennsylvania Railroad Company, or the Amboy Division, to run one of their said trucks or vehicles upon, against, and over the plaintiff's foot, and thereby injured him. We see no reason to doubt that if the plaintiff can prove that the defendants knew or had reasonable cause to know that the agents of the other companies were likely to use the platform by moving one of their trucks over the plaintiff's foot, and negligently permitted that to be done, the plaintiff will have established a cause of action. If, as the declaration avers, the plaintiff was a passenger, and the defendant knew that while he was upon the platform some one else was going to injure him, it clearly was bound to exercise reasonable care to prevent that injury. *Exton v. Central R. R. Co.*, 62 N. J. Law, 7, 42 Atl. 486, affirmed 63 N. J. Law, 356, 46 Atl. 1099, 56 L. R. A. 508.

The plaintiff is entitled to judgment.

(77 N. J. L. 299)

STATE v. WATSON et ux.

(Supreme Court of New Jersey. Feb. 23, 1909.) HOMICIDE (§ 283*)—MANSLAUGHTER—CULPABLE NEGLIGENCE—INSTRUCTIONS.

Upon an indictment for manslaughter, it was sought to hold the defendants for the com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mon-law crime, without regard to Act March 22, 1901 (P. L. p. 276), upon proof of failure to provide medical attendance for a child seven years of age. *Held*, it was erroneous to charge that, as it had been proven that the defendants did provide medical attendance, the jury must consider whether they provided this aid with the same diligence that a reasonable and prudent person would have done, and to charge that in this case negligence, if it exists at all, is the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demanded, failure to do what a reasonable and prudent person would have done.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 585; Dec. Dig. § 285.*]

(Syllabus by the Court.)

Error to Court of Quarter Sessions, Burlington County.

Edwin M. Watson and Mary Watson were convicted of manslaughter, and they bring error. Reversed.

Argued November term, 1908, before GUMMERE, C. J., and SWAYZE and TRENCHARD, JJ.

Joseph H. Lefferts and Donald Lefferts, for plaintiffs in error. Samuel A. Atkinson, for the State.

SWAYZE, J. The defendants were convicted of manslaughter. The specific charge was a failure to provide medical attendance for their minor child, aged seven years. We do not find it necessary to consider the interesting, and, in this state, novel question which was argued as to how far the religious belief of the defendants, who were Christian Scientists, would excuse them. The case was tried, apparently, without regard to Act March 22, 1901 (P. L. p. 276), which provides that any person having the care, custody, or control of any minor child, who shall willfully neglect to supply the same with sufficient food, clothing, and regular school education, or who shall willfully abandon or neglect the same, shall be guilty of a misdemeanor. Under a somewhat similar statute it has been held in England that the religious belief of the parents was not a sufficient defense. *Queen v. Senior* (1899) 1 Q. B. 283. This act does not seem to have been called to the attention of the trial judge, and he, therefore, did not put to the jury the question whether the parents had willfully neglected the child. However strong the evidence may have been upon this point, the defendants were entitled to the verdict of a jury thereon. Instead of submitting this question, the case was tried as arising under the common law. The judge properly charged in one part of his charge that the defendants could not be convicted unless the jury found that they were guilty of culpable negligence, and in another part of the charge he put to them the question whether the child died as the result of their being grossly negligent; but in other portions of the charge he told them that, as it had been proven that

the defendants did provide medical attendance, they must consider whether they provided this aid with the same diligence that a reasonable and prudent person would have done, and subsequently charged that, if they found that the defendants called in medical aid as soon as a reasonable and prudent person would have believed it to be necessary, the verdict must be not guilty, and toward the end of his charge defined negligence as the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, and that in this case negligence, if it exists at all, is the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demanded, whereby others suffer injury—failure to do what a reasonable and prudent person would have done. We think that the effect of this charge was to allow the jury to infer that the defendants had been grossly and culpably negligent if they failed to furnish medical aid with the promptness of a reasonable and prudent person. This ignores the distinction between such negligence as forms the basis of civil liability and that gross and more culpable negligence which is required at common law to constitute a crime. The charge was therefore faulty as a definition of the common-law offense.

The conviction cannot be sustained under the statute, since the jury have had no opportunity to find whether the neglect was willful. The judgment must therefore be reversed.

(77 N. J. L. 380)

STAHL v. ROMANIAN YOUNG MEN'S ASS'N.

(Supreme Court of New Jersey. March 1, 1909.)

MANDAMUS (§ 125*)—REINSTATEMENT OF MEMBER OF ASSOCIATION.

The circumstances of this case *held* sufficient to justify award of an alternative mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 259; Dec. Dig. § 125.*]

(Syllabus by the Court.)

Mandamus by Leon Stahl against the Romanian Young Men's Association. Alternative writ awarded.

Argued November term, 1908, before GARRISON, PARKER, and VOORHEES, JJ.

Phillip J. Schotland, for respondent.

PARKER, J. The relator is a member of the respondent society, and by its action was deprived of a vote and voice in its affairs for the period of one year less a day, and of the right to hold office in the society for the period of two years. He asks for a mandamus to reinstate him in his full privileges,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on the ground that the action of the society was without warrant of law.

The moving papers do not disclose the facts in the case with satisfactory fullness. The constitution and by-laws of the defendant society were not put in evidence, with the exception of certain extracts which were read at the time the depositions were taken. The story told by relator in his deposition is different from that indicated by the minutes of the society which were read in evidence. It is conceded, however, that the relator was chairman of a ball committee of the society, and in that capacity solicited and obtained advertisements for a program, and, among others, the advertisement of another order, known as the Berith Sholem, for which the respondent society was to receive \$5. The money did not come in, and relator was asked about it in meeting, and according to his story explained that he had not been able to collect it and therefore had not turned it in, but that, as soon as he did collect it, he would turn it in. He claims that the action of the society in depriving him of his franchise of vote and eligibility to office was based upon this occurrence. The minutes tell a somewhat different story, viz., that relator was accused of having accepted the advertisement without any specific contract for the payment of \$5 or any other sum, and that an investigating committee ascertained this by inquiries from the Order Berith Sholem. It appears, however, that afterwards the said order, through its representatives, stated that there had been a specific agreement, and that they would pay the money in due course. This statement, however, was not made until after relator had been tried by an executive committee of his association upon some charges which are not definitely stated in the case, and the action had been taken of which he complains here. It appears, however, that there is no provision in the constitution or by-laws for the punishment of any class of offense to which the transaction in question can be assigned; and, while the general rule is that the courts will not interfere in the conduct of these beneficial associations where any purely disciplinary measures are concerned, it seems to us that on neither theory of the case can the action of the association be regarded as disciplinary. For misbehavior at a meeting the by-laws provide punishment by cumulative fines and expulsion from the room, but there was no disorderly conduct shown by any of the evidence so far submitted; nor does there seem to have been any legal warrant for the punishment inflicted upon the relator, either by the organic law of the association or by any principles of natural justice.

We do not think that the facts are so clear as to justify the award of a peremptory mandamus reinstating him in his rights, but we do think that he has made out a sufficient

case to justify this court in calling upon the association to show cause why he should not be so reinstated. An alternative mandamus will therefore be awarded.

REGER et al. v. MADISON TP., MIDDLESEX COUNTY, et al.

(Supreme Court of New Jersey. Feb. 23, 1909.)

1. HIGHWAYS (§ 99*)—OPENING ESTABLISHED ROAD—DUTY OF TOWNSHIP AUTHORITIES.

It is no excuse for a township's failure to open an established public road that there is no fund or appropriation for the purpose, as in such case it is the duty of the township committee to call out the inhabitants to perform the work.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 325; Dec. Dig. § 99.*]

2. HIGHWAYS (§ 99*)—OPENING ESTABLISHED ROAD—DUTY OF TOWNSHIP AUTHORITIES.

If the duty of freeholders to build bridges for the purpose of an established road arises before the road is opened, their failure to do so cannot excuse the township committee for failure to perform their duty to open the road.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 99.*]

Mandamus by Louis Reger and another against the Township of Madison, in the County of Middlesex, and others. Peremptory writ ordered.

Argued November term, 1908, before GUMMERE, C. J., and SWAYZE and TRENCHARD, JJ.

Alan H. Strong, for relators.

PER CURIAM. In this case an alternative writ of mandamus was issued February 28, 1908, requiring the defendants to open, clear out, make, and work an unopened portion of a public road which had been laid out many years ago. The return alleges as an excuse for the failure of the defendants to open the road that it would cost \$1,000, exclusive of bridges, for which purpose there is no appropriation or balances in the hands of the respondents; that two running streams crossing said road will require the construction of two bridges of considerable size and expense; and that the respondents are ready and willing to open the road as required in the writ as soon as the money needed for the purpose can be lawfully raised and the board of chosen freeholders construct the required bridges.

As far as concerns the first alleged excuse, we are concluded by the decision of this court in the case of Kinmouth v. Township of Wall, 73 N. J. Law, 440, 63 Atl. 861. As pointed out by Mr. Justice Pitney in that case, if the township committee has no funds in hand, it is its duty to perform the work of opening the road by calling out the inhabitants of the township for the purpose. So far as concerns the second alleged excuse, the failure of the freeholders to perform their duty to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

build the bridges, if, indeed, that duty arises before the road is open, cannot excuse township committees for a failure to perform their duty to open the road.

Let a peremptory mandamus issue.

(77 N. J. L. 387)

BATES v. WARRICK.

(Supreme Court of New Jersey. Feb. 23, 1909.)

DAMAGES (§ 111*)—INJURIES TO BUILDING—MEASURE OF DAMAGES.

In an action for damages to a building, if the injury is so slight that it can be restored to its original condition at a less cost than the amount of the depreciation in the value of the property would be if no repairs were made, and where the repairs will not enhance the value of the property beyond that it possessed at the time of the injury, the cost of restoring the house to the condition in which it was before the injury is the measure of the damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 274; Dec. Dig. § 111.*]

(Syllabus by the Court.)

Appeal from District Court of Atlantic City.

Action by Martha E. Bates against Emma Warrick. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 69 Atl. 185.

Argued November term, 1903, before REED, BERGEN, and MINTURN, JJ.

Thompson & Cole, for appellant. Stone & Schwinghammer, for appellee.

BERGEN, J. The defendant, in making repairs to the sidewalk in front of her property, found it necessary to remove a large tree standing thereon near the house of the plaintiff, and employed a competent person to fell it. There was a wire running from the house of defendant to the tree, so attached to each as to throw the falling tree against plaintiff's house, causing the injuries for which this action was commenced. Plaintiff recovered a judgment, from which defendant appeals.

The workman was called as a witness by the plaintiff, and, after describing what he did, said that he "was as careful as a man could possibly be." The defendant insists that the plaintiff is bound by this statement because made by a witness called by her. The statement is nothing more than a conclusion drawn by the witness, and would have no weight if not supported by the testimony. There was testimony from which a jury might infer that the work was not carefully done, and the defendant does not deny that she had knowledge of the fact that the wire was fastened to her house and the tree; and, as she knew the tree was to be cut down, it was her duty to have the wire removed. Otherwise the tree could not fall away from the buildings, and its presence was likely to produce the result complained of. The proofs in the case are sufficient to support the finding that

the injury to plaintiff's property was the result of a negligent act of the defendant for which she is legally bound to indemnify the plaintiff.

The defendant also complains of the admission of testimony tending to show the cost of further repairs; the plaintiff not having completed the repairs required to put the building in the same condition in which it was at the time of the injury, because it did not appear that the plaintiff intended to make such further repairs. There is nothing in this objection, nor does appellant undertake to support it by any authority. The plaintiff would be entitled to the damage she suffered if she never made any repairs, for it is a question of damage, not of restoration. The defendant also insists that the evidence of cost of repair should not have been admitted, because the true measure of damage is the depreciation in value resulting from the trespass. We are of opinion that in a case like this, where manifestly the injury to a building can be repaired without greater expense than the amount of depreciation in value would be if no repairs were made, the cost of restoring the house to the same condition it was in before the injury would be the measure of damages (*Hale on Damages* 359); but aside from this the probable cost of repairs required to restore the building to its former condition was a proper element to be considered in ascertaining the diminution in value of the realty. The injury in the present case was slight, and there is no pretense that the repairs enhanced the property beyond its value at the time of the injury, and it also appears that the building was not available without the repairs. Under such conditions the cost of the repairs was some evidence of depreciation in value.

The judgment should be affirmed.

(77 N. J. L. 394)

HANSEN v. MAYOR, ETC., OF JERSEY CITY.

(Supreme Court of New Jersey. Feb. 23, 1909.)

MUNICIPAL CORPORATIONS (§ 186*)—POLICE OFFICER—COMPENSATION.

Plaintiff, as a member of the police department of Jersey City, was serving as detective sergeant, from which position he was removed and assigned to duty as a patrolman; the salary of the latter position being less than that of the former. He served as patrolman, and was paid the compensation incident to that office, and it being determined, in proceedings instituted by the plaintiff for that purpose, that his transfer from one position to another in the same department of the public service at a lower salary was unlawful, he brought suit to recover the salary incident to his former position for the period of time he served as patrolman. *Held*, that the money paid him by the city for services as patrolman was properly credited against the amount sought to be recovered.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 514, 515; Dec. Dig. § 186.*]

(Syllabus by the Court.)

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date & Reporter Indexes

Appeal from District Court of Jersey City.

Action by Joseph Hansen against the Mayor and Aldermen of Jersey City. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued November term, 1908, before REED, BERGEN, and MINTURN, JJ.

Merritt Lane, for appellant. John Milton, for appellee.

BERGEN, J. The plaintiff was a member of the police force of Jersey City, holding the position of detective sergeant at a salary of \$112 per month. From this position he was removed by the municipal authorities and assigned to the position of acting patrolman, the compensation for which was \$68 per month. He served in this capacity for four months, when, by virtue of an order of the Supreme Court, he was restored to his former position, and thereupon brought suit to recover the full compensation incident to the office of sergeant, without allowing credit for the money paid him for services as patrolman. The trial court allowed his claim for salary as sergeant and \$42.50 paid for patrolman's uniform, no uniform being required for the office of detective sergeant, but deducted from such allowance the sum paid the plaintiff while he served as patrolman. If it had appeared in this case that there was a de facto officer filling the plaintiff's position as detective sergeant who had been paid the compensation incident to that office during the period of such services, or which he might recover from the city under the rule established by the Court of Errors and Appeals in *Erwin v. Jersey City*, 60 N. J. Law, 141, 37 Atl. 732, 64 Am. St. Rep. 584, it would be a debatable question whether the plaintiff would be entitled to recover anything from the city unless the intruder came into office by fraud or without color of title, but this question is not raised by the record in this case and is not passed upon, the city not having appealed from the judgment below, and the only question raised and to be considered is whether, assuming that the plaintiff was entitled to the compensation of the office from which he was excluded during the time he was prevented from performing the duties of such office, it was proper to deduct therefrom the amount paid him by the city for his services in another branch of the same department of the city's administration.

The claim of the plaintiff, the appellant here, is that the right of an officer to the salary of his office does not rest upon a contract between himself and the city, but is an incident of that office which he is entitled to recover, without deduction, notwithstanding, during the period he seeks to recover for, he served as a member of the police department in another capacity and was paid for such services by the city. The doctrine that the right to compensation is an incident of and follows the legal title to a

public office to the extent that under all circumstances a de jure officer may recover whether he performs the duties of the office or not is not always recognized. In *Dolan v. Mayor*, 68 N. Y. 274, 23 Am. Rep. 168, suit was brought by a de jure officer against the city to recover the salary incident to the office from which he had been excluded by one who entered under color of title, and to whom a part of the consideration had been paid by the authorized disbursing officer of the city. Under these circumstances, it was held that the de jure officer could only recover from the city so much of the compensation incident to the office as had not been paid the de facto officer; that the city had a right to rely, in the payment of salaries, upon the apparent title, and to treat one clothed with it as a de jure, although it afterwards appears he is only a de facto, officer. The decision was largely rested upon the ground of public policy, which requires that public offices should always be filled so that at all times persons may be found ready and competent to exercise official powers and duties, because, if the public authorities could not pay the salary of the office to the de facto officer except at the peril of paying it a second time, the public service would be embarrassed and its efficiency impaired. Thus, according to the case just referred to, the right to recover from a municipality compensation incident to an office does not in every case follow the legal title to the office. In this state it has been held that an action by a de jure to recover from a de facto officer compensation incident to an office which has been paid to, the de facto officer cannot be maintained where the intruder came into office without dishonesty or fraud. *Stuhr v. Curran*, 44 N. J. Law, 181, 43 Am. Rep. 353; *Erwin v. Jersey City*, supra. In the latter case it was determined by our Court of Errors and Appeals that a de facto officer may recover from the city the compensation incident to the office, if he enters under a prima facie right without fraud, and thereafter performs the duties required of the person filling such office. The declaration in the case now under review contains the common counts only, and there is no special count for salary due as an incident to office, and it is doubtful whether under this declaration the plaintiff could recover other than for labor performed, for which it is admitted he has been paid.

But, assuming that the declaration correctly states the cause of action which the plaintiff now insists upon, it would show that the plaintiff was a member of the police force of Jersey City; that as such member he had been appointed to the office of detective sergeant at a salary of \$112 a month; that he had been unlawfully deprived of that office for a period of four months and assigned to another office on the police force the salary of which was \$68 a month, and has also been required to purchase a patrolman's outfit,

which he would not have been required to do except for the unlawful act of the city; that he performed the duties of the office to which he was so assigned, and received from the city the regular compensation incident to that office. From this it would appear that he at all times belonged to the police force of the city, and that the only injury he has suffered for which he could recover is the loss of compensation between the two offices.

In *McManus v. Newark*, 49 N. J. Law, 175, 6 Atl. 882, this court held that the change of a member of the police force from the position of detective to patrolman was not within the terms of the act restraining the right of removal from office, and that the municipal authorities might lawfully transfer from one branch to another of the same service. In that case the prosecutor was acting as detective, and his complaint was that he had been assigned to duty as a patrolman without notice or hearing, but the court held that he was still on the force, and, as the prosecutor had not been removed, suspended, expelled, or discharged from the police force, he was not within the terms of the protective statute, and the court said: "If questions of precedence and preference among the members of the police force are to be settled by hearing on evidence and argument, there can be no proper subordination, no selection or preference for skill or aptitude for special service." In *Douglass v. Jersey City*, 53 N. J. Law, 118, 20 Atl. 831, in which the opinion was written by Mr. Justice Scudder, who also wrote the opinion in *McManus v. Newark*, supra, it was held unlawful to reduce a detective who was paid \$100 to the position of patrolman at a less salary without notice to him; the court saying that the case differed "from the case of *McManus v. Newark*, 49 N. J. Law, 175, 6 Atl. 882, where the duties were different, but the compensation the same, and resembles in principle *Michaellis v. Jersey City*, 49 N. J. Law, 154, 6 Atl. 881, where there were different duties and decreased pay." In *Leary v. Orange*, 59 N. J. Law, 350, 35 Atl. 786, it was held that the prosecutor was improperly removed from the office of desk sergeant and assigned to the position of patrolman without notice or hearing, but in that case there was a difference in the compensation. The result of the decisions in this state seems to be that it is unlawful to transfer a member of a police force from one position to another at a lower salary without notice, but it is nowhere held that the officer ceases to be a member of the police force. We are of opinion that if a member of a police force serves in a position to which he has been assigned, and accepts the compensation incident to his new position, he is, if illegally transferred, at least only entitled to so much of the compensation incident to the office

from which he has been removed as would equal the difference between the respective salaries of the two positions.

Our attention has been called to the case of *People v. French*, 91 N. Y. 265, as sustaining the position taken by the appellant, but in that case the application for mandamus was limited to the difference between the salary of a patrolman and that paid to the applicant while on "sick leave." The applicant in that case, becoming ill and unable to perform his duties as patrolman, was paid only one-half the amount of compensation due his office for part of the time, and for another part only one quarter, and the only question passed upon was whether the department was justified in refusing to pay full compensation. It was held that it was not, but that payments made to a policeman while not on duty because of sickness, should be deducted. In *Fitzsimmons v. Brooklyn*, 102 N. Y. 536, 7 N. E. 787, 55 Am. St. Rep. 835, it was held that, where the officer was discharged and not permitted to perform any services in the department to which he belonged, he was not required to account for money earned elsewhere. This case is not an authority for the claim that, if the prosecutor, instead of being discharged, is deprived of a part of the compensation to which he is entitled, he would not be required to credit the amount which had been paid to him for services in another branch of the same department to which he had been improperly assigned.

The judgment below is affirmed.

(77 N. J. L. 423)

QUINN v. SEA ISLE CITY et al.

(Supreme Court of New Jersey. Feb. 23, 1909.)

MUNICIPAL CORPORATIONS (§ 107*)—ORDINANCES—PASSAGE OVER MAYOR'S VETO.

Where an act required a vote of two-thirds of all the members of common council to pass an ordinance over the mayor's veto, held that, where the council consisted of seven members, a vote of four, one member being absent, one voting to sustain the veto, and a third refraining to vote because interested in the ordinance, was not effective to override the veto.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 235; Dec. Dig. § 107.*]

(Syllabus by the Court.)

Certiorari at the prosecution of Bernard J. Quinn against the Sea Isle City and others to review an ordinance of said city. Ordinance set aside.

Argued November term, 1908, before GARRISON, PARKER, and VOORHEES, JJ.

Carrow & Kraft, for prosecutor. J. M. E. Hildreth, for defendants.

VOORHEES, J. This is a certiorari to review an ordinance passed by the common council of Sea Isle City. The municipality

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

is incorporated under revisions of an act entitled "An act relating to and providing for the government of cities of this state containing a population of less than twelve thousand inhabitants." Act March 21, 1899 (P. L. p. 96). The ordinance was passed, sent to the mayor for his approval, who returned it with his veto thereto. Thereupon council, composed of seven members, at its next meeting, with six members present proceeded to consider the mayor's objections and reconsider the ordinance, at which four members voted to pass the ordinance over the mayor's veto, one member voted to sustain the mayor's veto, and one member refrained from voting because financially interested in the railway which had an interest in the passage of the ordinance. The mayor declared the ordinance passed over the mayor's veto. The act under which the city is incorporated provides that after a veto the council "shall proceed to reconsider the same, and if on reconsideration it shall pass the common council by a vote of two-thirds of all the members it shall take effect." The vote under review was not a vote of two-thirds of all the members. *Crickenberger v. Westfield*, 71 N. J. Law, 467, 58 Atl. 1097; *Stephany v. Liberty, etc., Glass Co.*, 69 Atl. 967. Even if it were considered that a member refusing to vote might be counted as voting "Aye," which is not conceded, yet a person, disqualified because of interest, could not be so counted. *Traction Co. v. Board of Works*, 56 N. J. Law, 431, 29 Atl. 163; *Drake v. Elizabeth*, 69 N. J. Law, 190, 54 Atl. 248.

The ordinance is set aside.

(77 N. J. L. 406)

SYRING v. ZELENSKI.

(Supreme Court of New Jersey. Feb. 23, 1909.)

1. HUSBAND AND WIFE (§ 23½*)—CONTRACTS OF WIFE—RATIFICATION BY HUSBAND.

Defendant's wife made a contract with the plaintiff for the performance of certain work. No express contract was made by the husband, but it was insisted that the contract was made by the wife as agent for her husband, and that he had ratified the contract of his agent, because at one time while the work was in progress he said to the plaintiff: "My wife is boss. Anything as far as the wife goes that's all right. You will get your money." *Held*, that this statement did not show a ratification by the defendant of a contract made by the wife for him as his agent.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 23½.*]

2. APPEAL AND ERROR (§ 938*)—DISTRICT COURTS—SETTLING STATE OF CASE.

Where the law requires that the state of the case shall be agreed upon or settled within 15 days, unless the judge shall grant further time, the settling of such case by the court after 15 days will, in the absence of anything appearing to the contrary, be presumed to have been done within the further grant of time authorized by the law.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 938.*]

(Syllabus by the Court.)

Appeal from District Court of Hoboken.

Action by Robert Syring against Ignacy Zelenski. Judgment for plaintiff, and defendant appeals. Reversed.

Argued November term, 1908, before REED, BERGEN, and MINTURN, JJ.

Tennant & Haight, for appellant. Clement De R. Leonard, for appellee.

BERGEN, J. The state of the case, as settled by the trial court, shows that the plaintiff made a contract with the wife of defendant for the performance of the work sued for, and for which the judgment appealed from was rendered; that the plaintiff had no conversation with defendant about the work except once, when the defendant said, while the work was being done: "My wife is boss. Anything as far as the wife goes that's all right. You will get your money." Upon this evidence the trial court found that the contract was made by the wife as agent for her husband, and that there had been a ratification of the agent's contract in his behalf by the defendant.

It is insisted by the appellee, the plaintiff below, that this finding of fact cannot be reviewed. The rule is well settled that in cases of this character the finding of facts will not be reviewed if the evidence is sufficient to sustain the finding; but in this case we have a right to consider whether the statements made by the husband, the defendant, are sufficient to sustain the finding that he ratified the act of his wife, to the extent of binding himself for its fulfillment. There is no finding that a contract was made by the husband as principal, and the evidence does not show ratification by him of the contract made by the wife; on the contrary it tends to show that the wife was acting on her own responsibility, and that she would pay. The appellee also argues that the state of the case was not signed within the time required by law. The act regulating appeals from the district court to the Supreme Court (P. L. 1902, p. 565) provides that a party may appeal if notice be given within 10 days (that was done in this case); that, if parties cannot agree on the state of the case, the judge, on being applied to, shall settle and sign it, after which it shall be transmitted by the appellant to the clerk of this court; that the case shall be agreed upon or settled within 15 days unless the judge shall grant further time. In this case the parties were not able to agree, and applied to the court to settle the case, and it does not appear that any one was responsible for the delay except the court, from which it is proper to infer, without any evidence or record to the contrary, that the time was extended by it. The statute does not require that there should be an order entered extending the time for settling the state of the

case by the court, and in the absence of anything to the contrary the presumption is that the proceeding was regular.

The judgment should be reversed.

(77 N. J. L. 191)

BRINK v. NORTH JERSEY ST. RY. CO.
et al.

(Supreme Court of New Jersey. Feb. 9, 1909.)

1. APPEAL AND ERROR (§ 1099*)—REVIEW—SUBSEQUENT APPEALS—LAW OF THE CASE.

A second verdict for the plaintiff on substantially the same evidence as that adduced on the first trial of this cause (see 67 Atl. 705) ordered set aside for the same reason.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4376; Dec. Dig. § 1099.*]

2. APPEAL AND ERROR (§ 1215*)—REMAND—PROCEEDINGS IN LOWER COURT—INSTRUCTIONS.

This court having sent the case back for retrial on the ground that the weight of evidence indicated a cause of the death of plaintiff's intestate wholly unconnected with any negligence of defendant, and the evidence at the second trial being substantially the same, it was error to charge the jury that there was no evidence pointing to such extraneous cause.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1215.*]

(Syllabus by the Court.)

Action by Margaret E. Brink against the North Jersey Street Railway Company and others. Verdict for plaintiff. Rule to show cause made absolute.

Argued June term, 1908, before GARRISON, SWAYZE, and PARKER, JJ.

J. A. Kiernan, for plaintiff. Alvah A. Clark, for defendants.

PARKER, J. This case has been tried twice. After the first trial, a rule to show cause was argued before this court and made absolute; the opinion being delivered by Mr. Justice Reed (67 Atl. 705). That opinion gives an adequate synopsis of the testimony taken on the first trial, which does not materially differ from that now before us. One more witness was sworn, but his testimony elicited no new facts of importance. Upon the former rule this court held that the plaintiff had failed to sustain the burden of proof resting upon her of showing that the death of Mr. Brink resulted from injuries inflicted by the car of the defendant. In discussing the evidence, the court called attention to the facts that the deceased was lying on the track where he was afterwards struck by the trolley car and apparently in a state of unconsciousness; that the car was stopped after it had pushed the man about four feet; that prior to this accident the wagon in which the deceased was shown to have been driving was seen without a driver proceeding over the same road, Frelinghuysen avenue, parallel with the trolley line, and towards Mr. Brink's home in Elizabeth.

There was also testimony of the motorman tending to show that just before the accident he saw two men running from the place where the man lay. The court said: "It may be conceded that, if it were clear that the deceased was uninjured when lying upon the ground just before the collision, it might be inferred that the wound found upon the body (fracture of the skull) must have been caused by the impact of the fender upon his head. But it is not clear that the deceased was free from this wound before the collision. On the contrary, it is in the highest degree probable that his presence upon the track was attributable to his disabled condition resulting from this injury. * * *

Eliminating volition from the conduct of the deceased, what could have caused his helpless condition? The theory of the counsel for plaintiff is entirely unsatisfactory. If, however, the deceased had already received the brain injury which caused his death, the problem is solved and the cause of his unconsciousness of danger is at once manifest. The deceased might have received his injury from the two men who were seen by the motorman running from the place where the man lay. A more probable theory is that he was injured by falling while attempting to alight from his wagon for some purpose. He may have become chilled and thinking to warm himself by walking, may have tried to step down from the wagon seat and his limbs having become cramped and stiffened by the cold and his sustained position, he stumbled and fell, striking his head against the iron rail of the trolley track. It seems manifest that the injury to the deceased may have occurred in the way suggested and as already observed the fact of the deceased's unconsciousness or helplessness before the impact of the car fender is explicable upon the assumption that the injury did occur in some such way and is explicable upon no other rational theory." As a result of our examination of the evidence submitted on the second trial, we come to the same conclusion as that reached by this court upon the former rule to show cause, namely, that the evidence does not fairly support a finding that deceased came to his death as a result of the impact of the car, but that, on the contrary, the weight of evidence tends to show that the injury causing death had been inflicted before the car arrived, and are of opinion that the rule to show cause must be made absolute on this ground. It is true that a second concurring verdict on the same state of the evidence should cause the court to hesitate before granting a third trial (Brown v. Paterson Paper Co., 69 N. J. Law, 474, 55 Atl. 87); but this case falls within the class of cases mentioned in that decision as justifying the award of a third trial.

But, aside from this, we think there was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

error in the court's charge. It will appear from the portion of the opinion quoted above that it was at least a legitimate inference from the testimony that Brink did not receive the fatal injury from the impact of the car fender, but in some other way, either through the assault of the two men who were seen running away or by having fallen from his wagon and struck his head on the rail. It is plain, therefore, that this was a proper question to submit to the jury. An examination of the judge's charge on the second trial, however, shows that no such question was submitted, but that on the contrary it was excluded. On this branch of the case the judge charged as follows: "You must be satisfied by a preponderance of evidence that the plaintiff has made out a case; that the injury from which this man evidently died was caused by a blow struck by the fender of the car. There is no evidence whatever in the case to show that the man had been in any altercation with any one, or that he had fallen from his wagon, and there is nothing in the case to show at all how he received the blow which caused his death unless it was from the impact of the fender of this car." As we read this portion of the charge, which is all that we find bearing on this aspect of the case, the jury were instructed that, while it was the duty of the plaintiff to satisfy them by a preponderance of evidence that the blow of the car caused the injury, there was no evidence in the case from which they were entitled to infer that the injury occurred in any other way. Such an instruction entirely disregarded the view expressed by this court in setting aside the former verdict, as quoted in part above, and was in our opinion clearly erroneous.

For this reason, also, the rule to show cause must be made absolute.

(77 N. J. L. 375)

McDEVITT v. MAYOR, ETC., OF JERSEY CITY.

(Supreme Court of New Jersey. Feb. 23, 1909.)

MUNICIPAL CORPORATIONS (§ 186*)—POLICE OFFICERS—COMPENSATION.

The assignment of a police officer to the duties of a higher rank does not entitle him to the pay of that rank, nor, in the absence of a legal contract or an enabling statute, to any extra pay for the increased responsibility and duties of such assignment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 186.*]

(Syllabus by the Court.)

Appeal from District Court of Jersey City. Action by Charles McDevitt against the Mayor and Aldermen of Jersey City. Judgment for defendants, and plaintiff appeals. Affirmed.

Argued November term, 1908, before GAR- RISON, PARKER, and VOORHEES, JJ.

Merritt Lane, for appellant. John Milton, for appellees.

PARKER, J. The facts in this case are for the most part similar to those in the three applications for mandamus of Leonard, Coughlin, and Maxwell v. Fagen (N. J. Sup.) 69 Atl. 980. The present appellant, instead of applying for a mandamus on the city clerk to sign a pay warrant, brought suit against the city in a district court. The first item of his claim was awarded to him by the court below, and is not now in question. He appeals from the judgment against him as to the second item of \$216.64.

Appellant on December 7, 1906, was a police sergeant in Jersey City. On that date the board of police commissioners by order assigned him as captain to the Second precinct, stipulating in the order that the detail was temporary and determinable at pleasure of the board, and that during the detail the "said officers" should "be paid the salary of the position held before." Appellant entered on the duties of captain under this order and performed them until July 1, 1907, when he was promoted to the rank of captain. It is stipulated that his detail was to take the place of a captain suspended under charges, and that no one received captain's pay in place of the suspended officer from February 28 to July 1, 1907. On November 22, 1907, the police board passed a resolution, approved afterwards by the mayor, awarding to appellant \$216.64, the difference between a sergeant's and a captain's pay from February 28th to July 1, 1907, part of the time he had served as acting captain. The city clerk refused to draw a warrant for this sum though there were funds to meet it, and the appellant brought suit as stated. We fail to see any substantial difference between the circumstances in this case and those in Leonard v. Fagen, *supra*, or anything to take the case out of the general rule that a municipal officer having a fixed salary is not entitled to extra compensation for an increase of his official duties in the absence of a statute or contract providing for such increase. There was no such contract. The order assigning appellant to duty as captain gave specific notice that no extra pay was contemplated. It is claimed that this reservation was without authority of the board; but, even if it be disregarded, there is nothing to show the contrary and the burden of proving such contract was on appellant. In *Crane v. Shoenenthal* (N. J. Sup.) 69 Atl. 972, there was an express understanding for increased pay by virtue of which a city engineer was induced to undertake duties for which otherwise outside engineers would have been paid. In *Evans v. Trenton*, 24 N. J. Law, 784, the extra duties were held altogether outside the scope of the office. In the present case the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 71A.—71

appellant was merely performing the duties of the next higher rank, as is done constantly in the army, for example, and for which only since 1898 the pay of the superior rank has been allowed by statute. Act April 26, 1898, c. 191, 30 Stat. 364; Act May 26, 1900, c. 586, 31 Stat. 211. The resolution of November 22, 1907, was not a contract, for the services had been performed long before.

Nor was there any authority in law for the resolution of November 22d. If it be regarded as a gratuity, it was clearly beyond the power of the board. If we look at it as a salary for a new officer, viz., acting captain, we are met by the absence of any provision of law for either the creation or pay of such office. Whatever the duties performed by appellant he remained a sergeant until his promotion on July 1st. *Leonard v. Fagen*, ubi supra. Nor was it an increase in the salary of sergeant. Appellant claims that it was not, and we agree with him. If it were so claimed, then as we construe the acts of 1889 (P. L. p. 402) and 1905 (P. L. p. 132) adopted by Jersey City, especially the latter, an increase in pay in sergeants should apply to all sergeants, and not merely to one who had been singled out for such increase.

The judgment of the district court respecting the claim of \$216.64 was correct, and will be affirmed, with costs.

(77 N. J. L. 377)

McGREW, Auditor, v. STEINER et al.
(Supreme Court of New Jersey. Feb. 23, 1909.)
ATTACHMENT (§§ 101, 122*)—AFFIDAVIT—AMENDMENT—ERROR IN NAME.

An affidavit on which an attachment is to be based must, in the absence of statutory provision to the contrary, state the Christian name of the defendant debtor, an initial being insufficient; and, if the initial only be given in such affidavit, it cannot afterwards be amended.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 258, 332; Dec. Dig. §§ 101, 122.*]
(Syllabus by the Court.)

Certiorari to District Court of Passaic.

Certiorari by Benjamin E. McGrew, Auditor, against Herman Steiner and L. Williams to the district court. Reversed.

Argued November term, 1908, before GAR-
RISON, PARKER, and VOORHEES, JJ.

George P. Rust, for prosecutor. James A. Sullivan, for defendants.

PARKER, J. This writ brings up certain proceedings in attachment had before the district court of the city of Passaic, in which the defendant Steiner was plaintiff and the defendant Williams defendant. The affidavit for attachment in the district court alleged that "L. Williams" was indebted to the plaintiff, and that the said L. Williams absconded from his creditors. The writ of attachment as issued gave merely the name

of L. Williams as defendant. The jurat of the affidavit is signed by one who appended to his name the title "M. C. C. of N. J.," and it is claimed that the court will not take judicial notice that this means a master in chancery. This question, however, we find unnecessary to discuss.

Shortly after the issue of the district court attachment, another attachment was begun in the Passaic circuit court against Louis Williams, who is said to be the same person as the L. Williams made defendant in the first suit. The prosecutor was appointed auditor in the circuit court suit and promptly intervened in the district court attachment, asking that the district court should quash its writ of attachment on the ground that the defendant's name was not properly stated in the affidavit and writ. The court not only refused to quash the attachment, but made an order, on motion of the plaintiff's attorney, that the affidavit, writ, and all other papers filed in the cause be amended by inserting the name Louis Williams, instead of L. Williams, and denying the auditor's motion on the ground that the defects urged in said motion were properly amendable, and the circumstances of the case were shown to be such that the court in its discretion should order the amendment to be made. It is this action of the district court that is attacked by the present writ.

The status of an auditor in an attachment out of a superior court to attack the validity of an attachment in a district court may well be questioned. By the statute the circuit court attachment is a supersedeas to a district court attachment, and the sheriff takes possession as against the district court constable or sergeant at arms. District Court Act June 14, 1898 (P. L. p. 537, § 77). By the same statute the district court attachment retains its priority, and the plaintiff's claim, if adjudged valid, is settled by the circuit court auditor as a prior claim. We find nothing in the attachment act requiring or authorizing an auditor to attack other attachments for illegality, but his status for that purpose is not brought into question here. He did as a matter of fact, intervene in the district court and petitioned that the writ and proceedings be quashed. He was heard in that court. If his application had been simply denied, and the case were before us in that form, his status as an intervener would be open to examination; but the district court did not content itself with denying his application, but went further and undertook, as against him, to amend the affidavit and writ and other proceedings, and it is these amendments that he now attacks by certiorari. We think that he has a status for that purpose. Coming now to the merits of the case, we fail to see by what authority the district court undertook to amend the affidavit and the writ, and especially the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

former. An affidavit in attachment is a foundation of the action, and if it be insufficient it is not subject to amendment by supplemental proof. *Corbit v. Corbit*, 50 N. J. Law, 363, 13 Atl. 173. Upon the face of the affidavit in question, it was apparent that no defendant was named in a legal sense, as initials cannot be used for the Christian names of parties to actions except where some statute authorizes it. On these grounds a judgment in attachment was reversed because the plaintiff, a married woman, was named by her husband's initials, to which "Mrs." was prefixed (*Elberson v. Richards*, 42 N. J. Law, 69), and in another case in the same volume the same result followed the use of the initials of the plaintiff's name (*Dittmar Powder Co. v. Leon*, 42 N. J. Law, 540). The failure to give the defendant's Christian name in the affidavit as originally filed was therefore a fatal defect and not amendable, and, if the defendant or any other party interested and entitled to be heard had applied for such relief, it would have been the duty of the district court to quash the attachment.

Whether said court should have recognized the present prosecutor for that purpose is a question not now decided; but its action in undertaking to amend the papers was erroneous and will be set aside, leaving the district court record in the condition that it was in before the present prosecutor intervened.

(77 N. J. L. 310)

HEGMAN v. JERSEY CITY, H. & P. ST. RY. CO.

(Supreme Court of New Jersey. March 5, 1908.)

1. MASTER AND SERVANT (§ 111*)—INJURY TO SERVANT—LIABILITY OF MASTER.

A trolley car, on a dark night, was, by reason of the trolley pole leaving the wire, left standing unlighted, and while so standing another car, running in the same direction, on the same track, collided with it, and by force of the impact the front platform of the rear car was crushed, and the motorman standing upon it was killed. The testimony was such that the jury could draw the conclusion that the crushed platform was old and rotten and had been imperfectly inspected. In an action by the administratrix of the deceased, *held*, that the trolley company was responsible for the death of the motorman, if caused by the negligence of the company in failing to take reasonable care to maintain the platform in a safe condition.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 215; Dec. Dig. § 111.*]

2. MASTER AND SERVANT (§ 291*)—INJURY TO SERVANT—INSTRUCTION.

The trial judge was asked to charge that the proximate cause of the injury to the deceased was not the giving way of the platform, but was the running of the rear car into the front car.

The court refused to so charge, but charged that if the platform was not defective at all, or, if defective, did not bring about or contribute

to bring about the death of the deceased, the jury should find for the defendant.

There was no error in the charge or refusal to charge.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1145; Dec. Dig. § 291.*]

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by Elizabeth Hegman, administratrix of Hugo Hegman, against the Jersey City, Hoboken & Paterson Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued June term, 1908, before REED, BERGEN, and VOORHEES, JJ.

Alexander Simpson, for plaintiff in error. Edwards & Smith, for defendant in error.

REED, J. This action was brought by the administratrix of Hugo Hegman, who was killed in a collision between two cars of the defendant on April 15, 1907. The deceased was a motorman on the car which ran into another car which had been running ahead of the car of the deceased, and which had, at the time of the collision, stopped and was standing upon the track upon which the car of the deceased was following. The charge in the declaration is: That the deceased was operating his car at night, in the darkness, and that upon the same track, down a steep descent, at a point upon defendant's line of track which was unusually dark, and so maintained by the defendant by its servants, a car stopped in the darkness because there was no light along the track or upon the said car; that the car of the deceased was equipped with defective brakes, and a rotten and decayed front platform, caused by a lack of reasonable care on the part of the defendant to furnish the deceased with a safe place on which to work; and because of these conditions the deceased ran into the car in front of him, and his platform was smashed, and the deceased was killed.

The evidence on the part of the plaintiff was that the forward car was at a fast rate of speed going down an incline at Fourteenth street, Hoboken, in which there were two or three curves, when the trolley pole came off and left the car standing in darkness. A witness, Mr. Paul, says: That he was a passenger upon the forward car; that somebody told him to jump, and he jumped; that before he jumped he saw a car all lighted up coming toward the car he was on; that this following car hit his car, bounced back a little, then went ahead again, and struck his car a second time, when the front platform of the rear car, upon which the deceased was standing, caved in, the vestibule went down underneath the car, and the deceased went down with it. Mr. Paul says he first saw the rear car coming around the corner three car lengths away, and the motorman was working his brake. Mr. Leonard, another

witness, says he was on the front car, and it was running at the rate of 40 miles an hour, so fast that he went inside; and that they had got down 200 feet from the top of the hill when the trolley pole went off. He says the car stood a minute, or a minute and a half, and he says it was a minute between the time when he first saw the rear car and the moment when it struck. Mr. Middleton, another witness, says he saw the rear car at the horseshoe, 300 or 400 feet away. From the testimony the distance from the standing car to the point where the rear car came in sight is not very clear, but it seems to have been somewhere between 200 and 400 feet. Nor does it appear how closely the rear car had been following the front car before the latter stopped, nor how long the front car was at rest before the collision. Nor does it appear whether the headlight on the rear car was lighted, nor how far in front of a car another car would be visible, or with it what space a car running at a reasonable rate of speed at that point could be stopped by the use of a hand brake such as that with which the rear car was equipped. That the motorman of the rear car was using his brake when first seen was testified to, as already observed. It seems therefore impossible to attribute negligence to the deceased. It follows therefore that the collision was either a pure accident, without the fault of any one, or that it resulted from the fault of the defendant in maintaining a defective front platform upon the rear car.

The testimony concerning the condition of the platform is the following: One Morris went to the scene of the accident soon after its occurrence. He says he found the front platform of the rear car slammed against the front car, and that the bottom part of the vestibule was in pieces and the buffer all broken. He says: "You could not get hold of the wood. It would crumble in your hand. When you took hold of the wood it would break apart and crumble in your hand. It was just rotten wood." Mr. McCartney, a policeman, arrived at the place of the accident soon after it happened, and says he looked at the wood that had been the front platform or buffer of the rear car, and it seemed to be wood not in very good condition, according to his estimate. Mr. Rule was also there, and says the front platform of the rear car was rotten. He says he took the wood in his hand and it felt like sand, all rotten; and that they put a jack underneath, and the jack went into the wood; and they moved the jack back, and the jack sank into the wood because it was rotten. It appears that this car had been in use upon the road at least four years before the accident, but how much longer is not shown; but that it was among the older cars appears from the fact that the newer cars were equipped with air brakes, and this car was equipped with a hand brake. It also appears that although Mr. Strong, the inspector for the defendant,

says that he inspected cars every two or three days to find out any defects in the way of broken glass or weak points in the floors or doors, he admits that the last time he inspected this car was on March 4th, when he inspected the floor and woodwork. The accident, as already observed, happened on April 15th following. Whether the inspection he made every two or three days included the platforms is not clear, but he says that he had not inspected this car at all for nearly a month and a half before the accident. From this testimony it was obviously a question for the jury whether the defendant exercised reasonable care to maintain a reasonable safe platform to support the motorman, and for the jury to say whether, if the platform had been maintained in a reasonably sound and strong condition, it would have resisted the shock of the collision and so preserved the life of the deceased.

It is argued that the platform of a trolley car is not intended to be used for the same purposes as platforms of steam railway cars, which are liable to be jammed against each other in stopping, starting, and operating the cars, and that therefore the same strength and solidity in construction is not requisite. It is apparent, however, from the very form of its construction, that the bumper and platform is designed to withstand the shock of a possible collision. The purposes to be attained by this method of construction are doubtless several, among which is the design to save the body of the car from injury, and so avoid the expenses of reparation, as also to preserve the safety of the company's passengers; but, whatever the purposes of construction, the necessity for it arises from the recognized danger of a collision, and it is manifest that in case of a collision the servant whose place is upon the platform is the first person likely to be imperiled. In view of the habitual forms of construction of these platforms, I think that, when a motorman takes service with a trolley company, he has the right to assume that the platform upon which he is to stand is constructed and maintained in as sound and strong a condition as similar structures are usually built and kept. Of course if, from his own observation, or other information, he knows to the contrary, he takes the risk of danger from a defective platform; but if he has no knowledge of a defect, and the imperfection arises from a want of reasonable care on the part of the company, the responsibility will rest upon the company for injuries resulting to the servant therefrom.

Again, the court was asked to charge that the proximate cause of the injury to the plaintiff was not the giving way of the platform, but the running of the rear car into the front car. The judge refused to charge this as a proposition of law, but left the question to the jury, charging that if the jury found either that the platform was not defective at all, or that there was a defect in the plat-

form which did not bring about or contribute to bring about the death of the deceased, then the jury should find for the defendant. Of course, if the condition of the platform contributed to the death of the deceased, then the speed of the rear car was not the sole cause, but only a concurrent cause of the accident. The request to charge that the running of the rear car into the front car was the proximate cause could mean only that it was the sole cause, and the court could not say as a matter of law that, having found the platform defective, it was not a concurrent cause.

The judgment should be affirmed.

(77 N. J. L. 290)

OVERMAN et al. v. MANLY DRIVE CO.
(Supreme Court of New Jersey. March 8, 1909.)

CERTIORARI (§ 4*)—WHEN LIES—REMOVAL OF PRESIDENT OF CORPORATION—REVIEW.

Certiorari is not the proper remedy to review a resolution of a private corporation removing its president from office, or proceedings to reinstate or re-elect directors who had resigned, in a case where mandamus or quo warranto are available remedies.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 4; Dec. Dig. § 4*]

(Syllabus by the Court.)

Certiorari by Albert H. Overman and others against the Manly Drive Company. Dismissed.

Argued November term, 1908, before SWAYZE, J.

Charles H. Hartshorne, for prosecutors.
Abel R. Corbin, for defendants.

SWAYZE, J. The only precedent I have been able to find for a writ of certiorari in a case of this character is *Stephany v. Liberty Cut Glass Works*, recently decided by this court, and reported in 69 Atl. 967. In view of that decision, it was proper for me to allow this writ to review a resolution of a board of directors of a private corporation removing the prosecutor from the office of secretary. That case seems to have been undefended, and the question as to the propriety of the remedy could not have been called to the attention of the court. In the present case the proceedings are challenged by the defendant, and I am confronted with the necessity of deciding the question.

The text-books do not seem to recognize the use of certiorari for this purpose. Thompson, after calling attention to the use of that writ to review the action of *public municipal boards* (the italics are his), says: "It should be added that no precedent has come to the attention of the writer for the use of the writ of certiorari for the purpose of reviewing the proceedings of the judicatories of strictly private corporations or societies in removing their officers or expelling their members." Thompson on Corporations, § 825.

Cook refers to the use of mandamus and quo warranto in such cases, but says nothing of the use of certiorari. Cook on Corporations, § 617.

In our own state, liberal as we have been in the use of this writ, we have frequently had occasion to call attention to the circumscribed character of its use even in the case of public municipal corporations, and it seems to be now settled that certiorari is not the proper remedy where the office is already filled. Its use in the case of private corporations seems to have been limited to acts of the private corporation which were judicial in character. Thus in *Elder v. Medical Society of Hudson County*, 35 N. J. Law, 200, proceedings to punish the prosecutor for unprofessional conduct as a physician were reviewed, but this was upon the ground that the society was a special statutory tribunal whose adjudication might affect the prosecutor's rights, and the writ of certiorari in that case was in the nature of a writ of error. In the later case of *Watson v. Medical Society of New Jersey*, 38 N. J. Law, 377, Mr. Justice Depue was careful to call attention to the distinction between quo warranto and mandamus and certiorari. He said: "It is doubtful at least whether certiorari, which tears down, but does not build up, which, if successfully prosecuted, would vacate the resolution without ousting the sitting members or admitting the rejected claimants, is an appropriate remedy." Subsequently in *Lehmann v. Hudson County Republican Committee*, 62 N. J. Law, 574, 41 Atl. 718, the court refused to concede the power or duty of this court to intervene in a controversy of the character there presented. In the present case the proceedings are not judicial in their character. The directors whose title is questioned are actually in possession of the office, and the proper remedy is either by quo warranto to oust the directors or by a mandamus to compel the board to recognize the authority of the president. Certiorari is not the proper remedy. The reason given by Mr. Justice Depue in the passage above quoted is convincing. The effect of the judgment would be merely to tear down the resolutions in question. It would not give the prosecutors the relief they need.

I should, of course, not reach this result if I thought I was departing from anything that has actually been decided by the court, but I do not feel bound merely because the court in an uncontested case has failed to consider an objection to procedure. Under the circumstances the writ should be dismissed, but without costs.

In view of the *Stephany Case* it was proper to apply for the writ, and the only way open for final review of the question was to allow the writ, and have judgment entered thereon.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(77 N. J. L. 412)

CASS et al. v. SANGER.

(Supreme Court of New Jersey. Feb. 23, 1909.)

LANDLORD AND TENANT (§ 169*)—INJURIES TO CO-TENANT—EVIDENCE.

The plaintiffs were tenants of a store on the ground floor of a building. The defendants were tenants of the third floor of the building. The plaintiffs on Saturday evening locked their store with its contents in good condition. On Monday morning, upon opening the store, water was found trickling from the ceiling above upon their stock. An examination disclosed water coming from the third floor over the second floor, and upon the third floor for a distance of 16 feet around a water sink was sawdust, damp and covered with water. The ceiling of the third floor was not wet. The water was not running from the faucet at the sink. *Held* that, in order to apply the rule of *res ipsa loquitur*, the burden rested upon the plaintiffs to show that the damage did not result in any other way than from the faucet or the fixtures within the defendant's control.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 169.*]

(Syllabus by the Court.)

Appeal from District Court of Jersey City.

Action by John J. Cass and others against Eleanor Sanger, administratrix of Max E. Sanger, deceased. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued November term, 1908, before GARRISON, PARKER, and VOORHEES, JJ.

McEwan & McEwan, for appellant. Benjamin J. Darling, for appellees.

VOORHEES, J. It appears by the state of the case that the plaintiffs were the tenants and occupants of a store, No. 62 Cortlandt street in the city of New York, comprising the ground floor of the building, and that the third floor of the building was occupied by the defendant's intestate as tenant. The intervening or second floor was occupied by one Brady. On the evening of Saturday, February 23, 1907, the plaintiffs left their store locked with its contents in good condition. On the following Monday morning upon opening the store plaintiffs found water trickling from the ceiling above on their books (they were book merchants) on the shelves in the northeast corner of the store. An examination of the building and of the second floor disclosed water coming from the third floor, that of the defendant's intestate. Sawdust was found on this floor for a distance of 16 feet around the sink, which stood in the northwest corner. The sawdust was damp and covered with water. The ceiling of the third floor was not wet, and the fourth floor showed no water there. The sink in defendant's apartments was an ordinary kitchen sink with a strainer over the waste pipe and stood at a higher level than the floor. When examined on Monday morning immediately after plaintiffs' arrival at the store the water was not running out of the faucet at the sink. The suit was

brought for the recovery of damages for injury done to books, etc. A motion was made to nonsuit, and also to direct a verdict for the defendant. The court refused and found a judgment of \$225 in favor of the plaintiffs.

The trial court grounded his decision upon the doctrine of *res ipsa loquitur*. The evidence of the plaintiffs went only to the extent of showing that the water came from above the second floor. The testimony did not conclusively show whether it had come from a supply pipe or from a faucet. As Sanger was a tenant, it is not to be presumed that he controlled the supply pipes, but only the faucet and its connection within his apartments. The faucet when examined was not turned on. No water was running from it, and the fixture and connections seemed to be in good repair. In order to apply the rule of *res ipsa loquitur* the burden rested upon the plaintiffs to show that the damage did not result in any other way than from the faucet or the fixtures within the defendant's control. Because the defendant had not shown that the damage resulted from some other cause than the faucet, the court erroneously applied the doctrine. The plaintiffs, if they had gone further and excluded the idea that the defect was in the supply pipe by showing that no water was flowing from it, and that it had not been repaired since the Saturday preceding, then the doctrine might have been invoked. It is a substantial right of the defendant to have the plaintiff bear this burden. *Blen v. Unger*, 64 N. J. Law, 596, 46 Atl. 593. Until a plaintiff has presented all the testimony reasonably within his power, he can derive no benefit from this doctrine. *Bahr v. Lombard*, 53 N. J. Law, 240, 21 Atl. 190, 23 Atl. 167. Where negligence is alleged, and the proofs of it are circumstantial and not direct, the evidence must be such as to exclude all theories of accounting for the accident which would be inconsistent with the defendant's negligence. *Suburban Elec. Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700. And where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence, a nonsuit is proper. *Hummer v. Lehigh Valley*, 67 Atl. 1061.

The judgment will be reversed.

(77 N. J. L. 372)

JOERG v. PUBLIC SERVICE RY. CO.

(Supreme Court of New Jersey. Feb. 23, 1909.)

APPEAL AND ERROR (§ 1008*)—REVIEW—QUESTIONS OF FACT.

Plaintiff, driving his automobile and about to cross a street car track, observed a trolley car 150 feet away and moving at slow speed. He was himself about 20 feet from the track at the time, and judging that he would have sufficient time to cross in front of the car, and that the latter would, if necessary, check its speed to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

enable him to do so, he undertook to cross, and was struck by the car, which had increased its speed meanwhile. *Held*, that the question of contributory negligence on the part of the plaintiff was one of fact, which, having been settled by a district court judge, sitting without a jury, in his favor, was not the subject of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

(Syllabus by the Court.)

Appeal from District Court of Jersey City. Action by William A. Joerg against the Public Service Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed. Argued November term, 1908, before GABRISON, PARKER, and VOORHEES, JJ.

Edwards & Smith, for appellant. John Milton, for appellee.

PARKER, J. The appellee, plaintiff below, recovered a judgment for damages done to his automobile by reason of a collision with a trolley car of defendant. The car in question had just turned the corner from Sip avenue into Bergen avenue in Jersey City, and, having made a stop immediately after the turn, was gathering speed, going in a southerly direction. Plaintiff's automobile was moving eastwardly through Newkirk street, one block south of Sip avenue and parallel with it. At the trial the defendant moved for a nonsuit and for judgment in its favor, on the ground that no negligence of its employes had been shown, and also upon the ground of contributory negligence of the plaintiff. These motions were denied, and the court, sitting without a jury, found in favor of the plaintiff, and from that decision this appeal is taken.

The first ground is not urged in this court and therefore need not be discussed. We may say, however, that we have examined the evidence in the case and are fully satisfied with the determination of the district court that there was negligence in the operation of the trolley car. The appellant now relies solely upon the claim that there was contributory negligence on the part of the plaintiff.

The evidence shows that there were two tracks in Bergen avenue at this point, and that the car which struck the plaintiff's automobile was on the westerly or nearer track. There was also another car moving northward on the further track. The testimony on the part of the plaintiff was: That he was going slowly and cautiously through Newkirk street in an easterly direction, being aware of the car tracks in Bergen avenue, and was sounding his horn; that on reaching a point at or about the corner of Bergen avenue where he could see in both directions, he observed a car moving northward on the further track, and also the car which struck him on the nearer track, apparently just gathering speed from a stop

which the testimony shows it had made, and being then about 150 feet away. The north-bound car was only about 25 feet away, but stopped to let plaintiff go by, and he being then about 20 feet from the car track, and the colliding car being 150 feet away and not going very fast, the plaintiff testified that he "figured on" getting across in safety, and on the car in question stopping, as the other one had done, instead of which it increased its speed, colliding with the automobile when its front wheels were on the further track, striking it back of the front wheels and pushing it around upon the track. Mr. Lynch, who was riding in the plaintiff's automobile, testified that the speed of the car, when first seen, was about 8 miles an hour, and that it was 15 miles an hour when it struck the automobile. This testimony was contradicted, but the court was justified in finding the facts in accordance therewith.

Taking these as the facts, the case seems to us to fall within the principle of such cases as *Woodland v. North Jersey Street Railway Company*, 66 N. J. Law, 455, 49 Atl. 479; *North Jersey Street Railway Company v. Schwartz*, 66 N. J. Law, 437, 49 Atl. 683; *Conrad v. Elizabeth, etc., Railway Company*, 70 N. J. Law, 676, 58 Atl. 376; *Consolidated Traction Company v. Lambertson*, 59 N. J. Law, 297, 38 Atl. 110; *Vrooman v. North Jersey Street Railway*, 70 N. J. Law, 813, 59 Atl. 459,—in all of which cases the driver of a vehicle about to cross the tracks was held to be entitled, on seeing an approaching car, whether at high or low speed, to assume that it was equipped with controlling appliances and a prudent motorman who would respect his right to cross first by virtue of first reaching the point of crossing; and if on that assumption a jury might find from the evidence that it is apparently safe for him to cross, the car being sufficiently distant to be checked or stopped before reaching him, the question of contributory negligence is for the jury. In the present case a jury might have found still more favorably to the plaintiff, viz., that, if the car had simply maintained the speed it was under at the time of plaintiff's observation and determination to cross, he would have crossed in safety, and that the accident was due to increased speed afterward acquired by the car. The principle of *Earle v. Consol. Trac. Co.*, 64 N. J. Law, 573, 46 Atl. 613, is not applicable because on the case most favorable to plaintiff nothing appeared to indicate that the motorman did not intend to respect plaintiff's right to cross first. There was no error therefore in refusing to nonsuit because of contributory negligence. With the case as finally submitted the judge of the district court was discharging the functions of jury as well as of judge, and his subsequent determination of the same questions in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

favor of the plaintiff on the conflicting evidence of the parties involved a finding of fact entirely within his province and which is not before us on this appeal.

The judgment will be affirmed.

(77 N. J. L. 364)

FRANCOIS v. HANFF.

(Supreme Court of New Jersey. Feb. 23, 1909.)

1. HIGHWAYS (§ 184*)—RUNAWAY HORSES—LIABILITY OF OWNER.

The unexplained presence on a public highway of a team of runaway horses harnessed to a wagon, unattended by the owner or other person, raises a presumption of negligence on the part of the owner, and, if they collide with another vehicle on the street because they were not under proper control, the owner will be liable for damages resulting therefrom.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 468, 472; Dec. Dig. § 184.*]

2. Kokoll v. Brohm & Buhl Lumber Co. (N. J. Sup.) 71 Atl. 120, followed.

(Syllabus by the Court.)

Appeal from District Court of Hoboken.

Action by Alexander Francois against Max Hanff. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued November term, 1908, before GARRISON, PARKER, and VOORHEES, JJ.

Charles H. Burtis and Henry Singer, for appellant. James C. Agnew, for appellee.

PARKER, J. This appeal brings up the judgment in favor of the appellee, plaintiff below, in the district court of Hoboken for damages to plaintiff's horse and wagon and harness by reason of a collision with a horse and wagon claimed to have belonged to the defendant. The evidence in the case showed that plaintiff's horse and wagon were standing in the street alongside the curb when they were run into by another horse and wagon; the latter horse running away, and there being no driver at all in the wagon or anywhere in sight.

The first point urged before us is that the court below should have nonsuited on the ground that there was no proof of any negligence on the part of the defendant. The defendant was sworn and testified that he owned the horse and wagon, and that the facts proven in this case with reference to the runaway horse and wagon raise a presumption of negligence has been very recently decided by this court in the case of *Kokoll v. Brohm & Buhl Lumber Co.* (N. J. Sup.) 71 Atl. 120, with the finding and reasoning of which we entirely agree.

We think, also, that this reasoning also disposes of the appellant's second point, that there was no proof that the defendant's horse was of a vicious disposition, and that the defendant had knowledge of its vicious propensity. Such proof is not necessary in a case of this kind, for a horse does not have

to be vicious in order to run away, but may be merely nervous and timid; or the horse may be neither nervous nor timid, and yet be frightened by some cause against which due care on the part of the owner should have guarded. No proof of a vicious propensity therefore was called for.

The judgment will be affirmed.

(77 N. J. L. 351)

GUDE v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey. Feb. 23, 1909.)

CARRIERS (§ 185*)—CONNECTING CARRIERS—INJURY TO FREIGHT.

The last of a line of connecting carriers is presumed, in the absence of proof to the contrary, to have received freight in the same condition in which it was delivered to the initial carrier, and, if it appears to have been shipped in good order, and is in a damaged condition when the last carrier offers to deliver it, a presumption arises that the injury resulted from the negligence of the last carrier; but if there be no proof that the freight was in any other condition when it was delivered to either of the preceding carriers than as found in the hands of the last carrier, the presumption of negligence on the part of the final carrier does not arise, for there must be some proof of a change in condition of the freight between shipment and delivery, to warrant the presumption that a different condition exists because of negligence of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 841; Dec. Dig. § 185.*]

(Syllabus by the Court.)

Appeal from District Court of Newark.

Action by Arthur J. Gude against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued November term, 1908, before REED, BERGEN, and MINTURN, JJ.

Vredenburg, Wall & Carey, for appellant. W. E. Andrews, Jr., for appellee.

BERGEN, J. The plaintiff recovered a judgment against defendant for damages to goods shipped to him from Brighton, Ohio, and received by the defendant company at Newark, N. J., in a damaged condition. To support his case the plaintiff introduced in evidence a freight receipt for transportation charges, which was made out and delivered by the defendant company in Newark, N. J., the destination of the shipment. The receipt purported to be in the name of "Union Line," but immediately under these words there was printed, "Pennsylvania Railroad Company,—Pennsylvania Company." It was signed by the agent of defendant and, among other things, recited that the goods were shipped by the Union Line from Dayton, Ohio, and that the original point of shipment was Brighton, Ohio. The plaintiff proved the receipt of the goods by the defendant company in Newark, and that they were then damaged; but there was no proof of its

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

condition when delivered in Ohio for transportation. The defendant moved for a nonsuit, upon the ground that the declaration charged that the goods were shipped over the defendant's road from Cincinnati, and there was no proof that they came into the hands of the defendant company, or were delivered to it in good condition. The freight receipt was made out by the duly authorized agent of the defendant company, and its truth is not disputed. If the receipt for freight does not warrant the inference that the "Union Line" was managed and controlled by the defendant from Brighton, Ohio, then there was no proof that the goods were originally received by the defendant as the initial carrier; but it is admitted that during some part of the route the goods came into the hands of the defendant, and that it was the last of the connecting carriers. We do not think the receipt is evidence that the defendant was the initial carrier, for it states that the original point of shipment was Brighton, and that it was shipped from Dayton, Ohio, over "C. H. D.," which the case shows stands for the Chicago, Hamilton & Dayton Railroad, by the Union Line. The utmost that can be inferred from the receipt is that the defendant received the freight from another carrier at Dayton, Ohio, which had brought it from Brighton.

The rule undoubtedly is that the last of a line of connecting carriers is presumed, in the absence of proof to the contrary, to have received freight in the same condition in which it was delivered to the initial carrier, and if it appears to have been shipped in good order, and is in a damaged condition when the last carrier offers to deliver it, a presumption arises that the injury resulted from the negligence of the last carrier; but if there be no proof that the freight was in any other condition when it was delivered to either of the preceding carriers than as found in the hands of the last carrier, the presumption of negligence on the part of the final carrier does not arise. In the present case there was no waybill or receipt for delivery by the shipper showing the condition of the goods when delivered to the initial carrier, as is usually the case. If there had been, and it stated that the freight was received in good order, it, if offered as evidence, would have been *prima facie* proof of its contents, and, until rebutted, which it may be (*Ellis v. Willard*, 9 N. Y. [5 Seld.] 529), the presumption would be that the goods were delivered by the shipper to the initial carrier in good order, and that they were in that condition when delivered to the successive carriers; but a presumption must rest upon some proven or admitted fact or facts, and without it appears that the goods were not in a damaged condition when the shipper delivered them to the first carrier.

there is nothing upon which to rest a presumption that they were not damaged when delivered by the shipper. There is no reason why goods may not be shipped although damaged, and without proof to the contrary the presumption that they were, when shipped, in the condition found at their destination, is at least as strong as that they were not. The condition in which they were delivered for shipment is within the knowledge of the shipper, and, proof of it readily obtainable, which would not be the situation if the damage happened while passing from one to another of intermediary carriers, and because of the difficulty of showing by which of them the damage was done, the rule was adopted that goods delivered to one carrier in good order are presumed to have come to each successive carrier in like condition.

As there was no proof in this case that the goods were, when shipped, otherwise than as they were at the end of the journey, there can be no presumption that the last carrier received them in any other or different condition, and for this reason the judgment should be reversed.

(77 N. J. L. 404)

SHIELDS v. STERRAT.

(Supreme Court of New Jersey. Feb. 23, 1909.)

BROKERS (§ 43*)—COMPENSATION—RIGHT TO.

The plaintiff, a real estate agent, without a written agreement that the seller would pay commissions if the agent procured a purchaser for real estate, called the attention of a person who subsequently purchased the property and induced him to consider the matter, and he purchased the property from the vendor without further action on the part of the agent who rendered no further service in the matter. After he had seen the purchaser and called his attention to the property, the agent obtained from the vendor a written promise to pay commissions if he brought about a sale. Held that, as no service was rendered by the agent after the written agreement was executed, the written contract was nothing more than a subsequent promise to pay for services already rendered, and, having no consideration to support it, falls within the rule laid down in *Stout v. Humphrey*, 69 N. J. Law, 436, 55 Atl. 281.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 43.*]

(Syllabus by the Court.)

Appeal from District Court of Newark.

Action by Frank L. Shields against Joseph Sterrat. Judgment for plaintiff, and defendant appeals. Reversed.

Argued November term, 1908, before REED, BERGEN, and MINTURN, JJ.

Joseph A. Connolly, for appellant. Frank A. Boettner, for appellee.

BERGEN, J. This action is based upon a written contract dated May 25, 1908, which reads as follows: "I, Joseph Sterrat, of the township of Nutley, N. J., agree to give to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

F. L. Shields the sum of four hundred dollars, (\$400.) provided the sale of a ten (10) acre farm located west and north of the Atwater Realty Company, is made by J. E. Finger or F. L. Shields, at agreed price of fifty-four hundred dollars (\$5400.) Joseph Sterrat." It appears from the state of the case sent up by the trial court that on May 24th, which was Sunday, the plaintiff was authorized orally by the defendant to secure a purchaser for the lands described in the contract, and that on the same day he called upon the president of the realty company, and offered the land to him; that the president of the proposed purchaser promised to consider the matter and let the plaintiff know whether or not the company would buy by the following Tuesday; that on Monday, May 25th, the plaintiff telephoned to the defendant that he desired a written contract; that this contract was written and signed by the defendant and mailed to the plaintiff May 26th; that without further communication with the plaintiff Mr. Atwater, the president of the realty company, went to the defendant on May 26, 1908, and purchased the property. There was a motion for a nonsuit and also for a finding in favor of the defendant. Both motions were refused, and there was a judgment for the plaintiff, which the defendant seeks to reverse by this appeal.

Two reasons were urged by the appellant, the defendant below, upon the argument of this appeal: First, that the judge upon the trial admitted the contract in evidence, although the execution thereof by the defendant was not proven. It is sufficient to say on this point that there was no subscribing witness, and, the paper being shown to Mr. Sterrat, he admitted that he wrote and signed the contract, and then mailed it to the plaintiff. The second objection urged is that there should have been a nonsuit because the contract was made after the services had been rendered. It appears that at the time the plaintiff called upon Mr. Atwater there was no written contract or agreement between the plaintiff and the defendant for compensation or commissions upon the sale of this real estate, and that the agreement was made by the purchaser with the owner without again seeing the plaintiff, so that whatever the plaintiff did towards bringing about this sale was done on Sunday, and before there was any written contract for commissions as required by law, and if the plaintiff is entitled to recover anything it is because on the 24th day of May, before the contract upon which he relies had been executed, he had called the attention of a purchaser to the property, who did afterwards purchase it, so that this contract was a subsequent promise to pay for services already rendered, and falls within the ruling in *Stout v. Humphrey*, 69 N. J. Law, 436, 55 Atl. 281. It can make no difference

whether the subsequent promise to pay is in writing or oral, if there was no consideration for the agreement. It therefore follows that the plaintiff was not entitled to recover, and that the nonsuit should have been allowed.

For this reason, the judgment below is reversed.

(79 N. J. L. 344)

PINE v. SUPREME CIRCLE BROTHERHOOD OF THE UNION.

(Supreme Court of New Jersey. Feb. 23, 1909.)

INSURANCE (§ 815*) — BENEFIT SOCIETY — ACTION TO RECOVER BENEFITS—DECLARATION.

A count of plaintiff's declaration sets out that one Pine was a beneficial member of the defendant society, and as such was a member of the death benefit fund of the society; that the plaintiff is the sole beneficiary of Pine; that Pine is dead; and that the plaintiff as sole beneficiary is entitled to the death benefit fund.

Held, that the count is bad on demurrer in failing to state what class of persons is legally entitled to the death benefits of deceased members, and that the plaintiff comes within that class, and is the sole member of the class, and therefore the sole beneficiary.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 815.*]

(Syllabus by the Court.)

Action by Amy H. Pine against the Supreme Circle Brotherhood of the Union. Demurrer to declaration sustained.

Argued November term, 1908, before GUMMERE, C. J., and SWAYZE and TRENCHARD, JJ.

Higbee & Coulomb, for plaintiff. John F. Harned, for defendant.

TRENCHARD, J. This is a demurrer to a declaration. As amended by consent at the argument, it applies only to the first count.

That count, which was also by consent amended at the argument, sets out that one John F. D. Pine in the year 1895 was a beneficial member of the defendant society, and as such was a member of the death benefit fund of the society; that Pine, being such a member, disappeared at Cardiff in the kingdom of England on the 25th day of September, 1895, and has never been heard of since that time by the plaintiff or any one else; that Pine has remained beyond the sea and has absented himself from this state and from the place of his last residence for more than seven years successively; that the plaintiff for and in behalf of Pine since the year 1895 has kept and performed all the terms, conditions, and acts which he would have kept, maintained, and performed; that she is the sole beneficiary of Pine; that Pine, by reason of his absence from the state for more than seven years, and not being heard of during that time, is presumed to be, and is, dead; and that, being dead, the plaintiff as sole beneficiary is entitled to a death benefit fund amounting to \$500.

The only ground of demurrer necessary to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

consider is the third, which is that the count "does not show any duty or obligation by the defendant to the plaintiff." We think the count fails to disclose a cause of action. The statement that the plaintiff is the sole beneficiary of the deceased member is a mere conclusion. A statute of this state (P. L. 1898, p. 425, § 9) provides that it shall be lawful for such benevolent associations to contract with their members to pay death benefits according to the rules or by-laws adopted by such associations, and to agree to pay the same to the husband, wife, father, mother, son, daughter, brother, sister, or legal representative of such member after his or her death. The declaration, therefore, should state what class of persons is legally entitled to the death benefits of a deceased member either by virtue of the laws of this state or the rules and by-laws of the organization or by both, and should also show that the plaintiff comes within that class, and is the sole member of that class, and therefore the sole beneficiary. This the count of the declaration does not do, and for that reason is bad on demurrer.

The defendant is entitled to judgment on the demurrer.

(77 N. J. L. 288)

MARA et al. v. MAYOR, ETC., OF CITY OF BAYONNE (17 cases).

(Supreme Court of New Jersey. Feb. 23, 1909.)

STATUTES (§§ 94, 120*)—SUPPLEMENTAL ACT—TITLE—SPECIAL OR LOCAL ACTS—REGULATION OF MUNICIPAL AFFAIRS.

The act of April 10, 1908 (P. L. p. 286), is constitutional.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 103, 125, 128, 168-172; Dec. Dig. §§ 94, 120.*]

(Syllabus by the Court.)

Mandamus by Hugh H. Mara and by 16 others against the Mayor and Board of Councilmen of the City of Bayonne. Peremptory writs granted.

Argued November term, 1908, before GUMMERE, C. J., and SWAYZE and TRENCHARD, JJ.

Daniel J. Murray and Thomas F. Noonan, for relators. Elmer W. Demarest, for defendants.

SWAYZE, J. In this case an alternative writ of mandamus issued to compel the defendants to order a special election to determine upon the retention or rejection of voting machines pursuant to the act of April 10, 1908 (P. L. p. 286). The defendants, by their return, seek to justify their refusal to order the special election upon the ground that the statute is illegal, void, and in violation of the Constitution for two reasons: (1) Because the title of the act does not express its purpose and object; (2) because the act is of a private, special, and local character, and purports to apply only to elec-

tion precincts or districts within a municipality.

The first reason rests upon the fact that the act of 1908 is entitled "A supplement to an act, entitled 'An act to provide for the purchase of voting machines, and to regulate the use of the same at elections, approved April 28, 1905.'" The point insisted upon is that the act is not a supplement, but either an amendment or a repealer of the act of April 28, 1905 (P. L. p. 386). We see no force in this argument. By the act of 1905 the Secretary of State was empowered to determine in what election districts voting machines should be used. The effect of the act of 1908 is to give the voters of any election district the right to review his action. It is a supplement or addition to the scheme of the original act, and the title, as a whole, evinces an intent to legislate upon the use of voting machines.

The objection that the act is a private, local, or special act is equally futile. The constitutional prohibition appealed to seems to be the one directed against private, local, or special acts affecting the internal affairs of municipalities. The method of conducting elections is a matter of general state concern, and it has always been a matter of state regulation. We see no reason to hold, nor are we pointed to any authority which requires us to decide, that an act regulating the machinery of elections has to do with the internal affairs of a municipality. Moreover, the act is neither private, local, nor special. It provides a general scheme by which any district in which the Secretary of State has placed a voting machine may determine for itself whether it will retain the same or not. It applies to every district in the state which is similarly situated; that is, to every district in which a voting machine has been placed. So far from tending to produce diversity its tendency would be to produce uniformity by bringing the method of voting in districts where a voting machine had been placed into harmony with the method of voting in other districts.

The return fails to present any reason why a mandamus should not issue. Let a peremptory writ be issued in this case, and in the 16 other cases that are in the same situation.

(77 N. J. L. 389)

BLANCHARD v. NEWARK JOINT DISTRICT COUNCIL OF UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA et al.

(Supreme Court of New Jersey. Feb. 23, 1909.)

TRADE UNIONS (§ 4*)—RIGHTS AND LIABILITIES OF MEMBERS—INTER SE.

Plaintiff was a member of a trade union, from which he was suspended and a fine imposed of \$100 by a local council of the organization. He refused to pay the fine, and the de-

endants, members of the local council, thereupon induced his employers to discharge him, to recover damages for which plaintiff brought suit against them. During the pendency of this suit plaintiff appealed from the order suspending and fining him to the national association of the order, by which tribunal the order was revoked and plaintiff restored to his membership. *Held*, that the taking of the appeal from the order did not amount to a waiver by the plaintiff of his right to damages resulting from the illegal acts of the defendants in procuring his discharge from employment.

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 3; Dec. Dig. § 4.*]

(Syllabus by the Court.)

Appeal from District Court of Newark.

Action by Elmer E. Blanchard against the Newark Joint District Council of the United Brotherhood of Carpenters and Joiners of America and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued November term, 1908, before REED, BERGEN, and MINTURN, JJ.

Beecher & Baylor, for appellants. Newton P. Kinsey, for appellee.

BERGEN, J. The plaintiff was a member of the Newark District Council of the United Brotherhood of Carpenters and Joiners of America. While working for V. J. Hedden & Sons, he was discharged, because, as alleged, the defendants threatened to prevent all members of the order from working for his employers unless he was dismissed. This suit was brought for damages arising from such discharge, and resulted in a verdict for plaintiff, to review which this appeal was taken.

The case shows that plaintiff was suspended as a member of the order, and fined \$100 by the district council, which plaintiff refused to pay, claiming that the fine was not imposed according to the laws of the order, whereupon the defendants notified V. J. Hedden & Sons that, unless they discharged plaintiff, all the members of the order would refuse to work for the firm, and to avoid the loss of such labor, and for no other reason Hedden & Sons, discharged the plaintiff. Subsequently plaintiff paid the fine and appealed to a superior tribunal in the order, and was allowed to resume work. On his appeal plaintiff was sustained, reinstated in the order, and the district council required to refund the fine illegally exacted. The case discloses that plaintiff was illegally required to pay \$100, and upon refusal deprived of employment by the acts of the defendants. This creates a right of action under *Brennan v. Hatters*, 73 N. J. Law, 729, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727.

The appellants, the defendants below, urged several points in support of their appeal.

First. That the conduct of the defendants in inducing the discharge of the plaintiff by Hedden & Sons was within their legal rights. The argument on this point is that Hedden & Sons had no contract with plaintiff, and there-

fore might discharge him without cause. This does not meet the point, which is that plaintiff was deprived of employment because of unlawful threats made to Hedden & Sons, which influenced them to discharge him, and that this would not have happened except for defendants' conduct.

Second. That defendants did not request the discharge of plaintiff. On this point it is sufficient to say that what they did amounted to such a request, and was accompanied with a threat if not complied with.

Third. That the court was without jurisdiction to retain the case when motion for nonsuit was made, because the plaintiff had taken an appeal from the order of suspension and the imposition of the fine, from which it is argued he had submitted to the jurisdiction of the order. Taking an appeal from an order relating to the discipline of such an association does not amount to a waiver of damages resulting from the illegal act of the defendants in procuring the discharge of the plaintiff in order to enforce the act appealed from.

Fourth. That there was error in admitting in evidence a printed copy of the trade rules of the order. The secretary of the association had been subpoenaed to produce the minutes showing the by-laws of the association. This he did not do, but produced a printed book which he said was a copy of the by-laws printed by the defendants for the use of its members. Whether competent or not its admission did not harm defendants, because the illegality of the proceedings suspending and imposing the fine which the by-laws were offered to prove had been decided in plaintiff's favor by a proper tribunal, and the plaintiff reinstated in the order and the fine returned to him.

Fifth. That the nonsuit should have been granted because of failure to offer in evidence the constitution of the national organization. This was not relevant to the issue being tried.

Sixth. That two letters were improperly admitted. One of these letters was written by the president of the national association, and the other by the general secretary of the association, each containing a notice to the district council of the disposition made of plaintiff's appeal. They were produced by the defendants on notice, and were competent.

The remaining points relate to admission of testimony, which we do not find to be erroneous.

The judgment below is affirmed.

(77 N. J. L. 354)

ATLANTIC CITY & S. R. CO. v. VENTNOR CITY.

(Supreme Court of New Jersey. Feb. 23, 1909.)
LICENSES (§ 32*)—WHEN PAYABLE—MUNICIPAL ORDINANCE.

Under a municipal ordinance approved on June 8, 1908, requiring payment of certain li-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cense fees on or before June 1st of each year, such fees are not enforceable until June 1, 1909, though the ordinance prescribed that it should be operative "on and after June 1, 1908."

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 66; Dec. Dig. § 32.*]

(Syllabus by the Court.)

Certiorari by the Atlantic City & Shore Railroad Company to review a conviction for violation of an ordinance of Ventnor City requiring a license fee of \$50 a year for every car carrying passengers within the city limits. Conviction set aside.

Argued November term, 1908, before GARRISON, PARKER, and VOORHEES, JJ.

Clarence L. Cole, for prosecutor.

PARKER, J. Ventnor City in June, 1908, enacted an ordinance requiring a license fee of \$50 per year for every electric car carrying passengers within the city limits; providing for the posting of such license in such car, and imposing a penalty of \$50 on any person or corporation operating any car without license, or failing to post the license if obtained. On complaint of operating a car without license, prosecutor was adjudged guilty and fined, and brings this writ of certiorari to review the conviction.

Section 1 of the ordinance reads as follows:

"Section 1. Be it ordained by the common council of Ventnor City, that on and after June 1, 1908, any person, persons or corporation operating or running electric cars for the carrying of passengers within the limits of Ventnor City, shall pay annually on or before June 1st, of each and every year a license fee of \$50 for every car operated or running within the limits of Ventnor City."

The ordinance was passed on June 3, 1908, and approved on June 8, 1908. It could not be retroactive, although it purports so to be. Construing it prospectively, it is evident that the license fees are payable on or before June 1, 1909, and annually thereafter. Hence no license fee was collectible from the prosecutors at the time of the complaint. For this reason the conviction will be set aside. We have not found it necessary to discuss the other reasons filed.

MEMORANDUM DECISIONS.

(71 N. J. E. 768)

ANDREWS v. GUAYAQUIL & Q. RY. CO. et al. (Court of Errors and Appeals of New Jersey. June 25, 1906.) Appeal from Court of Chancery. Bill by Arthur L. Andrews against the Guayaquil & Quinto Railway Company and others. From an order of the Court of Chancery (69 N. J. Eq. 211, 60 Atl. 568), overruling a plea to the cross-bill, plaintiff appeals. Affirmed. Edwin B. Williamson, for appellant. Charles L. Corbin, for respondents.

PER CURIAM. The order appealed from is affirmed, for the reasons stated in the opinion delivered in the Court of Chancery by Vice Chancellor Stevens.

(71 N. J. E. 769)

BARCLAY v. CHARLES ROOME PARMELE CO. (Court of Errors and Appeals of New Jersey. Jan. 2, 1907.) Appeal from Court of Chancery. Action by William F. Barclay against Charles Roome Parmele Company. From a decree of the Court of Chancery (70 N. J. Eq. 218, 61 Atl. 715), defendant appeals. Affirmed. Guild, Lum & Tamblin and Arthur A. Mickell, for appellant. Coult, Howell & Smith and Henry W. Goodrich, for respondent.

PER CURIAM. The decree of the Court of Chancery is affirmed, for the reasons given by Vice Chancellor Emery in the court below.

(76 N. J. L. 329)

BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY v. KAISER. (Court of Errors and Appeals of New Jersey. Nov. 16, 1908.) Error to Supreme Court. Action by the Board of Chosen Freeholders of the County of Hudson against John C. Kaiser. From a judgment (69 Atl. 25) overruling demurrer to the declaration, defendant brings error. Affirmed. Marshall Van Winkle and Gilbert Collins, for plaintiff in error. John Griffin, for defendant in error.

PER CURIAM. The judgment in this case is affirmed, for the reasons given in the opinion of the Chief Justice. The opinion cited the case of *Virtue v. Freeholders of Essex*, 67 N. J. Law, 189, 60 Atl. 380. We have not considered that case, and express no opinion thereon.

(71 N. J. E. 302)

CAMPBELL v. PERTH AMBOY SHIP-BUILDING & ENGINEERING CO. et al. (Court of Errors and Appeals of New Jersey. Nov. 19, 1906.) Appeal from Court of Chancery. Suit by Edward S. Campbell, receiver of the Middlesex County Bank, against the Perth Amboy Shipbuilding & Engineering Company and others. From a decree for complainant (70 N. J. Eq. 40, 62 Atl. 319), defendants appeal. Affirmed. Adrian Lyon, for appellants. Lindabury, Depue & Faulke, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion filed in the Court of Chancery by Vice Chancellor Pitney.

(71 N. J. E. 307)

DALEY v. SOMERS LUMBER CO. et al. (Court of Errors and Appeals of New Jersey. Dec. 12, 1906.) Appeal from Court of Chancery. Suit by Thomas W. Daley against the Somers Lumber Company and others. From a decree of the Court of Chancery for defendants (70 N. J. Eq. 343, 61 Atl. 730), complainant appealed. Affirmed. Charles C. Babcock and William Clevenger, for appellant. Thompson & Cole, for respondents.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion filed in the Court of Chancery by Vice Chancellor Grey.

(71 N. J. E. 281)

DIXON v. DIXON. (Court of Errors and Appeals of New Jersey. Nov. 19, 1906.) Appeal from Court of Chancery. Action by William H. Dixon against Josephine T. Dixon. Judgment for defendant (66 Atl. 597), and plaintiff appeals. Affirmed.

PER CURIAM. The decree appealed from will be affirmed, for the reasons set forth in the opinion filed in the Court of Chancery by Vice Chancellor Stevens.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(71 N. J. E. 789)

DOREMUS et al. v. MAYOR, ETC., OF CITY OF PATERSON. (Court of Errors and Appeals of New Jersey. July 13, 1906.) Appeal from Court of Chancery. Action by Henry W. Doremus and others against the Mayor and Aldermen of the City of Paterson. From an order for complainants, advised by Vice Chancellor Stevens (70 N. J. Eq. 296, 62 Atl. 3), defendants appeal. Affirmed. Edmund G. Stalter and George S. Hilton, for appellants. Lindabury, Depue & Faulks, for respondents.

PER CURIAM. The order appealed from is affirmed, for the reasons set out in the opinion delivered in the Court of Chancery by Vice Chancellor Stevens.

(71 N. J. E. 300)

EUREKA FIRE HOSE CO. v. EUREKA RUBBER MFG. CO. (Court of Errors and Appeals of New Jersey. Nov. 19, 1906.) Appeal from Court of Chancery. Action by the Eureka Fire Hose Company against the Eureka Rubber Manufacturing Company. From a decree for complainant (69 N. J. Eq. 159, 60 Atl. 561), advised by Vice Chancellor Emery, defendant appeals. Affirmed. John V. B. Wicoff, for appellant. Crouse & Perkins, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion filed in the Court of Chancery by Vice Chancellor Emery.

(76 N. J. L. 327)

HANOVER TP., in MORRIS COUNTY, v. CAMP MEETING ASS'N OF NEWARK CONFERENCE. (Court of Errors and Appeals of New Jersey. Nov. 17, 1908.) Error to Supreme Court. Certiorari by the Township of Hanover, in the County of Morris, against the Campmeeting Association of the Newark Conference, to review a judgment of the State Board of Equalization. Judgment was reversed (68 Atl. 753), and said association brings error. Affirmed. Pierre F. Cook and W. W. Cutler, for plaintiff in error. Vreeland, King, Wilson & Lindabury, for defendant in error.

PER CURIAM. The judgment under review herein will be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Swayne in the Supreme Court.

(76 N. J. L. 324)

HARBISON v. CAMDEN & S. RY. CO. (Court of Errors and Appeals of New Jersey. Nov. 17, 1908.) Error to Supreme Court. Action by William S. Harbison against the Camden & Suburban Railway Company. From a judgment of the Supreme Court, affirming a judgment for defendant (74 N. J. Law, 252, 65 Atl. 868), plaintiff brings error. Affirmed. Francis D. Weaver, for plaintiff in error. Lewis Starr, for defendant in error.

PER CURIAM. For the reasons expressed in the opinion of Chief Justice Gummere in the Supreme Court, the judgment under review herein will be affirmed.

(71 N. J. E. 306)

In re HYNES' WILL. (Court of Errors and Appeals of New Jersey. Dec. 12, 1906.) Appeal from Prerogative Court. Proceedings for the probate of the will of Mary Hynes. From a decree of the Prerogative Court (69 N. J. Eq. 485, 60 Atl. 951), affirming an order of the orphans' court dismissing an appeal from a decree admitting the will to probate, Roger Ryan appealed. Affirmed. James A. Gordon, for appellant. Harvey F. Carr, for respondents.

PER CURIAM. The decree appealed from is affirmed, for the reasons set forth in the opinion filed in the Prerogative Court by Vice Ordinary Bergen.

(74 N. J. E. 354)

LEONARD et al. v. BOSCH et al. (Court of Errors and Appeals of New Jersey. Nov. 17, 1908.) Appeal from Court of Chancery. Bill by John Leonard and others, copartners, against Charles Bosch and others. There was a decree of the Chancery Court for complainants (64 Atl. 1001, 68 Atl. 56), and defendants appeal. Affirmed. Ralph W. E. Donges and Thomas R. French, for appellants. Robert H. McCarter, Atty. Gen., for respondents.

PER CURIAM. The decree under review will be affirmed, with costs, for the reasons set forth in the opinions of Vice Chancellor Emery.

(71 N. J. E. 790)

LONG BRANCH COMMISSION v. TINTER MANOR WATER CO. (Court of Errors and Appeals of New Jersey. Feb. 2, 1907.) Appeal from Court of Chancery. Suit by the Long Branch Commission against the Tinter Manor Water Company. From a decree of the Court of Chancery (70 N. J. Eq. 71, 62 Atl. 474) for defendant, plaintiff appeals. Affirmed. Clarence G. Vannote and Robert H. McCarter, Atty. Gen., for appellant.

PER CURIAM. The decree appealed from in this case is affirmed, for the reasons stated in the opinion filed in the Court of Chancery by Vice Chancellor Pitney.

(71 N. J. E. 303)

McKENNA v. CORCORAN et al. (Court of Errors and Appeals of New Jersey. Nov. 19, 1906.) Appeal from Court of Chancery. Suit by Thomas P. McKenna against Richard F. Corcoran and others. From a decree in the Court of Chancery (70 N. J. Eq. 627, 61 Atl. 1026) for complainant, defendants appeal. Affirmed. Charles J. Roe, for appellants. Collins & Corbin, for respondent.

PER CURIAM. The decree appealed from will be affirmed, for the reasons set forth in the opinion filed in the Court of Chancery by Vice Chancellor Garrison.

MAXWELL et al. v. LEICHTMAN. (Court of Errors and Appeals of New Jersey. Jan. 7, 1909.) Appeal from Court of Chancery. Suit by Charles H. Maxwell and others against Charles J. Leichtman. From an order, defendant appeals. Affirmed. Thompson & Colo, for appellant. Harry Wootton, for respondents.

PER CURIAM. This is an appeal from an order allowing to the complainants in an interpleader suit their costs and a counsel fee of \$50, to be paid out of the fund deposited by the complainants in court. No sufficient reason being shown why this allowance should not be made, the order under review will be affirmed, with costs.

(74 N. J. E. 353)

MIDDLETON v. CARTER (two cases). (Court of Errors and Appeals of New Jersey. Nov. 16, 1908.) Appeal from Prerogative Court. Accounting by Melbourne F. Middleton, as administrator of William L. Carter. William D. Carter, substituted administrator, filed exceptions. From decrees of the Prerogative Court (68 Atl. 763, 765), affirming orders of the orphans' court sustaining the exceptions, Middleton appeals. Affirmed. T. J. Middleton and J. J. Crandall, for appellant. Lewis Starr and Allen S. Morgan, for respondent.

PER CURIAM. The decrees that are under review in these cases will be affirmed, for the reasons expressed in the opinions of Magie, Ordinary.

(76 N. J. L. 326)

MILLVILLE IMP. CO. v. PITMAN, GLASSBORO & CLAYTON GAS CO. et al. (Court of Errors and Appeals of New Jersey. Nov.

17, 1908.) Error to Supreme Court. Certiorari by the Millville Improvement Company against the Pitman, Glassboro & Clayton Gas Company and others, to review an ordinance. There was a judgment of the Supreme Court affirming the ordinance (67 Atl. 1005), and relator brings error. Affirmed. Louis H. Miller and Gaskill & Gaskill, for plaintiff in error. French & Richards, for defendants in error.

PER CURIAM. The judgment under review herein will be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Swayze in the Supreme Court.

(71 N. J. E. 308)

MORRIS & E. R. Co. et al. v. MAYOR, ETC., OF JERSEY CITY. (Court of Errors and Appeals of New Jersey. June 20, 1904.) Appeal from Court of Chancery. Bill by the Morris & Essex Railroad Company and others against the Mayor and Aldermen of Jersey City. From a decree of the Chancery Court (63 N. J. Eq. 45, 51 Atl. 387) for complainants, defendants appeal. Affirmed. George L. Record, Corp. Counsel, and Allan L. McDermott (Robert Carey, Corp. Atty., on the brief), for appellants. Bedle, Edwards & Thompson, for respondents.

PER CURIAM. Decree affirmed, by the following vote: For affirmance: The CHIEF JUSTICE and FORT, HENDRICKSON, PITNEY, VROOM, GREEN, and GRAY, JJ. For reversal: DIXON, GARRISON, and VREDENBURGH, JJ.

(71 N. J. E. 777)

NICKLAS v. PARKER et al. (Court of Errors and Appeals of New Jersey. Jan. 2, 1907.) Appeal from Court of Chancery. Suit by August J. Nicklas, administrator of Ellen Cunningham, deceased, against Bridget Parker and others. From a decree of the Court of Chancery (69 N. J. Eq. 743, 61 Atl. 267) for complainant, defendant Honora Finerty appeals. Affirmed. Carrick & Wortendyke, for appellant. Collins & Corbin, for respondent Nicklas. Elmer H. Geran and Henry M. Stevenson, for respondents Parker and others. Hartshorne, Insley & Leake, for respondent Provident Institution for Savings in Jersey City.

PER CURIAM. Affirmed, on the opinion delivered in the court below.

(71 N. J. E. 304)

PERKINS et al. v. TRINITY REALTY CO. (Court of Errors and Appeals of New Jersey. Nov. 23, 1906.) Appeal from Court of Chancery. Action by George F. Perkins and others

against the Trinity Realty Company. Judgment for plaintiffs on the opinion of Vice Chancellor Garrison (69 N. J. Eq. 723, 61 Atl. 167), and defendant appeals. Affirmed. Frank Durand, for appellant. Tennant & Haight, for respondents.

PER CURIAM. The decree appealed from will be affirmed, for the reasons set forth in the opinion filed in the Court of Chancery by Vice Chancellor Garrison.

(76 N. J. L. 822)

PHIFER, Fish and Game Warden, v. SNYDER. (Court of Errors and Appeals of New Jersey, Nov. 16, 1908.) Error to Supreme Court. Andrew R. Snyder was convicted of a violation of the game law, and brings error from a judgment of the Supreme Court (67 Atl. 934) affirming on certiorari the conviction. Affirmed. Joseph F. Smith, for plaintiff in error. Nelson B. Gaskill, Asst. Atty. Gen., for defendant in error.

PER CURIAM. The judgment under review herein will be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Swayze in the Supreme Court.

(76 N. J. L. 821)

SIMMONS v. MAYOR, ETC., OF CITY OF MILLVILLE. (Court of Errors and Appeals of New Jersey. Nov. 16, 1908.) Error to Supreme Court. Suit by Thomas S. Simmons against the Mayor, etc., of the city of Millville. Judgment for complainant in the Supreme Court (66 Atl. 895), and defendant brings error. Affirmed. Louis H. Miller, for plaintiff in error. French & Richards, for defendant in error.

PER CURIAM. The judgment under review herein will be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Swayze in the Supreme Court.

(71 N. J. E. 301)

URICH v. WATTS et al. (Court of Errors and Appeals of New Jersey. Nov. 19, 1906.) Appeal from Court of Chancery. Suit by Louise Urich against Thomas P. Watts and others. From a decree of the Court of Chancery for defendants (69 N. J. Eq. 604, 66 Atl. 432), complainant appealed. Affirmed. Frank Voigt and Frank E. Bradner, for appellant. Charles R. Snyder and Edmund Wilson, for respondents.

PER CURIAM. The decree appealed from will be affirmed, for the reasons set forth in the opinion filed in the Court of Chancery by Vice Chancellor Emery.

END OF CASES IN VOL. 71.

